

SOME THOUGHTS ON FEDERALISM

by

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I have jotted down these quick notes at the request of the conference organizers. I hope they are useful. They are quite abbreviated, but I hope they assist the discussion.

Today, members and supporters of the white regime in South Africa are proposing a "federal" system of government. They point to the United States as an example of such a system. The United States government has also exercised techniques of persuasion, to convince the ANC and others that a federal system is a good solution for South Africa.

There are three good answers to these contentions. First, the American federal system was conceived largely to protect the interests of Southern United States slaveowners. Its origins hardly commend it as a model for South Africa. Second, "federalism" in the United States was dealt a decisive blow the American civil war and the amendments to the United States Constitution that resulted from that war, and the antifederal, unitary trend continued thereafter. Third, today federalism in the United States is meaningless except as a battle cry of reactionary jurists and legislators. The United States is in reality a unitary

government in which certain powers are left to the several states.

I. The Origins of Federalism

Those who wrote the Constitution of 1787 provided in a number of ways for the continuance of slavery. Slaves were not counted as whole persons for representation purposes. The slave trade was expressly protected for a period of time. The United States Congress was the scene of bitter battles over admission of new states to the Union, focussing on whether these states would be slave or free.

As the debate over slavery intensified in the early 19th Century, the federal Congress reinforced "federalism" by passing Fugitive Slave Acts that punished those who aided runaway slaves and provided for return of the slaves to their masters.

During this period, a strong antislavery movement developed -- a civil rights movement, we would call it today. This movement campaigned for the abolition of slavery and against the extension of it to new territory. Its members were active in the "underground railroad" that helped slaves go North to freedom. The movement was joined by women and free workers.

One leader of this campaign was Frederick Douglass, the influential Black orator and writer. Douglass argued, along with many other constitutionalists, that the United States Constitution could provide a framework for abolishing

slavery. He thought the general constitutional language on freedom and popular sovereignty should triumph over other provisions that seemed to support slavery. I have written about Douglass's work in my article in Akron Law Review. He was supported by such notables as Lysander Spooner.

The Douglass view never found support in the United States courts. Indeed, in 1857, the Supreme Court decided a case that confirmed that federalism was just a code word for protecting slavery, and that civil war was inevitable.

The case involved a runaway slave, Dred Scott. Justice Grier of the Supreme Court leaked word of the decision to President-elect Buchanan, who was able to say in his inaugural address that the slavery issue was about to be decided.

The Dred Scott decision of the Supreme Court did indeed decide the issue. The Court said that a black man in American had no rights that a white man need respect. It affirmed the slaveowners' power over their "property." It said in effect that the constitution was a contractual bargain with slavery that had to be kept.

II. The Civil War and the Succeeding Period

The American Civil War cost tens of thousands of lives. As a condition of re-entry to the Union, the rebel states were required to assent to three amendments to the American Constitution. The Thirteenth Amendment abolished slavery. The Fourteenth Amendment said that every state owed due

process to all its inhabitants, and equal protection of the laws. It also authorized Congress to pass a great array of legislation guaranteeing civil rights and providing federal power to punish those who violated those rights.

The Fifteenth Amendment provided that the right to vote could not be curtailed on grounds of race.

These amendments were a direct repudiation of the idea that federalism could solve the problems of racial justice and democracy. They gave that national government the power to see that no local area could violate civil rights.

Of course, the reactionaries counterattacked and blocked full implementation of these amendments and the legislation passed under them, for many decades. But the basic point is that only by rejecting the right of a region or racial group to independent power of governance in any matter touching basic rights could the United States progress towards democratic principles.

Perhaps as significant was the great development of American capital and industry in the post-Civil War period. The federal government became a major force in American life. The economic reality of a national market made federalism increasingly irrelevant as an economic matter. The federalist aspects of the federal constitution became less important. The "commerce clause" of the Constitution, which gives Congress the power to regulate commerce and forbids states from interfering with a national market, grew in importance.

Intense battles raged over the power of states and the federal government to regulate the marketplace. Obviously, I can do no more than refer to these in this short memorandum. In 1933, when Franklin Roosevelt was elected, the federal government responded to the Great Depression and to worker agitation with federal legislation on wages and hours, the right to organize labor unions, the right to strike, regulation of capital markets, regulation of transportation, and many other areas of national life.

By the time the Second World War was over, federal power over the economy had become plenary. Nobody argued that the States could or should play a significant regulatory role in directing national energies and economic policy.

In sum, federalism was proven bankrupt in the field of human rights, and worthless in the field of economic policy.

III. Modern Debate

Today, federalism is sometimes invoked in a progressive way, as some states have sought to avoid the impact of reactionary policies of the national government. This is a tactical use of the "federalism" rhetoric of the U.S. Constitution. It does not reflect a deep-seated political consensus that serious social problems should not be addressed at the national level.

In the main, however, federalism is a slogan of the political right. It is being invoked by the reactionary

majority of the Supreme Court to permit reactionary state governments to administer the death penalty on a racially-discriminatory basis, and to ignore basic rights of the accused that are guaranteed by the federal constitution. It is invoked to undo the civil rights victories of the 1960s, by giving states increased power to punish political dissent.

At the same time, all progressive work in the national legislature recognizes that the federal government is the only entity suited to solve the major problems that confront the country. The banking crisis legislation has overridden the power of state regulators. Environmental legislation recognizes that polluters and destroyers do not respect state boundaries and that this is a national, indeed international problem.

IV. Concluding Thoughts

International finance and industrial capital is deployed without regard to national frontiers. The most significant human rights developments of the past two decades have resulted from the formulation and application of an international set of human rights norms in treaties and customary law. These norms have part of the battle cry of the anti-apartheid forces, who have learned that interdependence and not isolation is the key to progress and change.

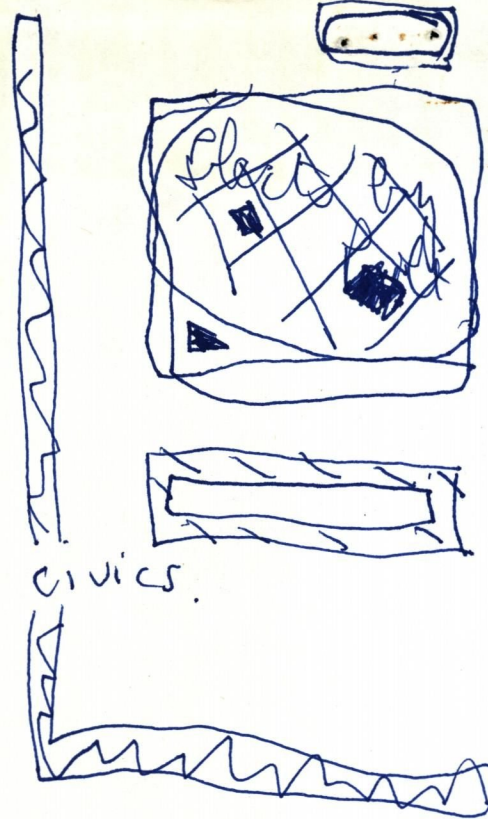
A unitary government for South Africa recognizes two imperatives. First, it avoids the terrible and costly error of the Americans by denying reactionaries state power to continue their campaign against human rights, and by giving a central government the acknowledged power to direct the national economy towards a more just allocation of the economic surplus.

Second, a unitary government is a strong voice in the international community, to end the outlaw status of South Africa in that community and bring all parts of South African life into harmony with international norms.

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