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**A Liberal Theory of Federalism**  
**Benjamin Herscovitch**

**A thesis submitted in partial fulfilment of the requirements for the degree**  
**of**  
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Benjamin Herscovitch

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## Abstract

From the European Wars of Religion to post-colonial independence struggles, and on to calls for minority rights and freedoms in Tibet, Kurdistan and beyond, liberals have always been moved by the desires of different individuals to live by different mores and systems of government. By offering a liberal theory of federalism that can equip us with both an account of legitimacy and an institutional structure capable of effectively navigating the diversity endemic to human society, this thesis seeks to carry forward the liberal project of doing justice to what John Rawls famously called “the fact of pluralism.”

The liberal theory of federalism rests on a minimalist conception of liberalism, which holds that individuals should be free to live as they see fit, provided they do not stop others from living as they see fit. This in turn yields an account of legitimacy according to which any institutional structure whatsoever is legitimate, with the sole proviso that it not stop individuals from living as they see fit. This thesis fashions minimalist liberalism into a direct justification of the defining strengths of federal systems. By constitutionally enshrining constituent unit autonomy, federal systems are able to both protect negative liberty and promote democratic accountability.

The liberal theory of federalism does not shy away from acknowledging that there is no guarantee that any given federal system will realise the liberal goal of doing justice to the fact of pluralism. Nonetheless, federalism offers the hope of a more perfect union between institutional structures and how individuals would like to live: As a means of limiting centralised power and giving more political autonomy to sub-state groups, federalism is another constitutional tool for ensuring that, as Benjamin Constant might have put it, the interests of individuals are “united when they are the same, balanced when they are different,



but known and felt in all cases."

# Propositional Summary

## Chapter 1: A Topography of Federalism

1. The first necessary condition of federalism is a division of sovereignty.
2. The second necessary condition of federalism is the constitutional enshrinement of the division of sovereignty.
3. The necessary and sufficient conditions of federalism distinguish federalism from unitary systems and systems of sovereign states.
4. The distinction between federations and con-federations is a function of the scope of the central government's jurisdiction and not a difference of kinds.

## Chapter 2: Minimalist Liberalism

1. Minimalist liberalism's rejection of pre-political measures of legitimacy suggests that it is a thoroughly political species of liberalism, while political species of liberalism are best placed to do justice to the fact of pluralism.
2. The minimalist character of minimalist liberalism means that it is a liberal threshold test of legitimacy rather than a more demanding liberal theory of justice.
3. Minimalist liberalism holds that legitimacy is a measure of whether individuals are able to live as they see fit.

4. Minimalist liberalism does not sanction oppressive institutional structures as legitimate and can account for cases in which it is legitimate to *not* allow individuals to live as they see fit.

### **Chapter 3: The Minimalist Liberal Theory of Federalism**

1. The minimalist liberal theory of federalism builds on existing liberal theories of federalism by directly connecting federalism's many strengths to the liberal project of doing justice to the fact of pluralism.
2. The minimalist liberal theory of federalism expands and extends many of the specific claims made by competing liberal theories of federalism.
3. Federalism is not a panacea and is best seen as a powerful constitutional tool for allowing individuals to live as they see fit.
4. Even in societies that do not contain national and cultural divisions, federalism is a powerful constitutional tool for allowing individuals to live as they see fit.

### **Chapter 4: Negative Liberty and Democratic Accountability**

1. Federalism is able to protect negative liberty because it leaves groups of individuals free to live as they see fit as regards the areas of public policy under the jurisdiction of their constituent units.
2. Federalism is able to promote democratic accountability because by creating a common central government, it gives individuals political

influence over legislative processes that impinge on their liberty but which would otherwise be beyond their influence.

3. Federalism is able to promote democratic accountability because it increases—both by electoral and extra-electoral means—the political influence of individuals over the legislative processes that affect them.
4. Federalism promotes democratic accountability because horizontal intergovernmental competition between constituent units means they have an incentive to implement public policy that accords with the political preferences of individuals.

## **Chapter 5: Federalism Defended**

1. There is no necessary connection between federalism and the implementation of illiberal public policy.
2. It is misleading to accuse federalism of being a completely malleable constitutional mechanism that simply promotes the values to which a society happens to subscribe.
3. Federalism's qualified rejection of the principle of majority rule actually makes federal systems more democratically accountable.
4. The qualified rejection of the principle of majority rule does not rest on an unworkable conception of the relevant majority.

# Introduction: Political Liberalism & Federalism

## The Political Liberal Turn

In a commentary on Montesquieu's *The Spirit of The Laws*, Marie Condorcet claimed:

As truth, reason, justice, the rights of man, the interests of property, of liberty, of security, are the same everywhere, there is no reason to think that all the provinces of a state, or even all states, should not have the same criminal laws, the same civil laws, the same laws of commerce, etc.

A good law must be good for all men, as a true proposition is true for all.<sup>1</sup>

The insistence that what is right is right for all makes Condorcet's vision of politics a robust fusion of monism and universalism. Instead of accepting that different groups of individuals might reasonably want to live in accordance with different laws, Condorcet had one conception of how society should be organised and maintained that this particular conception should be universally applied.

It might seem entirely reasonable, and so utterly innocuous, to hold that a good system of government is good for all in the same way that a truth is true for all. Although this is a widely held view, the underlying proposition that animates this thesis is that it has two interrelated and deleterious consequences. The first problem with this approach to politics is that it abandons a core element of the liberal project: Namely, the attempt to do justice to what

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<sup>1</sup> M. Condorcet, 'Observations Sur Le Vingt-Neuvième Livre de L'Esprit des Lois' in *Commentaire Sur L'Esprit des Lois de Montesquieu*, A.-L.-C. Destutt de Tracy, Slatkine Reprints, Genève, 1970, pp. 401–432, p. 420. To avoid quotations becoming overly cumbersome and to ensure that they remain faithful to their original spirit, gender-specific language is preserved throughout. Nevertheless, unless otherwise specified, all claims apply to all individuals, irrespective of gender or sex.

John Rawls called “the fact of pluralism.”<sup>2</sup> If a good system of government is good for all, then surely it will not be necessary to tailor institutional structures to map human diversity.<sup>3</sup> The second problem with Condorcet's approach to politics—which is a direct result of the first—is the systematic privileging of systems of government that demand homogeneity over those that incorporate diversity into their basic structures. A key consequence of this is an unwarranted marginalisation of federalism in contemporary political theory.

Despite how jarring Condorcet's combination of monism and universalism—“the universal implementation of a single set of principles of political order”—might appear to many readers, this thesis argues that the root problem with Condorcet's conception of politics is neither its monism, nor its universalism.<sup>4</sup> By extension, contrary to the claims of Dimitrios Karmis, Wayne Norman, and Jacob T. Levy, the problem is neither that “[m]ost political theories in the modern era have been monistic, not pluralistic,” nor that contemporary political theorists have often “casually assumed ... that liberalism is synonymous with moral universalism applied to politics.”<sup>5</sup> Rather, the problem with Condorcet's conception of politics—along with much contemporary political theory—is that it universally applies one *overly determinate* vision of how society ought to be organised, and thereby abandons the liberal project of doing justice to the fact of pluralism and privileges systems of government that demand homogeneity. In short, monism and universalism are not problematic in and of themselves; they only become problematic when they are combined with comprehensive conceptions of how society ought to be organised. By offering a liberal theory of federalism, this thesis seeks to restore the attempt to do justice to the fact of pluralism to the core of the

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<sup>2</sup> J. Rawls, 'The Domain of The Political and Overlapping Consensus,' *New York University Law Review*, vol. 64, no. 2, May 1989, pp. 233–255, p. 235 (§1).

<sup>3</sup> The term “institutional structures” is used throughout to refer to a broad class of human organisations, including legal frameworks, systems of government, packages of legislation, etc.

<sup>4</sup> A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Westview Press, Boulder, 1991, p. 8 (Chapter 1, §II).

<sup>5</sup> D. Karmis & W. Norman, 'The Revival of Federalism In Normative Political Theory' in *Theories of Federalism: A Reader*, D. Karmis & W. Norman (eds.), Palgrave Macmillan, New York, 2005, pp. 3–21, p. 10 (§2). & J. T. Levy, 'Federalism, Liberalism, and The Separation of Loyalties,' *American Political Science Review*, vol. 101, no. 3, August 2007, pp. 459–477, p. 463.

liberal project and compensate for the dearth of normative theorising about federalism.

To combat the first problematic consequence of the predominance of comprehensive conceptions of politics—namely, the abandonment of the liberal project of doing justice to the fact of pluralism—the liberal theory of federalism builds on political theories of liberalism. The resulting minimalist conception of liberalism holds that, as Stephen A. Douglas expressed it:

There is no principle on earth more sacred to all the friends of freedom than that which says that no institution, no law, no constitution, should be forced on an unwilling people contrary to their wishes.<sup>6</sup>

As strange as it might seem in view of Douglas' support of the institution of chattel slavery, minimalist liberalism maintains that the judgement that good institutional structures are good for all runs counter to the liberal commitment to individual liberty. In other words, this judgement is at odds with the basic liberal insight that individuals should be free to live as they see fit instead of having supposedly good institutional structures thrust upon them. If one takes the liberal commitment to individual liberty as a given and seeks to fully do justice to the fact of pluralism, the crucial question is not whether institutional structures are good, but rather whether people want to live under them. The first chief goal of this thesis is thus to show that the upshot of a conception of liberalism that carries forward the liberal project of doing justice to the fact of pluralism is that individuals ought to be free to live as they see fit, with the sole proviso that this not inhibit the freedom of others to live as they see fit. Rather than a dubious distortion of liberalism, the resulting minimalist liberalism simply seeks to fully do justice to the fact of pluralism: If one is thoroughly committed to individual liberty, one will only restrict individual liberty in the name of individual liberty.

The minimalist conception of liberalism articulated and defended in this thesis is both monistic and universalistic. It is monistic because it holds that institutional structures are *solely*

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<sup>6</sup> S. A. Douglas & A. Lincoln, 'The Alton Debate' in *Created Equal?: The Complete Lincoln-Douglas Debates of 1858*, P. M. Angle (ed.), The University of Chicago Press, Chicago, 1958, pp. 361–402, p. 374.

legitimate to the extent that they allow individuals to live as they see fit. At the same time, it is universalistic because it holds that the legitimacy of *all* institutional structures ought to be determined by applying this one principle. However, this monistic and universalistic version of liberalism is qualitatively different from Condorcet's conception of politics and much contemporary political theory, and therefore does not abandon the liberal project of doing justice to the fact of pluralism. This is because this monistic and universalistic version of liberalism only comes with what is arguably a *minimalist* conception of how society ought to be organised that is able to do justice to the fact of pluralism and allow individuals to live as they see fit.<sup>7</sup>

To guard against the second problematic consequence of the predominance of comprehensive conceptions of politics—namely, the privileging of systems of government that demand homogeneity—this thesis argues that the notion that institutional structures should be chosen on the basis of what individuals want and not on the basis of which institutional structures are supposedly good, serves to justify systems of government that map human diversity. Chandran Kukathas aptly observes that “the good society liberal political theory describes is not a unified entity.”<sup>8</sup> This is a function of the way in which, in practice, the liberal commitment to doing justice to the fact of pluralism legitimises systems of government that

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<sup>7</sup> Given that this thesis' central proposition is that federalism is a powerful constitutional tool for allowing individuals to live as they see fit, the focus is, not surprisingly, on the implications of minimalist liberalism for *political* institutions. Be this as it may, it is worth briefly noting that minimalist liberalism arguably also has consequences for the organisation of economic life. In particular, minimalist liberalism lends itself to a defence of capitalism as a result of the two key ways in which this economic system advances individual liberty. First, capitalism guarantees economic freedom, which, as Milton Friedman argued, “is itself a component of freedom broadly understood ... [and] an end in itself.” See M. Friedman, *Capitalism and Freedom*, The University of Chicago Press, Chicago, 2002, p. 8 (Chapter 1). Cf. *ibid.*, p. 9 (Chapter 1). Second, capitalism contributes to political freedom by ensuring that power is not exclusively centred on the political institutions of state. As Friedman observed: “By removing the organization of economic activity from the control of political authority, the market eliminates this source of coercive power.” See *ibid.*, p. 15 (Chapter 1). Cf. *ibid.*, p. 16 (Chapter 1). The above is obviously not a satisfactory defence of the connection between individual liberty and capitalism. Not only does it sidestep the question of why economic freedom is an important element of freedom broadly understood, but it ignores the way in which poorly managed capitalism can itself create poles of coercive power (e.g., market monopolies). Notwithstanding these limitations, the forgoing remarks do provide *prima facie* grounds for thinking that minimalist liberalism is likely to recommend a capitalist economic system, despite also, as Chapter 2, Section 2.5.2. suggests, justifying limited welfare rights. Cf. *ibid.*, pp. 8–9 (Chapter 1).

<sup>8</sup> C. Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom*, Oxford University Press, Oxford, 2003, p. 20 (Chapter 1). Cf. *ibid.*, pp. 25–26 (Chapter 1). *ibid.*, p. 38 (Chapter 1). & *ibid.*, p. 264 (Conclusion).



incorporate diversity into their basic structures. Just as surely as the commitment to individual liberty is inconsistent with imposing apparently good institutional structures simply because they are apparently good, it favours federal arrangements because they can reflect the diversity endemic to human society.<sup>9</sup> The second chief goal of this thesis is therefore to establish that by constitutionally dividing sovereignty, federalism is a powerful tool for advancing the liberal goal of allowing individuals to live as they see fit and thereby doing justice to the fact of pluralism.

The central normative proposition of this thesis is that the form of liberalism that seeks to fully do justice to the fact of pluralism places no limits on individuals living as they see fit, bar the requirement that this not infringe on the freedom of others to do likewise. The resulting minimalist liberal conception of legitimacy holds that any given institutional structure is legitimate to the extent that it allows individuals to live as they see fit. Notwithstanding F. A. Hayek's particularly pertinent warning that "the more ambitious the task, the more inadequate will be the performance," this thesis attempts to use this minimalist liberalism to advance a novel normative theory of federalism.<sup>10</sup> As will become clear as the argument progresses, this liberal theory of federalism can be summarised in one key proposition: By constitutionally dividing sovereignty, federalism is a powerful tool for advancing the liberal goal of doing justice to the fact of pluralism by ensuring that individuals are able to live as they see fit.

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<sup>9</sup> Daniel J. Elazar's "biological analogy," according to which federal systems form "a genus of political organization," forms the basis of the terminology used in this thesis. See D. J. Elazar, *Exploring Federalism*, The University of Alabama Press, Tuscaloosa, 1991, p. 6 (Chapter 1). Cf. D. J. Elazar, 'Federalism' in *The Encyclopedia of Democracy: Volume II*, S. M. Lipset (ed.), Congressional Quarterly, Washington, 1995, pp. 474–482, p. 475. & D. J. Elazar, 'Introduction—Using Federalism Today,' *International Political Science Review*, vol. 17, no. 4, October 1996, pp. 349–351, p. 349. There is a wide array of species within the genus of federal systems—federations and con-federations being the two most notable examples. See Elazar, *Exploring Federalism*, *op. cit.*, pp. 6–7 (Chapter 1). It will quickly become apparent as the argument develops that this thesis does not defend federations or con-federations in particular. The goal is rather to provide a general defence of the broad genus of systems of government that can be classed as federal systems. Given that, as Andreas Føllesdal observes, federalism is the "theory or advocacy" of federal systems, the defence of federal systems in what follows makes this thesis a liberal theory of federalism. See A. Føllesdal, 'Federalism,' *Stanford Encyclopedia of Philosophy*, 9<sup>th</sup> March 2010, accessed 15<sup>th</sup> January 2013, <<http://plato.stanford.edu/entries/federalism/>>.

<sup>10</sup> F. A. Hayek, *The Constitution of Liberty: The Definitive Edition*, R. Hamowy (ed.), The University of Chicago Press, Chicago, 2011, p. 40 (Preface).

## The Appeal to Living as One Sees Fit

This thesis has already made extensive use of the liberal trope of individuals living as they see fit. As the argument progresses, it will become clear that doing justice to the fact of pluralism means allowing individuals to live as they see fit. In other words, allowing individuals to live as they see fit is how minimalist liberalism understands the concrete consequences of the liberal commitment to individual liberty. As helpful as this trope might be as a simple conceptual place-holder for liberalism's project of doing justice to the fact of pluralism, its extensive use raises an obvious question: In practice, what precisely does allowing individuals to live as they see fit mean?

Given that the image of individuals living as they see fit serves as a means of explaining the concrete consequences of the liberal commitment to individual liberty, it is no surprise that it denotes a state of affairs in which individuals are not forced to live in ways that they judge unacceptable. Conceived in this way, allowing individuals to live as they see fit is in one sense an impossibly exacting threshold test of legitimacy for institutional structures. To take just one obvious example, no modern state with millions or even hundreds of millions of citizens can entirely avoid forcing individuals to endure what they judge unacceptable. From mundane matters of road rules and local government by-laws to more fundamental questions of powers of taxation and the regulation of speech, every state will force individuals to endure what they judge unacceptable to varying degrees.

Although very few, if any, institutional structures can allow all individuals to fully live as they see fit, it does not follow that pursuing the goal of not forcing individuals to endure what they judge unacceptable is hopelessly idealistic. Rather, this goal is practical and at least partially realisable: Clear distinctions can be made between institutional structures that more fully allow individuals to live as they see fit and those that force individuals to endure a great

many things that they judge unacceptable. It may be impossible for institutional structures to not force any individuals to endure anything that they judge unacceptable. Nevertheless, it is certainly possible for institutional structures to allow more individuals to more fully live as they see fit. For example, although the Chinese state of today obviously forces many individuals to endure what they judge unacceptable (e.g., Uighurs, Tibetans, political dissidents, etc.), with increased economic, personal and political freedom, it is manifestly better able to allow individuals to live as they see than its Maoist counterpart.

In light of the above, the defence of federalism in this thesis obviously does not amount to arguing that federal systems never force individuals to endure what they judge unacceptable. Such a claim would obviously be incorrect: Federal systems, like all systems of government, force many individuals to endure many things that they judge unacceptable. Instead, the liberal theory of federalism is far more modest. Indeed, the significance of the liberal trope of allowing individuals to live as they see fit is only that, like other constitutional mechanisms that can be used to safeguard individuals from enduring what they judge unacceptable—democratic methods of government, bills of rights, divisions of power between the different branches of government, etc.—federalism's constitutionally enshrined constituent unit autonomy is a powerful tool for allowing individuals to live as they see fit.<sup>11</sup>

By way of clarifying other points of potential confusion, minimalist liberalism is in an important respect not at all minimalist. The minimalist liberal commitment to doing justice to

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<sup>11</sup> Constituent units are frequently referred to as states, provinces, cantons, Länder, etc. See G. Anderson, *Fiscal Federalism: A Comparative Introduction*, Oxford University Press, Ontario, 2010, p. 1 (Chapter One, §1.1). For the sake of simplicity, this thesis restricts itself to using the terms "constituent unit" and "state" interchangeably throughout. This thesis does not reflect Norman's concern about the term "sub-unit": "The standard generic term 'subunit' is not neutral: it seems to imply a hierarchy where the central or federal government is *above* the provincial governments; whereas in its purest form federalism is about coordinating two 'orders' not 'levels' of government, each of which is sovereign in its own competencies." See W. Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, Oxford University Press, Oxford, 2006, p. 77 (Chapter 3, §3.2). This moralistic reading of the term "sub-unit" is questionable: The prefix "sub" does not come with any moral baggage. That is to say that "sub-unit" is not to "unit" what "sub-human" is to "human." The prefix "sub" simply points to the way in which state governments are below central governments in the sense that they exist within the constitutional frameworks of central governments. Nevertheless, so as to not trouble those who adopt a moralistic reading of the term "sub-unit," this thesis only uses the innocuous terms "constituent unit" and "state."

the fact of pluralism and only restricting individual liberty in the name of individual liberty has dramatic and far-reaching consequences for the ways in which institutional structures are organised. From responding to Tamil calls for political autonomy in Sri Lanka to abolishing the elements of the Australian 'Racial Discrimination Act 1975' that inhibit freedom of speech, minimalist liberalism demands monumental changes to current institutional structures.<sup>12</sup> Although minimalist liberalism has minimal normative content because it makes only one demand—namely, that institutional structures allow individuals to live as they see fit—this one demand requires changes that are by no means minimal.<sup>13</sup> The minimalist liberal account of legitimacy outlined in this thesis is therefore only minimalist in its attempt to derive its normative force solely from the liberal commitment to individual liberty. As regards its practical implications for contemporary institutional structures, it is far from minimalist.

It is also worth clarifying that despite superficial similarities, minimalist liberalism is not a form of conventionalism. To be sure, it has conventionalist characteristics insofar as the result of doing justice to the fact of pluralism and only restricting individual liberty in the name of individual liberty will be that groups of individuals are often able to govern themselves in accordance with their conventions. However, minimalist liberalism is a form of liberalism and not a version of conventionalism because different groups of individuals being able to govern themselves in accordance with their conventions is parasitic on the commitment to only

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<sup>12</sup> Andrew Bolt, a controversial Australian columnist, was found to have contravened the 'Racial Discrimination Act 1975' in a series of blog posts suggesting Aboriginal identity was cynically used by some Indigenous Australians to acquire professional advantage. See A. Bolt, 'White Is The New Black,' *Herald Sun*, 15<sup>th</sup> April 2009, accessed 5<sup>th</sup> February 2012, <<http://blogs.news.com.au/heraldsun/andrewbolt/index.php/heraldsun/comments/column-white-is-the-new-black>>. & A. Bolt, 'White Fellas In The Black,' *Herald Sun*, 21<sup>st</sup> August 2009, accessed 5<sup>th</sup> February 2012, <<http://www.heraldsun.com.au/opinion/white-fellas-in-the-black/story-e6frfif0-1225764532947>>. The Act stipulates: "It is unlawful for a person to do an act, otherwise than in private, if ... the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people." See 'Racial Discrimination Act 1975,' *Attorney-General's Department*, Canberra, 21<sup>st</sup> October 2011, accessed 5<sup>th</sup> February 2012, <[http://www.comlaw.gov.au/Details/C2011C00852/Html/Text#\\_Toc306959758](http://www.comlaw.gov.au/Details/C2011C00852/Html/Text#_Toc306959758)>, p. 13 (Part IIA, Article 18C). Quite aside from whether Bolt acted contrary to the Act, the way in which Article 18C can be used to retard freedom of speech makes the Act illiberal according to the minimalist conception of liberalism.

<sup>13</sup> Notwithstanding the substantial changes to current institutional structures required by the minimalist conception of liberalism, this version of liberalism is referred to as minimalist throughout because of its minimal normative content.

restricting individual liberty in the name of individual liberty. The liberal commitment to individual liberty always trumps the conventionalist commitment to allowing local conventions to shape institutional structures. As such, minimalist liberalism would never defer to local conventions if that meant denying individuals their liberty. This in effect means that local conventions should only shape institutional structures when they reflect how individuals would live if they were living as they saw fit. For example, minimalist liberalism holds that deeply patriarchal local conventions should not shape institutional structures if they are only shared by a subset of the male population. Unlike conventionalism, minimalist liberalism maintains that individuals living as they see fit is the core priority. By contrast, having local conventions shape institutional structures is only contingently valuable (i.e., it is valuable when individuals actually want to live in accordance with local conventions).

### **Why a (Minimalist) Liberal Theory of Federalism?**

Before proceeding any further, it is essential to address some questions that are likely to be at the back of the reader's mind and which go to the heart of this theoretical project: Given the many concrete problems of institutional design faced by federal systems, is a normative theory of federalism really the most valuable intellectual enterprise? For example, rather than defending federalism in general, would it not be more useful to give a precise account of the institutional arrangements best suited to managing the tensions between national and sub-national groups in federal systems? On top of this, why is it necessary to provide an account of a specific version of liberalism when the overarching goal is to advance a general normative theory of federalism? In other words, is it not counter-productive to tie this thesis' defence of federalism to an unorthodox form of liberalism? These questions suggest two broad concerns with this thesis' attempt to articulate a specifically minimalist liberal theory of federalism:

first, the risk that a general normative theory of federalism will overlook the pressing concrete challenges facing federal systems, and second, the worry that a specifically minimalist liberal theory of federalism will only be persuasive to a small subset of liberals.

A reasonable response to the first concern must begin by acknowledging that a thesis offering a liberal theory of federalism will indeed sidestep many pressing empirical questions about federal systems. For example:

- What is the best way to develop a stable federal compact in a post-conflict society (e.g., Nepal)?
- How should a federal system be designed when there are huge disparities in the distribution of natural resources among the constituent units (e.g., Nigeria)?
- Does federalism exacerbate governance problems in weak states (e.g., Pakistan)?

Empirical questions such as these are not only immensely complex, they are fertile ground for academic research. Although the body of empirical literature on federalism is growing, much important research remains to be done. To be sure, it may no longer be true to claim, as Sheldon S. Wolin did, that “relatively few theoretical treatises of lasting significance [on federalism] have emerged.”<sup>14</sup> Of substantial importance are Elazar’s *Exploring Federalism* and R. L. Watts’ *Comparing Federal Systems*, to name just two significant descriptive theoretical treatises on federalism.<sup>15</sup> Nevertheless, fully understanding the concrete challenges facing federal systems will require much more analysis. Given this admission, this thesis’ sole focus on threshing out a general normative theory of federalism is obviously not a product of unawareness that much empirical research on federalism remains to be done, much less a denial of the importance of answering empirical questions.

Notwithstanding the value of empirical work on federalism, a normative theory of

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<sup>14</sup> S. S. Wolin, 'Foreword' in *Federalism: Origin, Operation, Significance*, W. H. Riker, Little, Brown and Company, Boston, 1964, pp. v–ix, p. vii.

<sup>15</sup> Elazar, *Exploring Federalism*, *op. cit.* & R. L. Watts, *Comparing Federal Systems*, 3<sup>rd</sup> edition, Institute of Intergovernmental Relations & McGill-Queen’s University Press, Montreal & Kingston, 2008.

federalism is by no means a superfluous luxury. Although recent research by political scientists may have ended the dearth of descriptive theoretical treatises on federalism, contemporary political theorists still pay remarkably little attention to this topic. The problem is so acute that no substantial monographs devoted exclusively to formulating a normative theory of federalism have been produced in many decades, if not longer.<sup>16</sup> As Norman ruefully acknowledges: "Modern federal theory ... awaits its Rawls."<sup>17</sup> This suggests that there is a great deal of theoretical work that still needs to be done to map out the normative foundations of federalism. Although this thesis obviously does not break the drought of normative theories of federalism, it is at least a small contribution to the rich but heretofore rather small pool of work on federalism's normative foundations.

Let us now turn to the second general concern with this thesis' liberal theory of federalism—namely, that it would be more fruitful to offer a general liberal theory of federalism instead of a specifically minimalist one. By way of response, it is useful to begin with the often ignored link between liberalism and federalism that this thesis highlights. For federalists, this thesis aims to show that liberalism offers a particularly powerful rationale for their preferred system of government: Liberalism provides a forceful defence of federalism's defining feature (i.e., the constitutional division of sovereignty). For liberals, the goal of this thesis is to demonstrate that their commitment to individual liberty lends itself to a preference for federal systems over unitary systems and systems of sovereign states: Federalism is a powerful constitutional tool for doing justice to the fact of pluralism and allowing individuals to live as they see fit. Although it may seem surprising at this early stage, it will become apparent

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<sup>16</sup> Although Norman's *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State* is certainly a substantial academic monograph that deals with the normative foundations of federalism, it is not devoted exclusively to formulating a normative theory of federalism. See Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, *op. cit.* The most recent case of a substantial monograph devoted exclusively to formulating a normative theory of federalism may well be Pierre-Joseph Proudhon's 1863 work, *Du Principe Fédératif et De La Nécessité De Reconstituer Le Parti De La Révolution*. See P.-J. Proudhon, *Du Principe Fédératif et De La Nécessité De Reconstituer Le Parti De La Révolution*, Éditions Romillat, Paris, 1999.

<sup>17</sup> W. J. Norman, 'Towards A Philosophy of Federalism' in *Group Rights*, J. Baker (ed.), University of Toronto Press, Toronto, 1994, pp. 79–100, p. 97. Cf. Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, *op. cit.*, p. 82 (Chapter 3, §3.3).

as the argument develops that the minimalist liberal account of legitimacy is one of the most effective arguments for persuading federalists and liberals of these propositions.

So as to avoid pre-empting the argument to come, it suffices to observe that this thesis would be incomplete without the minimalist conception of liberalism. This version of liberalism forms the basis of the normative theory of federalism that follows because the affinity between federalism and liberalism is arguably most striking when federalism is seen through the prism of minimalist liberalism. With its fixation on individual liberty and the goal of doing justice to the fact of pluralism, minimalist liberalism serves as a direct justification of the way in which federalism's constitutionally enshrined constituent unit autonomy is a powerful tool for allowing individuals to live as they see fit. In other words, for this thesis' two key audiences—federalists and liberals—the connection between liberalism and federalism is strongest when the liberal commitment to doing justice to the fact of pluralism is pushed as far as possible in the form of minimalist liberalism. Justifying federalism on the basis of an unconventional conception of liberalism may well limit this thesis' general appeal. However, the hope is that what this thesis loses in audience share, it is able to recoup in the force of the argument it offers in favour of federal systems.

## **The Minimalist Liberal Theory of Federalism Condensed**

This thesis performs five principal tasks, each of which corresponds to one of the five chapters that follow:

1. The first task is to provide an accurate topography of federalism that highlights its essential features and the variety of federal arrangements. This account of federalism will show that the necessary and sufficient conditions for federalism are the constitutional division of sovereignty.



2. The second task is to provide an account of the minimalist conception liberalism on which the liberal theory of federalism rests. The crux of this conception of liberalism is that legitimate institutional structures that do justice to the fact of pluralism allow individuals to live as they see fit by only restricting individual liberty in the name of individual liberty.
3. The third task is to frame the minimalist liberal theory of federalism by comparing it to other liberal theories of federalism. Not only does the minimalist liberal theory of federalism build on many of the specific claims made by other liberal theories of federalism, but it also connects federalism with the general liberal commitment to individual liberty by highlighting the way in which federalism is a powerful constitutional tool for allowing individuals to live as they see fit.
4. The fourth task is to detail the ways in which federalism is a powerful constitutional tool for allowing individuals to live as they see fit and doing justice to the fact of pluralism. In particular, federalism protects negative liberty by guaranteeing the freedom of individuals to govern themselves as they see fit and promotes democratic accountability by increasing the political influence of individuals over the legislative processes that affect them, thereby providing federal arrangements with an advantage over both unitary systems and systems of sovereign states.<sup>18</sup>
5. The fifth and final task is to respond to the most significant critiques of federalism. This is done by rebutting the charges that federal systems facilitate the implementation illiberal public policy and are undemocratic.

It is needlessly divisive—not to mention incorrect—to claim, as Wolfgang Kasper does,

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<sup>18</sup> Levy's powerful challenge to normative theories of federalism is acutely relevant: "A general normative account of federalism must be able to ... give an account of why one might not want states to be unitary ... [and] why states should not be much *more* decentralized than federations are." See Levy, 'Federalism, Liberalism, and The Separation of Loyalties,' *op. cit.*, p. 459. Following Levy's injunction, the political liberal theory of federalism in effect amounts to the claim that federal arrangements have important advantages over both unitary systems and systems of sovereign states when it comes to the liberal project of doing justice to the fact of pluralism.

that "genuine liberals around the world have always favoured federalist arrangements."<sup>19</sup> As fixated on the connection between liberalism and federalism as this thesis may be, it would be simply misleading to suggest that liberalism logically leads to a commitment to federalism. Nonetheless, there is a rarely appreciated and powerful natural affinity between liberalism and federalism. To put this thesis in as pithy terms as possible, by constitutionally enshrining the freedom of individuals to live as they see fit in the constituent units, federalism arguably institutionalises liberalism's commitment to individual liberty. Indeed, federalism is perhaps one of the most powerful constitutional tools available for doing justice to the fact of pluralism.

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<sup>19</sup> W. Kasper, 'Reviving The Spirit of Federalism' in *Where To For Australian Federalism?*, R. Carling (ed), The Centre for Independent Studies, St Leonards, 2008, pp. 37–42, p. 40.

# Chapter 1: A Topography of Federalism

## 1.1. Introduction

The academic literature on federalism is marred by significant conceptual confusion as to what makes a system of government federal. What is more, the orthodox understanding of federalism misconstrues the defining features of federations and con-federations. The task in Chapter 1 is therefore to provide a comprehensive account of the necessary and sufficient conditions of federalism and accurately delineate the different species of federalism. This chapter will make four key claims:

1. the first necessary condition of federalism is a division of sovereignty;
2. the second necessary condition of federalism is the constitutional enshrinement of the division of sovereignty;
3. the necessary and sufficient conditions of federalism distinguish federal systems from unitary systems and systems of sovereign states; and
4. the distinction between federations and con-federations is a function of the scope of the central government's jurisdiction and not a difference of kinds.

The crux of this chapter is that because the necessary and sufficient conditions of federalism are only a constitutional division of sovereignty, there is immense scope for diversity among the species of federalism.

## 1.2. Divided Sovereignty & Federalism

Johannes Althusius notably described politics as “the art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them.”<sup>1</sup> If Althusius was right, it would seem that both the federal integration of sovereign states and the federalisation of existing unitary states are examples of political art in its highest form.<sup>2</sup> This is because the substance of federalism is none other than the pledging of political bodies “to mutual communication of whatever is useful and necessary for the harmonious exercise of social life.”<sup>3</sup> The upshot of this is that federalism presupposes, as Samuel Pufendorf observed, an “agreement that one or other part of the supreme sovereignty should be exercised at the consent of all.”<sup>4</sup> In other words, federalism *qua* federalism divides sovereignty (i.e., all of the sovereign powers in federal systems are of necessity not in the hands of one government).

### 1.2.1. A federalist reconceptualisation of sovereignty

So as to understand the nature of the division of sovereignty required by federalism, let us take the classic conception of sovereignty advocated by Jean Bodin as our starting point. According to Bodin, “sovereignty is the absolute and perpetual power.”<sup>5</sup> This conception of sovereignty suggests that, to use Hugo Grotius' words, “sovereignty is a unity, in itself

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<sup>1</sup> J. Althusius, *Politica*, F. S. Carney (ed. & trans.), Liberty Fund, Indianapolis, 1995, p. 17 (Chapter I, §1). *Cf. ibid.*, p. 17 (Chapter I, §2).

<sup>2</sup> *Cf.* D. J. Elazar, 'Althusius' Grand Design For A Federal Commonwealth' in *Politica*, J. Althusius, F. S. Carney (ed. & trans.), Liberty Fund, Indianapolis, 1995, pp. xxxv–xlvi, p. xlv. The distinction between federal integration and federalisation will be explained in full detail later in this chapter (Section 1.5.6.). For the moment, suffice it to note that the former refers to political bodies (e.g., previously sovereign states or constituent units in an extant federation) binding themselves together in a (tighter) union, while the latter refers to a unitary or federal system becoming more decentralised.

<sup>3</sup> Althusius, *op. cit.*, p. 17 (Chapter I, §2).

<sup>4</sup> S. Pufendorf, *De Jure Naturae et Gentium Libri Octo: Volume Two*, C. H. Oldfather & W. A. Oldfather (trans.), The Clarendon Press, Oxford, 1934, p. 1038 (Book VII, Chapter V, §13). *Cf. ibid.*, p. 1047 (Book VII, Chapter V, §18).

<sup>5</sup> J. Bodin, *Les Six Livres De La République: Livre Premier*, Librairie Arthème Fayard, Paris, 1986, p. 179 (Chapitre VIII).

indivisible.”<sup>6</sup> Insofar as sovereignty is understood as a power without limit, it follows that sovereignty cannot be divided and limited to particular spheres. For what might be called orthodox theorists of sovereignty, such as Bodin, a sovereign power is one that is, at least when it comes to other human powers, unqualified and unchallenged.<sup>7</sup> As Bodin himself put it:

Those who are sovereigns must not be in any way subjects of the commands of others, and they must be able to give laws to subjects and smash or annihilate useless laws so as to make others: which is what he who is subject to laws or to those who have command of the law cannot do.<sup>8</sup>

Considering the above, it quickly becomes apparent that federalism represents a serious challenge to the classic conception of sovereignty. The contrast between an absolutist conception of sovereign power and systems of government in which each level of government is sovereign with respect to certain matters could hardly be greater. It is for this reason that Elazar claimed that “the federal principle represents an alternative to (and a radical attack upon) the modern idea of sovereignty.”<sup>9</sup>

Faced with the divergence between the classic and federalist conceptions of sovereignty, there are two plausible responses. The first response is to rigidly adhere to the traditional absolutist Bodinian conception of sovereignty and argue that there are no sovereign powers in federal systems. This was essentially Carl J. Friedrich's position when he argued that “[n]o sovereign can exist in a federal system” because “we have federalism only if a set of political communities coexist and interact as autonomous entities, united in a common order with an

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<sup>6</sup> H. Grotius, *The Law of War and Peace: De Jure Belli ac Pacis Libri Tres*, F. W. Kelsey (trans.), The Bobbs-Merrill Company, Indianapolis, 1925, p. 123 (Book I, Chapter III, §XVII). Cf. J.-J. Rousseau, 'Du Contrat Social ; Ou, Principes Du Droit Politique' in *Du Contrat Social Précédé De Discours Sur L'Économie Politique et De Du Contrat Social Première Version et Suivi De Fragments Politiques*, R. Derathé (ed.), Éditions Gallimard, Paris, 1964, pp. 169–292, p. 191 (Livre II, Chapitre II).

<sup>7</sup> Bodin thought that “the absolute power of sovereign Princes and lords does not in any way extend to the laws of God and nature.” See Bodin, *op. cit.*, p. 193 (Chapitre VIII).

<sup>8</sup> *ibid.*, p. 191 (Chapitre VIII).

<sup>9</sup> Elazar, *Exploring Federalism, op. cit.*, p. 109 (Chapter 3).

autonomy of its own.”<sup>10</sup> The second response is to suggest that although there are sovereign powers in federal systems, they are qualified sovereign powers quite unlike those theorised by the likes of Bodin. Given that, as this chapter goes on to argue, one's understanding of federalism is substantially improved by making use of the concept of sovereignty, this thesis recommends a reconceptualisation of sovereignty consistent with the second response. It is, however, important to emphasise that the required reconceptualisation of sovereignty is only partial. This is because, as we will see, the implications of federalism can only be properly understood if elements of the traditional absolutist Bodinian conception of sovereignty are retained.

At the heart of federalism is the principle of, to borrow Grotius' expression, “divided sovereignty.”<sup>11</sup> Conceiving of federalism in this way requires replacing—at least in large part—the Bodinian conception of sovereignty with the Tocquevillian conception. More specifically, it requires replacing the understanding of sovereignty as an absolute and perpetual power with the conception of “sovereignty ... [as] the right to make laws.”<sup>12</sup> This Tocquevillian conception of sovereignty entails that sovereignty can be successfully divided in systems of government in which two or more levels of government have legislative authority (i.e., the right to make laws) with respect to different areas of public policy. Given this Tocquevillian conception of sovereignty, the nature of federalism's ability to divide sovereignty becomes quite obvious: “The principle on which rest all con-federations [or, to be more precise, all federal systems] is the fragmentation of sovereignty” because in a federal system “the body of law ... [as] the expression of sovereignty” derives its authority from two different sources.<sup>13</sup>

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<sup>10</sup> C. J. Friedrich, *Trends of Federalism In Theory and Practice*, Pall Mall Press, London, 1968, pp. 7–8 (Part I, Chapter 1).

<sup>11</sup> Grotius, *op. cit.*, p. 124 (Book I, Chapter III, §XVII).

<sup>12</sup> A. de Tocqueville, *De La Démocratie En Amérique : Tome I*, Éditions Gallimard, Paris, 1986, p. 197 (Première Partie, Chapitre VIII).

<sup>13</sup> Grotius, *op. cit.*, p. 125 (Book I, Chapter III, §XIX). & Tocqueville, *op. cit.*, p. 255 (Première Partie, Chapitre VIII). Cf. R. R. Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government*, Angus & Robertson, Sydney, 1897, p. 15 (Part I, §1), *ibid.*, p. 24 (Part I, §3). & P. E. Trudeau, 'Federalism, Nationalism,

Although neither the central government nor the constituent units can possess all of the powers and freedoms of fully sovereign governments, federalism *qua* federalism demands that both levels of government retain absolute sovereignty over some matters. It is for this reason that the federalist conception of sovereignty does not constitute a thoroughgoing repudiation of the traditional absolutist Bodinian conception of sovereignty. No government is absolutely sovereign with respect to all areas of public policy in federal systems. However, each level of government must be absolutely sovereign with respect to at least some areas of public policy for a system of government to be considered federal. In other words, a system of government that integrates previously sovereign political bodies by wholly subsuming their sovereign powers under its own cannot be considered federal.<sup>14</sup> As Carl Schmitt succinctly pointed out:

If only the federation is sovereign, then only the totality exists politically.

Then there is a sovereign unitary state and the question of federalism is simply circumvented.<sup>15</sup>

Equally, a state with a previously unitary system could not be said to have properly federalised if the unitary system was replaced with a system of sovereign states in which the states were sovereign over all matters.

The above point was neatly made by Alexis de Tocqueville when he noted that in the United States, “[t]he Union ... only forms a people with respect to certain ends; as regards all the others it is nothing.”<sup>16</sup> The federal government of the United States is nothing with respect to some matters because although the entry into force of the US constitution significantly diminished the sovereignty of the individual states, it left them absolutely sovereign with respect to some areas of public policy. As Alexander Hamilton rightly observed:

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and Reason' in *Federalism and The French Canadians*, The Macmillan Company of Canada, Toronto, 1968, pp. 182–203, p. 191.

<sup>14</sup> Cf. Pufendorf, *op. cit.*, pp. 1043–1044 (Book VII, Chapter V, §16).

<sup>15</sup> C. Schmitt, 'The Constitutional Theory of Federation (1928),' G. L. Ulmen (ed. & trans.), *Telos*, no. 91, Spring 1992, pp. 26–56, p. 35.

<sup>16</sup> Tocqueville, *op. cit.*, p. 227 (Première Partie, Chapitre VIII). Cf. *ibid.*, p. 196 (Première Partie, Chapitre VIII).

The proposed Constitution, so far from implying an abolition of the State Governments, ... leaves in their possession certain exclusive and very important portions of sovereign power.<sup>17</sup>

To be sure, as Daniel Webster correctly argued:

The main design, for which the whole constitution was framed and adopted, was to establish a government that should not be obliged to act through State agency, or depend on State opinion and State discretion.<sup>18</sup>

Be this as it may, the United States is a federal system precisely because the central government can only act as an independent sovereign power with respect to certain areas of public policy, while the states retain absolute sovereignty over other areas.

The upshot of the relationship between federalism and the traditional absolutist Bodinian conception of sovereignty is twofold. First, federalism does indeed challenge the traditional conception of sovereignty because it of necessity divides sovereignty between different levels of government. Second, the federalist conception of sovereignty does not rest on a wholesale rejection of the traditional conception of sovereignty because each level of government is of necessity absolutely sovereign within its sphere of jurisdiction. Federalism consequently occupies the middle ground between unitary systems and systems of sovereign states. In the former, the central government is sovereign with respect to all matters, and in the latter, the independent states are sovereign with respect to all matters. By contrast, both the central government and the constituent units are sovereign with respect to some areas of public policy in federal systems.

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<sup>17</sup> A. Hamilton, 'The Federalist No. 9' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed.), Cambridge University Press, Cambridge, 2006, pp. 35–40, p. 39. Cf. J. Madison, 'The Federalist No. 62' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed.), Cambridge University Press, Cambridge, 2006, pp. 299–305, p. 301.

<sup>18</sup> D. Webster, 'Reply To Hayne' in *The World's Great Speeches*, 2<sup>nd</sup> edition, L. Copeland (ed.), Dover Publications, New York, 1958, pp. 270–278, pp. 271–272.



### 1.2.2. The nature of federalism's divided sovereignty

The division of sovereignty in federal systems typically mirrors the division between those areas of public policy that are deemed to not concern all of the constituent units and those that are thought to touch the interests of all.<sup>19</sup> This means that, to quote Pufendorf, in federalism:

Individual states reserve for themselves liberty in the exercise of those parts of supreme sovereignty, the manner of conducting which is of little or *no* interest, at least directly, to the rest.<sup>20</sup>

At the same time, sovereignty over those areas of public policy that are of general interest are usually attributed to the central government. This is what can be called the collective disinterestedness rationale for constituent unit autonomy.

As an aside, there is an interesting parallel between the above justification of constituent unit autonomy and the liberal justification of individual liberty. Given that the liberal theory of federalism rests on a basic commitment to individual liberty, this parallel is particularly pertinent. Benjamin Constant drew attention to this parallel:

It is necessary that the internal arrangements of the particular factions, as soon as they have no influence on the general association, remain entirely independent, and, as with an individual's life, the portion that does not threaten in any way the society's interests must remain free, all that does not harm the collective in the existence of the factions must enjoy the same freedom.<sup>21</sup>

As fruitful as this line of argument regarding the connection between federalism and liberalism

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<sup>19</sup> Cf. P. King, *Federalism and Federation*, Croom Helm, London, 1982, p. 139 (Part Three, Chapter 11).

<sup>20</sup> Pufendorf, *op. cit.*, p. 1047 (Book VII, Chapter V, §18).

<sup>21</sup> B. Constant, 'Principes De Politique Applicables À Tous Les Gouvernements Représentatifs et Particulièrement À La Constitution Actuelle De La France' in *Écrits Politiques*, M. Gauchet (ed.), Éditions Gallimard, Paris, 1997, pp. 303–588, p. 428 (Chapitre XII). Cf. *ibid.*, p. 423 (Chapitre XII).

might be, further comment will be reserved for the four subsequent chapters in which the liberal theory of federalism is explained and defended at length.

Although the distinction between common and particular interests is a useful rule for determining how sovereignty is divided between the central government and the constituent units, it is by no means the only criterion used. Considerations of, for example, economic efficiency (e.g., economies of scale) and institutional reach (e.g., the effectiveness of each level of government at delivering services) might equally play a role in determining the appropriate division of sovereignty. Irrespective of the criterion or criteria used to configure the division of sovereignty, the crucial point is that both the central government and the constituent units are of necessity absolutely sovereign with respect to at least some areas of public policy.

Despite forming a key part of the liberal theory of federalism that follows, it is worthwhile briefly emphasising that because federalism requires a division of sovereignty, it fosters both homogeneity and heterogeneity. It was this characteristic of federalism that Tocqueville pointed to when he argued:

Those who fear licentiousness, and those who dread absolute power,  
must ... equally desire the gradual development of provincial liberties.<sup>22</sup>

In other words, federalism counters both excessive liberality and excessive authoritarianism by fostering both homogeneity and heterogeneity. To use more florid language, federalism is entirely consistent with Proudhon's principle that "[s]ociety finds its highest perfection in the union of order with anarchy."<sup>23</sup>

On the one hand, federalism demands homogeneity regarding those areas of public policy that concern all of the constituent units collectively and are consequently under the

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<sup>22</sup> Tocqueville, *op. cit.*, p. 162 (Première Partie, Chapitre V).

<sup>23</sup> P.-J. Proudhon, 'What Is Property? Or, An Inquiry Into The Principle of Right and of Government' in *The Human Rights Reader: Major Political Essays, Speeches, and Documents From Ancient Times To The Present*, 2<sup>nd</sup> edition, M. R. Ishay (ed.), Routledge, New York, 2007, pp. 208–215, p. 214 (Chapter II, §3).

jurisdiction of the central government.<sup>24</sup> On the other hand, federalism equally accommodates heterogeneity regarding those areas of public policy that primarily concern the individual constituent units and are consequently under their jurisdiction. Federalism's ability to combine homogeneity and heterogeneity is a function of the way in which, as Elazar noted, "federalism ... is *self-rule plus shared rule*."<sup>25</sup> Federalism accommodates heterogeneity among the constituent units in matters of self-rule and demands homogeneity from the constituent units in matters of shared-rule; "liberty and union, now and forever, one and inseparable."<sup>26</sup>

In summary, the first necessary condition of federalism is the division of sovereignty between the central government and the constituent units. By of necessity dividing sovereignty, federalism poses a challenge to the traditional absolutist Bodinian conception of sovereignty. At the same time, federalism's division of sovereignty equally means that each level of government is sovereign in a robust Bodinian sense in its own sphere of jurisdiction. If each level of government was not absolutely sovereign in its own sphere, then a system of government would not be truly federal. As such, although federalism divides sovereignty, it does not dilute it.

### **1.3. Constitutionalism & Federalism**

It is now crucial to specify the mechanism by which federal integration or federalisation divides sovereignty between the central government and the various constituent units. Although the precise configuration of this mechanism may vary, for a system of government to be truly federal, the division of sovereignty must be achieved by means of a constitution.

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<sup>24</sup> Cf. Dante, *Monarchy*, P. Shaw (ed. & trans.), Cambridge University Press, Cambridge, 1996, p. 25 (Book I, §xiv).

<sup>25</sup> Elazar, *Exploring Federalism*, *op. cit.*, p. 12 (Chapter 1).

<sup>26</sup> Webster, *op. cit.* p. 278.

Federalism's reliance on constitutional mechanisms led the constitutional theorist A. V. Dicey to claim that "[a] federal state derives its existence from the constitution,"<sup>27</sup> which suggest that federalism rests on "the supremacy of the constitution."<sup>28</sup> To get a better sense of why Dicey was right, it is useful to consider the connection between federalism and constitutional mechanisms in tandem with the question of the necessary and sufficient conditions of federalism. Doing so reveals that the second necessary condition of federalism is the constitutional enshrinement of the aforementioned division of sovereignty.

### 1.3.1. Beyond self-rule and shared-rule

As observed earlier, Elazar rightly claims that "federalism ... is *self-rule plus shared rule*."<sup>29</sup> However, Elazar's bolder claim that "[f]ederalism is the generic term for what may be referred to as self-rule/shared-rule relationships" is extremely problematic.<sup>30</sup> The reason for this is that if federalism is understood as simply being a division of responsibilities between a central government and various constituent units, it will be impossible to distinguish federalism from the many systems of government that are characterised by a degree of decentralisation. Indeed, such an understanding of federalism renders it a vacuous concept insofar as, as Mikhail Filippov, Peter C. Ordeshook and Olga Shvetsova point out, "every government affords local authorities some degree of autonomy."<sup>31</sup> Put simply, the combination of self-rule and shared-rule is not an effective means of defining federalism because, in practice,

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<sup>27</sup> A. V. Dicey, *Introduction To The Study of The Law of The Constitution*, 8<sup>th</sup> edition, Macmillan and Co., London, 1915, p. 140 (Part I, Chapter III).

<sup>28</sup> *ibid.* Cf. *ibid.*, p. 161 (Part I, Chapter III).

<sup>29</sup> Elazar, *Exploring Federalism*, *op. cit.*, p. 12 (Chapter 1).

<sup>30</sup> *ibid.*, p. 16 (Chapter 1). Cf. C. Saunders, 'The Constitutional, Legal, and Institutional Foundations of Australian Federalism' in *Where To For Australian Federalism?*, R. Carling (ed), The Centre for Independent Studies, St Leonards, 2008, pp. 15–26, p. 24.

<sup>31</sup> M. Filippov, P. C. Ordeshook & O. Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions*, Cambridge University Press, Cambridge, 2004, p. 5 (Chapter 1, §1.2). Cf. S. H. Beer, *To Make A Nation: The Rediscovery of American Federalism*, The Belknap Press of Harvard University Press, Cambridge, 1993, p. 23 (Introduction), King, *op. cit.*, p. 140 (Part Three, Chapter 11). & *ibid.*, p. 142 (Part Three, Chapter 11).

all viable systems of government combine self-rule and shared-rule to some degree. This critique of the Elazarian means of defining federalism is put most sharply by Preston King:

All states will fall between these extremes [i.e., an absolute or total degree of control at one extreme and no control at the other]—including federation. Which suggests that to describe federation in terms of such an undifferentiated degree of 'intermediate' centralization/decentralization is to make no intelligible distinction between it and other types of government.<sup>32</sup>

Samuel H. Beer therefore rightly observes that “[f]ederalism is not mere decentralization, even where decentralization is substantial and persistent.”<sup>33</sup> Although the combination of self-rule and shared-rule is most certainly a necessary condition of federalism, it is not sufficient. It is therefore necessary to search for a supplementary attribute to arrive at the necessary and sufficient conditions of federalism that will allow us to distinguish federal systems from both unitary systems and systems of sovereign states. Given the earlier claim that the division of sovereignty is facilitated by a constitutional mechanism, it should come as no surprise that the missing element is the *constitutional enshrinement* of the coexistence of self-rule and shared-rule.

Combining what has been argued thus far, the necessary and sufficient conditions of federalism are the constitutional division of responsibilities between the constituent units and the central government (i.e., the combination of self-rule and shared-rule) and the division of sovereignty this produces. The upshot of this is that federalism requires, to quote Dicey again, “a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states.”<sup>34</sup> The constitutional

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<sup>32</sup> *ibid.*, pp. 136–137 (Part Three, Chapter 11).

<sup>33</sup> Beer, *op. cit.*, p. 23 (Introduction).

<sup>34</sup> Dicey, *op. cit.*, p. 139 (Part I, Chapter III). Cf. G. C. S. Benson, 'Values of Decentralized Government – 1961' in

basis of federal systems was neatly captured by Robert A. Dahl's definition of federalism as:

A system in which some matters are exclusively *within* the competence of certain local units—cantons, states, provinces—and are constitutionally *beyond* the scope of the authority of the national government; and where certain other matters are constitutionally outside the scope of the authority of the smaller units.<sup>35</sup>

In addition to once again highlighting the division of sovereignty characteristic of federalism, Dahl draws attention to the pivotal role of constitutional mechanisms. It is precisely the constitution that divides sovereignty between the levels of government by acting as a constraint on both the central government and the constituent units. As John C. Calhoun pointed out, “the object of a constitution is to *restrain the government* [at all levels (i.e., both the central government and the constituent units)], *as that of laws* is to restrain *individuals*.”<sup>36</sup> In constraining both the central government and the constituent units, the constitution also serves to guarantee the autonomy of each.<sup>37</sup> Indeed, if the autonomy of each tier of government was not constitutionally guaranteed, then sovereignty would not be truly divided and the system of government in question would not be federal.

In short, the division of sovereignty that of necessity characterises federalism is the fruit of the enactment of a constitutional division of responsibilities between the central government and the constituent units. This in turn yields the necessary and sufficient conditions of federalism: the *constitutional division of sovereignty*.

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*Essays In Federalism*, The Institute For Studies In Federalism, Claremont, 1961, pp. 1–18, pp. 2–3.

<sup>35</sup> R. Dahl, 'Federalism and The Democratic Process' in *Democracy, Liberty, and Equality*, Norwegian University Press, Oslo, 1986, pp. 114–126, p. 114. Cf. Watts, *Comparing Federal Systems*, *op. cit.*, p. 83 (Chapter 5, §5.1).

<sup>36</sup> J. C. Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., *Messenger*]' in *The Papers of John C. Calhoun: Volume XI, 1829–1832*, C. N. Wilson (ed.), The University of South Carolina Press, Columbia, 1978, pp. 413–440, p. 416.

<sup>37</sup> Cf. Anderson, *op. cit.*, p. 1 (Chapter One, §1.1).

### 1.3.2. Constitutionalism and a juridical condition

The significance and nature of the constitutional division of sovereignty between the central government and the constituent units can be further illuminated by considering the notion of juridical and extra-juridical conditions. To begin, it is instructive to consider Homer's account of the Cyclops:

The Cyclopes [*sic*] have no assemblies for the making of laws, nor any established legal codes, but they live in hollow caverns in the mountain heights, where each man is lawgiver to his own children and women, and nobody has the slightest interest in what his neighbours decide.<sup>38</sup>

This is a poetic account of the extra-juridical condition later described by Benedict de Spinoza:

In the state of nature, wrong-doing is impossible; or, if anyone does wrong, it is to himself, not to another. For no one by the law of nature is bound to please another, unless he chooses, nor to hold anything to be good or evil, but what he himself, according to his own temperament, pronounces to be so; and, to speak generally, nothing is forbidden by the law of nature, except what is beyond everyone's power.<sup>39</sup>

Without also citing the examples of Epicurus and Jean-Jacques Rousseau, it is fair to conclude that lurking behind accounts of an extra-juridical condition is the connection between the absence of a common power and a condition of rightlessness.<sup>40</sup>

The idea that it is only a common power that can institute a juridical condition and

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<sup>38</sup> Homer, *The Cave of The Cyclops*, E. V. Rieu & D. C. H. Rieu (trans.), Penguin Books, London, 2005, p. 3.

<sup>39</sup> B. de Spinoza, 'Political Treatise' in *The Chief Works of Benedict de Spinoza: Volume I*, R. H. M. Elwes (trans.), Dover Publications, New York, 1951, pp. 267–387, p. 297 (Chapter II, §18). Cf. B. de Spinoza, *Ethics*, E. Curley (ed. & trans.), Penguin Books, London, 1996, pp. 136–137 (Part IV, P37). & I. Kant, *The Metaphysics of Morals*, M. Gregor (ed. & trans.), Cambridge University Press, Cambridge, 1996, p. 34 (Introduction).

<sup>40</sup> See Epicurus, 'Principal Doctrines' in *The Essential Epicurus: Letters, Principal Doctrines, Vatican Sayings, and Fragments*, E. O'Connor (trans.), Prometheus Books, Amherst, pp. 69–76, p. 74 (§31–§33). & Rousseau, 'Du Contrat Social ; Ou, Principes Du Droit Politique,' *op. cit.*, p. 189 (Livre I, Chapitre IX).

guard against rightlessness becomes explicit in Thomas Hobbes' writings. In his *locus classicus* on the subject, Hobbes argued that in the “warre of every man against every man,” which exists when there is no “common Power to feare,” “nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice.”<sup>41</sup> In other words, in the absence of a coercive institutional structure, illegality and legality have no force, and without illegality and legality, all that is left is a condition of rightlessness. As Jeremy Bentham notoriously put it, the notion of “[n]atural rights is simple nonsense ... , rhetorical nonsense, —nonsense upon stilts” because “no government, and thence no laws—no laws, and thence no such things as rights.”<sup>42</sup> Leaving aside the question of the plausibility of Hobbes' and Bentham's positivist interpretations of law in light of what Jürgen Habermas argues is the dual-character of human rights, the crucial point for present purposes is that in the absence of a common power, a condition of rightlessness—at least in the positivist sense of the term—obtains among individuals.<sup>43</sup> That is to say that, to borrow Thomas Paine's conception of the distinction, in the absence of a common power, a condition of rightlessness obtains in the sense that there are no “[c]ivil rights

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<sup>41</sup> T. Hobbes, *Leviathan*, R. Tuck (ed), Revised student edition, Cambridge University Press, Cambridge, 1996, p. 90 (Part I, Chapter 13). Cf. *ibid.*, pp. 117–118 (Part II, Chapter 17). & Spinoza, ‘Political Treatise,’ *op. cit.*, pp. 298–299 (Chapter II, §23).

<sup>42</sup> J. Bentham, ‘Anarchical Fallacies; Being An Examination of The Declarations of Rights Issued During The French Revolution’ in *The Works of Jeremy Bentham: Volume II*, Simpkin, Marshall, & Co., London, 1843, pp. 489–534, pp. 500–501. Cf. *ibid.*, p. 502 & p. 524. Although not directly relevant to the argument at hand, the forgoing Hobbesian line of reasoning entails that there is a necessary connection between violence and law. Unless there is a common power that can maintain the legal order by means of the use of violence, or at the very least the threat of the use of violence, lawlessness results. As Walter Benjamin observed, “violence ... alone can guarantee law.” See W. Benjamin, ‘Critique of Violence’ in *Reflections: Essays, Aphorisms, Autobiographical Writings*, P. Demetz (ed.), E. Jephcott (trans.), Schocken Books, New York, 1986, pp. 277–300, p. 296. Cf. *ibid.*, p. 286.

<sup>43</sup> Habermas argues that “as constitutional norms they [i.e., human rights] enjoy a positive validity (of instituted law), but as rights that are attributed to each person as a human being they acquire supra-positive validity.” See J. Habermas, ‘Kant's Idea of Perpetual Peace, With The Benefit of Two Hundred Years' Hindsight,’ J. Bohman (trans.) in *Perpetual Peace: Essays On Kant's Cosmopolitan Ideal*, J. Bohman & M. Lutz-Bachmann (eds.), The Massachusetts Institute of Technology Press, Cambridge, 1997, pp. 113–153, p. 137 (§4). Cf. T. Paine, ‘On Just Revolutionary Wars, Commerce and Republicanism (The Rights of Man)’ in *The Human Rights Reader: Major Political Essays, Speeches, and Documents From Ancient Times To The Present*, 2<sup>nd</sup> edition, M. R. Ishay (ed.), Routledge, New York, 2007, pp. 148–151, pp. 148–149. Without presuming to be able to make a substantive contribution to the complex debate about the status of human rights, it is nevertheless reasonable to reject the idea that human rights have supra-positive validity if one holds that the only plausible meta-ethical theories are anti-realist and that “Covenants, without the Sword, are but Words.” See Hobbes, *op. cit.*, pp. 117–118 (Part II, Chapter 17).



... which appertain to man in right of his being a member of society."<sup>44</sup> In summary, to escape the state of rightlessness, a common power needs to be instituted that can bring into existence a juridical condition.

Regarding what he called a "federal republic," Montesquieu argued that:

This form of government is a covenant by which several political bodies consent to become citizens of one larger state that they wish to form. It is a society of societies, which makes a new one, and which can grow larger by new members which are united.<sup>45</sup>

Taking Montesquieu's notion of federalism as a "society of societies," a parallel can be drawn between the creation of a juridical condition among individuals and the creation of a juridical among states.<sup>46</sup> Accepting the equivalence of individuals and states in the "state of meer Nature," the logical corollary of what has just been argued is that without a common power, a right-less extra-juridical condition will obtain among states.<sup>47</sup> As Immanuel Kant observed:

Peoples, as states, can be judged as individual human beings who, when in the state of nature (that is, when they are independent from external laws), bring harm to each other already through their proximity to one another.<sup>48</sup>

Despite this, a state can:

For the sake of his own security, ... demand of others that they enter with him into a constitution, similar to that of a civil one, under which

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<sup>44</sup> Paine, *op. cit.*, p. 149.

<sup>45</sup> Montesquieu, *De L'Esprit Des Lois: Tome I*, L. Versini (ed.), Éditions Gallimard, Paris, 1995, pp. 287–288 (Seconde Partie, Livre Neuvième, Chapitre I).

<sup>46</sup> *ibid.*, p. 288 (Seconde Partie, Livre Neuvième, Chapitre I).

<sup>47</sup> Hobbes, *op. cit.*, p. 140 (Part 2, Chapter XX). Cf. Madison, 'The Federalist No. 62,' *op. cit.*, p. 304.

<sup>48</sup> I. Kant, 'Toward Perpetual Peace: A Philosophical Sketch' in *Toward Perpetual Peace and Other Writings On Politics, Peace, and History*, P. Kleingeld (ed.), D. L. Colclasure (trans.), Yale University Press, New Haven, 2006, pp. 67–109, p. 78 (Second Section).

each is guaranteed his rights.<sup>49</sup>

Kant was essentially suggesting that like individuals, states in an extra-judicial condition can create a juridical condition and so escape the state of rightlessness. As with individuals, a juridical condition between states can be created by means of a common power that restricts the freedom of individual states. As Kant explains elsewhere:

Unless it [i.e., a state] wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate *power* (not its own but an external power); that is, it ought above all else to enter a civil condition.<sup>50</sup>

To relate the above arguments to the constitutional division of sovereignty in federalism, the constitution is the common power that creates a juridical condition between the central government and the constituent units, as well as among the individual constituent units. Given that federalism *qua* federalism rests on a constitutional division of sovereignty, it is clear that the creation of a juridical condition is an integral part of federalism. The upshot of the constitutional division of sovereignty in federalism is that extra-judicial freedom is replaced with what Kant calls "lawful *freedom*, the attribute of obeying no other law than that to which

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<sup>49</sup> *ibid.* Cf. J.-J. Rousseau, *Jugement Sur Le Projet De Paix Perpétuelle De L'Abbé De Saint-Pierre*, H. Guineret (ed.), Ellipses Édition Marketing, Paris, 2004, p. 15. & H. Guineret, 'Introduction – Rousseau et La Question De La Paix : Un Rapport Ambigu' in *Jugement Sur Le Projet De Paix Perpétuelle De L'Abbé De Saint-Pierre*, J.-J. Rousseau, H. Guineret (ed.), Ellipses Édition Marketing, Paris, 2004, pp. 5–11, p. 9.

<sup>50</sup> Kant, *The Metaphysics of Morals*, *op. cit.*, p. 90 (Part I, Part II, Section I, §44). Cf. I. Kant, 'On The Common Saying: This May Be True In Theory, But It Does Not Hold In Practice, Parts 2 and 3' in *Toward Perpetual Peace and Other Writings On Politics, Peace, and History*, P. Kleingeld (ed.), D. L. Colclasure (trans.), Yale University Press, New Haven, 2006, pp. 44–66, p. 63 (Part III). & *ibid.*, p. 65 (Part III).

he has given his consent.”<sup>51</sup> In practice, the freedom of a state to behave as it sees fit is replaced with the freedom to behave in accordance with the terms of the constitutional agreement to which it is a party. A federal system therefore embeds sovereignty in both the central government and the constituent units by means of the constitutional creation of a juridical condition.

### 1.3.3. Constitutional mechanisms and power relations

Michel Foucault noted that:

To live in society is to live in such a way that action upon other actions is possible—and in fact ongoing. A society without power relations can only be an abstraction.<sup>52</sup>

In light of this, conceiving of federal systems as societies of states leads us to the question of the power relations between the central government, the constituent units, and the constitution. To further draw on Foucault's analysis, insofar as “the exercise of power ... [is] a way in which certain actions may structure the field of other possible actions,” it is now essential to examine the way in which the central government, the constituent units, and the constitution structure each other's fields of possible actions.<sup>53</sup>

To understand the power relations between the central government, the constituent units, and the constitution, it is first necessary to make the distinction between the establishment of a federal system and its operation. On the basis of this distinction, it is possible to map out a two-tiered schematisation of the power relations between the central government, the constituent units, and the constitution. The first tier focuses on the power

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<sup>51</sup> Kant, *The Metaphysics of Morals*, *op. cit.*, p. 91 (Part I, Part II, Section I, §46).

<sup>52</sup> M. Foucault, 'The Subject and Power' in *Michel Foucault: Beyond Structuralism and Hermeneutics*, H. L. Dreyfus & P. Rabinow, The Harvester Press, Brighton, 1982, pp. 208–226, pp. 222–223.

<sup>53</sup> *ibid.*, p. 222.

relations that bring federal systems into existence, while the second tier concerns the power relations that determine the way in which extant federal systems function. The results of this schematisation are that the power relations that determine the way in which extant federal systems function are of greatest importance and that the constitution in general, and the amending power in particular, are supreme in extant federal systems.

With respect to the first tier of analysis, a commonplace view is that the constituent units structure the central government's field of possible actions. What might be called the Calhounian understanding of the power relations that bring federal systems into existence essentially amounts to the claim that because the constituent units structure the constitutional compact that accords the central government power, the constituent units structure the central government's field of possible actions. As Calhoun himself argued, the "distribution of power...[is] settled solemnly by a constitutional compact, to which all the states are parties," and as such, "the Constitution ... [is] a rule of action impressed on it [i.e., "the General Government"] at its creation."<sup>54</sup> To be sure, the central government may have jurisdiction over some exceptionally important areas of public policy (e.g., defence, foreign policy, central government fiscal policy, etc.). However, on the Calhounian understanding of the power relations that bring federal systems into existence, the central government has its field of possible actions structured by the constituent units because it is brought into existence by a

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<sup>54</sup> Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., *Messenger*],' *op. cit.*, pp. 418–419 & p. 421. *Cf. ibid.*, p. 424. & K. C. Wheare, *Federal Government*, 3<sup>rd</sup> edition, Oxford University Press, London, 1953, pp. 2–3 (Part I, Chapter I, §1). Calhoun argued that "[t]he States are its [i.e., the "Federal Constitution"] constituents, and not the people" on the grounds that the political communities represented by the states were distinct entities that had the original claim to sovereignty on which the sovereignty of the United States was predicated. See J. C. Calhoun, 'Speech On The Introduction of His Resolutions On The Slave Question [February 19, 1847]' in *Union and Liberty: The Political Philosophy of John C. Calhoun*, R. M. Lence (ed.), Liberty Fund, Indianapolis, 1992, pp. 511–521, p. 517. As Calhoun argued elsewhere: "the general Government emanated from the people of the several States, forming distinct political communities, and acting in their separate and sovereign capacity, and not from all of the people forming one aggregate political community." See Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., *Messenger*],' *op. cit.*, p. 415. *Cf.* J. C. Calhoun, 'A Discourse On The Constitution and Government of The United States' in *A Disquisition On Government and Selections From The Discourse*, C. G. Post (ed.), Hackett Publishing Company, Indianapolis, 1995, pp. 83–104, p. 86., *ibid.*, p. 89., *ibid.*, p. 91. & *ibid.*, p. 98.

constitutional compact among them.<sup>55</sup>

In those cases in which a federal system is the product of federal integration, it may well be true to argue, as Proudhon did, that “the individual liberties, corporate and local ... gave birth to and alone sustain it [i.e., the central government]; which ... by the constitution that they gave to it ... remain superior to it.”<sup>56</sup> Consistent with this, as Ronald L. Watts observes, “the aggregation of formerly separate units ... [frequently leads] to an emphasis on retaining a large element of autonomy for the federating units.”<sup>57</sup> However, just as surely as a federal system can be the product of the federal integration of sovereign political units that structure the newly created central government's field of possible actions, it can also be the product of the federalisation of a unitary state. In the cases in which a federal system is the product of federalisation, it is unrealistic to expect the constitutional compact to be exclusively between the constituent units. In all likelihood, the government of the unitary state that is being federalised will also be a party to the constitutional compact. Consider, for example, Watts' observation that “devolution from a previous unitary regime ... has usually resulted in a greater relative emphasis on federal powers.”<sup>58</sup> This suggests that when a federal system is the product of federalisation, the constituent units will not be at complete liberty to structure the central government's field of possible actions. The constituent units and the central government may jointly structure each other's fields of possible actions, or the central government may in fact structure the field of possible actions of the constituent units. Consequently, it is incorrect to claim that in all instances all of the central government's “force and authority flows from the confederated states which appointed it.”<sup>59</sup>

The above suggests that the power relations that bring federal systems into existence

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<sup>55</sup> Cf. Dante, *op. cit.*, p. 21 (Book I, §xii).

<sup>56</sup> Proudhon, *Du Principe Fédératif et De La Nécessité De Reconstituer Le Parti De La Révolution*, *op. cit.*, p. 172 (Conclusion).

<sup>57</sup> Watts, *Comparing Federal Systems*, *op. cit.*, p. 65 (Chapter 3, §3.3).

<sup>58</sup> *ibid.*

<sup>59</sup> Pufendorf, *op. cit.*, p. 1049 (Book VII, Chapter V, §19).

can be configured in a number of different ways. The constituent units may structure the central government's field of possible actions, the central government may structure the field of possible actions of the constituent units, or the constituent units and the central government may jointly structure each other's fields of possible actions. Theories of federalism that attribute all power at the point of the creation of federal systems to one level of government, such as Calhoun's, therefore do not stand up to critical scrutiny.

In contrast to the uncertainty regarding the power relations that bring federal systems into existence, those that determine the way in which extant federal systems function are always the same. Once a federal system has been established, the central government and the constituent units are, to use Calhoun's turn of phrase, "equals and coordinates in their respective spheres."<sup>60</sup> This means that neither structures the field of possible actions of the other. The reason for this is that the constitution divides sovereignty between the central government and the constituent units, thereby ensuring that each remains autonomous in its own sphere of jurisdiction.

To be sure, some federal systems place so much power in the hands of the central government that it seems to structure the field of possible actions of the constituent units. At the same time, others leave the central government with such a meagre amount of power that the constituent units seem to structure its field of possible actions. Regarding the first category, consider the Indian federation in which the executive of the federal government can exercise draconian emergency powers.<sup>61</sup> In particular, 'The Constitution of India' specifies that if the President declares there is a grave emergency, "the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is

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<sup>60</sup> Calhoun, 'A Discourse On The Constitution and Government of The United States,' *op. cit.*, pp. 92–93.

<sup>61</sup> These emergency powers are truly draconian because quite aside from being anti-federal, they allow for the suspension of rights. See 'The Constitution of India,' Government of India Ministry of Law and Justice, New Delhi, 1st December 2007, viewed on the 14th January 2010, <<http://lawmin.nic.in/coi/coiason29july08.ppdf>>, p. 227 (Part XVIII, Article 359, §(1)).

to be exercised.”<sup>62</sup> What is more:

The President may by Proclamation—(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State; (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament; (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State.<sup>63</sup>

Concerning the second category, consider the 'Constitution of The Federal Democratic Republic of Ethiopia,' which states that “[e]very Nation, Nationality and People in Ethiopia has an unconditional right to selfdetermination, including the right to secession.”<sup>64</sup> Similarly, the 'Consolidated Versions of The Treaty On European Union and The Treaty On The Functioning of The European Union' stipulates that “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”<sup>65</sup> As extreme as these examples

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<sup>62</sup> *ibid*, p. 218 (Part XVIII, Article 352, §(1)). & *ibid*, p. 221 (Part XVIII, Article 353). It is important to bear in mind that this declaration can be pre-emptive. As the Indian constitution explicitly states: “[a] Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.” See 'The Constitution of India,' *op. cit.*, p. 218 (Part XVIII, Article 352, §(1)).

<sup>63</sup> *ibid*, p. 222 (Part XVIII, Article 356, §(1)).

<sup>64</sup> 'Constitution of The Federal Democratic Republic of Ethiopia,' *The Parliament of The Federal Democratic Republic of Ethiopia*, Addis Ababa, 21<sup>st</sup> August 1995, viewed on the 25<sup>th</sup> December 2010, <<http://www.ethiobar.net/>>, Chapter Three, Part Two, Article 39, §1).

<sup>65</sup> 'Consolidated Versions of The Treaty On European Union and The Treaty On The Functioning of The European Union,' *Official Journal of The European Union*, C 115, vol. 51, 9<sup>th</sup> May 2008, viewed on the 25<sup>th</sup> December 2010, <<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:en:HTML>>, pp. 43–44 (TEU, Title VI, Article 50, §1). Together with the example of Ethiopia, the case of the EU plainly debunks the myth that the inclusion of a right to unilateral secession in a constitutional agreement inevitably leads to political instability

might be, the crucial point is that, despite appearances, neither the central government nor the constituent units entirely structure the field of possible actions of the other even in outlying cases. In the Indian case, just as much as in the cases of Ethiopia and the European Union (EU), the constitution structures the fields of possible actions of both the central government and the constituent units. More specifically, the great powers of the Indian federal government and the immense autonomy of Ethiopian provinces and EU member states flow from the respective constitutional compacts.

As has already been shown, federalism *qua* federalism require a constitutional division of sovereignty. The significance of this is that each level of government has autonomy in its area of jurisdiction and is not an agent of the other level of government. In federal systems, as Watts notes, “each of the different orders of government derives its authority from a supreme constitution rather than from another level of government.”<sup>66</sup> Indeed, if either level of government was able to entirely structure the field of possible actions of the other level of

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and the anarchical disintegration of the union. Indeed, even in the context of long-standing Québécois calls for secession, the Supreme Court of Canada's qualified ruling in favour of a unilateral right to secession did not precipitate the dismemberment of the Canadian union. See Supreme Court of Canada, 'Reference re Secession of Quebec,' [1998] 2 S.C.R. 217, viewed on the 13<sup>th</sup> December 2011, <<http://www.canlii.org/en/ca/scc/doc/1998/1998canlii793/1998canlii793.pdf>>, pp. 6–7 (§(2)). A striking example of the misrepresentation of constitutional rights to unilateral secession is Abraham Lincoln's claim that “[p]lainly, the central idea of secession, is the essence of anarchy,” and that because of this “[i]t is safe to assert that no government proper ever had a provision in its organic law for its own termination.” See A. Lincoln, 'First Inaugural Address, March 4, 1861' in *The Declaration of Independence and Other Great Documents of American History, 1775–1865*, J. Grafton (ed), Dover Publications, Mineola, 2000, pp. 80–88, p. 85. & *ibid.*, p. 83. Similarly misleading is Robert Randolph Garran's contention: “No right to secession can be admitted by the Union, because such an admission would destroy its strength. A federal union must in terms be *perpetual*, else it contains within itself the seeds of its own dissolution, and is merely a partnership by mutual consent. Secession, then, is revolt, and must expect to be dealt with as revolt.” See Garran, *op. cit.*, p. 34 (Part I, §4). Without wanting to enter into an extended exploration of the merits of constitutionally enshrined rights to unilateral secession, like James M. Buchanan and Daniel Weinstock, minimalist liberalism holds that “[t]he separate states, individually or in groups, must be constitutionally empowered to secede from the federalized political structure” in order to ensure that “the ultimate powers of the central government ... [are] held in check.” See J. M. Buchanan, 'Federalism As An Ideal Political Order and An Objective For Constitutional Reform,' *Publius: The Journal of Federalism*, vol. 25, no. 2, Spring 1995, pp. 19–27, pp. 21–22. Cf. D. Weinstock, 'Towards A Normative Theory of Federalism,' *International Social Science Journal*, vol. 53, no. 167, March 2001, pp. 75–83, p. 81. Despite the possible costs of secession, if one is truly committed to individual liberty, the rationale for a constitutionally enshrined right to unilateral secession will be irresistible. As Kukathas notes, “in a social order in which diversity is to prevail rather than be suppressed, the most important thing that rules or institutions that govern it do is permit people to go their separate ways.” See Kukathas, *op. cit.*, p. 259 (Conclusion).

<sup>66</sup> Watts, *Comparing Federal Systems*, *op. cit.*, p. 65 (Chapter 3, §3.3).



government, then the system of government in question would not have a constitutional division of sovereignty and so would not be federal.<sup>67</sup> Taking all of these points together, once a federal system has been instituted, it is of necessity the constitution that structures the fields of possible actions of both the central government and the constituent units.

#### **1.3.4. Constitutional mechanisms and the amending power**

Given that the constitution structures the fields of possible actions of both the central government and the constituent units, the amending power in the constitution is actually the ultimate source of authority in federal systems. This is because the amending power ultimately structures the field of possible actions of the constitution. As Garran observed:

The amending power is ... the one power which is supreme over the federal constitution. The amending power (when it exists) is in fact the real legislative sovereign which presides directly over the constitution, and so indirectly over the dual sovereignty of the Nation and the States.<sup>68</sup>

Two key points need to be made regarding the constitutional amending power in federal systems. First, the amending power is typically in the hands of both the central government and the constituent units. Second, even in those rare cases in which the amending power is solely in the hands of the constituent units, the constituent units do not structure the field of possible actions of the central government once a federal system has been instituted.<sup>69</sup> The

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<sup>67</sup> The Indian federation does admittedly come dangerously close to meeting this condition.

<sup>68</sup> Garran, *op. cit.*, p. 25 (Part I, §3). Garran went on to point out that “[t]here are, if we express it so, three tiers of sovereignties: first and lowest the limited and co-ordinate sovereignties of the national and state governments respectively; above these the superior sovereignty of the constitution, and above all the supreme sovereignty of the amending power.” See *ibid*, pp. 25–26 (Part I, §3).

<sup>69</sup> There are no federal systems, including the highly centralised Indian federation, in which the amending power rests solely with the central government. To be sure, the Indian constitution states that “[a]n amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, [it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand

significance of these two points is that, as argued above, neither the central government nor the constituent units structure the field of possible actions of the other once a federal system has been instituted.

With respect to the first point, the amending power is commonly in the hands of both the central government and the constituent units. By way of demonstration, it suffices to consider a number of prominent extant federal systems. For example, the 'Commonwealth of Australia Constitution Act (The Constitution)' states:

This Constitution shall not be altered except ... if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law.<sup>70</sup>

Similarly, the 'Constitution Fédérale De La Confédération Suisse Du 18 Avril 1999' stipulates that "amendments to the Federal Constitution" "must be put to the vote of the People and the Cantons," and that "[p]roposals that are submitted to the vote of the People and Cantons are accepted if a majority of those who vote and a majority of the Cantons approve them."<sup>71</sup> In a like manner, the 'Consolidation of Constitution Acts, 1867 To 1982' of Canada stipulates:

An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by (a) resolutions of the Senate and House

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amended in accordance with the terms of the Bill." See 'The Constitution of India,' *op. cit.*, p. 240 (Part XX, Article 368, §(2)). However, it adds that "if such amendment seeks to make any change in—(a) article 54, article 55, article 73, article 162 or article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or (c) any of the Lists in the Seventh Schedule, or (d) the representation of States in Parliament, or (e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent." See *ibid.*, pp. 240–241 (Part XX, Article 368, §(2)).

<sup>70</sup> 'Commonwealth of Australia Constitution Act (The Constitution),' *Attorney-General's Department*, Canberra, 25<sup>th</sup> July 2003, viewed on the 25<sup>th</sup> December 2010, <[http://www.comlaw.gov.au/comlaw/comlaw.nsf/440c19285821b109ca256f3a001d59b7/57dea3835d797364ca256f9d0078c087/\\$FILE/ConstitutionAct.pdf](http://www.comlaw.gov.au/comlaw/comlaw.nsf/440c19285821b109ca256f3a001d59b7/57dea3835d797364ca256f9d0078c087/$FILE/ConstitutionAct.pdf)>, pp. 46–47 (Chapter VIII, Section 128).

<sup>71</sup> 'Constitution Fédérale De La Confédération Suisse Du 18 Avril 1999,' *Les Autorités Fédérales De La Confédération Suisse*, Berne, 7<sup>th</sup> March 2010, viewed on the 25<sup>th</sup> December 2010, <<http://www.admin.ch/ch/f/rs/1/101.fr.pdf>>, p. 45 (Titre 4, Chapitre 2, Article 140, §1), *ibid* & *ibid*, p. 46 (Titre 4, Chapitre 2, Article 142, §2).

of Commons; and (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.<sup>72</sup>

Finally, the Ethiopian constitution also states that:

All provisions of this Constitution other than those specified in sub-Article 1 [i.e., [a]] rights and freedoms specified in Chapter Three of this Constitution, this very Article, and Article 104] of this Article can be amended only in the following manner: (a) When the House of Peoples' Representatives and the House of the Federation, in a joint session, approve a proposed amendment by a two-thirds majority vote; and (b) When two-thirds of the Councils of the member States of the Federation approve the proposed amendment by majority votes.<sup>73</sup>

Although further examples could be furnished, the above suffice to demonstrate that the amending power typically lies in the hands of both the central government and the constituent units. Neither the central government nor the constituent units are placed in a subordinate position vis-à-vis the other regarding the amending power and therefore neither the central government nor the constituent units structure the field of possible actions of the other.

At this point, it might be argued that the above characterisation of federalism is erroneous because the amending power is solely in the hands of the constituent units in some federal systems. Take, for example, the EU treaties, which specify that "amendments [to the Treaties] shall enter into force after being ratified by all the Member States in accordance with

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<sup>72</sup> 'Consolidation of Constitution Acts, 1867 To 1982,' *Department of Justice Canada*, Ottawa, 17<sup>th</sup> April 1982, viewed on the 25<sup>th</sup> December 2010, <<http://laws.justice.gc.ca/eng/Const/ConstDoc.html>>, pp. 56–57 (1982, Part V, Article 38, §1).

<sup>73</sup> 'Constitution of The Federal Democratic Republic of Ethiopia,' *op. cit.*, (Chapter Eleven, Article 105, §2).

their respective constitutional requirements.”<sup>74</sup> The case of the amending power in the EU poses a *prima facie* challenge because it seems to suggest that the constituent units are wholly at liberty to structure the field of possible actions of the central government. However, on closer inspection, the EU treaties do not contradict the claim that neither the central government nor the constituent units structure the field of possible actions of the other in federal systems.

Attributing the amending power to the constituent units does not subordinate the central EU government because so doing only ensures that proposed constitutional amendments cannot be imposed on constituent units without their consent. This in no way inhibits the central EU government from acting as a sovereign power in its respective sphere. In particular, attributing the amending power to the constituent units does not stop “the European Parliament ... act[ing] by a majority of the votes cast” with respect to those areas of public policy within its sphere of jurisdiction.<sup>75</sup> Attributing the amending power to the constituent units does admittedly mean that *initially* the constituent units structure the central government's field of possible actions in the sense that they create it. However, even in the case of the EU, once the federal system has been instituted, the central government and the constituent units are independent in their respective spheres. We therefore again see that the constitution, and in particular its amending power, structures the fields of possible actions of both the central government and the constituent units in federal systems.

In conclusion, although the central government and the constituent units may structure each other's fields of possible actions when a federal system is being instituted, once it has been established, the constitution ensures that the levels of government are independent in their respective spheres. Combining this with the conclusion reached in the previous section yields

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<sup>74</sup> 'Consolidated Versions of The Treaty On European Union and The Treaty On The Functioning of The European Union,' *op. cit.*, p. 42 (TEU, Title VI, Article 48, §4).

<sup>75</sup> *ibid.*, p. 152 (TFEU, Part Six, Title I, Chapter 1, Section 1, Article 231).

the result that the necessary and sufficient conditions of federalism are a constitutionally enshrined division of sovereignty in which the constitution's amending power in effect structures the fields of possible actions of both the central government and the constituent units.

## **1.4. Systems of Sovereign States and Unitary Systems**

Having shown that the necessary and sufficient conditions of federalism are the constitutional division of sovereignty, it is instructive to explore precisely how this distinguishes federal systems from systems of sovereign states and unitary systems.

### **1.4.1. Federal systems and systems of sovereign states**

Federal systems are distinct from systems of sovereign states because they significantly limit the sovereignty of individual political units. Federalism circumscribes the sovereignty of individual political units in the sense that the central government and the constituent units each only have jurisdiction over some areas of public policy. By contrast, each political unit is sovereign with respect to the vast majority of, if not all, areas of public policy in systems of sovereign states.

It might be objected that this distinction overlooks the present non-existence of systems of sovereign states. The various political, economic, technological, institutional, etc., links between states mean that even the most autonomous of states are not fully sovereign. To see this, it suffices to consider the way in which treaties function. Although treaties generally only concern very specific matters, their binding nature means that even they limit

sovereignty in the current system of international law.<sup>76</sup> As the 'Vienna Convention On The Law of Treaties (1969)' stipulates:

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with other contracting States.<sup>77</sup>

Consequently, it contravenes international law for a state to unilaterally withdraw from a treaty arrangement, unless it contains a provision authorising action of this kind. It is therefore no longer correct to hold, as Pufendorf did, that in simple treaties:

Each people of the league ... are on no account willing to make the exercise of that part of the sovereignty from which ... [mutual performances] flow dependent upon the consent of their associates.<sup>78</sup>

In the current system of international law, the exercise of the element of sovereignty from which the mutual performances of the treaty flow is dependent on none other than the consent of the other parties to the treaty, unless the treaty authorises unilateral withdrawal.

There are admittedly crucial differences between treaties and federal constitutional agreements. Treaties generally only cover very specific matters, and therefore leave the freedom of states to conduct themselves as they see fit largely intact. By contrast, federal constitutional agreements cover many areas of public policy, and consequently demand a substantial reduction in the sovereign powers of the constituent units. Compare, for example, the relatively robust sovereignty retained by parties to the 'Treaty On The Non-Proliferation of Nuclear Weapons (NPT) (1968)' and the relatively circumscribed sovereignty of Indian states.

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<sup>76</sup> Cf. Kant, 'Toward Perpetual Peace: A Philosophical Sketch,' *op. cit.*, p. 80 (Second Section). & Pufendorf, *op. cit.*, p. 1047 (Book VII, Chapter V, §18).

<sup>77</sup> 'Vienna Convention On The Law of Treaties (1969)' in *International Law and Politics: Key Documents*, S. V. Scott (ed.), Lynne Rienner Publishers, London, 2006, pp. 58–83, p. 73 (Section 3, Article 54).

<sup>78</sup> Pufendorf, *De Jure Naturae et Gentium Libri Octo: Volume Two*, *op. cit.*, p. 1047 (Book VII, Chapter V, §18).

Whereas the NPT only restricts sovereignty with respect to the acquisition or development of nuclear weapons by non-nuclear-weapon State Parties, the Indian constitution leaves the constituent units with, as we have seen, meagre and largely unsecured sovereign powers.<sup>79</sup>

Notwithstanding significant differences in the scope of the limitations on sovereignty demanded by treaties and federal arrangements, the distinction between federalism and treaties remains a matter of degrees rather than a difference of kinds. Both create a juridical condition by means of a constitutional, or at least quasi-constitutional, division of sovereignty.<sup>80</sup> The difference is simply that the sovereignty ceded by the parties to a treaty is minimal as compared to the relatively extensive sovereignty that the constituent units cede to the central government in federal systems. The distinction between federal systems and systems of sovereign states therefore seems to be a distinction between real things (i.e., the various different kinds of federal constitutional agreements) and mere will-o'-the-wisps (i.e., systems of sovereign states).

The first point to make in responding to the above objection is that although the sovereignty of states in the international order has been diminished, it is an exaggeration to claim that their sovereignty has been circumscribed to the point that it is no longer true to call the international order a system of sovereign states. Despite the significant pressures exerted by globalisation in its political, economic, technological, institutional, etc., forms, states nevertheless remain sovereign in the sense that it is in states that "all or virtually all sovereign competences are concentrated."<sup>81</sup> With their "*monopoly of legitimate physical violence*," states are the pre-eminent loci of power at the global level and remain largely sovereign.<sup>82</sup> In addition,

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<sup>79</sup> 'Treaty On The Non-Proliferation of Nuclear Weapons (NPT) (1968)' in *International Law and Politics: Key Documents*, S. V. Scott (ed.), Lynne Rienner Publishers, London, 2006, pp. 117–122, pp. 118–119 (Articles I & II). & 'The Constitution of India,' *op. cit.*, pp. 321–326 (Seventh Schedule, List II-State List).

<sup>80</sup> Unlike the full-bodied constitutional agreements that undergird federal systems, treaties are meagre constitutional or quasi-constitutional agreements.

<sup>81</sup> E. Cavallero, 'Federative Global Democracy,' *Metaphilosophy*, vol. 40, no. 1, January 2009, pp. 42–64, p. 44 (§1).

<sup>82</sup> M. Weber, 'The Profession and Vocation of Politics' in *Political Writings*, P. Lassman (ed.) & R. Speirs (trans.), Cambridge University Press, Cambridge, 1994, pp. 309–369, pp. 310–311. International organisations (e.g., the

as prominent international relations theorists have observed, government activity has in many cases increased in the contemporary era of globalisation.<sup>83</sup> Not only has the power of states increased in fundamentally important fields, including revenue raising, and the exercise of force, international organisations that ostensibly diminish state power often actually reinforce it.<sup>84</sup> All of this indicates that, as Stephen D. Krasner puts it:

Those who proclaim the death of sovereignty misread history. The nation-state has a keen instinct for survival and has so far adapted to new challenges—even the challenge of globalization.<sup>85</sup>

The above is by no means a thorough defence of the realist understanding of the importance of state power in global politics. It nevertheless serves to adequately demonstrate that the international system constitutes a system of sovereign, or at least largely sovereign, states.

In any case, it does not pose a problem for the account of federalism offered earlier if no systems of sovereign states currently exist. It would simply imply that the present international system is either already federal, or is approaching the point at which it becomes federal. Crucially, it would not be necessary to abandon the distinction between federal systems and systems of sovereign states (even if the later happen to now be extinct). In short, irrespective of the current international system's status, federal systems are distinct from systems of sovereign states because they significantly limit the sovereignty of individual political units (i.e., both the central government and the constituent units only have jurisdiction

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United Nations (UN), the North Atlantic Treaty Organisation (NATO), the African Union (AU), etc.) that use legitimate violence do so on behalf of their member states.

<sup>83</sup> Cf. S. D. Krasner, 'Sovereignty' in *Essential Readings In World Politics*, K. A. Mingst & J. L. Snyder (eds.), 2<sup>nd</sup> edition, W. W. Norton & Company, New York, 2004, pp. 143–149, p. 147.

<sup>84</sup> Cf. H. Bull, 'Does Order Exist In World Politics?' in *Essential Readings In World Politics*, K. A. Mingst & J. L. Snyder (eds.), 2<sup>nd</sup> edition, W. W. Norton & Company, New York, 2004, pp. 120–124, p. 123., D. Held, A. McGrew, D. Goldblatt & J. Perraton, 'Globalization' in *Essential Readings In World Politics*, K. A. Mingst & J. L. Snyder (eds.), 2<sup>nd</sup> edition, W. W. Norton & Company, New York, 2004, pp. 462–471, p. 470., A.-M. Slaughter, 'The Real New World Order' in *Essential Readings In World Politics*, K. A. Mingst & J. L. Snyder (eds.), 2<sup>nd</sup> edition, W. W. Norton & Company, New York, 2004, pp. 149–156, p. 155. & J. J. Mearsheimer, 'The False Promise of International Institutions' in *Essential Readings In World Politics*, K. A. Mingst & J. L. Snyder (eds.), 2<sup>nd</sup> edition, W. W. Norton & Company, New York, 2004, pp. 283–294, p. 283.

<sup>85</sup> Krasner, *op. cit.*, p. 143.



over some areas of public policy).

The concern that is then likely to be raised is that if even the international system is a federal system, then surely the claim that federalism is a powerful constitutional tool for allowing individuals to live as they see fit risks becoming vacuous. The minimalist liberal theory of federalism would be forced into the untenable position of holding that every system of government, bar the most atomised, is federal, and as a result, should be able to allow individuals to live as they see fit. In other words, if the concept of federalism can be stretched so that it includes the international system, then the minimalist liberal theory of federalism advanced in this thesis will in effect amount to an implausible defence of an extremely broad range of systems of government.

As will become apparent as the argument progresses, claiming that federalism is a powerful constitutional tool for allowing individuals to live as they see fit is not the same as claiming that any given extant federal system allows individuals to live as they see fit. Rather than a blanket defence of all federal systems, the minimalist liberal theory of federalism is qualified: Although federalism might be a powerful constitutional tool for allowing individuals to live as they see fit, there is no guarantee that every federal system will be able to allow individuals to live as they see fit. As such, the minimalist liberal theory of federalism retains critical force even if federalism is understood in the most expansive terms possible. In practice, despite being a powerful constitutional tool for allowing individuals to live as they see fit, it is surely possible to employ federal structures more effectively in many extant federal systems. For example, the international system may not be effective at allowing individuals to live as they see fit even though it arguably qualifies as a federal system.

By way of conclusion, irrespective of whether there are extant examples of systems of sovereign states or whether the international system is considered federal, federal systems are distinct from systems of sovereign states. Whereas federal systems significantly limit the

sovereignty of individual political units, systems of sovereign states leave each political unit sovereign with respect to the vast majority of, if not all, areas of public policy.

#### 1.4.2. Federal and unitary systems

Federal systems are distinct from unitary systems because although the latter can be decentralised, the entities to which powers are devolved will not have their new-found powers constitutionally enshrined. The importance of constitutionalism in distinguishing federal systems from unitary systems is that, as William H. Riker made clear:

Federalism is a constitutionally determined tier-structure. If its constitutional feature is ignored, then it is merely some particular arrangement for decentralization.<sup>86</sup>

If constituent units are not constitutionally recognised and their powers can be unilaterally curtailed by the central government—as is the case in a devolved unitary system—then the system of government in question cannot be federal. As Henry Sidgwick rightly observed:

A modern state might be *practically* federal, without a precise and stable division of powers, if the substantial autonomy of the parts were maintained by custom and public opinion. But if the central legislature were recognised as having the power to abolish this autonomy, I should regard the state as *formally* unitary.<sup>87</sup>

The upshot of this is that Hans Kelsen's understanding of federalism, according to which “[o]nly the degree of decentralization distinguishes a unitary State divided into autonomous

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<sup>86</sup> W. H. Riker, 'Federalism' in *A Companion To Contemporary Political Philosophy: Volume I*, R. E. Goodin, P. Pettit & T. Pogge (eds.), 2<sup>nd</sup> edition, Blackwell Publishing, Oxford, 2007, pp. 612–617, p. 613. Cf. T. Fleiner, 'Facing Diversity' *International Social Science Journal*, vol. 53, no. 167, March 2001, pp. 33–40, p. 34.

<sup>87</sup> H. Sidgwick, *The Elements of Politics*, 2<sup>nd</sup> edition, Macmillan and Co., London, 1897, p. 532 (Part II, Chapter XXVI, §2).

provinces from a federal State," is deeply flawed.<sup>88</sup> Unlike unitary systems, federal systems require decentralisation *plus* constitutional enshrinement.

Given that the regional autonomy in a devolved unitary system can always be revoked by the central government, John Emerich Edward Dalberg-Acton was indeed right to insist that "a great democracy must either sacrifice self-government to unity, or preserve it by federalism."<sup>89</sup> The point Dalberg-Acton was making is that unless self-government is constitutionally enshrined (i.e., unless a federal arrangement of some kind is instituted), there is no guarantee that the national majority will not rescind it. To borrow Henri Bourassa's turn of phrase, although federalism unifies the constituent units, the constitutional enshrinement of their autonomy means that federalism cannot fuse them.<sup>90</sup> Unlike devolved unitary systems that can still suffer from what Dicey called "Parliamentary despotism," federalism's unavoidable constitutional division of sovereignty ensures that the constituent units are never simply subordinates of the central government.<sup>91</sup> The heart of the distinction between federal systems and unitary systems is therefore that, as Sidgwick noted, "in the former the power of the ordinary legislature of the whole is constitutionally limited in favour of the autonomy of locally distinct parts."<sup>92</sup> In conclusion, constitutionally divided sovereignty, which, as has already been pointed out, is a precondition for federalism, distinguishes federal systems from unitary systems.

In summary, the necessary and sufficient conditions of federalism distinguish federal

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<sup>88</sup> H. Kelsen, *General Theory of Law and State*, A. Wedberg (trans.), Russell & Russell, New York, 1961, p. 316 (Part Two, Chapter V, §D.a.1). Cf. *ibid.*, p. 317 (Part Two, Chapter V, §D.a.1). Kelsen later contradicts this earlier statement when he writes: "[b]y this constitutional autonomy of the component States—even if limited—the federal State is distinguished from a relatively decentralized unitary State, organized in autonomous provinces." See *ibid.*, p. 318 (Part Two, Chapter V, §D.a.1). As such, it is hard to know whether Kelsen was wrong or simply confused.

<sup>89</sup> J. E. E. Dalberg-Acton, 'Nationality' in *Essays On Freedom and Power*, G. Himmelfarb (ed.), The Free Press, Glencoe, 1948, pp. 166–195, p. 173.

<sup>90</sup> Bourassa, a notable proponent of pan-Canadian nationalism, advocated "a more general patriotism that unifies us, without fusing us, to 'the other elements that make up the population of Canada.'" See J.-P. Tardivel & H. Bourassa, 'A Controversy' in *French-Canadian Nationalism: An Anthology*, R. Cook (ed.), The Macmillan Company of Canada, Toronto, 1969, pp. 147–151, p. 149.

<sup>91</sup> Dicey, *op. cit.*, p. 152 (Part I, Chapter III). Cf. Beer, *op. cit.*, p. 23 (Introduction).

<sup>92</sup> Sidgwick, *The Elements of Politics*, *op. cit.*, pp. 532–533 (Part II, Chapter XXVI, §2).

systems from both systems of sovereign states and unitary systems. In the first instance, whereas political bodies are sovereign with respect to most, if not all, public policy arenas in systems of sovereign states, political bodies are only sovereign with respect to a limited range of public policy arenas in federal systems. In the second instance, whereas the central government is sovereign with respect to all public policy arenas in unitary systems, the jurisdiction of the central government is constitutionally constrained to a limited range of public policy arenas in federal systems.

## **1.5. Federal Versus Con-federal Systems**

Having specified the necessary and sufficient conditions of federalism and how they distinguish federal systems from both systems of sovereign states and unitary systems, it is now time to examine some of the most important varieties of federalism. It is also essential to provide a persuasive and complete account of the differences between federal and con-federal systems. This will in turn rectify some misconceptions prevalent in academic literature on federalism. In particular, it will become apparent that rather than being separated by a difference of kinds, federal and con-federal systems are distinct because of differences in the scope of the central government's jurisdiction.

### **1.5.1. Federal variety**

The history of federalism has seen everything from highly centralised federations—in which the central government has jurisdiction over most areas of public policy—to extremely decentralised con-federations—in which constituent units are autonomous with respect to the

vast majority of areas of public policy. This federal variety suggests that, as Watts observes, “there is no single pure or ideal model” of federalism.<sup>93</sup> To fully appreciate this point, it is instructive to briefly put federalism's diversity in as stark relief as possible. Among the variety of federal systems is the Indian federation in which the federal government has the power to unilaterally:

(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; (b) increase the area of any State; (c) diminish the area of any State; (d) alter the boundaries of any State; (e) alter the name of any State.<sup>94</sup>

At the other end of the spectrum sits the US con-federation in which the central government only had authority to conduct diplomacy, regulate the military, decide in matters of war and peace, coin and determine the value of money, manage the postal service, resolve disputes between states, manage relations with the Native American Indians, and fix the standards of weights and measures.<sup>95</sup> Federal systems of necessity share a constitutional division of sovereignty. However, as these two, albeit extreme, examples demonstrate, beyond the necessary and sufficient conditions of federalism, there is immense variety among federal systems.

Federalism's variety means that the minimalist liberal theory of federalism does not specify in minute detail the characteristics a federal system needs to have to allow individuals to live as they see fit. Rather, the minimalist liberal theory of federalism simply makes the general argument that the constitutional division of sovereignty—the necessary and sufficient

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<sup>93</sup> R. Watts, 'Models of Federal Power Sharing,' *International Social Science Journal*, vol. 53, no. 167, March 2001, pp. 23–32, p. 28. Cf. Føllesdal, 'Federalism,' *op. cit.*

<sup>94</sup> 'The Constitution of India,' *op. cit.*, p. 2 (Part I, Article 3).

<sup>95</sup> 'The Articles of Confederation' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed), Cambridge University Press, Cambridge, 2006, pp. 537–544, pp. 540–543 (Article IX). Cf. *ibid.*, p. 537 (Article II).

conditions of federalism—is an effective tool for allowing individuals to live as they see fit. The minimalist liberal theory of federalism is cautious because it acknowledges that important questions cannot be answered in the abstract: The specific characteristics a particular federal system needs to have to allow individuals to live as they see fit cannot be known in advance. For example, whether a particular federal system should have a stronger central government or give the constituent units more autonomy will depend on the particularities of its society (e.g., the scale of the power imbalance between the national majority and the constituent unit minorities, the extent of fellow feeling among the different groups in the constituent units, the vulnerability of constituent unit minorities, etc.). Establishing a federal system that allows individuals to live as they see fit might therefore in practice require further federal integration or further federalisation. This suggests that, as Garran claimed:

There is no such thing as one stereotyped perfect model of federal government; the highest perfection of a federal government, or any other government, is perfect adaptation to the wants of the people. The principle and the spirit of federalism are everywhere the same; the form and the details depend upon an infinite variety of circumstances, and will everywhere be different.<sup>96</sup>

As such, excepting the necessary constitutional division of sovereignty, the form that any given federal system ought to take remains an open question.<sup>97</sup>

### **1.5.2 The orthodox federal versus con-federal distinction**

Among the great diversity of federal systems hinted at above, arguably the two most important species are federations and con-federations. In delineating the distinction between

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<sup>96</sup> Garran, *op. cit.*, pp. 28–29 (Part I, §4).

<sup>97</sup> Cf. Norman, 'Towards A Philosophy of Federalism,' *op. cit.*, p. 98.

these species of federalism, this section will correct a serious mistake in the academic literature on the subject. Conventional wisdom holds that the distinction between federations and con-federations is twofold. First, whereas the central government acts on the constituent units instead of individual citizens in a con-federation, it acts directly on individual citizens in a federation. Second, whereas the central government is subordinate to the constituent units in a con-federation, neither the constituent units nor the central government are subordinate in a federation. Typical of the first dimension of this orthodox view is Garran's claim that:

The characteristic of the Confederation ... is that the central government deals only with the governments of the several States, not with the individual citizens. [Whereas] in a true Federation ... the central authority acts directly on each individual citizen of each State, who is also a citizen of the union.<sup>98</sup>

An example of the second dimension of this orthodox view is Watts' assertion that although "the common government is dependent upon the constituent governments" in a con-federation, "in a federation neither the federal nor the constituent units of government are constitutionally subordinate to the other."<sup>99</sup>

Before explaining the serious errors in this orthodox understanding of the distinction between federations and con-federations, it is important to acknowledge that it rightly draws attention to the way in which constituent units are not subordinate to the central government and *vice versa* in a federation. This is the federal principle K. C. Wheare described when he

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<sup>98</sup> Garran, *op. cit.*, p. 18 (Part I, §1). Cf. A. Hamilton, 'The Federalist No. 15' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed), Cambridge University Press, Cambridge, 2006, pp. 64–71, p. 67–68., J. Madison, 'The Federalist No. 39' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed), Cambridge University Press, Cambridge, 2006, pp. 181–187, pp. 185–187., Sidgwick, *The Elements of Politics*, *op. cit.*, p. 539 (Part II, Chapter XXVI, §3)., R. L. Watts, 'Federalism, Federal Political Systems, and Federations,' *Annual Review of Political Science*, vol. 1, June 1998, pp. 117–137, p. 121. & Watts, *Comparing Federal Systems*, *op. cit.*, p. 135 (Chapter 10, §10.1).

<sup>99</sup> Watts, 'Models of Federal Power Sharing,' *op. cit.*, p. 26. & *ibid*, p. 27. Cf. Sidgwick, *The Elements of Politics*, *op. cit.*, p. 538 (Part II, Chapter XXVI, §3)., Wheare, *op. cit.*, p. 15 (Part I, Chapter I, §6). & W. J. Norman, 'The Morality of Federalism and The European Union' in *Law, Justice and The State: The Nation, The State and Democracy –Vol. II*, M. Troper & M. M. Karlsson (eds.), Franz Steiner Verlag, Stuttgart, 1995, pp. 202–211, p. 209.

wrote of:

The method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent.<sup>100</sup>

Thomas Jefferson described this federal principle in typically terse terms when he clarified a misunderstanding about his own federation:

With respect to our State and federal governments, I do not think their relations correctly understood by foreigners. They generally suppose the former subordinate to the latter. But this is not the case. They are co-ordinate departments of one simple and integral whole.<sup>101</sup>

As noted above, rather than either level of government being subordinate to the other, the constitution structures the fields of possible actions of both the central government and the constituent units in federations, thereby making them independent in their respective spheres.

Despite providing a partially accurate picture, the conventional understanding of the distinction between federations and con-federations is deeply misleading for three reasons. First, it attaches great importance to whether the central government acts directly on individual citizens or on constituent units. Second, it conceives of the central government as being subordinate to the constituent units in con-federations. Third, it presents what is actually a difference of degrees between federations and con-federations as a difference of kinds.

Although these three deceptive elements of the orthodox view might seem unrelated, they are in fact intimately intertwined. In particular, a stark distinction between federations and con-federations is posited because it is erroneously thought that in con-federations, unlike federations, the central government is subordinate to the constituent units and acts on the

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<sup>100</sup> Wheare, *Federal Government*, *op. cit.*, p. 11 (Part I, Chapter I, §5). *Cf. ibid.*, p. 2 (Part I, Chapter I, §1), *ibid.*, p. 15 (Part I, Chapter I, §6), Garran, *op. cit.*, p. 18 (Part I, §1). & W. Kymlicka, 'The Paradox of Liberal Nationalism' in *Politics In The Vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford University Press, Oxford, 2001, pp. 254–264, p. 255.

<sup>101</sup> T. Jefferson, 'To Major John Cartwright (1824)' in *The Essential Jefferson*, J. M. Yarbrough (ed.), Hackett Publishing Company, Indianapolis, 2006, pp. 260–266, p. 263. *Cf. Douglas & Lincoln*, *op. cit.*, p. 364., *ibid.*, p. 368., *ibid.*, p. 374., *ibid.*, p. 399. & *ibid.*, p. 400.



constituent units and not on individual citizens.

### 1.5.3. The subject of governmental action and subordination of central government

The first problem with the orthodox understanding of the distinction between federations and con-federations is that, contra Garran, Hamilton, Madison, *et al.*, it fails to recognise that whether the central government acts on the constituent units or on individual citizens is an intolerably vague marker of whether the system of government in question is federal or con-federal. The reason for this is twofold. In the first instance, the central government can in fact act directly on individual citizens in con-federations. For example, the US confederation presumably acted directly on individual citizens in coining and determining the value of money.<sup>102</sup> In the second instance, the central government can also act on the states instead of individual citizens in federations. For example, Australia's central government acts on the states in exercising its power to, as stipulated in the Australian constitution, "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."<sup>103</sup> These examples suffice to demonstrate that the central government can act on individual citizens *and* constituent units in both federations *and* con-federations. As such, the distinction between federations and con-federations does not mirror the distinction between those federal species in which the central government acts on the constituent units and those in which it acts on individual citizens.

By way of a defence of the orthodoxy, it might be argued that the key determinant is not whether the central government acts on the constituent units or individual citizens, but rather whether the central government is formed by the constituent units or individual citizens. This reformulated distinction is between con-federations in which the central government is formed

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<sup>102</sup> 'The Articles of Confederation,' *op. cit.*, p. 542 (Article IX).

<sup>103</sup> 'Commonwealth of Australia Constitution Act (The Constitution),' *op. cit.*, p. 37 (Chapter IV, Section 96).

by the constituent units and federations in which it is formed by individual citizens.<sup>104</sup>

The problem with this further attempt to distinguish federations and con-federations is that it also fails to serve as a sufficiently precise criterion. The central government will, at least in part, be formed by constituent units and not individual citizens in some federations. For example, the Indian constitution specifies:

The representatives of each State in the Council of States shall be elected  
by the elected members of the Legislative Assembly of the State.<sup>105</sup>

What is more, the central government will, at least in part, be formed by individual citizens and not constituent units in some con-federations. For example, in the EU Treaties it states:

The European Parliament shall draw up a proposal to lay down the  
provisions necessary for the election of its Members by direct universal  
suffrage in accordance with a uniform procedure in all Member States or  
in accordance with principles common to all Member States.<sup>106</sup>

These examples are enough to demonstrate that the central government can be composed of individual citizens *and* constituent units in both federations *and* con-federations.

As we have seen, Sidgwick, Watts, Wheare, *et al.*, argue that the central government is subordinate to the constituent units in con-federations. Regarding this second misconception in the orthodox understanding of the distinction between federations and con-federations, what looks like subordination is actually merely evidence of a more circumscribed jurisdiction. In the same way that, as Schmitt put it, “neither the federation nor the member states play the role of sovereign *vis-à-vis* the other” in federations, neither the central government nor the

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<sup>104</sup> Cf. J. S. Mill, 'Considerations On Representative Government' in *On Liberty and Other Essays*, J. Gray (ed.), Oxford University Press, Oxford, 1998, pp. 203–467, p. 437 (Chapter XVII)., Anderson, *op. cit.*, p. 2 (Chapter One, §1.1)., Watts, 'Federalism, Federal Political Systems, and Federations,' *op. cit.*, p. 121. & Watts, *Comparing Federal Systems*, *op. cit.*, p. 135 (Chapter 10, §10.1).

<sup>105</sup> 'The Constitution of India,' *op. cit.*, p. 38 (Part V, Chapter II, Article 80, §(4)).

<sup>106</sup> 'Consolidated Versions of The Treaty On European Union and The Treaty On The Functioning of The European Union,' *op. cit.*, p. 149 (TFEU, Part Six, Title I, Chapter 1, Section 1, Article 223, §1).

constituent units play the role of sovereign *vis-à-vis* the other in con-federations.<sup>107</sup> The point of difference with federations is simply that the central government has jurisdiction over a smaller sphere of public policy in con-federations.

To go back to the example of the US con-federation, it is clear that rather than being subordinate to the constituent units, the central government simply had a far narrower jurisdiction than the central government of a federation such as the Republic of India.<sup>108</sup> This means that what Wheare called "the *federal principle*"—"the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent"—applies equally to con-federations.<sup>109</sup> Indeed, in light of what has been argued regarding the necessary and sufficient conditions of federalism, it is clear that Wheare's federal principle of necessity applies to all species of federalism.

In conclusion, the above suffices to show that the difference between federations and con-federations does not lie in the distinction between those federal systems in which the central government is formed by/acts on constituent units and those in which the central government is formed by/acts on individual citizens. Equally, it does not lie in the distinction between those federal systems in which the central government is subordinate to the constituent units and those in which it is not. In both federal and con-federal systems, the central government is formed by/acts on both individual citizens and constituent units, while the central government is not subordinate to the constituent units in either con-federal systems or federal systems.

#### **1.5.4. A difference of degrees**

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<sup>107</sup> Schmitt, 'The Constitutional Theory of Federation (1928),' *op. cit.* p. 39.

<sup>108</sup> See 'The Articles of Confederation,' *op. cit.*, pp. 540–543 (Article IX). & 'The Constitution of India,' *op. cit.*

<sup>109</sup> Wheare, *op. cit.*, p. 11 (Part I, Chapter I, §5).

It follows from what has been argued thus far that what is presented as a difference of kinds is actually a difference of degrees: Federations and con-federations are not in different categories, they just sit at different points on the spectrum of centralisation. Federations concentrate more power in the central government, whereas con-federations disperse more power to the constituent units. The two levels of government are independent in their respective spheres in both federations and con-federations. The difference is simply that the central government has a relatively circumscribed jurisdiction in con-federations and a relatively wide jurisdiction in federations.

At this point, the recasting of the distinction between federations and con-federations in terms of a difference of degrees might be questioned on the grounds that, as King argues:

The difference between a federation and a confederation ... is not best dealt with as a matter of degree of decentralization, but in terms of a difference of organizational or legal or constitutional principle. In the federal/confederal case the difference is between one polyarchy whose decision-procedure is ultimately majoritarian as opposed to the other which operates basically on a unanimity principle.<sup>110</sup>

King is, in effect, suggesting that there is a difference of kinds between federations and con-federations regarding the nature of their decision-making procedures. On the one hand, the decision-making procedure in a federation will be majoritarian in that legislative decisions will be made on the basis of either what the majority of electors decide or what the majority of electors in a majority of states decide. On the other hand, the decision-making procedure in a con-federation will require unanimity in that legislative decisions will be made on the basis of the unanimous agreement of the constituent units.

The distinction between unanimity and majoritarian decision-making procedures

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<sup>110</sup> King, *op. cit.*, p. 142 (Part Three, Chapter 11).

certainly serves as a useful marker of the divide between federations and con-federations. However, it is important not to overstate the usefulness of this distinction as a means of distinguishing federations from con-federations. The reason for this is that the distinction between unanimity and majoritarian decision-making procedures only maps the divide between federations and con-federations up to a point.

It is true that unanimity decision-making procedures are generally employed in con-federations when amending constitutions (e.g., the US con-federation and the EU). With respect to the first example, 'The Articles of Confederation' prohibited:

Alteration at any time hereafter be made in any of them [i.e., the Articles of Confederation]; unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state.<sup>111</sup>

As regards the EU, the EU Treaties state:

The amendments [to the Treaties] shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.<sup>112</sup>

In both of these notable con-federations, constitutional amendments require(d) the use of exacting unanimity decision-making procedures.

However, the application of unanimity decision-making procedures when amending constitutions by no means entails that all of the decisions made by central governments must be unanimously approved by constituent units in con-federations. In fact, with respect to those areas of public policy under the jurisdiction of the central government, unanimity decision-making procedures are manifestly not employed. For example, the central government was

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<sup>111</sup> 'The Articles of Confederation,' *op. cit.*, p. 544 (Article XIII). Cf. A. Hamilton, 'The Federalist No. 22' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed.), Cambridge University Press, Cambridge, 2006, pp. 98–106, p. 100.

<sup>112</sup> 'Consolidated Versions of The Treaty On European Union and The Treaty On The Functioning of The European Union,' *op. cit.*, p. 42 (TEU, Title VI, Article 48, §4).

authorised to make decisions with regard to war, diplomacy, the coining and determination of the value of money, the direction of fiscal policy, and military matters on the basis of a majoritarian decision-making procedure (i.e., “by the votes of the majority of the United States in congress assembled”) in the US con-federation.<sup>113</sup> The EU Treaties similarly authorise the use of a majoritarian decision-making procedure:

Save as otherwise provided in the Treaties, the European Parliament shall act by a majority of the votes cast.<sup>114</sup>

These examples unambiguously demonstrate that unanimity decision-making procedures are not always employed in con-federations.

Turning to federations, majoritarian decision-making procedures are generally employed when amending constitutions (e.g., the Commonwealth of Australia and the Swiss Confederation).<sup>115</sup> In the first instance, the Australian constitution stipulates that to alter the constitution it suffices to have a double majority in the states and at the national level. In other words, a constitutional amendment is passed if:

In a majority of the States a majority of the electors voting approve the proposed law, and ... a majority of all the electors voting also approve the proposed law.<sup>116</sup>

Similarly, the Swiss constitution states:

Proposals that are submitted to the vote of the People and Cantons are accepted if a majority of those who vote and a majority of the Cantons approve them.<sup>117</sup>

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<sup>113</sup> 'The Articles of Confederation,' *op. cit.*, p. 543 (Article IX).

<sup>114</sup> 'Consolidated Versions of The Treaty On European Union and The Treaty On The Functioning of The European Union,' *op. cit.*, p. 152 (TFEU, Part Six, Title I, Chapter 1, Section 1, Article 231).

<sup>115</sup> Despite Switzerland's official name, the Swiss system of government is typically considered federal. See Watts, *Comparing Federal Systems*, *op. cit.*, p. 13 (Chapter 1, §1.4).

<sup>116</sup> 'Commonwealth of Australia Constitution Act (The Constitution),' *op. cit.*, pp. 46–47 (Chapter VIII, Section 128).

<sup>117</sup> 'Constitution Fédérale De La Confédération Suisse Du 18 Avril 1999,' *op. cit.*, p. 46 (Titre 4, Chapitre 2, Article

However, federations do not always employ majoritarian decision-making procedures.

For example, the Australian constitution also stipulates:

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.<sup>118</sup>

Likewise, the Swiss constitution states:

2. Any change in the number of Cantons requires the consent of the citizens and the Cantons concerned together with the consent of the People and the Cantons. 3. Any change in territory between Cantons requires the consent both of the Cantons concerned and of their citizens as well as the approval of the Federal Assembly in the form of a Federal Decree.<sup>119</sup>

Clearly, federations do not restrict themselves to majoritarian decision-making procedures. Indeed, they often require the employment of much more exacting unanimity decision-making procedures—at least among the relevant constituent units whose vital interests are affected by a constitutional amendment.

What is more, federations will almost exclusively be established by means of unanimity decision-making procedures. As Madison observed with respect to the creation of the United States in its federal form:

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142).

<sup>118</sup> 'Commonwealth of Australia Constitution Act (The Constitution),' *op. cit.*, pp. 46–47 (Chapter VIII, Section 128).

<sup>119</sup> 'Constitution Fédérale De La Confédération Suisse Du 18 Avril 1999,' *op. cit.*, p. 13 (Titre 3, Chapitre 1, Section 4, Article 53).

The constitution is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it.<sup>120</sup>

The foregoing considerations are not simply a function of Anderson's point: "Federal constitutions are typically quite stable because special majorities are needed to change them."<sup>121</sup> They are rather a function of the way in which—with respect to at least some matters—federations employ unanimity decision-making procedures.

The above shows that there is not a stark contrast between federations and confederations regarding the decision-making procedures employed. *Both* majoritarian and unanimity decision-making procedures are employed in *both* federations and confederations. Contra King, the distinction between unanimity and majoritarian decision-making procedures is therefore not an accurate criterion for distinguishing between federations and confederations.

### 1.5.5. Practical questions of institutional design

In light of the above argument, it even seems fair to speculate that the difference between the species of federalism that generally employ unanimity decision-making procedures and those that typically employ majoritarian decision-making procedures is parasitic on the difference in scope of the central government's jurisdiction. In the case of federations, majoritarian decision-making procedures are more common because the scope of the central government's jurisdiction means that the execution of core components of state

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<sup>120</sup> Madison, 'The Federalist No. 39,' *op. cit.*, pp. 184–185.

<sup>121</sup> Anderson, *op. cit.*, p. v (Preface and Acknowledgements). Cf. Dicey, *op. cit.*, p. 169 (Part I, Chapter III). & Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State, op. cit.*, p. 85 (Chapter 3, §3.4).



activity would be seriously compromised if more exacting unanimity decision-making procedures were employed. For example, it would have dire economic consequences if budgetary decisions in a federation like Australia were held up because a slow and cumbersome unanimity decision-making procedure required the consent of all constituent units. Conversely, in the case of con-federations, the pragmatic reason for employing majoritarian decision-making procedures is absent. More exacting decision-making procedures can be tolerated because the limited scope of the central government's jurisdiction means that the execution of core components of state activity is less likely to be seriously compromised. For example, the individual constituent units would be able to provide their populations with essential services even if the decision-making procedure in a con-federation like the EU was slow and cumbersome.

The idea that the difference in the decision-making procedures employed is parasitic on the difference in the scope of the central government's jurisdiction will seem even more plausible in light of the rationale for a con-federal arrangement over a federal one. Con-federal arrangements are generally chosen so as to limit the jurisdiction of the central government and ensure the continued independence of the constituent units with respect to most areas of public policy. In light of this, it is hardly surprising that more exacting decision-making procedures that reserve greater autonomy for constituent units predominate in con-federations. Once again, it seems that the choice of the decision-making procedure is a product of the scope of the central government's jurisdiction.

Rather than constituting a difference of kinds, the distinction between federations and con-federations is a function of differences in the scope of the central government's jurisdiction. The species of federalism in which the central government has a relatively wide jurisdiction are federations (e.g., the Republic of India), whereas those in which the central government has a relatively circumscribed jurisdiction are con-federations (e.g., the US con-

federation).<sup>122</sup> The distinction between central governments with wide and narrow jurisdictions is admittedly a relatively loose measure of two of the most important species of federalism. Be that as it may, it both avoids the errors of the orthodox means of making the distinction between federations and con-federations and is broadly consistent with the judgements typically made about whether specific federal systems are federal or con-federal.

### 1.5.6. Further federal forms

Having clarified the crucial difference between federations and con-federations, let us briefly consider further options for federal design. The most important remaining options are asymmetrical federalism, multi-tiered federalism, federalisation and federal integration. These various options for federal design mean that the species of federalism can be altered depending on circumstances, which in turn helps to make federalism a powerful constitutional tool for allowing individuals to live as they see fit.

As Anderson notes, “arrangements that treat constituent units differently ... [are the product of] constitutional asymmetry.”<sup>123</sup> By ensuring that some constituent units have jurisdiction over more areas of public policy than others, asymmetrical federal systems are able to respond to the demands of particular constituent units for greater autonomy. This is crucially important because, as Watts observes:

In some federations ... the intensity of the pressure for autonomous self-government has been much stronger in some constituent units than in others.<sup>124</sup>

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<sup>122</sup> 'The Constitution of India,' *op. cit.*, pp. 315–321 (Seventh Schedule, List I–Union List). & 'The Articles of Confederation,' *op. cit.*, pp. 540–543 (Article IX).

<sup>123</sup> Anderson, *op. cit.*, p. 84 (Chapter Seven, §7.3).

<sup>124</sup> Watts, 'Models of Federal Power Sharing,' *op. cit.*, p. 29. Cf. J. Kincaid, 'Economic Policy-Making: Advantages and Disadvantages of The Federal Model,' *International Social Science Journal*, vol. 53, no. 167, March 2001, pp. 85–92, p. 90. & R. L. Watts, 'The Relevance Today of The Federal Idea,' *International Conference On Federalism 2002*,

The example of the province of Québec in Canada illustrates the need for the option of asymmetrical federalism. Asymmetrical federal systems comes in various different forms:

- ◆ associated states, such as Monaco and France, where a nominally sovereign state is constitutionally tied to or dependent on another state for certain purposes;
- ◆ federacies, such as Jersey and the United Kingdom, where a smaller state is constitutionally linked to a larger one in an asymmetrical manner; and
- ◆ condominiums, such as Andorra, France and Spain, where a state is jointly controlled by two or more other states.<sup>125</sup>

Multi-tiered federal systems are what Watts describes as “federations which have themselves become constituent units within a wider federal or confederal organisation.”<sup>126</sup> The option of a “federation of federations” is valuable given the possibility of a series of overlapping consensuses among different groups that progressively include more individuals and yet progressively become narrower.<sup>127</sup> Multi-tiered federal systems are able to reflect these various different overlapping consensuses by stacking federations and/or con-federations on top of each other. For example, the con-federation at the EU level sits on top of federations in Germany, Belgium and Austria.

In addition to asymmetrical and multi-tiered federalism, there is the option of federalisation or federal integration.<sup>128</sup> This distinction relates to the process by which federal systems are created and is variously referred to as “*holding-together federalism*” versus “*coming-together federalism*,” or “centrifugal federalization” versus “centripetal

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Saint Gallen, viewed on the 9<sup>th</sup> June 2010, <<http://www.forumfed.org/en/federalism/federalismtoday.php>>.

<sup>125</sup> See Elazar, 'Federalism,' *op. cit.*, p. 475.

<sup>126</sup> Watts, 'Models of Federal Power Sharing,' *op. cit.*, p. 29.

<sup>127</sup> T. O. Hueglin, *Early Modern Concepts For A Late Modern World: Althusius On Community and Federalism*, Wilfrid Laurier University Press, Waterloo, 1999, p. 226 (Part Three, Chapter 12). Cf. J. Habermas, 'Citizenship and National Identity: Some Reflections On The Future of Europe,' *Praxis International*, vol. 12, no. 1, April 1992, pp. 1–19, p. 7 (\$I).

<sup>128</sup> This distinction is taken from Weinstock. See Weinstock, *op. cit.*, p. 76.

federalization.”<sup>129</sup>

Federalisation refers to the process of either creating constituent units with constitutionally enshrined autonomy in what was previously a unitary system, or according constituent units in a federal system greater autonomy. The option of federalisation is necessary because a system of government may fail to reflect the full extent of the variety of political preferences among citizens. A contemporary example of a candidate for federalisation is the Sri Lankan state: Institutional structures in Sri Lanka manifestly fail to reflect the political preferences of those Tamil Sri Lankans who seek self-determination. Through federalisation, the aspirations of groups that seek (greater) freedom can be satisfied by means of (greater) autonomy being conferred to constituent units.

Federal integration refers to the process of either creating a common system of government between previously independent political bodies, or binding constituent units in a federal system closer together.<sup>130</sup> Federal integration is an effective tool in scenarios in which an overlapping consensus among individuals is not reflected in any extant institutional structures. An example of a case where federal integration might be called for is the overlapping consensus among large portions of the world's population regarding certain basic principles of democratic governance. Federal integration is able to ensure that institutional structures reflect overlapping consensuses by using common institutional structures to bring states together if they are sovereign, or closer together if they are already constituent units in extant federal systems.

In conclusion, the most important species of federalism are federal and con-federal

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<sup>129</sup> A. Stepan, 'Federalism and Democracy: Beyond The U.S. Model,' *Journal of Democracy*, vol. 10, no. 4, October 1999, pp. 19–34, pp. 22–21. & J. Kincaid, 'Federalism: The Highest Stage of Democracy?' in *Democratizations: Comparisons, Confrontations, and Contrasts*, J. V. Cipurut (ed.), The MIT Press, Cambridge, 2008, pp. 93–117, p. 95. Cf. J. E. E. Dalberg-Acton, 'Sir Erskine May's "Democracy In Europe"' in *Essays On Freedom and Power*, G. Himmelfarb (ed.), The Free Press, Glencoe, 1948, pp. 128–165, p. 153.

<sup>130</sup> See *ibid*

systems. The distinction between these systems of government is not best understood in terms of differences in the subject of the central government's actions, the subordinate level of government, the units represented by the central government or the decision-making procedures employed. Rather, a difference of degrees and not a difference of kinds separates these two species of federalism. In particular, the central government's jurisdiction is wider in federal systems and narrower in con-federal systems. In addition to their federal and con-federal forms, federal systems can come in asymmetrical and multi-tiered configurations, and can be the product of either federalisation or federal integration.

## **1.6. Conclusion**

Chapter 1 has provided a comprehensive account of federalism that rectifies a number of the confusions in the academic literature. In particular, four key claims have been advanced:

1. the first necessary condition of federalism is a division of sovereignty;
2. the second necessary condition of federalism is the constitutional enshrinement of the division of sovereignty;
3. the necessary and sufficient conditions of federalism distinguish federalism from unitary systems and systems of sovereign states; and
4. the distinction between federations and con-federations is a function of the scope of the central government's jurisdiction and not a difference of kinds.

The general conclusion to be taken from this chapter is that because the necessary and sufficient conditions of federalism are only a constitutional division of sovereignty, there is an immense amount of federal diversity.

## Chapter 2: Minimalist Liberalism

### 2.1. Introduction

Given that this thesis is not a work on the history of ideas, a long historical excursus about the nature and origins of liberalism would be inappropriate. Nevertheless, the particular conception of liberalism on which this thesis' normative theory of federalism rests warrants some elucidation. As the Introduction stressed, minimalist liberalism seeks to carry forward the political liberal goal of doing justice to the fact of pluralism by arguing that individuals should be free to live as they see fit, subject to the sole proviso that they not stop others from doing the same.<sup>1</sup> By attempting to further do justice to the fact of pluralism in this way, minimalist liberalism yields an account of legitimacy according to which institutional structures are legitimate to the extent that they allow individuals to live as they see fit.<sup>2</sup> As subsequent chapters argue, this account of legitimacy serves as a forceful defence of the way in which federalism constitutionally enshrines constituent unit autonomy.

Four key claims are made in an attempt to fashion a political liberal account of legitimacy that does justice to the fact of pluralism:

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<sup>1</sup> Cf. Friedman, *Capitalism and Freedom*, *op. cit.*, p. 195 (Chapter XII).

<sup>2</sup> Cf. Constant, 'Principes De Politique Applicables À Tous Les Gouvernements Représentatifs et Particulièrement À La Constitution Actuelle De La France,' *op. cit.*, p. 483 (Chapitre XVIII)., T. Jefferson, 'First Inaugural Address, March 4, 1801' in *The Declaration of Independence and Other Great Documents of American History, 1775–1865*, J. Grafton (ed.), Dover Publications, Mineola, 2000, pp. 61–65, p. 63., T. Jefferson, 'Excerpts From *Notes On Virginia* (1782)' in *The Essential Jefferson*, J. M. Yarbrough (ed.), Hackett Publishing Company, Indianapolis, 2006, pp. 77–138, p. 127 (Query XVII). Proudhon, 'What Is Property? Or, An Inquiry Into The Principle of Right and of Government,' *op. cit.*, p. 214 (Chapter II, §3)., R. W. Emerson, 'Self-Reliance' in *Ralph Waldo Emerson*, R. Poirier (ed.), Oxford University Press, Oxford, 1990, pp. 131–151, p. 134., M. L. King, Jr., 'Letter From A Birmingham City Jail' in *Classics of Political and Moral Philosophy*, S. M. Cahn (ed.), Oxford University Press, New York, 2002, pp. 1200–1209, p. 1208., R. Rorty, 'The Contingency of A Liberal Community' in *Contingency, Irony, and Solidarity*, Cambridge University Press, Cambridge, 1989, pp. 44–69, p. 60. & J. Shklar, 'The Liberalism of Fear' in *Political Liberalism: Variations On A Theme*, S. P. Young (ed.), State University of New York Press, Albany, 2004, pp. 149–166, p. 149.

1. minimalist liberalism's rejection of pre-political measures of legitimacy suggests that it is a thoroughly political species of liberalism, while political species of liberalism are best placed to do justice to the fact of pluralism;
2. the minimalist character of minimalist liberalism means that it is a liberal threshold test of legitimacy rather than a more demanding liberal theory of justice;
3. minimalist liberalism holds that legitimacy is a measure of whether individuals are able to live as they see fit; and
4. minimalist liberalism does not sanction oppressive institutional structures as legitimate and can account for cases in which it is legitimate to *not* allow individuals to live as they see fit.

Taking these claims together, this chapter attempts to show that minimalist liberalism further advances the liberal project of doing justice to the fact of pluralism by holding that the legitimacy of an institutional structure is a function of whether individuals are able to live as they see fit.

## **2.2. Political Liberalism & Individual liberty**

This section begins by arguing that the political species of liberalism are more faithful to the liberal project of doing justice to the fact of pluralism because of their political character. By showing that minimalist liberalism is a thoroughly political form of liberalism, this section also aims to show that minimalist liberalism seeks to further advance the liberal project of doing justice to the fact of pluralism.

Before delving into the above arguments, it is essential to observe that they are framed

by a particular vision of liberalism. In particular, political conceptions of liberalism are advocated over comprehensive conceptions of liberalism and the minimalist version of political liberalism is advocated over other strands of political liberalism on the basis of a vision of liberalism with the project of doing justice to the fact of pluralism at its very core. These arguments are an attempt to determine what liberalism looks like if this liberal project is carried as far as possible. As such, these arguments should not be construed as grounds for definitively rejecting either comprehensive conceptions of liberalism or non-minimalist strands of political liberalism. They merely aim to show that carrying the liberal project of doing justice to the fact of pluralism as far as possible produces, first, a preference for political conceptions of liberalism over comprehensive conceptions of liberalism, and second, a preference for the minimalist version of political liberalism over other versions of political liberalism.

### 2.2.1. Political species of liberalism and the fact of pluralism

Let us begin with the distinction between political and comprehensive conceptions of liberalism. A useful starting point is John Rawls' "[p]olitical liberalism" and its "*political* conception of justice."<sup>3</sup> On Rawls' account, an institutional structure is just—in Rawls' estimation "[j]ustice is the first virtue of social institutions"—if it reflects the "overlapping consensus" among "reasonable though opposing religious, philosophical, and moral doctrines."<sup>4</sup> That is to say that whether an institutional structure is just depends on whether it reflects the practical commitments of those individuals who are politically reasonable in a

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<sup>3</sup> J. Rawls, 'The Idea of An Overlapping Consensus,' *Oxford Journal of Legal Studies*, vol. 7, no. 1, Spring 1987, pp. 1–25, p. 21 (§VI). & J. Rawls, *Justice As Fairness: A Restatement*, E. Kelly (ed.), The Belknap Press of Harvard University Press, Cambridge, 2001, p. 82 (Part III, §23.3).

<sup>4</sup> J. Rawls, *A Theory of Justice: Original Edition*, The Belknap Press of Harvard University Press, Cambridge, 1971, p. 3 (Part One, Chapter I, §1)., J. Rawls, 'Justice As Fairness: Political Not Metaphysical,' *Philosophy and Public Affairs*, vol. 14, no. 3, Summer 1985, pp. 223–251, p. 225 (§I). & Rawls, *Justice As Fairness: A Restatement*, *op. cit.*, p. 32 (Part I, §11.1). *Cf.* Rawls, 'The Idea of An Overlapping Consensus,' *op. cit.*, pp. 1–2., *ibid.*, p. 11 (§III). & Rawls, 'The Domain of The Political and Overlapping Consensus,' *op. cit.*, p. 233.



liberal sense.<sup>5</sup> In contrast to Rawls' political liberalism, a comprehensive conception of liberalism is “fully comprehensive if it covers all recognised values and virtues within one rather precisely articulated system.”<sup>6</sup> Unlike comprehensive conceptions of liberalism that come with full-bodied conceptions of the good, political forms of liberalism apply to “constitutional essentials” or “the basic structure alone.”<sup>7</sup> In other words, they only apply to “society's main political, social, and economic institutions, and how they fit together into one unified system of social cooperation.”<sup>8</sup> Political liberalism is therefore a *political* doctrine—as opposed to a complete moral doctrine—in the sense that, as Charles E. Larmore suggests, the core idea of political liberalism is that liberalism is not a “philosophy of man, but a philosophy of politics.”<sup>9</sup> In other words, rather than suggesting how to live goods lives, political conceptions of liberalism offer visions of how individuals can live together.

This brief account of Rawls' treatment of the distinction between political and comprehensive conceptions of liberalism indicates that the crucial point of difference is the reach of the values underpinning these respective conceptions. Roughly speaking, the values underpinning comprehensive conceptions reach into a wide range of spheres of life, while those underpinning political conceptions leave more spheres untouched. So as to flesh out this distinction in concrete terms, consider Wilhelm von Humboldt's claim that:

The true end of man ... is the highest and most harmonious development

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- <sup>5</sup> Throughout this thesis the term “practical commitments” is used to refer to both moral values and desires of a non-moral kind. Not unlike Margaret Thatcher's view that “[t]here is no such thing as ... collective freedom,” there is no room for collective practical commitments. See Margaret Thatcher as quoted in *The Australian*, Monday 1<sup>st</sup> February 2010, p. 9. Collective freedom is either a species of individual freedom—in that it is just an aggregate of the freedom of individuals—or it is not freedom at all—in that the freedom of the collective is predicated on denying certain individuals their freedom. Similarly, collective practical commitments are either a species of individual practical commitments—in that they are just an aggregate of the practical commitments of individuals—or they are not practical commitments at all—in that the recognition of collective practical commitments is predicated on not recognising the practical commitments of certain individuals.
- <sup>6</sup> J. Rawls, *Political Liberalism*, Columbia University Press, New York, 1996, p. 13 (Part One, Lecture I, §2.2). Cf. Rawls, 'The Idea of An Overlapping Consensus,' *op. cit.*, p. 14 (§IV). & Rawls, 'The Domain of The Political and Overlapping Consensus,' *op. cit.*, p. 240 (§IV).
- <sup>7</sup> *ibid.*, pp. 240–241 (§IV). Cf. Rawls, 'The Idea of An Overlapping Consensus,' *op. cit.*, pp. 4–5 (§I–§II).
- <sup>8</sup> *ibid.*
- <sup>9</sup> C. E. Larmore, *Patterns of Moral Complexity*, Cambridge University Press, Cambridge, 1987, p. 129 (Chapter 5). Cf. *ibid.*, p. 126 (Chapter 5). & C. Larmore, 'Political Liberalism,' *Political Theory*, vol. 18, no. 3, August 1990, pp. 339–360, p. 345 (§II).

of his powers to a complete and consistent whole. Freedom is the first and indispensable condition which the possibility of such a development presupposes.<sup>10</sup>

Although Rawls and Humboldt were both firmly in favour of the protection of individual liberty, their commitments were based on vastly different justifications. Whereas Rawls saw the protection of individual liberty as an essential antidote to attempts to impose comprehensive doctrines on inevitably pluralistic societies, Humboldt was in favour of its protection because he judged it would allow individuals to lead good lives.<sup>11</sup> Rawls' justification of individual liberty proceeds from the simple political fact that individuals want to live in accordance with their own conceptions of the good. By contrast, Humboldt stipulates that individual liberty is preferable because it allows individuals to develop themselves in a morally laudable fashion. This contrast neatly highlights the general divergence between political and comprehensive forms of liberalism: Just as the political liberal seeks to ensure that individuals are not forced to conform to a specific set of values, the comprehensive liberal wants society to reflect a specific set of, albeit liberal, values.

The relatively loose distinction established thus far suggests that a political conception of liberalism will focus solely on the political values embodied in a liberal approach to structuring society, whereas a comprehensive conception of liberalism will situate these liberal political values in a broader—or one might say, more robust—liberal conception of the good. As Jeremy Waldron suggests:

What they [i.e., political liberals] will have in common—as *political* liberals—is their insistence on a distinction between the principles and ideals that (in their respective views) define a liberal order for society,

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<sup>10</sup> W. von Humboldt, *The Limits of State Action*, J. W. Burrow (ed), Cambridge University Press, London, 1969, p. 16 (Chapter II). Cf. *ibid.*, p. 20 (Chapter II).

<sup>11</sup> Rawls, 'The Domain of The Political and Overlapping Consensus,' *op. cit.*, p. 235 (§I). Rawls, *Justice As Fairness: A Restatement*, *op. cit.*, p. 9 (Part I, §3.2). & Humboldt, *op. cit.*, pp. 16 & 20 (Chapter II).

and the deeper values and commitments associated with particular philosophical outlooks. The political liberal insists that the articulation and defence of a given set of liberal commitments for a society should not depend on any particular theory of what gives value or meaning to a human life. A comprehensive liberal denies this. He maintains that it is impossible adequately to defend or elaborate liberal commitments except by invoking the deeper values and commitments associated with some overall or 'comprehensive' philosophy.<sup>12</sup>

There is disagreement among political liberals as to whether the political values embodied in a liberal approach to structuring society rely on "a higher moral authority," or whether they have merely gained "widespread agreement among reasonable people moved by a desire for reasonable agreement."<sup>13</sup> Notwithstanding this divergence of views, political liberals are united in claiming that liberal political values and their institutional embodiment need not have their basis in a comprehensive liberal conception of the good.<sup>14</sup>

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<sup>12</sup> J. Waldron, 'Liberalism, Political and Comprehensive' in *Handbook of Political Theory*, G. F. Gaus & C. Kukathas (eds.), Sage Publications, London, 2004, pp. 89–99, p. 91.

<sup>13</sup> C. Larmore, 'The Moral Basis of Political Liberalism,' *The Journal of Philosophy*, vol. 96, no. 12, December 1999, pp. 599–625, p. 610 (§III). & S. Macedo, 'The Politics of Justification,' *Political Theory*, vol. 18, no. 2, May 1990, pp. 280–304, p. 282. Some advocates of political species of liberalism—most notably Larmore and Bruce Ackerman—underwrite their political accounts of justice with loosely articulated forms of moral realism. Consider, for example, Larmore's claim: "Political liberalism makes sense only in the light of an acknowledgement of ... a higher moral authority [i.e., "moral requirements whose validity is external to their [i.e., the citizens] collective will"]." See *ibid* & *ibid*. This squares with Larmore's earlier claim: "In political liberalism ... the norms of rational dialogue and equal respect, as well as the principle of neutrality they justify, are understood to be correct and valid norms and not merely norms which people in a liberal order believe to be correct and valid." See Larmore, 'Political Liberalism,' *op. cit.*, p. 353 (§IV). Cf. *ibid*, p. 354 (§IV)., Larmore, 'The Moral Basis of Political Liberalism,' *op. cit.*, p. 609 (§III). & B. Ackerman, 'Political Liberalisms,' *The Journal of Philosophy*, vol. 91, no. 7, July 1994, pp. 364–386, p. 375– 376 (§III). The motivation for appealing to a moral realist foundation to underwrite their political species of liberalism is partly explained by Ackerman's remark: "Political liberalism would turn into provincial rationalization if it followed Rawls's advice." See *ibid*, p. 377 (§III). According to Ackerman, Rawls' "deference to existing practice seriously compromises his vision," insofar as "[t]he task is to criticize political culture, not rationalize it." See *ibid*, pp. 377–378 (§III). In other words, in the absence of moral realist bedrock, the political species of liberalism will apparently be indistinguishable from morally problematic forms of conventionalism that look exclusively to existing practices to justify institutional structures.

<sup>14</sup> Although this is likely to elicit cries of protest from some Rawlsians, Rawls' political liberalism should arguably be placed at the justificatory populism end of the spectrum of political species of liberalism. The reason for this is that, as Bernard Williams points out: "The intuitions [undergirding Rawls' political conception of liberalism] are supposed to represent our ethical beliefs, because the theory being sought is one of ethical life *for us*, and the point is not that the intuitions should be in some ultimate sense correct, but that they should be

To formulate the distinction between political and comprehensive conceptions of liberalism slightly differently, whereas comprehensive species of liberalism anchor liberalism in a full-bodied moral conception, political species of liberalism, as Kukathas puts it, “establish liberalism as a *minimal moral conception*.”<sup>15</sup> The moral conceptions that underpin the political species of liberalism are minimal in that they constitute, to appropriate Kukathas' description of his own version of political liberalism:

Account[s] of how different moral standards may coexist rather than a set of substantive moral commitments by which all communities should

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ours.” See B. Williams, *Ethics and The Limits of Philosophy*, Routledge, Abingdon, 2006, p. 102 (Chapter 6). This interpretation of Rawls' post-political-turn conception of liberalism is well supported by textual evidence. Rawls explicitly stated that the political justification of a liberal political order “seeks to identify the kernel of an overlapping consensus, that is, the shared intuitive ideas which when worked up into a political conception of justice turn out to be sufficient to underwrite a just constitutional regime. This is the most we can expect, nor do we need more.” See Rawls, 'Justice As Fairness: Political Not Metaphysical,' *op. cit.*, pp. 246–247 (§VI). In a similar vein, Rawls elsewhere emphasised that “we are not trying to find a conception of justice suitable for all societies regardless of their particular social or historical circumstances.” See Rawls, 'Kantian Constructivism In Moral Theory,' *op. cit.*, p. 518 (Lecture 1, §I). Cf. Rawls, *A Theory of Justice: Original Edition*, *op. cit.*, p. 454 (Part Three, Chapter VIII, §69)., Rawls, 'Justice As Fairness: Political Not Metaphysical,' *op. cit.*, p. 225 (§I)., Rawls, 'The Domain of The Political and Overlapping Consensus,' *op. cit.*, p. 240 (§IV)., Rawls, *Political Liberalism*, *op. cit.*, p. 432 (Part Three, Lecture IX, §5.4)., J. Rawls, 'The Law of Peoples' in *The Law of Peoples With “The Idea of Public Reason Revisited”*, Harvard University Press, Cambridge, 2001, pp. 1–128, p. 32 (Part I, §3.2). & J. Rawls, 'The Idea of Public Reason Revisited' in *The Law of Peoples With “The Idea of Public Reason Revisited”*, Harvard University Press, Cambridge, 2001, pp. 129–180, pp. 178–179 (§7.2). This indicates that Larmore is likely wrong to claim that Rawls “seems clearly not to believe ... that the commitments on which his political liberalism rests are simply those which people in modern Western societies share as a matter of fact.” See Larmore, 'Political Liberalism,' *op. cit.*, p. 356 (§IV). Like Aaron James and Joseph Raz, it seems fair to conclude that “rootedness in the here and now” is of primordial importance for Rawls and that, as a result, “Rawls has always taken the subject at hand to be the practices that simply happen to exist.” See J. Raz, 'Facing Diversity: The Case of Epistemic Abstinence,' *Philosophy & Public Affairs*, vol. 19, no. 1, Winter 1990, pp. 3–46, p. 6 (§1). & A. James, 'Constructing Justice For Existing Practice: Rawls and The Status Quo,' *Philosophy & Public Affairs*, vol. 33, no. 3, July 2005, pp. 281–316, p. 284. This suggests that, as Habermas argues, when Rawls “calls his conception of justice political, his intention appears to be ... to collapse the distinction between its justified acceptability and its actual acceptance.” See J. Habermas, 'Reconciliation Through The Public Use of Reason: Remarks On John Rawls's Political Liberalism,' *The Journal of Philosophy*, vol. 92, no. 3, March 1995, pp. 109–131, p. 122 (Part II). The key concern for Rawls is not whether the liberal principles of justice are in some ultimate sense correct, but whether they are accepted by the community of liberals whose institutional structures they shape. This focus on the community of liberals led Stephen Mulhall and Adam Swift to argue, perhaps quite rightly, that “Rawls ... can properly be read as a 'communitarian liberal.” See S. Mulhall & A. Swift, 'Rawls and Communitarianism' in *The Cambridge Companion To Rawls*, S. Freeman (ed.), Cambridge University Press, Cambridge, 2003, pp. 460–487, p. 461. In short, it is plausible to place Rawls' political conception of liberalism at the justificatory populism end of the spectrum of political species of liberalism insofar as, by Rawls' own admission, it only has normative force insofar as a community of liberals exists. As with Rawls, Stephen Macedo should probably be put at this end of the spectrum. Consider his claim that “the goodness of good reasons, for a 'political' theory, becomes entirely a function of their capacity to gain widespread agreement among reasonable people moved by a desire for reasonable agreement.” See Macedo, *op. cit.*, p. 282.

<sup>15</sup> Kukathas, *op. cit.*, p. 17 (Introduction). Cf. Ackerman, *op. cit.*, p. 371 (§II)., Larmore, 'Political Liberalism,' *op. cit.*, pp. 340–341 (§I). & *ibid.*, p. 346 (§II).

be required to abide.<sup>16</sup>

Although the minimal moral conceptions of political species of liberalism distinguish them from their comprehensive counter-parts, it is important to emphasise the perhaps obvious point that this does not mean that they do without moral conceptions entirely. Indeed, the very idea that the political species of liberalism rest only on minimal moral conceptions implies that even they come with moral presuppositions, albeit less expansive in character. This qualification acknowledged, the key point to bear in mind is that although “[t]he distinction between ‘comprehensive’ and ‘political’ liberalism ... cannot plausibly be one between moral and non-moral theories,” there is nevertheless a crucially important difference between the political species of liberalism that rely on minimal moral conceptions and the comprehensive species of liberalism that rely on more full-bodied moral conceptions.<sup>17</sup>

As we have seen, Rawls advocated a form of “[p]olitical liberalism [that] is not ... a view of the whole of life” on the grounds that comprehensive forms of liberalism overlook the way in which “the diversity of views will persist and may increase” in liberal democracies.<sup>18</sup> For Rawls and other political liberals, the diversity of human society means that liberalism should be in the business of offering a vision of how individuals can live together rather than suggesting how individuals can live good lives. Given that political conceptions of liberalism eschew questions of the good life, it is hardly surprising that they are able to more fully do justice to the fact of pluralism than comprehensive conceptions. More specifically, the basic conviction that, as Ronald Dworkin succinctly formulates it, “political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life,” is best preserved in the political species of liberalism that decouple the justification of the

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<sup>16</sup> Kukathas, *op. cit.*, p. 30 (Chapter 1).

<sup>17</sup> *ibid.*, p. 16 (Introduction).

<sup>18</sup> Rawls, ‘The Domain of The Political and Overlapping Consensus,’ *op. cit.*, p. 240 (§IV). *ibid.*, p. 235 (§I). & Rawls, ‘The Idea of An Overlapping Consensus,’ *op. cit.*, p. 4 (§I). Cf. J. Rawls, ‘Kantian Constructivism In Moral Theory,’ *The Journal of Philosophy*, vol. 77, no. 9, September 1980, pp. 515–572, p. 539 (Lecture 2, §I)., Rawls, ‘The Idea of An Overlapping Consensus,’ *op. cit.*, p. 1., *ibid.*, pp. 4–5 (§I)., Rawls, ‘The Domain of The Political and Overlapping Consensus,’ *op. cit.*, pp. 236–239 (§II–§III). & *ibid.*, pp. 249–250 (§VIII–§IX).

liberal means of organising political life from a comprehensive liberal conception of the good.<sup>19</sup>

This is essentially Kukathas' point when he claims:

A comprehensive conception of liberalism would fail to accomplish—because it abandons—the task liberalism sets itself: providing an account of a political order that could command the acceptance of all, irrespective of their moral commitments or ideals of the good life. Any plausible liberalism ... [is] a 'political' liberalism—one which describe[s] ... a political order which ... [i]s not hostage to a particular 'comprehensive' moral doctrine.<sup>20</sup>

Simply put, if a species of liberalism is comprehensive and therefore embodies a particular conception of what it means to live a good life, it will fail to fully do justice to the fact of pluralism because the conception of the good on which it rests will circumscribe the extent of the diversity to which it can do justice.

To concretise the above point, as Chris Bowen, Australia's former Minister for Immigration and Citizenship, puts it, “[a] truly robust liberal society is a multicultural society” because a society that did not provide scope for cultural diversity would be one that failed to carry through the liberal project of doing justice to the fact of pluralism.<sup>21</sup> Unless cultural diversity is protected and individuals are free to live in accordance with their own conceptions of the good, the liberal commitment to doing justice to the fact of pluralism will be counterfeit. The implication of this is arguably that a fully “liberal society will be one in which politics is given priority over morality” in the sense that the political priority of ensuring that everyone is able to live as they see fit takes precedence over the moral priority of ensuring that everyone

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<sup>19</sup> R. Dworkin, 'Liberalism' in *Public and Private Morality*, S. Hampshire (ed.), Cambridge University Press, Cambridge, 1978, pp. 113–143, p. 127 (§III).

<sup>20</sup> Kukathas, *op. cit.*, p. 16 (Introduction). Cf. *ibid.*, pp. 268–269 (Conclusion). & R. Geuss, 'Liberalism and Its Discontents,' *Political Theory*, vol. 30, no. 3, June 2002, pp. 320–338, p. 333 (§IV).

<sup>21</sup> C. Bowen, 'What Makes Multiculturalism Great Is Mutual Respect,' *The Sydney Morning Herald*, 17<sup>th</sup> February 2011, accessed 21<sup>st</sup> February 2011, <<http://www.smh.com.au/opinion/politics/what-makes-multiculturalism-great-is-mutual-respect-20110216-1awik.html>>.

lives a morally laudable life.<sup>22</sup> Ordering political life in accordance with principles that embody a comprehensive conception of the good should be avoided, lest political life be structured in a hopelessly partisan way that prejudices institutional structures against particular conceptions of the good. The “inescapable controversiality of ideals of the good life” and the concomitant “need to find political principles that abstract from them” means that, as Sandel argues:

A liberal vision ... [of] a just society seeks not to promote any particular ends, but enables its citizens to pursue their own ends, consistent with a similar liberty for all; it ... must govern by principles that do not presuppose any particular conception of the good.<sup>23</sup>

In short, political species of liberalism are better able to do justice to the fact of pluralism because their priority is institutional structures that allow individuals to live as they see fit instead of those that allow individuals to live morally laudable lives.

### **2.2.2. Minimalist liberalism and political species of liberalism**

Having argued that the political species of liberalism are more faithful to the liberal project of doing justice to the fact of pluralism than comprehensive species, minimalist liberalism will now be advocated on the grounds that it builds on the progress made by other permutations of political liberalism.

Given that the notion of political reasonableness on which Rawls' political liberalism relies “is nothing less than a moral principle in its own right,” Rawls correctly observed that it was a “mistake” to claim that his conception of justice was “part of the theory of rational choice.”<sup>24</sup> This is obvious in light of W. M. Sibley's distinction between the rational—which

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<sup>22</sup> Kukathas, *op. cit.*, p. 19 (Chapter 1).

<sup>23</sup> Larmore, *Patterns of Moral Complexity*, *op. cit.*, pp. 129–130 (Chapter 5). & M. J. Sandel, ‘The Procedural Republic and The Unencumbered Self,’ *Political Theory*, vol. 12, no. 1, February 1984, pp. 81–96, p. 82.

<sup>24</sup> C. Larmore, ‘Lifting The Veil,’ *The New Republic*, vol. 224, no. 6, 5<sup>th</sup> February 2001, pp. 32–37, p. 36., Rawls, *Justice As Fairness: A Restatement*, *op. cit.*, p. 82 (Part III, §23.3). & Rawls, *A Theory of Justice: Original Edition*,

simply implies that one “will use intelligence in pursuing” one’s ends—and the reasonable—which “is essentially related to the disposition to act morally.”<sup>25</sup> Although the unavoidable moral dimension of Rawls’ notion of political reasonableness highlights that his political liberalism does indeed constitute a moral conception, it is important to remember that it is only a minimal moral conception because it “does not presuppose accepting any particular comprehensive doctrine.”<sup>26</sup> Similarly, it is essential to acknowledge that minimalist liberalism has—to use Larmore’s phrase—an “abiding moral heart.”<sup>27</sup> Nevertheless, this abiding moral heart is, like its Rawlsian equivalent, slight. In fact, and this is the crucial point, minimalist liberalism is even more political than Rawls’ political liberalism and other versions of political liberalism because its abiding moral heart is slight to the point that it only consists of a commitment to individual’s living as they see fit.

So as to fully flesh out this argument, it is useful to consider Richard Bellamy’s observation that “[j]ustice as politics involves a shift from constitutional or liberal democracy to democratic constitutionalism or liberalism.”<sup>28</sup> In line with Bellamy’s characterisation, the defining feature of the political species of liberalism can be captured by noting that they are more democratic than the comprehensive species of liberalism. Rather than imposing comprehensive visions of legitimate institutional structures from above, the political species of liberalism accept, to lesser and greater degrees, that legitimate institutional structures will be

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*op. cit.*, p. 47 (Part One, Chapter I, §9). Cf. Rawls, ‘Justice As Fairness: Political Not Metaphysical,’ *op. cit.*, p. 236 (§IV)., *ibid.*, p. 247 (§VI). & Rawls, ‘The Idea Of An Overlapping Consensus,’ *op. cit.*, p. 11 (§III).

<sup>25</sup> W. M. Sibley, ‘The Rational Versus The Reasonable,’ *The Philosophical Review*, vol. 62, no. 4, October 1953, pp. 554–560, p. 560 (§6). Cf. M. Horkheimer, *Eclipse of Reason*, The Continuum Publishing Corporation, New York, 1992, p. 3 (Chapter I)., *ibid.*, p. 5 (Chapter I). & A. MacIntyre, *After Virtue: A Study In Moral Theory*, 3<sup>rd</sup> edition, University of Notre Dame Press, Notre Dame, 2007, p. 54 (Chapter 5).

<sup>26</sup> Rawls, ‘The Domain of The Political and Overlapping Consensus,’ *op. cit.*, p. 240 (§IV).

<sup>27</sup> Larmore, ‘The Moral Basis of Political Liberalism,’ *op. cit.*, p. 606 (§II). Larmore earlier refers to the “moral core of liberal thought.” See *ibid.*, p. 602.

<sup>28</sup> R. Bellamy, ‘Pluralism, Liberal Constitutionalism and Democracy: A Critique of John Rawls’s (Meta) Political Liberalism’ in *The Liberal Political Tradition: Contemporary Reappraisals*, J. Meadowcroft (ed.), Edward Elgar Publishing, Cheltenham, 1996, pp. 77–100, p. 96 (§3). Bellamy goes on to specify: “The former [i.e., constitutional or liberal democracy] conceives the rule of law in terms of a set of formal legal principles that frame and constrain democratic decision-making. The latter [i.e., democratic constitutionalism or liberalism] consists of a set of fair procedures for the reconciliation of differing points of view.” See *ibid.* Cf. R. Bellamy, *Liberalism and Modern Society: An Historical Argument*, The Pennsylvania State University Press, University Park, 1992, p. 254 (Conclusion).



those that reflect the practical commitments of the individuals living under them. The practical significance of the political species of liberalism being more faithful to the liberal project of doing justice to the fact of pluralism is therefore that they maximise the freedom of individuals to live as they see fit: Political species of liberalism ensure that institutional structures reflect the practical commitments of the individuals living under them rather than reflecting a predetermined conception of what legitimate institutional structures look like.

Accepting the forgoing characterisation of political liberalism, minimalist liberalism can be thought of as a thoroughly political form of liberalism because it carries forward the rejection of “pre-political” visions of what institutional structures should look.<sup>29</sup> The result of this is that legitimacy is propagated in the local soil and is not a function of the extent to which real world institutional structures mirror a predetermined and precisely detailed picture of legitimate institutional structures. Without abandoning the liberal commitment to individuals living as they see fit (i.e., without disposing of everything that is liberal in political liberalism), minimalist liberalism ensures that, to the greatest extent possible, political liberalism is infused with what might be called the radical democratic spirit of Calhoun.<sup>30</sup> Although it avoids Calhoun's democratic excesses, minimalist liberalism does not pre-ordain in any way the characteristics of legitimate institutional structures, beyond, of course, requiring that they allow individuals to live as they see fit.<sup>31</sup> As with Kukathas' political liberalism, regarding the minimalist version of political liberalism:

The reader is ... not being asked to imagine any particular kind of society

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<sup>29</sup> *ibid.*

<sup>30</sup> Calhoun maintained that “a people, in forming a constitution, have the unconditional right to form and adopt the government which they may think best calculated to secure their liberty, prosperity, and happiness.” See Calhoun, 'Speech On The Introduction of His Resolutions On The Slave Question [February 19, 1847];' *op. cit.*, p. 521. Cf. G. Monbiot, *The Age of Consent: A Manifesto For A New World Order*, Flamingo, London, 2003, p. 117 (Chapter 4).

<sup>31</sup> From a liberal perspective, Calhoun's objection to striking “down the higher right of a community to govern themselves, in order to maintain the absolute right of individuals in every possible condition to govern themselves” is clearly a democratic excess. See Calhoun, 'Speech On The Introduction of His Resolutions On The Slave Question [February 19, 1847];' *op. cit.*, p. 518. Cf. D. J. Elazar, 'Viewing Federalism As Grand Design' in *Federalism As Grand Design: Political Philosophers and The Federal Principle*, D. J. Elazar (ed.), University Press of America, Lanham, 1987, pp. 1–11, p. 9.

at all ... the principles defended ... leave the matter of what kind of society would emerge much more open.<sup>32</sup>

The political versions of liberalism are more faithful to the liberal project of doing justice to the fact of pluralism because they do not prejudge what legitimate institutional structures will look like. The minimalist conception of liberalism in turn seeks to carry this liberal project even further by only requiring institutional structures to allow individuals to live as they see fit. In short, the minimalist conception of liberalism is a thoroughly political version of liberalism because it sanctions as legitimate *any* given institutional structure whatsoever, on the sole condition that the institutional structure in question allows individuals to live as they see fit.

In conclusion, two principal claims have been made in this section. First, the political species of liberalism remain more faithful to the liberal project of doing justice to the fact of pluralism than comprehensive species precisely because of their political character. Second, minimalist liberalism is a thoroughly political species of liberalism that carries the liberal project of doing justice to the fact of pluralism even further. The corollary of these two arguments is that minimalist liberalism seeks to further do justice to the fact of pluralism by sanctioning any given institutional structure whatsoever as legitimate, provided, of course, that it allows individuals to live as they see fit.

### **2.3. Minimalist Liberalism's Relatives & Justice Versus Legitimacy**

Before exploring the minimalist liberal principle of legitimacy in detail in the next section, it is useful to frame minimalist liberalism. To that end, this section explores the

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<sup>32</sup> Kukathas, *op. cit.*, p. 31 (Chapter 1).

relationship between minimalist liberalism and reiterative universalism and conservatism, as well as explaining why minimalist liberalism is best seen as an account of legitimacy rather than a theory of justice.

### 2.3.1. Minimalist liberalism as reiterative universalism

As indicated, minimalist liberalism looks to the individuals living under any given institutional structure to determine whether it is legitimate.<sup>33</sup> To appropriate Michael Walzer's claim that "[t]here cannot be a just society until there is a society," there cannot be a legitimate institutional structure until there are individuals living under it.<sup>34</sup> In short, minimalist liberalism is not a form of "ethics applied to society" because it does not presuppose a comprehensive conception of the good that predetermines the specific characteristics of legitimate institutional structures.<sup>35</sup> Nevertheless, it is, as noted in the Introduction, a universalistic conception of legitimacy because it holds that the principle that legitimate institutional structures allow individuals to live as they see fit to the fullest extent possible ought to be universally applied.

This at once minimalist and universalistic conception of legitimacy means that minimalist liberalism can be accurately conceived of as a form of what Walzer calls "reiterative universalism."<sup>36</sup> That is to say that it is a form of universalism that governs and constrains

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<sup>33</sup> Cf. B. Williams, 'In The Beginning Was The Deed' in *In The Beginning Was The Deed: Realism and Moralism In Political Argument*, G. Hawthorn (ed.), Princeton University Press, Princeton, 2005, pp. 18–28, pp. 23–24.

<sup>34</sup> M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, Basic Books, New York, 1983, p. 313 (Chapter 13). Cf. M. Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 4<sup>th</sup> edition, Basic Books, New York, 2006, p. 55 (Part Two, Chapter 4).

<sup>35</sup> I. Berlin, 'On The Pursuit of The Ideal,' *The New York Review of Books*, vol. 35, no. 4, 17<sup>th</sup> March 1988, pp. 11–16 & p. 18, p. 11 (§1). Cf. I. Berlin, 'Two Concepts of Liberty' in *Contemporary Political Philosophy: An Anthology*, R. E. Goodin & P. Pettit (eds.), Blackwell Publishers, Oxford, 1997, pp. 391–417, p. 392., Levy, 'Federalism, Liberalism, and The Separation of Loyalties,' *op. cit.*, pp. 463–464. & B. Williams, 'Realism and Moralism In Political Theory' in *In The Beginning Was The Deed: Realism and Moralism In Political Argument*, G. Hawthorn (ed.), Princeton University Press, Princeton, 2005, pp. 1–17, p. 2.

<sup>36</sup> M. Walzer, 'Nation and Universe,' *The Tanner Lectures On Human Values 1988–89*, Oxford University, 1<sup>st</sup> and 8<sup>th</sup> May 1989, pp. 507–556, p. 513 (Lecture 1, §1).

diversity without overruling it.<sup>37</sup> Unlike “[c]overing-law universalism [, which] describes the standard philosophical effort to bring all human activities, all social arrangements, all political practices, under a single set of principles or a single conception of the right or the good,” “the minimalist universalism of reiteration” “is compatible with recognizing rather than disregarding (most of) the ‘spontaneous, natural forms of human self-expression’.”<sup>38</sup> In other words, although reiterative forms of universalism, such as minimalist liberalism, apply principles universally, the principles are such that their universal application fosters an immense number of particular variations.

To concretise the above points, minimalist liberalism is a form of reiterative universalism because the universal application of the principle that institutional structures are legitimate if they allow individuals to live as they see fit sanctions great diversity in institutional structures. Minimalist liberalism is a form of universalism because the minimalist liberal principle of legitimacy is applied universally. However, it also accommodates an immense amount of diversity because the minimalist liberal principle of legitimacy comes with a minimal amount of normative content (i.e., it demands little of institutional structures). Like reiterative universalism, minimalist liberalism functions as a side constraint that only rules out a minimal amount of the potential diversity of institutional structures.<sup>39</sup>

### 2.3.2. Minimalist liberalism and conservatism

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<sup>37</sup> *ibid.*, p. 516 (Lecture 1, §II). *Cf. ibid.*, p. 527 (Lecture 1, §V), *ibid.*, p. 533 (Lecture 2, §I). & Montesquieu, *De L'Esprit Des Lois: Tome II*, L. Versini (ed), Éditions Gallimard, Paris, 1995, p. 1039 (Sixième Partie, Livre Vingt-Neuvième, Chapitre XVIII).

<sup>38</sup> Walzer, 'Nation and Universe,' *op. cit.*, pp. 532–533 (Lecture 2, §I). & *ibid.*, p. 546 (Lecture 2, §V).

<sup>39</sup> See Walzer, 'Nation and Universe,' *op. cit.*, p. 552 (Lecture 2, §VI). *Cf.* Epicurus, 'Principal Doctrines,' *op. cit.*, p. 75 (§36), *ibid.*, p. 75 (§37), *ibid.*, p. 75 (§38), Jefferson, *op. cit.*, pp. 263–264., T. Jefferson, 'To Samuel Kercheval (1816)' in *The Essential Jefferson*, J. M. Yarbrough (ed), Hackett Publishing Company, Indianapolis, 2006, pp. 239–238, p. 244., T. Jefferson, 'To John Tyler (1816)' in *The Essential Jefferson*, J. M. Yarbrough (ed), Hackett Publishing Company, Indianapolis, 2006, pp. 233–236, p. 233., T. Jefferson, 'To James Madison (1789)' in *The Essential Jefferson*, J. M. Yarbrough (ed), Hackett Publishing Company, Indianapolis, 2006, pp. 176–180, p. 177. & I. Kant, 'An Answer To The Question: What Is Enlightenment?' in *Toward Perpetual Peace and Other Writings On Politics, Peace, and History*, P. Kleingeld (ed.), D. L. Colclasure (trans.), Yale University Press, New Haven, 2006, pp. 17–23, p. 20.

It is equally important to clarify the nature of the *prima facie* affinity between minimalist liberalism and conservatism. Although conservatism can mean many different things, it is, in its original and most general form, simply the idea that social practices and political institutions should not be too readily abandoned. Consider, for example, Edmund Burke's classic formulation of the conservative impulse:

It is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society.<sup>40</sup>

Conservatives are conservative precisely because their default position is to conserve existing social practices and political and economic institutions. As Hayek put it when explaining why he was not a conservative, "one of the fundamental traits of the conservative attitude is a fear of change, a timid distrust of the new as such."<sup>41</sup> According to the conservative, society should be particularly wary of rejecting existing social practices and dismantling established political institutions because they embody a great store of wisdom inherited from past generations. As Michael Oakeshott argued, "the self-made man is never literally *self-made*, but depends upon a certain kind of society and upon a large unrecognized inheritance."<sup>42</sup>

The parallels between minimalist liberalism and conservatism become apparent when one considers that minimalist liberalism is liable to hold that some apparently retrograde social practices and economic and political institutions ought to be accepted as legitimate. In practice, the conservative and the minimalist liberal may well find themselves side by side arguing in favour of misogynistic, homophobic and racist institutional structures. Although the minimalist liberal will at times defend these types of institutional structures, the parallels between

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<sup>40</sup> E. Burke, 'Reflections On The Revolution In France, 1790' in *Selected Prose*, P. Magnus (ed), The Falcon Press, London, 1948, pp. 60–80, p. 68.

<sup>41</sup> F. A. Hayek, 'Why I Am Not A Conservative' in *The Constitution of Liberty: The Definitive Edition*, R. Hamowy (ed), The University of Chicago Press, Chicago, 2011, pp. 517–533, p. 400 (§3). *Cf. ibid.*, p. 398 (§1).

<sup>42</sup> M. Oakeshott, 'Rationalism In Politics' in *Rationalism In Politics and Other Essays*, Methuen & Co., London, 1962, pp. 1–36, p. 12 (§2). *Cf.* Burke, 'Reflections On The Revolution In France, 1790,' *op. cit.*, p. 63. & *ibid.*, pp. 71–72.

minimalist liberalism and conservatism have very strict limits.<sup>43</sup> An advocate of minimalist liberalism will *only* consider retrograde social practices and economic and political institutions legitimate if they allow individuals to live as they see fit. In stark contrast, conservatives are liable to—and in practice often do—endorse retrograde social practices and political institutions even if they patently do not allow individuals to live as they see fit.

The nub of the divergence between minimalist liberalism and conservatism can be captured by noting that while conservatism of necessity looks back to the past, minimalist liberalism looks wherever individuals themselves look.<sup>44</sup> While conservatism seeks institutional structures that are constructed in accordance with the dictates of tradition, minimalist liberalism seeks institutional structures that individuals themselves seek. For the minimalist liberal, whether the institutional structures that individuals themselves seek happen to be constructed in accordance with the dictates of tradition is entirely immaterial. This fundamental cleavage between minimalist liberalism and conservatism means that, despite the at times striking parallels, minimalist liberalism cannot be considered a form of conservatism properly understood.

### **2.3.3. Justice and legitimacy**

To get a better sense of why minimalist liberalism carries forward the liberal project of doing justice to the fact of pluralism, it is instructive to consider the distinction between justice and legitimacy.

In a rightly famous exchange with his Democrat opponent, Lincoln, then a Republican candidate for the Senate, claimed:

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<sup>43</sup> Cf. Hayek, 'Why I Am Not A Conservative,' *op. cit.*, p. 399 (§2). Unsurprisingly, misogynistic, homophobic and racist institutional structures will often restrict individuals from living as they see fit, and will therefore rarely be deemed legitimate by minimalist liberalism.

<sup>44</sup> *ibid.*, pp. 397–398 (§1).

He contends that whatever community wants slaves has a right to have them. So they have if it is not a wrong. But if it is a wrong, he cannot say people have a right to do wrong.<sup>45</sup>

The implication of Lincoln's criticism is that institutional structures should only be accepted if they are just, or, at the very least, not unjust. As counter-intuitive as it might seem in light of Lincoln's opposition to the institution of chattel slavery, his view is arguably illiberal in one important respect. In particular, if one is truly committed to the liberal project of doing justice to the fact of pluralism, the crucial consideration is not whether an institutional structure is just or unjust, but rather whether it is legitimate or illegitimate. To be sure, the institution of chattel slavery is, at least on most accounts, both an unjust and an illegitimate institutional structure. However, justice and legitimacy will often pull in different directions.<sup>46</sup> This is because although principles of justice typically demand a precise suite of qualities from institutional structures, principles of legitimacy generally amount to threshold tests that leave the specific characteristics of institutional structures largely undetermined. For example, consider Rawls' version of the liberal principle of legitimacy:

Political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in light of their common human reason.<sup>47</sup>

Given the scope for a wide diversity of views among reasonable and rational citizens, this Rawlsian principle of legitimacy must leave room for a wide diversity of legitimate institutional structures.

As discussed earlier, political conceptions of liberalism remain more faithful to the liberal project of doing justice to the fact of pluralism because they avoid prejudging the

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<sup>45</sup> Douglas & Lincoln, *op. cit.*, p. 392.

<sup>46</sup> Cf. Kukathas, *op. cit.*, p. 260 (Conclusion).

<sup>47</sup> Rawls, *Justice As Fairness: A Restatement*, *op. cit.*, p. 41 (Part II, §12.3).

characteristics institutional structures ought to have. Similarly, when liberalism is conceived of as an account of legitimacy, is also arguably more faithful to this project because accounts of justice tend to be comparatively prescriptive. By contrast, there is more scope for individuals to live as they see fit when the goal is simply legitimacy and questions of justice are deferred. This is similar to the view advocated by Kukathas when he claims: "A political philosophy that subordinates the question of justice ... provides us with a better, truer, version of liberalism."<sup>48</sup> Notwithstanding Kukathas' strong language, this is certainly not an attempt to claim that liberalism conceived of as an account of justice is inauthentic. It is rather to say that if one privileges the liberal project of doing justice to the fact of pluralism, liberalism will be better conceived of as an account of legitimacy. Given that minimalist liberalism attempts to carry forward the liberal project of doing justice to the fact of pluralism, it is no surprise that this version of liberalism is best understood as a minimalist liberal threshold test of legitimacy.<sup>49</sup>

Admittedly, a conception of justice need not make overbearing demands of institutional structures. Indeed, drawing on Rawls' distinction between "the concept of justice ... [and] the various conceptions of justice," it might be argued that conceptions of justice only need to ensure:

No arbitrary distinctions are made between persons in the assigning of basic rights and duties and ... [that] rules determine a proper balance between competing claims to the advantages of social life.<sup>50</sup>

Although relatively undemanding conceptions of justice are possible, it is still more accurate to view minimalist liberalism as a conception of legitimacy. This is in part a function of semantics: The notion of legitimacy is usually taken to be less demanding than justice. Consistent with this, conceptions of justice are typically far from minimalist, whereas conceptions of legitimacy demand comparatively little from institutional structures. For example, even Rawls' political and

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<sup>48</sup> Kukathas, *op. cit.*, p. 261 (Conclusion). *Cf. ibid.*, p. 264 (Conclusion).

<sup>49</sup> *Cf. ibid.*, p. 260 (Conclusion).

<sup>50</sup> Rawls, *A Theory of Justice: Original Edition, op. cit.*, p. 5 (Part One, Chapter I, §1).



relatively permissive conception of justice is substantially more demanding than minimalist liberalism. Consider the requirements of Rawls' conception of justice:

(a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).<sup>51</sup>

By contrast, minimalist liberalism only requires institutional structures to allow individuals to live as they see fit. Considering the asymmetries between minimalist liberalism and Rawls' political conception of justice, as well as the status of Rawls' political conception of justice as one of the more permissive conceptions of justice, it seems reasonable to conclude that the connotations of legitimacy are more suitable for minimalist liberalism.

#### **2.3.4. Competing practical commitments**

At this point, it might be objected that minimalist liberalism demands an utterly untenable form of schizophrenia. In particular, it requires individuals to bracket their own deeply held conceptions of justice when judging whether any given institutional structure ought to be accepted. To better explain this counter-argument, it suffices to make use of the structurally analogous—although substantively quite different—“paradox of Democracy.”<sup>52</sup>

Richard Wollheim argued:

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<sup>51</sup> Rawls, *Justice As Fairness: A Restatement*, *op. cit.*, p. 42 (Part II, §13.1).

<sup>52</sup> R. Wollheim, 'A Paradox In The Theory of Democracy' in *Philosophy, Politics and Society: (Second Series)*, P. Laslett & W. G. Runciman (eds.), Basil Blackwell, Oxford, 1962, pp. 71–87, p. 84. Despite using the solution to the “paradox of democracy” as inspiration for a defence of minimalist liberalism, it is worth stressing that this section does not necessarily endorse this solution.

The acceptance of the [democratic] machine's choice seems to be incompatible with—not just not to follow from, but to be incompatible with—one's own original choice. For if a man expresses a choice for A and the machine expresses a choice for B, then the man, if he is to be a sound democratic (*sic.*), seems to be committed to the belief that A ought to be the case *and* to the belief that B ought to be the case.<sup>53</sup>

This apparent paradox of democracy parallels a structurally comparable problem for minimalist liberalism: Minimalist liberalism sometimes requires individuals to be committed to two mutually exclusive views. As a case in point, individuals might need to be committed to the view that a profoundly patriarchal institutional structure is legitimate and ought to be accepted because it allows the individuals living under it to live as they see fit (C), while also maintaining that this institutional structure ought to be rejected because profoundly patriarchal institutional structures are unjust (D).

The demand that individuals hold conflicting views seems to call into question the plausibility of minimalist liberalism. However, in the same way that the paradox of democracy is only apparently intractable, this demand for internal contradictions is more imagined than real. Just as surely as it can be shown that “it is perfectly in order for one and the same citizen to assert that A ought to be enacted, where A is the policy of his choice, and B ought to be enacted, where B is the policy chosen by the democratic machine, even when A and B are not identical,” it is perfectly in order for an individual to assert both C and D.<sup>54</sup> The supposedly fatal flaws in democracy and minimalist liberalism result from a failure to appreciate two different senses in which policies ought to be enacted and institutional structures ought to be accepted. As Bellamy points out in relation to the apparent paradox of democracy:

The paradox dissolves ... once one distinguishes what one thinks right

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<sup>53</sup> *ibid.*, pp. 78–79.

<sup>54</sup> *ibid.*, p. 84.

for oneself from what one accepts as right for the collectivity to which one belongs. In the latter instance, the right decision cannot be constructed antecedently to the process from which it emerges and to which one contributes one's own point of view.<sup>55</sup>

Similarly, the demand that individuals hold conflicting views becomes nothing more than a mirage once one makes a distinction between the institutional structures that one is personally committed to and the institutional structures that one recognises as legitimate for others in light of their practical commitments.<sup>56</sup> This is to suggest that there is nothing schizophrenic about wanting non-patriarchal institutional structures for oneself and others who are committed to feminism broadly construed, while at the same time accepting that profoundly patriarchal institutional structures are legitimate for those who are committed to thoroughly patriarchal values.

This section has reached two principal conclusions. First, although minimalist liberalism can be conceived of as a form of reiterative universalism, it is not a brand of conservatism, despite the superficial affinity. Second, even though minimalist liberalism can be categorised as a theory of justice, it is best understood as an account of legitimacy.

## **2.4. The Minimalist Liberal Principle of Legitimacy**

The minimalist liberalism described thus far yields a minimalist liberal principle of legitimacy: Institutional structures are legitimate to the extent that they allow individuals to live

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<sup>55</sup> Bellamy, 'Pluralism, Liberal Constitutionalism and Democracy: A Critique of John Rawls's (Meta) Political Liberalism,' *op. cit.*, p. 85 (§1).

<sup>56</sup> Cf. D. B. Rasmussen & D. J. D. Uyl, *Norms of Liberty: A Perfectionist Basis For Non-Perfectionist Politics*, The Pennsylvania State University Press, University Park, 2005, p. 296 (Part Three, Chapter 12)., *ibid.*, pp. 298–299 (Part Three, Chapter 12). & *ibid.*, p. 302 (Part Three, Chapter 12).

as they see fit. Walzer notably claimed:

Justice is rooted in the distinct understandings of ... things ... that constitute a shared way of life ... [, t]o override those understandings is (always) to act unjustly.<sup>57</sup>

The minimalist liberal principle of legitimacy can be similarly formulated in the negative: It is illegitimate to impose institutional structures if they restrict individuals from living as they see fit.<sup>58</sup> As will become clear as the argument progresses, this principle is perhaps a more precise formulation of Kukathas' vision of society as "a *liberal* archipelago": "The legitimacy of any authority rests on the acquiescence of its subjects."<sup>59</sup>

This section provides a detailed account of the minimalist liberal principle of legitimacy, as well as responding to the objection that minimalist liberalism betrays itself by relying on a conception of the good that is far from minimalist. The argument that follows shows that by only restricting individual liberty in the name of protecting individual liberty, the minimalist liberal principle of legitimacy carries forward the liberal project of doing justice to the fact of pluralism, while also not needing to rely on a comprehensive conception of the good.

#### **2.4.1. Allowing individuals to live as they see fit as the mark of legitimacy**

The minimalist liberal principle of legitimacy outlined in this chapter is broadly consistent with Waldron's vision of liberalism:

The thesis that ... is *fundamentally* liberal is this: a social and political order is illegitimate unless it is rooted in the consent of all those who have to live under it; the consent or agreement of these people is a

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<sup>57</sup> Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, *op. cit.*, p. 314 (Chapter 13).

<sup>58</sup> Cf. A. Smith, 'The Theory of Moral Sentiments' in *Classics of Political and Moral Philosophy*, S. M. Cahn (ed.), Oxford University Press, New York, 2002, pp. 624–632, p. 628 (Part IV, Chapter I).

<sup>59</sup> Kukathas, *op. cit.*, p. 22 (Chapter 1). & *ibid.*, p. 25 (Chapter 1). Cf. *ibid.*, p. 5 (Introduction), *ibid.*, p. 8 (Introduction), *ibid.*, p. 19 (Chapter 1), *ibid.*, p. 22 (Chapter 1), *ibid.*, p. 26 (Chapter 1). & *ibid.*, p. 38 (Chapter 1).

condition of its being morally permissible to enforce that order against them.<sup>60</sup>

However, the minimalist liberal principle of legitimacy is by no means a prosaic restatement of the general liberal commitment to individual liberty.<sup>61</sup> The reason for this is that beyond the minimal requirement that institutional structures allow individuals to live as they see fit, this principle demands *nothing* from institutional structures.

As a result of deeming institutional structures legitimate solely on the basis of whether they allow individuals to live as they see fit, the minimalist liberal principle of legitimacy, like Walzer's conventionalism, reflects "a decent respect for the opinions of mankind."<sup>62</sup> This principle is able to respect the opinions of individuals because it does not contain extensive normative content that determines in advance the precise form legitimate institutional structures must take. By highlighting the connection between the liberal project of doing justice to the fact of pluralism with a form of humility that gives due regard to the opinions of individuals, the minimalist liberal principle of legitimacy bears out Friedman's observation that "[h]umility is the distinguishing virtue of the believer in freedom; arrogance, of the paternalist."<sup>63</sup>

As well as being consistent with a general attitude of humility, there is a crucially important parallel between the minimalist liberal principle of legitimacy and Article 4 of 'La

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<sup>60</sup> J. Waldron, 'Theoretical Foundations of Liberalism,' *The Philosophical Quarterly*, vol. 37, no. 147, April 1987, pp. 127–150, p. 140 (§III). Cf. *ibid.*, p. 128 (§I), *ibid.*, p. 146 (§V), & *ibid.*, p. 149 (§VII).

<sup>61</sup> Similarly, the minimalist liberal principle of legitimacy is not a simple reformulation of the Golden Rule (i.e., One ought to treat others as one would like to be treated oneself). Cf. Confucius, *The Analects (Lun yü)*, D. C. Lau (trans.), Penguin Books, London, 1979, p. 112 (Book XII, §2), Mencius, *Mencius*, D. C. Lau (trans.), Revised edition, Penguin Books, London, 2004, p. 146 (Book VII, Part A, §4), 'The New Covenant Commonly Called The New Testament of Our Lord and Saviour Jesus Christ: New Revised Standard Version' in *Holy Bible: New Revised Standard Version*, HarperCollins Publishers, London, 2007, pp. 1–282, p. 7 (Matthew 7.12). & *ibid.*, p. 69 (Luke 6.31). The Golden Rule only prohibits individuals from imposing institutional structures on others if they would not want to be subjected to them. Given that some individuals are happy to be subjected to institutional structures that others would object to, it is hardly surprising that the Golden Rule can yield profoundly illiberal outcomes. Cf. J. L. Mackie, *Ethics: Inventing Right and Wrong*, Penguin Books, London, 1990, pp. 89–90 (Part One, Chapter 4, §1).

<sup>62</sup> Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, *op. cit.*, p. 320 (Chapter 13). Cf. *ibid.*, p. 314 (Chapter 13).

<sup>63</sup> Friedman, *Capitalism and Freedom*, *op. cit.*, p. 188 (Chapter XI).

Déclaration Des Droits De L'Homme et Du Citoyen De 1789,' which states:

Liberty consists in the freedom to do everything which injures no one else. Therefore, the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights.<sup>64</sup>

Like the Swiss constitution, which stipulates that “[r]estrictions on fundamental rights must be justified ... for the protection of the fundamental rights of others,” the minimalist liberal principle of legitimacy entails that the freedom of individuals to live as they see fit should only be restricted in the name of the freedom of individuals to live as they see fit.<sup>65</sup> Or, to put the same point more forcefully in the negative, by holding that institutional structures are legitimate to the extent that they allow individuals to live as they see fit, the minimalist liberal principle of legitimacy places only one strict limit on individual liberty: The exercise of individual liberty is illegitimate when it restricts individual liberty. In other words, to borrow Friedman's turn of phrase, the minimalist liberal principle of legitimacy seeks to “preserve the maximum degree of freedom for each individual separately that is compatible with one man's freedom not interfering with other men's freedom.”<sup>66</sup>

Holding that there is one strict limit on individual liberty (i.e., when individual liberty restricts individual liberty) means that the minimalist liberal principle of legitimacy entails that one class of restrictions on individual liberty are entirely legitimate. Restrictions on the freedom to restrict the individual liberty of others are legitimate because by restricting the freedom to restrict individual liberty, the freedom of individuals to live as they see fit is being protected.

This essentially parallels Kant's claim:

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<sup>64</sup> 'Déclaration Des Droits De L'Homme et Du Citoyen De 1789' in *La Déclaration Des Droits De L'Homme et Du Citoyen*, S. Rials (ed.), Hachette, Paris, 1988, pp. 21–26, pp. 22–23 (Article 4).

<sup>65</sup> 'Constitution Fédérale De La Confédération Suisse Du 18 Avril 1999,' *op. cit.*, p. 7 (Titre 2, Chapitre 1, Article 36, §2).

<sup>66</sup> Friedman, *Capitalism and Freedom*, *op. cit.*, p. 39 (Chapter III). Cf. C. Beccaria, 'On Torture and The Death Penalty (Treatise On Crimes and Punishments)' in *The Human Rights Reader: Major Political Essays, Speeches, and Documents From Ancient Times To The Present*, 2<sup>nd</sup> edition, M. R. Ishay (ed.), Routledge, New York, 2007, pp. 107–113, pp. 107–108 (Chapter 2).

If a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right.<sup>67</sup>

Restricting individual liberty is consistent with a commitment to individual liberty when the restriction stops individuals using their liberty to restrict the liberty of others. In other words, the minimalist liberal principle of legitimacy entails that in the same way that, as Bentham put it, “[n]o law can be made that does not take something from liberty; those excepted which take away, in the whole or in part those laws which take from liberty,” no restrictions on the freedom of individuals to live as they see fit are legitimate, excepting those restrictions that restrict the freedom of individuals to restrict the freedom of others.<sup>68</sup>

In holding that one's freedom to live as one sees fit has no legitimate limit—aside from the requirement that it not interfere with the freedom of others to live as they see fit— the minimalist liberal principle of legitimacy is consistent with Shklar's classic rendering of the “original and only defensible meaning of liberalism”:

Every adult should be able to make as many effective decisions without fear or favor about as many aspects of her or his life as is compatible with the like freedom of every other adult.<sup>69</sup>

In essence, the minimalist liberal principle of legitimacy carries forward the liberal commitment to individual liberty to the point that it entails that the only instances in which an individual should not be free to live as they see fit are those in which this freedom would allow them to impose on others institutional structures that restrict their freedom to live as they see fit.

To get a better sense of the practical implications of the minimalist liberal principle of

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<sup>67</sup> Kant, *The Metaphysics of Morals*, *op. cit.*, p. 25 (Introduction). *Cf. ibid.*, p. 24 (Introduction).

<sup>68</sup> Bentham, *op. cit.*, p. 493.

<sup>69</sup> Shklar, *op. cit.*, p. 149.

legitimacy, it is instructive to apply it to a particular case. In Sri Lanka, “Tamils have long complained of discrimination at the hands of the island's majority Sinhalese.”<sup>70</sup> Despite the defeat of the Liberation Tigers of Tamil Eelam (LTTE) and the subsequent conclusion of the Sri Lankan civil war, there is little indication that the Sri Lankan government is committed to making institutional structures more democratically accountable or giving Tamil Sri Lankans the autonomy they have long called for. Indeed, according to the International Crisis Group, Sri Lanka has accelerated its “authoritarian turn,” which has seen the abolition of presidential terms and the independence of bodies charged with government oversight, as well as the politically motivated impeachment of the country's chief justice.<sup>71</sup> Consistent with this trend, “[t]he Tamil National Alliance[’s] ... [announcement] that it would accept a ‘federal structure’ in the north and east provinces with power over land, finance, and law and order” has been met with the “authorities [representing the government of Sri Lanka] ... [rejecting] any self-rule for them, saying it would be a prelude to secession.”<sup>72</sup> This effectively means that Tamil Sri Lankan hopes for an autonomous or semi-autonomous institutional structure that would give them a measure of much sought-after freedom have been quashed. Without even delving into the violent conclusion of the war between the Sri Lankan state and the LTTE, which Gordon Weiss, former United Nations Sri Lanka spokesperson, suggests amounts to Sri Lanka's “‘Srebrenica Moment’,” it seems plausible to conclude that the current institutional structures of the Sri Lankan state do not allow a large portion of Tamil Sri Lankans to live as they see fit.<sup>73</sup>

In light of the above, the minimalist liberal principle of legitimacy entails that the Sri Lankan state is illegitimate in at least one important respect. Although the institutional structures of the Sri Lankan state might allow non-Tamil Sri Lankans to live as they see fit—although even this is unlikely—it certainly does not allow many Tamil Sri Lankans to live as

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<sup>70</sup> ‘Tamils Now Look To Self Rule,’ *The Australian*, Monday 15<sup>th</sup> March 2010, p. 10.

<sup>71</sup> International Crisis Group, *Sri Lanka's Authoritarian Turn: The Need for International Action*, International Crisis Group, Brussels, 2013, pp. i–ii

<sup>72</sup> ‘Tamils Now Look To Self Rule,’ *op. cit.*

<sup>73</sup> G. Weiss, ‘Sri Lanka Faces Its “Srebrenica Moment”,’ *The Weekend Australian*, 23<sup>rd</sup>–24<sup>th</sup> April 2011, p. 17.



they see fit.<sup>74</sup> Given that this point will be explained in greater detail when the minimalist liberal theory of federalism is advanced, for the moment it suffices to note that the upshot of the current Sri Lankan state being illegitimate in this respect is that it needs to undergo a process of federalisation—or perhaps even allow the Tamil minority to secede completely—to ensure that it allows individuals to live as they see fit.<sup>75</sup>

#### **2.4.2. The minimalist liberal principle of legitimacy and the good**

In the same way that, as John Gray has argued, “[w]e cannot prevent conceptions of the good entering into the judgements we make when we apply liberal principles giving priority to liberty;” it can be argued that the minimalist liberal principle of legitimacy comes with a far more robust conception of the good than has been admitted thus far.<sup>76</sup> It might seem *prima facie* commonsensical to hold that it would be illegitimate to impose institutional structures on individuals if they stop them from living as they see fit. Indeed, this principle looks particularly innocuous because it apparently derives all of its normative force from a simple commitment to doing justice to the fact of pluralism. However, it is arguably precisely because the minimalist liberal principle of legitimacy attempts to be minimalist with respect to normative content that it actually relies on a far from minimalist conception of the good. The very idea that an account of legitimacy should come with minimal normative content seems to rely on a comprehensive conception of the good, according to which the good life is to be able to determine for oneself

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<sup>74</sup> Given that “amendments to the Sri Lankan constitution which further centralise presidential power” have recently been enacted, it is increasingly unlikely that the Sri Lankan state even allows non-Tamil Sri Lankans to live as they see fit. See L. Slattery, ‘Asian Engagement Comes Up Short,’ *The Australian*, Wednesday 16<sup>th</sup> March 2011, accessed 23<sup>rd</sup> March 2011, <<http://www.theaustralian.com.au/higher-education/opinion-analysis/asian-engagement-comes-up-short/story-e6frgcko-1226022015844>>.

<sup>75</sup> An end to discrimination against Tamil Sri Lankans within the current unitary Sri Lankan state is not included because a large number of Tamil Sri Lankans arguably want nothing less than a semi or entirely autonomous territory. See ‘Tamils Now Look To Self Rule,’ *op. cit.*

<sup>76</sup> J. Gray, *Two Faces of Liberalism*, The New Press, New York, 2000, p. 71 (Chapter 3).

what the good life is.<sup>77</sup> In light of Macedo's observation that "[l]iberal theorists tend to systematically minimize what liberalism entails," it is hardly surprising that the forgoing account of minimalist liberalism has glossed over the comprehensive conception of the good on which it is predicated.<sup>78</sup> In other words, it fails to appreciate that insofar as, as William Galston observes, "[n]o form of political life can be justified without some view of what is good for individuals," even the justification of a form of political life that seeks to avoid relying on a comprehensive conception of the good will itself rely on a comprehensive conception of the good.<sup>79</sup>

Chantal Mouffe is right to argue that there can be no such thing as a neutral justification of the neutrality of the state.<sup>80</sup> The idea that the state should be neutral as regards conceptions of the good is hardly neutral itself and indeed arguably embodies a particular liberal conception of the good. To the extent that a justification of a means of ordering political life is proffered—even if it is liberal neutrality—it will of necessity rely on some kind of conception of the good. Indeed, if a society endeavoured to be thoroughly neutral, then it would not be able to justify its own neutrality. As Schmitt describes the paradoxical nature of neutrality: "Should only neutrality prevail in the world, then not only war but also neutrality would come to an end."<sup>81</sup> The implication of this is that liberals must defend their commitment to neutrality in a thoroughly partisan and non-ecumenical manner, and, as Waldron puts it, "abandon any claim about the 'neutrality' of liberal politics."<sup>82</sup> Liberals need to accept that what Larmore calls a "neutral justification of political neutrality" is simply impossible.<sup>83</sup>

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<sup>77</sup> Cf. W. Galston, 'Defending Liberalism,' *The American Political Science Review*, vol. 76, no. 3, September 1982, pp. 621–629, p. 621. & *ibid.*, p. 629 (§V).

<sup>78</sup> Macedo, *op. cit.*, p. 294.

<sup>79</sup> Galston, *op. cit.*, p. 621. Cf. *ibid.*, p. 627 (§III). & *ibid.*, p. 629 (§V).

<sup>80</sup> See C. Mouffe, 'Political Liberalism: Neutrality and The Political,' *Ratio Juris*, vol. 7, no. 3, December 1994, pp. 314–324, p. 314.

<sup>81</sup> C. Schmitt, *The Concept of The Political: Expanded Edition*, G. Schwab (trans.), The University of Chicago Press, Chicago, 2007, p. 35 (§3). Cf. *ibid.*, p. 36 (§3).

<sup>82</sup> Waldron, 'Theoretical Foundations of Liberalism,' *op. cit.*, p. 146 (§IV). Cf. Waldron, 'Liberalism, Political and Comprehensive,' *op. cit.*, p. 93.

<sup>83</sup> Larmore, *Patterns of Moral Complexity*, *op. cit.*, p. 53 (Chapter 3). Cf. *ibid.*, p. 42 (Chapter 3), *ibid.*, p. 68 (Chapter 3). & Galston, *op. cit.*, p. 627 (§III). Even Larmore acknowledges as much when he concedes that "the

Acknowledging that, as Macedo observes, “[t]he liberal must, in the end, defend his partisanship and not evade it,” it is important to not shy away from admitting that minimalist liberalism is predicated on a conception of the good that prizes the freedom of individuals to live as they see fit above all else.<sup>84</sup> This admission is simply recognition of Kukathas' point: “No political doctrine which is devoid of moral content can, in the end, be a normative doctrine of any kind.”<sup>85</sup> Insofar as minimalist liberalism makes recommendations as to how institutional structures ought to be organised, it will, of necessity, rely on moral content of some kind. This means that although forms of liberalism like Kukathas' and minimalist liberalism might be what J. Donald Moon calls “radically minimalist form[s] of political liberalism,” they are by no means examples of what Deborah Hawkins terms “liberalism without principle.”<sup>86</sup>

The above concession notwithstanding, it is important to emphasise that the conception of the good presupposed by minimalist liberalism does not constitute a comprehensive conception of the good that has comparable normative content to the conceptions of the good presupposed by comprehensive species of liberalism. Although all accounts of the appropriate means of ordering political life must presuppose conceptions of the good, this does not entail that they must presuppose conceptions of the good that are equally substantive. Simply put, not all conceptions of the good are equal. By way of demonstration, let us consider the difference between the conception of the good presupposed by minimalist liberalism and the conception framing Humboldt's comprehensive liberalism. As we saw earlier, Humboldt defended individual liberty on the grounds that it is a precondition

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argument does not aim at complete moral neutrality. It intends to be neutral only with regard to controversial conceptions of the good life and not to all values or norms whatsoever.” See Larmore, *Patterns of Moral Complexity*, *op. cit.*, pp. 54–55 (Chapter 3). *Cf. ibid.*, p. 60 (Chapter 3), *ibid.*, p. 67 (Chapter 3). & Larmore, ‘Political Liberalism,’ *op. cit.*, p. 341 (§1).

<sup>84</sup> Macedo, *op. cit.*, p. 298. *Cf.* W. Galston, ‘Equality of Opportunity and Liberal Theory’ in *Justice and Equality: Here and Now*, F. S. Lucash (ed.), Cornell University Press, Ithaca, 1986, pp. 89–107, p. 91.

<sup>85</sup> Kukathas, *op. cit.*, p. 16 (Introduction).

<sup>86</sup> J. D. Moon, ‘Book Review: Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom*,’ *Ethics*, vol. 115, no. 2, January 2005, pp. 422–427, p. 422. & D. Hawkins, ‘Tolerance and Freedom of Association: A Lockean State of Nature?’, *Social Theory and Practice*, vol. 30, no. 4, October 2004, pp. 589–598, p. 597.

for individuals leading good lives.<sup>87</sup> By contrast, minimalist liberalism defends the freedom of individuals to live as they see fit for no other reason than to ensure that individuals are free to live as they see fit. Although the latter undoubtedly presupposes a conception of the good of some kind, it is far less substantive than Humboldt's: The minimalist liberal conception of the good demands far less from individuals and is far less prescriptive when it comes to determining what constitutes a legitimate institutional structure. It is true to say, to appropriate Larmore's remark regarding political liberalism, that although minimalist liberalism "forms a freestanding conception in regard to comprehensive moral visions of the good life[,] ... it cannot coherently claim to be freestanding with respect to morality altogether."<sup>88</sup> However, just by virtue of eschewing reliance on a comprehensive conception of the good, minimalist liberalism comes with significantly less moral baggage.

In summary, the minimalist liberal principle of legitimacy holds that institutional structures are legitimate to the extent that they allow individuals to live as they see fit. As such, minimalist liberalism's conception of the good cannot be seriously compared to comprehensive conceptions of the good. Although the minimalist liberal principle of legitimacy presupposes a conception of the good, the limited scope of this conception of the good makes it truly a minimalist.

## 2.5. Individual Liberty and Oppression

William Graham Sumner's observation that every individual "is subjected to the influence of the mores, and formed by them, before he is capable of reasoning about them"

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<sup>87</sup> Humboldt, *op. cit.*, pp. 16 & 20 (Chapter II).

<sup>88</sup> Larmore, 'The Moral Basis of Political Liberalism,' *op. cit.*, p. 608 (§III).

raises the serious problem of covert oppression.<sup>89</sup> It points to cases in which individuals are able to live as they see fit and yet are oppressed because they have had their preferences forced upon them by processes of "person-hood creation."<sup>90</sup> Minimalist liberalism must therefore confront the objection that it risks sanctioning covertly oppressive institutional structures as legitimate because it only requires institutional structures to allow individuals to live as they see fit.

### 2.5.1. Covert oppression

Let us consider a hypothetical woman born into a profoundly patriarchal and misogynistic society. The forced inculcation of patriarchal and misogynistic values through processes of person-hood creation means that such a society will be able to oppress the hypothetical woman covertly. She might lack underlying practical commitments to, for example, the equal moral worth of human beings *qua* human beings. Consequently, allowing this woman to live under institutional structures of her choosing may actually amount to allowing her to be severely oppressed. The effectiveness of processes of person-hood creation at co-opting individuals and implicating them in their own oppression means that allowing individuals to live as they see fit may be tantamount to allowing them to live in accordance with the demands of their oppressors. As such, institutional structures that oppress individuals in harsh and unconscionable by covert means ways may well be sanctioned as legitimate by minimalist liberalism.

Given the above, it might be argued that minimalist liberalism needs to rely on something akin to what Williams calls "*the critical theory principle*":

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<sup>89</sup> W. G. Sumner, *Folkways: A Study of The Sociological Importance of Usages, Manners, Customs, Mores, and Morals*, Ginn and Company, Boston, 1906, p. 76 (Chapter II, §80). *Cf. ibid.*, p. 28 (Chapter I, §31). & *ibid.*, p. 77 (Chapter II, §80).

<sup>90</sup> I have taken this turn of phrase from Karen Jones' paper 'Guiding Action By Reasons,' which was presented at the Australasian Association of Philosophy 2009 Conference.

The acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified.<sup>91</sup>

Applied specifically to minimalist liberalism, this supplementary principle would stipulate that individuals are not truly living as they see fit if their preference for that way of life was produced by the very institutional structures legitimised by the preference. A “*Critical Theory Test*” of this kind would ensure individuals do not suffer from “false consciousness” in living as they see fit.<sup>92</sup> More specifically, it would avoid scenarios in which individuals legitimise oppressive institutional structures by choosing to live in accordance with the demands of those institutional structures.

It is tempting to respond to the above critique by noting that a critical theory test will probably not actually help avoid the covert oppression of vulnerable individuals. Sustainable change is unlikely unless oppressive institutional structures are actually illegitimate in the sense that individuals would not choose to live under them. This amounts to cautiously observing that social, political and economic reforms will typically be more easily achieved and are more likely to endure if they are supported by those who are affected by them. As well as being empirically questionable, this response is inadequate because it completely sidesteps the question of whether minimalist liberalism has the conceptual resources to condemn clearly oppressive institutional structures that are chosen by the individuals they oppress.

By way of a direct and more instructive response to the above concerns, minimalist liberalism does not make use of a conceptual device akin to the critical theory test and finds nothing objectionable in institutional structures—even apparently oppressive ones—if they allow individuals to live as they see fit. This means that minimalist liberalism is happy to call covertly oppressive institutional structures (i.e., institutional structures that apparently oppress individuals even though the individuals living under them are living as they see fit)

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<sup>91</sup> Williams, 'Realism and Moralism In Political Theory,' *op. cit.*, p. 6. Cf. B. Williams, *Truth & Truthfulness: An Essay In Genealogy*, Princeton University Press, Princeton, 2002, p. 221 (Chapter 9, §4).

<sup>92</sup> *ibid.*, p. 221 (Chapter 9, §4). & *ibid.*, p. 228 (Chapter 9, §5).

legitimate. As alarming as this claim might appear, two intertwined counter-arguments will now be advanced to show that the minimalist liberal grounds for rejecting the critical theory test and sanctioning covertly oppressive institutional structures are sound.

The first of these counter-arguments is the empirical contention that a scenario of the kind described above is unlikely to eventuate. Simply put, notwithstanding the power of processes of person-hood creation, a profoundly patriarchal and misogynistic society is unlikely to allow women to live as they see fit. To add weight to this claim, it is helpful to make reference to the idea of “intuitive humanism” formulated by Anthony J. Langlois on the basis of fieldwork conducted in Indonesia, Malaysia and Singapore.<sup>93</sup> As Langlois paraphrases the testimony of a women's organisation worker:

Out in the field, women do not know about human rights. They do know, however, that violence is wrong and that they don't want to be battered.

This is not something that needs cognitive justification: *people just know* that being battered is bad for you and thus is wrong.<sup>94</sup>

It is not possible to marshal the inordinate amount of presently unavailable empirical evidence required to fully validate Langlois' theory of intuitive humanism. Nevertheless, it is at least plausible to hold that the process of person-hood creation utilised by a profoundly patriarchal and misogynistic society would not be powerful enough to thoroughly quash the intuitive humanism regularly encountered by the women's organisation worker cited by Langlois. Although the profoundly patriarchal and misogynistic institutional structures might allow some women in this hypothetical society to live as they saw fit, it is unlikely that they would allow all women to do so. As such, minimalist liberalism would in all likelihood deem these institutional structures illegitimate.

To add weight to this admittedly highly speculative claim, consider the reaction of young

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<sup>93</sup> A. J. Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory*, Cambridge University Press, Cambridge, 2001, p. 52 (Chapter 2).

<sup>94</sup> *ibid.*

girls to the practice of female genital mutilation. Martha C. Nussbaum reports Rakia Idrissou, a genital exciser from Togo, as saying:

Girls usually have the procedure between the ages of four and seven. If weak, they are held down by four women; if stronger, they require five women, one to sit on their chests and one for each arm and leg.<sup>95</sup>

This suggests that despite the power of processes of person-hood creation, even young children are unlikely to choose to live under institutional structures that oppress them in particularly severe ways. Given that—notwithstanding the power of processes of person-hood creation—deeply oppressive institutional structures will probably not allow individuals to live as they see fit, minimalist liberalism is unlikely to sanction oppressive institutional structures as legitimate.

In addition to the empirical claim that deeply oppressive institutional structures would not, in all likelihood, allow individuals to live as they see fit, there is a further conceptual counter-argument. The very idea of covert oppression is dubious insofar as it is taken to denote a state of affairs that should not to be tolerated even though those who are apparently oppressed see no problem with it. A standard English dictionary recommends oppression be understood to involve the cruel or unjust exercise of authority or power. Accepting this, it can be argued that there is no sense in labelling institutional structures oppressive if they allow individuals to live as they see fit. Simply put, it is implausible to claim that an institutional structure can cruelly or unjustly exercise authority or power over an individual if the individual does not think it is doing anything of the kind.

Given the numerous different ways of understanding morally loaded terms such as “cruel” and “unjust,” many will likely object that there are manifestly situations in which authority or power is cruelly or unjustly exercised over individuals who themselves support

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<sup>95</sup> M. C. Nussbaum, 'Judging Other Cultures: The Case of Genital Mutilation' in *Sex & Social Justice*, Oxford University Press, Oxford, 1999, pp. 118–129, p. 118.



this exercise of power. To use a historical example, in 1941, Adolf Hitler reiterated Dietrich Eckart's claim that Otto Weininger was the only "good Jew ... [because he] killed himself on the day when he realised that the Jew lives upon the decay of peoples."<sup>96</sup> Accepting—for the purposes of progressing the analysis—Eckart and Hitler's account of why Weininger committed suicide, it might be argued that if Weininger had instead been killed by the National Socialists, he would still have been the victim of oppression. In other words, even if the institutional structure that sanctioned the killing of Jews such as Weininger allowed him to live as he saw fit (i.e., by killing him), he would still have been the victim of oppression.

As complex and troubling as examples of this kind might be, minimalist liberalism can be defended on the grounds that they do not exemplify oppression. This judgement is based on the suspicion that when these kinds of cases are described as examples of oppression, it is typically assumed that *really*—when "really" signifies that an individual's underlying practical commitments are being referred to—Weininger did not want to die because he was a Jew. This is the view that Plato expressed via Socrates when he had him claim that "a man might do what seems fitting to him in a city without ... doing what he really wants."<sup>97</sup> In particular, it can be asked of "a tyrant or an orator who kills or banishes or confiscates property because he believes it to be better for him, and it turns out to be worse," "does he do what he *wants*, if what he does turns out to be bad?"<sup>98</sup> If the above analysis of "really" is correct and Weininger did not in fact want to die because he was a Jew, this objection is just grist to the mill: The institutional structure that sanctions Weininger's killing will in this case be illegitimate according to minimalist liberalism because it can no longer be said to allow Weininger to live as he sees fit.

Although the above may well be true, it might be further objected that even if

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<sup>96</sup> A. Hitler, *Hitler's Table Talk: 1941–1944*, N. Cameron & R. H. Stevens (trans.), Oxford University Press, Oxford, 1988, p. 141 (Part One, §74).

<sup>97</sup> Plato, *Gorgias*, W. Hamilton & C. Emlyn-Jones (trans.), Penguin Books, London, 2004, p. 39 (Part B[2], §468e).

<sup>98</sup> *ibid.*, p. 38 (Part B[2], §468d). In a similar vein, Plato later had Socrates claim that "no one does wrong willingly and ... all wrongdoing is involuntary." See *ibid.*, p. 110 (Part C[9], §509e).

Weininger *really*—when “really” signifies that an individual's underlying practical commitments are being referred to—did want to die because he was a Jew, he would *still* be the victim of oppression. This is to argue that Weininger's practical commitment to being killed because he was a Jew cannot possibly legitimise institutional structures that sanction his killing. As such, the minimalist liberal account of legitimacy is missing a crucial element: It is unable to account for cases in which institutional structures allow individuals to live as they see fit and yet cannot possibly be considered legitimate because of the severe ways in which they oppress individuals.

To further explain this critique without relying on the idealised scenario of the willing victim Weininger, it is instructive to consider the case of “deformed desires” or “adaptive preferences”.<sup>99</sup> According to some feminist theorists, patriarchal societies can inculcate women with desires that “involve deception about what their bearer truly wants, or even what is truly in the bearer's own interest or will promote her welfare.”<sup>100</sup> This is the idea of what Sandra Lee Bartky calls “false needs”:

'False needs' ... are needs which are produced through indoctrination, psychological manipulation, and the denial of autonomy; they are needs whose possession and satisfaction benefit not the subject who has them but a social order whose interest lies in domination.<sup>101</sup>

Although women in a patriarchal society might seek the perpetuation of their subjugation, the idea of deformed desires implies that this aspiration does not reflect what women really want, and therefore cannot be taken to show that a patriarchal society's institutional structures reflect the true preferences of women. Consequently, the idea of deformed desires makes it easy to argue that patriarchal social arrangements should be abolished even if they reflect the

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<sup>99</sup> A. Superson, 'Feminist Moral Psychology,' *Stanford Encyclopedia of Philosophy*, 10<sup>th</sup> July 2012, accessed 22<sup>nd</sup> January 2013, <<http://plato.stanford.edu/entries/feminism-moralpsych/#PsyOpp>>.

<sup>100</sup> *ibid.*

<sup>101</sup> S. L. Bartky, 'Narcissism, Femininity, and Alienation' in *Femininity and Domination: Studies in the Phenomenology of Oppression*, Routledge, New York, 1990, pp. 33–44, p. 42. Cf. *ibid.*, p. 36.

preferences of everyone living under them, including the women they seem to oppress.

Drawing on the idea of deformed desires, the critic of the minimalist liberal account of legitimacy can now claim that there are surely many situations in which the practical commitments of individuals should not be the basis on which institutional structures are deemed legitimate. This is because individuals could find themselves living under institutional structures that reflect their practical commitments and yet also oppress them in severe ways. To use the earlier example of the hypothetical woman born into a profoundly patriarchal and misogynistic society, it would hardly be surprising if this woman was perfectly comfortable with patriarchal and misogynistic institutional structures. Notwithstanding that many women in her situation may reject these institutional structures because of something akin to the intuitive humanism mentioned above, there are likely to be others who fully accept the institutional structures that oppress them. In these cases, the minimalist liberal account of legitimacy will be woefully morally inadequate: It will be left legitimising institutional structures that are oppressive in potentially manifestly brutal ways. Minimalist liberalism therefore needs to be supplemented with a conceptual apparatus similar to the idea of deformed desires that is capable of stipulating that practical commitments that implicate individuals in their own oppression do not confer legitimacy. Without a supplementary principle of this kind, the minimalist liberal account of legitimacy will be caught in the deeply uncomfortable position of legitimising potentially grossly oppressive institutional structures.

The idea of deformed desires and—for want of a better turn of phrase—deformed practical commitments presupposes that certain privileged observers are better placed to judge whether an individual's desires are authentic and whether their practical commitments reflect what they should really be committed to. As we will now see, this is dubious for two key reasons. First, the very notion of deformed practical commitments risks raising more questions than it answers. Second, and perhaps more importantly for liberals, this idea also takes us in the direction of an extremely presumptuous form of paternalism.

All accounts of deformed practical commitments presuppose bold and highly contestable assertions about the privileged positions of certain individuals that allow them to know what others should really be committed to. Not surprisingly, all of these claims are likely to be met with equally forceful counter-claims. For example, the feminist's claim that women should really be committed to being treated as equals is likely to butt up against the ultra-conservative's claim that women should really be committed to being treated in accordance with traditional gender roles. Claiming that one knows what others should really be committed to clearly does not allow one to simply and easily determine that some practical commitments are deformed while others are not. Quite the contrary, it is likely to be just the beginning of long and complex debates about who the privileged adjudicators of practical commitments are and why exactly they are well-positioned to make judgements about what others should really be committed to.

It is also questionable to hold that certain privileged observers are better placed to judge whether an individual's practical commitments reflect what they should really be committed to because it in effect amounts to severely illiberal paternalism. To insist that one knows what an individual should really be committed to irrespective of what they are actually committed to is to effectively deny that individuals should be able to make their own choices about their practical commitments. If a woman insists that she is in fact committed to patriarchal and misogynistic institutional structures and yet one still responds that she should be committed to egalitarian institutional structures, one will have embraced the paternalistic impulse to manage the affairs of others even when they do not seek assistance. Although paternalism of this kind will presumably be motivated by honourable intentions—a desire to free people from oppression—it infantilises the individuals it is aimed at aiding. The patriarchal misogynist is justly condemned when they disrespectfully treat women like children by making decisions for them that are against their wishes. Analogously, the individual who claims that certain women should not be committed to what they are in fact committed to should be condemned for

disrespectfully treating women like children by making decisions for them that are against their wishes.<sup>102</sup> The motivation may be very different in these two cases, and yet in both scenarios women are denied the status of fully fledged agents.

The above objections to the idea of deformed practical commitments strongly suggest that the minimalist liberal account of legitimacy should not use this conceptual tool. However, it is important to acknowledge that this is not because the idea of deformed practical commitments is conceptually confused or empirically incorrect. It is rather because this idea leads in a distinctly illiberal direction. In particular, it makes grand claims about who has privileged insights into what individuals should really be committed to, and on this basis, dismisses the normative weight of what individuals are actually committed to. Although it may not be conceptually confused or empirically incorrect to refer to deformed practical commitments, a liberal theory that takes the commitment to individual liberty seriously should be deeply hesitant to make any claims about legitimacy on the basis of apparently deformed practical commitments. This parallels the concern raised by Christina Hoff Sommers when she criticises some feminists' insistence that women should have different desires:

No intelligent and liberal person ... can accept the idea of a social agenda to "overhaul" the desires of large numbers of people to make them more "authentic."<sup>103</sup>

In short, the above is an argument against the use of deformed practical commitments in a liberal theory rather than an argument against their use in general.

On top of the above argument against using the idea of deformed practical commitments in a liberal account of legitimacy, there is an even stronger case in favour of not modifying minimalist liberalism. One can accept a form of minimalist liberalism that deems some apparently oppressive institutional structures as perfectly legitimate without thereby being

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<sup>102</sup> C. H. Sommers, *Who Stole Feminism?: How Women Have Betrayed Women*, Simon & Schuster, New York, 1994, p. 256 (Chapter 12).

<sup>103</sup> *ibid.*, p. 259 (Chapter 12).

forced to concede that one should be entirely comfortable with these institutional structures. More specifically, one can acknowledge that patriarchal and misogynistic institutional structures that reflect the practical commitments of women are legitimate without also thinking that these women should live in this way. One might accept the legitimacy of these institutional structures while at the same time considering them immoral and seeking to convince women that they should no longer be committed to patriarchal and misogynistic standards. This suggests that it is perfectly possible to maintain that any institutional structure is legitimate if it allows individuals to live as they see fit, and yet also insist that individuals would be better off not living in that way. The thrust of the minimalist liberal account of legitimacy is not to say that legitimate institutional structures should not be criticised at all, it is simply to say that they are legitimate because they allow individuals to live as they see fit. On this account, legitimacy is a threshold test for which institutional structures should be tolerated and not a complete account of the morality of institutional structures.

### **2.5.2. Children and the limits of individual liberty**

Having raised in passing the issue of the treatment of children, it is essential to at least briefly deal with a related concern. All readers who are parents will observe that if the minimalist liberal principle of legitimacy is accepted, familial institutional structures will be deemed profoundly illegitimate. This is simply a function of parenting inevitably involving imposing on individuals (i.e., children) institutional structures that do not allow them to live as they see fit. For this not to be an integral part of parenting, parents would need to be wildly anti-authoritarian or children would need to be exceptionally obliging. Not only are neither of these scenarios likely, the result of the first would be particularly disastrous.

By way of a response, imposing institutional structures that do not allow individuals to live as they see fit can be entirely legitimate in the case of children. So as to avoid introducing

new conceptual tools, this suspension of the minimalist liberal principle of legitimacy can be justified on the basis of this principle itself. Imposing institutional structures that do not allow children to live as they see fit is—at least as regards some matters—an important prerequisite for children becoming the kinds of individuals capable of fully enjoying the benefits of being able to live as they see fit. This is to suggest that if children were free to live as they see fit in all arenas, they would, in all likelihood, seriously compromise their ability to take advantage of being able to live as they see fit later in life. To take just one example, their dietary preferences would likely produce atrocious medium to long-term health outcomes that would significantly shorten their life expectancy and impair their ability to make a host of life choices.

The above line of reasoning parallels the argument for limited welfare rights predicated on the primordial value of “‘negative’ freedom” or “liberty *from*; absence of interference.”<sup>104</sup> The claim is simply that if the freedom from entailed by negative liberty is going to have any value at all, individuals in need must be accorded at least limited welfare rights that will allow them to make good use of their negative liberty. As Shklar observes:

If negative freedom is to have any political significance at all, it must specify at least some of the institutional characteristics of a relatively free regime. Socially that ... means ... the elimination of such forms and degrees of social inequality as expose people to oppressive practices. Otherwise the ‘open doors’ are a metaphor—and not, politically, a very illuminating one at that.<sup>105</sup>

For example, the negative liberty of a profoundly disabled teenager from a terribly impoverished family will have little value unless he or she can claim assistance from society-at-large in the form of an at least limited set of welfare rights. This mirrors Elizabeth S. Anderson’s argument in favour of the ideal of “democratic equality,” which aims at guaranteeing “all law-

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<sup>104</sup> Berlin, ‘Two Concepts of Liberty,’ *op. cit.*, p. 410 (§VII). & *ibid.*, p. 395 (§I).

<sup>105</sup> Shklar, *op. cit.*, p. 156.

abiding citizens effective access to the social conditions of their freedom at all times."<sup>106</sup>

Anderson's point, which minimalist liberalism fully endorses, is that the liberal state needs to guarantee not just the individual's freedom from coercion, but also their enjoyment of "a decent set of freedoms, sufficient for functioning as an equal in society."<sup>107</sup> In practice, this means that an at least limited set of welfare rights must be safeguarded.

The consequence of the above is that just as surely as "the preservation of individual freedom is incompatible with a full satisfaction of our views of distributive justice," a complete lack of resource redistribution is incompatible with the full satisfaction of the liberal's preference for negative liberty.<sup>108</sup> So much so that even though Friedman—a classical liberal economist—did not explicitly rely on the above argument in favour of limited welfare rights, he nevertheless accepted the need for "governmental action to alleviate poverty; to set, as it were, a floor under the standard of life of every person in the community."<sup>109</sup> To be sure, in ensuring that negative liberty has value by guaranteeing limited welfare rights, the negative liberty of some individuals will be restricted in important respects. For example, guaranteeing limited welfare rights will inevitably limit the freedom of individuals and organisations to dispose of their income as they see fit. The simple, although admittedly not uncontroversial, claim is that the loss of negative liberty entailed by increased taxation is justifiable in light of the freedom dividend resulting from disadvantaged individuals being better able to enjoy their negative liberty by means of limited welfare rights.

By way of clarification, the above justification of limited welfare rights does not rest on a distorted understanding of freedom. In particular, it does not erroneously assume that, as John Dewey argued, "liberty ... is power, effective power to do specific things."<sup>110</sup> Just as Montesquieu warned against the confusion of "the power of the people with the freedom of

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<sup>106</sup> E. S. Anderson, 'What Is The Point of Equality?', *Ethics*, vol. 109, no. 2, January 1999, pp. 287–337, p. 289.

<sup>107</sup> *ibid.*, p. 326.

<sup>108</sup> F. A. Hayek, 'Individualism: *True and False*' in *Individualism and Economic Order*, Routledge & Kegan Paul, London, 1949, pp. 1–32, p. 22 (\$6).

<sup>109</sup> Friedman, *Capitalism and Freedom*, *op. cit.*, p. 191 (Chapter XII).

<sup>110</sup> J. Dewey, 'Liberty and Social Control,' *The Social Frontier*, vol. 2, no. 1, November 1935, pp. 41–42, p. 41.



the people," it is crucial to remember that it does not entail a lack of freedom if the profoundly disabled teenager from the terribly impoverished family lacks power.<sup>111</sup> As Hayek argued:

Liberty ... does not assure us of any particular opportunities, but leaves it to us to decide what use we shall make of the circumstances in which we find ourselves.<sup>112</sup>

It should now be clear that rather than questioning the extent to which the profoundly disabled teenager from a terribly impoverished family is free, the claim is only that the *value* of their freedom will be negligible unless limited welfare rights are guaranteed. If the value of this teenager's freedom can be dramatically increased by means of a comparatively small limitation on the freedom of others, then, as even classical liberal economists like Friedman agree, it is appropriate to institute a system of limited welfare rights.

The object of fundamental value in the above arguments for parental control of children and limited welfare rights is the freedom of the individual to live as they see fit. However, the value of freedom is used to justify, in the first instance, restrictions on freedom, and in the second instance, the limited welfare rights that make possible the enjoyment of the fruits of freedom. Given the cursory nature of these arguments, it would be naïve to presume to have demonstrated beyond doubt that all clear-headed liberals must hold that the advancement of individual liberty demands that individual liberty be restricted in the ways suggested. The forgoing is simply a tentative proposal for what is arguably the most consistently liberal configuration of what might be called the calculus of liberty.

Some liberals will no doubt forcefully object to the way in which the calculus of liberty is tabulated in the above argument. Consequently, there is no expectation that all concerns will have been put to rest with the brief account offered. However, if one rejects the calculus of liberty proposed above, intellectual honesty demands that one not deceive oneself into thinking

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<sup>111</sup> Montesquieu, *De L'Esprit Des Lois: Tome I, op. cit.*, p. 324 (Seconde Partie, Livre Onzième, Chapitre II).

<sup>112</sup> Hayek, *The Constitution of Liberty: The Definitive Edition, op. cit.*, p. 70 (Chapter One, §6). Cf. *ibid*, p. 61 (Chapter One, §1).

that one need not offer a calculus of one's own. All forms of liberalism, irrespective of how austere they might be, must trade liberty for liberty. This is simply a function of a point Hayek ruefully acknowledged: "To prevent people from coercing each other is to coerce them," and therefore "coercion can only be reduced or made less harmful but not entirely eliminated."<sup>113</sup> The successful operation of all political systems, even liberal ones that seek to maximise the extent to which individuals are free to live as they see fit, is predicated on sacrificing a quantum of liberty. Insofar as one is a liberal, one must therefore determine the point at which liberty should be restricted so as to achieve a more valuable liberty dividend. Although the way in which the calculus of liberty is tabulated here will not satisfy all liberals, the hope is that it is at least *prima facie* plausible to those who seek to structure liberty trade-offs so as to maximise the extent to which individuals are free to live as they see fit.

In conclusion, minimalist liberalism does not risk sanctioning covertly oppressive institutional structures as legitimate and is able to accommodate cases (e.g., children) in which it is legitimate for institutional structures to not allow individuals to live as they see fit.

## 2.6. Conclusion

This chapter articulated and defended the minimalist liberal principle of legitimacy that serves as the basis of the minimalist liberal theory of federalism. In advancing this minimalist conception of liberalism, four key claims have been made:

1. minimalist liberalism's rejection of pre-political measures of legitimacy suggests that it is a thoroughly political species of liberalism, while

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<sup>113</sup> F. A. Hayek, 'Freedom and Coercion: Some Comments and Mr. Hamowy's Criticism,' *The New Individualist Review*, vol. 1, no. 2, Summer 1961, pp. 28–30, p. 28. Cf. *ibid.*, p. 30.

political species of liberalism are best placed to do justice to the fact of pluralism;

2. the minimalist character of minimalist liberalism means that it is a liberal threshold test of legitimacy rather than a more demanding liberal theory of justice;
3. minimalist liberalism holds that legitimacy is a measure of whether individuals are able to live as they see fit; and
4. minimalist liberalism does not sanction oppressive institutional structures as legitimate and can account for cases in which it is legitimate to *not* allow individuals to live as they see fit.

In short, by holding that legitimacy is a measure of whether individuals are able to live as they see fit, minimalist liberalism carries forward the liberal project of doing justice to the fact of pluralism.

# Chapter 3: The Minimalist Liberal Theory of Federalism

## 3.1. Introduction

Before detailing the minimalist liberal theory of federalism, it is essential to determine its scope and position it within the existing landscape of liberal theories of federalism. Although this chapter will analyse and critique competing liberal theories of federalism, it is important to bear in mind that it will not engage with the liberal theories of federalism that are broadly critical of federalism. Analysis of this kind will be reserved for the fifth and final chapter that responds to liberal theorists, such as Riker, who have been generally sceptical of the merits of federalism. With that caveat in mind, this third chapter frames the minimalist liberal theory of federalism by making four key claims:

1. the minimalist liberal theory of federalism builds on existing liberal theories of federalism by directly connecting federalism's many strengths to the liberal project of doing justice to the fact of pluralism;
2. the minimalist liberal theory of federalism expands and extends many of the specific claims made by competing liberal theories of federalism;
3. federalism is not a panacea and is best seen as a powerful constitutional tool for allowing individuals to live as they see fit; and
4. even in societies that do not contain national and cultural divisions, federalism is a powerful constitutional tool for allowing individuals to live as they see fit.

The general thrust of this chapter is that the minimalist liberal theory of federalism is simultaneously more ambitious than competing liberal theories of federalism and

appropriately cautious. The attempt to tie federalism's various different virtues together in a general liberal theory of federalism makes the minimalist liberal theory of federalism more ambitious. At the same time, this theory of federalism is appropriately cautious because it recognises that there are limits on what federal constitutional structures can achieve. In short, the minimalist liberal theory of federalism advances a forceful defence of federalism without overlooking federalism's real world weaknesses.

### **3.2. Competing Liberal Theories of Federalism**

Before advancing the minimalist liberal theory of federalism, it is crucial to survey competing liberal theories of federalism. The analysis is restricted to competing liberal theories of federalism because—the real merits of non-liberal theories of federalism notwithstanding—the goal of this thesis is the relatively modest one of demonstrating that there is a strong affinity between federalism and liberalism, and that this connection is at its strongest in the minimalist liberal theory of federalism. Although the minimalist liberal theory of federalism is advocated over competing liberal theories of federalism, these competing liberal theories are certainly not rejected root and branch. As will become clear as the argument progresses, the minimalist liberal theory of federalism draws on the arguments made by competing liberal theories of federalism regarding federalism's various virtues. Indeed, the minimalist liberal theory of federalism's aim is to build on these competing liberal theories by connecting federalism's many strengths to the overarching liberal project of doing justice to the fact of pluralism.

Despite building on competing liberal theories of federalism, it is worth cautioning that there is a relatively small number of such theories for the minimalist liberal theory of federalism to draw upon. This is because—notwithstanding some honourable exceptions—

many competing liberal theories of federalism are, as the next section shows, under-theorised. Indeed, some competing liberal quasi-theories of federalism consist in little more than bold rhetorical flourishes about the advantages of federalism. Typical of this tendency are Elazar's grand—and yet unsubstantiated—claims that “federalism ... embodies a world-view” and that it is “a classic value concept, like democracy.”<sup>1</sup> As incomplete as liberal quasi-theories of federalism like this may be, there is much to be gained from examining other more substantive competing liberal theories of federalism.

### 3.2.1. Complementary liberal theories of federalism

As the analysis of competing liberal theories of federalism advances, it will be noted that the theories discussed are exclusively contemporary. This is certainly not because no older liberal theories of federalism exist. From approximately the 18<sup>th</sup> century onwards, influential and broadly liberal theories of federalism have been advanced by diverse figures in the canon of liberal thinkers.<sup>2</sup> In the 18<sup>th</sup> century, US founding fathers Hamilton, Madison and John Jay defended federalism on the grounds that it preserves the autonomy of constituent units, while at the same time providing a general government to ensure peace and stability among constituent units and collectively protect them from external threats.<sup>3</sup> In the 19<sup>th</sup> century, prominent liberal theorists, such as Proudhon and Dalberg-Acton, forcefully advocated in favour of federalism on classically liberal grounds. While Proudhon argued that federalism—with its combination of a central government and semi-autonomous states—provides the best balance of authority and freedom, Dalberg-Acton emphasised the way in which federalism's

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<sup>1</sup> Elazar, *Exploring Federalism*, *op. cit.*, pp. 28–29 (Chapter 1).

<sup>2</sup> There are also much older partially liberal theories of federalism that subsequent liberal theories of federalism built on. Althusius' theory of federalism—referred to in Chapter 1—is just one particularly prominent example. See Althusius, *op. cit.* However, given that the older partially liberal theories of federalism can only be considered liberal in a very loose sense, and were in any case analysed in Chapter 1, this section is focussed squarely on the properly liberal and more recent liberal theories of federalism.

<sup>3</sup> Hamilton, 'The Federalist No. 9,' *op. cit.*, p. 35.

constitutional division of sovereignty enhances democratic self-government.<sup>4</sup> Given other important contributions from notable liberals, such as Montesquieu, Calhoun and Tocqueville, there is no doubt that the history of liberal arguments in favour of federalism is long and rather grand.<sup>5</sup>

Even the above sketch of the historical crossover between liberal and federal theory—severely truncated as it is—makes clear that the connection between liberalism and federalism has been established for centuries. Despite this, these historical liberal arguments in favour of federalism do not feature in the survey of competing liberal theories of federalism because they are in broad terms consistent with the minimalist liberal theory of federalism. Despite significant divergences in overall positions (e.g., it would be fruitless and misleading to reinterpret Proudhon as a minimalist liberal), the minimalist liberal theory of federalism draws heavily on the many different broadly liberal arguments in favour of federalism found in the liberal canon. Indeed, one of the chief innovations of the minimalist liberal theory of federalism is to borrow these traditional liberal arguments in favour of federalism and tie them to the underlying liberal commitment to allowing individuals to live as they see fit. That is to say that it is because of federalism's various strengths identified by the many liberal theorists of federalism that it is such a powerful constitutional tool for allowing individuals to live as they see fit.

The historical liberal theories of federalism are primarily cited in chapters four and five (i.e., the chapters in which the minimalist liberal theory of federalism is advanced and defended). This is because these historical liberal theories of federalism make many of the

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<sup>4</sup> See Proudhon, *Du Principe Fédératif et De La Nécessité De Reconstituer Le Parti De La Révolution*, *op. cit.*, p. 114 (Chapitre VIII), *ibid.*, p. 123 (Chapitre VIII), Dalberg-Acton, 'Sir Erskine May's "Democracy In Europe"', *op. cit.*, p. 163. & Dalberg-Acton, 'Nationality' *op. cit.*, p. 173.

<sup>5</sup> See Montesquieu, *De L'Esprit Des Lois: Tome I*, *op. cit.*, Montesquieu, *De L'Esprit Des Lois: Tome I*, *op. cit.*, Tocqueville, *op. cit.*, Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., *Messenger*],' *op. cit.*, Calhoun, 'A Discourse On The Constitution and Government of The United States,' *op. cit.*, Calhoun, 'Speech On The Introduction of His Resolutions On The Slave Question [February 19, 1847],' *op. cit.* & J. C. Calhoun, 'A Disquisition On Government' in *A Disquisition On Government and Selections From The Discourse*, C. G. Post (ed.), Hackett Publishing Company, Indianapolis, 1995, pp. 1–81.

claims—albeit diffusely—that are woven together in the minimalist liberal theory of federalism. By contrast, the examination of competing liberal theories of federalism in this section is focused on analysing and critiquing contemporary liberal theories of federalism because of the way in which they diverge in substantial ways from the minimalist liberal theory of federalism. As will soon become apparent, whereas the minimalist liberal theory of federalism advocates federalism directly on the basis of the liberal project of doing justice to the fact of pluralism and thereby allowing individuals to live as they see fit, many contemporary liberal theories of federalism either primarily focus on other facets of federalism or make the connection between federalism and individual liberty in an indirect and sometimes obtuse way.

### **3.2.2. Federalism and identity**

Helder de Schutter's "federalism-as-fairness" theory is a recent and important contribution to liberal debates about federalism.<sup>6</sup> Schutter's broadly liberal theory of federalism begins with the phenomenon of shared state-wide identities and diverse sub-state identities. According to Schutter, the existence of both shared and particular identities speaks strongly in favour of federalism because "federalism allows for the institutional expression of both sub-state and state-wide identities."<sup>7</sup> More specifically, federalism makes it possible for state-wide identities to receive institutional expression in the central government, while also allowing sub-state identities to receive institutional expression in the constituent units. This means that federalism can solve a problem that unitary states cannot effectively overcome: "Political recognition of national-cultural identities is an important good" and yet it is

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<sup>6</sup> H. de Schutter, 'Federalism As Fairness,' *The Journal of Political Philosophy*, vol. 19, no. 2, June 2011, pp. 167–189, p. 184 (§VI). Cf. *ibid.*, p. 182 (§V).

<sup>7</sup> *ibid.*



impossible for the unitary state to remain “politically neutral towards such identities.”<sup>8</sup> By showing how federalism allows for the institutional expression of diverse national and cultural identities, Schutter's federalism-as-fairness theory provides a strong case for federalism being “the best way to realize equal treatment” for divergent sub-state identities.<sup>9</sup>

Schutter's federalism-as-fairness theory provides a powerful liberal rationale for federalism. A unitary state with strong protections for individual liberties in the form of, for example, a bill of rights can certainly ensure individuals are able to maintain and express their identities. However, unitary states suffer a crucial limit on the extent to which individuals can express their identities. Insofar as one central government has jurisdiction over the vast majority of areas of public policy in unitary states, they will not be able to accommodate the institutional expression of significantly divergent sub-state identities. By contrast, with their constitutionally enshrined constituent unit autonomy, federal systems will be able to accommodate the institutional expression of significantly divergent sub-state identities at the constituent unit level, while at the same time allowing for the institutional expression of state-wide identities at the level of the central government. Although the central government's jurisdiction will limit the number of policy arenas in which divergent sub-state identities receive institutional expression, the very existence of constitutionally enshrined constituent unit autonomy means federal systems have a natural advantage over unitary states in situations where there are both sub-state and state-wide identities seeking institutional expression.

Schutter's federalism-as-fairness theory certainly identifies an important strength of federal systems. However, the minimalist liberal theory of federalism is arguably superior as a *general* liberal theory of federalism. In addition to encompassing Schutter's identity-based argument for federalism, the minimalist liberal theory points to a broader liberal reason for

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<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

favouring federalism. By exclusively focusing on identity, Schutter's federalism-as-fairness theory is blind to important arenas of divergence and convergence among individuals that can be taken into account if instead the more expansive notion of individuals being able to live as they see fit is used. Indeed, Schutter's identity-based theory of federalism arguably just draws attention to a specific application of the key federal strength identified by the minimalist liberal theory of federalism. Divergence and convergence with respect to identity is just one instance of divergence and convergence with respect to the ways in which individuals seek to live as they see fit. As such, Schutter's federalism-as-fairness theory can be subsumed under the minimalist liberal idea that federalism is a powerful constitutional tool for allowing individuals to live as they see fit: Schutter correctly identifies just one specific way in which federalism is a powerful constitutional tool for allowing individuals to live as they see fit (i.e., federalism makes it possible for state-wide identities to receive institutional expression in the central government, while also allowing sub-state identities to receive institutional expression in the constituent units). By advocating federalism on the general grounds that it is a powerful constitutional tool for allowing individuals to live as they see fit—irrespective of whether individuals living as they see fit relates to the institutional expression of their identities—the minimalist liberal theory of federalism can more fully capture the extent to which the liberal project of doing justice to the fact of pluralism lends itself to a defence of federalism.

Less significant than the above limitation of Schutter's identity-based theory of federalism, but nonetheless worth noting, is that it only really counts in favour of federalism when there are divergent sub-state identities of a particular kind. In a state in which there are no territorially delineated sub-state identities occupying regions that could easily become constituent units, there would be no grounds for federalism on Schutter's account. This is because a federal system would not have an advantage over a unitary system as regards the institutional expression of sub-state identities in such a scenario (i.e., there would be no national minorities whose identities could easily receive institutional expression in the

constituent units). By contrast, the minimalist liberal theory of federalism would constitute an argument in favour of federalism if there were differences in political preferences between regions that could easily become constituent units but no sub-state identities. This suggests that minimalist liberalism provides a stronger liberal theory of federalism than Schutter's theory because it highlights federalism's ability to allow individuals to live as they see fit even when there are no divergent sub-state identities. Schutter's federalism-as-fairness theory is an important contribution to the attempt to formulate a liberal theory of federalism because it puts one of the key advantages of federalism for liberals in stark relief: Federalism is able to effectively facilitate the institutional expression of sub-state identities. Despite this obvious strength, Schutter's federalism-as-fairness theory is arguably too narrow to constitute a satisfactory general liberal theory of federalism.

At this point, Schutter could reasonably respond that it was never his intention to provide a general liberal theory of federalism. Indeed, the aim may have always been far more modest. Although this is an entirely reasonable point to make, it misconstrues the thrust of the above argument: The key claim is not that Schutter's theory of federalism should be rejected because it is wanting; it is rather that the minimalist liberal theory of federalism is preferable if the goal is to devise a general liberal theory of federalism. In other words, rather than Schutter's particular defence of federalism being in some way inadequate, the minimalist liberal theory of federalism simply offers a broader and more far-reaching liberal case for federalism.

The forgoing suffices to show that the minimalist liberal theory of federalism is not blind to issues of cultural and political identity. Although identity does not form a core component of this theory of federalism—as it does in Schutter's federalism-as-fairness theory—the minimalist liberal theory of federalism has all the conceptual tools necessary to adequately account for various different kinds of identity claims, including cultural and political identity claims. Indeed, this is precisely the implication of suggesting that Schutter's identity-

based rationale for federalism can be seen as just an applied instance of the minimalist liberal principle of legitimacy. The idea that institutional structures should allow individuals to live as they see fit implies that they should allow for the institutional expression of all forms of identities to the greatest extent possible. For example, as indicated in Chapter 2, Section 2.4.1., although minimalist liberalism would justify the federalisation of the Sri Lankan state on the grounds that so doing would allow individuals to live as they saw fit, this in effect amounts to a justification of the institutional expression of the identity claims of Sri Lanka's different ethnic groups. In short, through its overriding commitment to doing justice to the fact of pluralism and thereby allowing individuals to live as they see fit, minimalist liberalism justifies the institutional expression of identities.

### **3.2.3. Federalism from a Rawlsian perspective I**

Owing to Rawls' stature among contemporary liberal theorists, it stands to reason that there have been important specifically Rawlsian attempts to map out liberal theories of federalism. Equally, however, given the generally limited amount of contemporary liberal theorising about federalism, it is hardly surprising that the Rawlsian family of theories of federalism is remarkably small. In fact, it has just two notable members: Norman's "theory of overlapping-consensus federalism" and Loren A. King's original position-based argument.<sup>10</sup> Rather than attempting to massage Rawls' general account of political liberalism or his theory of justice into liberal theories of federalism, both Norman and King rightly focus their respective analyses on particular elements of the Rawlsian framework. By sensibly borrowing specific Rawlsian devices, Norman and King persuasively show that different elements of Rawlsian liberalism strongly count in favour of federalism.

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<sup>10</sup> Norman, 'Towards A Philosophy of Federalism,' *op. cit.*, p. 95. & L. A. King, 'The Federal Structure of A Republic of Reasons,' *Political Theory*, vol. 33, no. 5, October 2005, pp. 629–653.

Turning first to the overlapping consensus theory of federalism, Norman writes:

The most suitable basis for a just and stable federal union will ... be some form of overlapping consensus that demands more of federal partners and their citizens than a *modus vivendi*, but less than a comprehensive, monolithic conception of shared identity and citizenship.<sup>11</sup>

The first and most obvious element of Norman's justification of the overlapping consensus theory of federalism is the need for a certain degree of fellow feeling for federal systems to function. Norman puts this rationale for an overlapping consensus-based form of federalism in strong terms when he writes:

Without some moral or quasi-moral bond between federating polities ... one side or the other will quickly sour of the relationship when short- to medium-term considerations suggest that it could be doing better out of the federation.<sup>12</sup>

According to Norman, a federation must be more than a mere *modus vivendi* to which groups of individuals in the constituent units are parties so as to serve their particular ends. This is because unless there is a "moral or quasi-moral bond or commitment to the federation and its citizens; call it fellow-feeling, solidarity or a pan-national or federal identity," "the federation will become unstable whenever shifting conditions make it no longer in the perceived self-interest of one or more member nations."<sup>13</sup>

Although the above implies that a stable federal system requires a pan-federal overlapping consensus, this overlapping consensus need not be comprehensive. This is consistent with the way in which federalism constitutionally enshrines the autonomy of the constituent units: One of the key considerations in favour of federalism is precisely that it allows groups of individuals to pool governance in areas of public policy that are of mutual

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<sup>11</sup> Norman, 'Towards A Philosophy of Federalism,' *op. cit.*, p. 88.

<sup>12</sup> *ibid.*, p. 86.

<sup>13</sup> Norman, 'The Morality of Federalism and The European Union,' *op. cit.*, p. 207.

concern, while at the same time leaving other areas of public policy in the hands of the constituent units. Consequently, as Norman observes, it would be unreasonable to expect federalism's moral bond or identity to be "'comprehensive,' that is, the same for the citizens of all member nations."<sup>14</sup> In short, Norman's overlapping consensus theory of federalism highlights both the homogeneity that federal systems require and the heterogeneity that they accommodate.

As well as being an account of federal stability, Norman's overlapping consensus theory of federalism provides a strong liberal rationale for federalism: It highlights the way in which federalism can both reflect areas of consensus while also accommodating dissensus. As Norman observes, just as it provides a stable basis for common government where it is sought, federalism's overlapping consensus preserves the liberal commitment to diversity because it "can be adopted by people with differing comprehensive doctrines and justified varyingly, according to those same doctrines."<sup>15</sup> This suggests that overlapping consensus federalism is eminently liberal because it provides common government on matters of common agreement without overriding particularities.<sup>16</sup> To put this point in more obviously liberal terms, overlapping consensus federalism advances the liberal project of doing justice to the fact of pluralism because it means common government reflects areas of consensus among different groups of individuals, while also ensuring that these groups have the freedom to live as they see fit in the arenas in which there is dissensus.

Norman's overlapping consensus theory of federalism offers a persuasive account of federalism's central strength. However, although this theory of federalism is amenable to being moulded into a strong liberal rationale for federalism, Norman does not dwell explicitly on the connection between the general liberal project of doing justice to the fact of pluralism and the way in which federalism accommodates diversity within the framework of common

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<sup>14</sup> *ibid.*

<sup>15</sup> Norman, 'Towards A Philosophy of Federalism,' *op. cit.*, p. 87.

<sup>16</sup> *Cf. ibid.*

government. This is not to claim that Norman's overlapping consensus theory of federalism contains serious oversights. As was observed in relation to Schmitter's theory of federalism, this is not a critique of Norman's theory *per se*. It is rather to suggest that his theory can be extended by exploring how the strengths of overlapping consensus federalism lend weight to a general liberal theory of federalism that place emphasis squarely on the liberal project of doing justice to the fact of pluralism and allowing individuals to live as they see fit.

By offering a general liberal rationale for federalism, the minimalist liberal theory of federalism takes forward some of the key elements of Norman's overlapping consensus theory of federalism (i.e., the emphasis on federalism's combination of unity and diversity). However, the minimalist liberal theory of federalism is not simply the overlapping consensus theory of federalism dressed in slightly different garb. Rather, it builds on Norman's overlapping consensus theory by showing how federalism's key strength lends itself to a powerful and specifically liberal argument in favour of federalism: Federalism's ability to reflect both areas of consensus and dissensus effectively allows individuals to live as they see fit because it accommodates diversity when individuals seek different institutional structures, while also preserving a common way of life when individuals seek the same institutional structures. Consequently, although the minimalist liberal theory of federalism shares some of the basic normative building blocks with the first member of the Rawlsian family of liberal theories of federalism, it builds a more general liberal theory of federalism with individual liberty and the project of doing justice to the fact of pluralism at its core.

#### **3.2.4. Federalism from a Rawlsian perspective II**

Turning to the second member of the Rawlsian family of theories of federalism, King

claims that “the Rawlsian state will be federal.”<sup>17</sup> King makes this bold assertion on the basis of a connection he draws between the Rawlsian device of the original position and federalism. In particular, he argues:

Parties in an original position ... would favor federal arrangements that satisfactorily secure the fair worth of their liberties and tend to be more rather than less responsive to their reasonable values and interests, even if they are in a clear minority.<sup>18</sup>

King's argument draws attention to the way in which federalism both protects negative liberty and promotes democratic accountability. Simply put, “a democracy consistent with (Rawlsian) political liberalism will be federal” because federalism is able to increase the political influence of individuals over the legislative processes that affect them and guarantee the freedom of groups of individuals by constitutionally dividing sovereignty between the central government and the constituent units.<sup>19</sup> In practice, each individual is able to exert proportionally more influence over political decisions at the constituent unit level, while groups of individuals are able to live as they see fit in the constituent units. Federalism's ability to increase the political influence of individuals and protect their freedom means that Rawlsian actors in the original position would choose this model for a variety of situations. As King observes:

The institutions that follow from application of the Rawlsian framework will be federal ... whether we are concerned with regional governance, legitimate rule in divided societies, or the contours of a just global order.<sup>20</sup>

Although King's liberal theory of federalism has a narrow beginning (i.e., the Rawlsian device of the original position), it develops into a general rationale for federalism.

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<sup>17</sup> King, 'The Federal Structure of A Republic of Reasons,' *op. cit.*, p. 648.

<sup>18</sup> *ibid.*, p. 649. *Cf. ibid.*, p. 631. & *ibid.*, pp. 639–640.

<sup>19</sup> *ibid.*, p. 631.

<sup>20</sup> *ibid.*



King offers a plausible Rawlsian case for federalism that points to some of federalism's most noteworthy strengths. Indeed, despite not relying on the Rawlsian device of the original position, the minimalist liberal theory of federalism—like King's theory—centres on the way in which federal systems promote democratic accountability and protect negative liberty. Having only been explained in the most cursory terms here, these aspects of federalism will be explored in much greater detail in the next chapter. For the moment, it suffices to note that the shared emphasis on federalism's promotion of democratic accountability and protection of negative liberty means that there is a great deal of common ground between the minimalist liberal theory of federalism and King's original position-based argument.

Not only is King right to draw attention to federalism's promotion of democratic accountability and protection of negative liberty, but his argument that individuals in the original position would opt for a federal system is particularly powerful if it is assumed that there is a chance they will be members of a geographically concentrated minority. Federalism's ability to provide geographically concentrated national minorities with constitutionally enshrined autonomy in the constituent units would lead individuals to favour federal systems if they adopted a conservative minimax strategy—the strategy of minimising the possible loss in the worst outcome. In this scenario, individuals would not know whether they were going to be members of the national majority or minority, which would lend itself to choosing a federal arrangement that minimised the costs of being part of the national minority. To be sure, individuals in the original position might opt for a system of government that protected minority rights without providing geographically concentrated national minorities with constitutionally enshrined autonomy. However, given that minorities often demand political autonomy as well as the protection of their rights, a conservative minimax strategy would arguably still lead to a preference for federalism as well as a preference for the protection of minority rights.

The above alone makes King's Rawlsian theory of federalism an important contribution

to attempts to formulate a liberal theory of federalism. The influence of Rawlsian versions of liberalism over contemporary political theory only adds to the value of King's argument. Indeed, this significant and ongoing Rawlsian influence makes King's specifically Rawlsian defence of federalism a noteworthy intervention in the debate about the nature of liberalism and the systems of government it justifies.

The manifest strengths of King's Rawlsian theory of federalism acknowledged, it is also arguably deficient as a general liberal theory of federalism. Although King makes reference to federalism's promotion of democratic accountability and protection of negative liberty, his primary focus is the way in which these features of federalism play out given the highly idealised device of the original position. Without entering into a debate as to the plausibility of Rawls' original position scenario, the key problem is that King largely glosses over the crucially important question of precisely how federal systems promote democratic accountability and protect negative liberty. In other words, he sidesteps the question of the specific features of federalism that apparently make it so appealing to individuals in the original position.

As with the above critiques of Schutter's and Norman's liberal theories of federalism, this is not an objection to King's argument *per se*. It is simply to say that by fleshing out the details of the arguments that underlie King's Rawlsian theory of federalism, the minimalist liberal theory of federalism is able to offer a more complete liberal theory of federalism. King's original position-based argument for federalism is doubtless of significant academic interest because it persuasively finds a novel application for the Rawlsian device of the original position. What is more, King's Rawlsian theory of federalism is arguably not under-theorised because his aim was presumably not to provide a precise account of the way in which federal systems protect negative liberty and promote democratic accountability; the goal was rather to highlight how these features lend themselves to a Rawlsian defence of federalism. As such, without suggesting that King's theory of federalism should be rejected, the minimalist liberal theory of federalism proposes to supplement it by providing concrete details of the ways in

which federalism promotes democratic accountability and protects negative liberty.

As indicated, the minimalist liberal theory of federalism certainly does not rest on a wholesale rejection of competing liberal theories of federalism. Indeed, this theory of federalism draws on the arguments made by competing liberal theories of federalism regarding federalism's strengths. Although the minimalist liberal theory of federalism is advocated over competing liberal theories on the grounds that it offers a more complete general liberal theory of federalism that can duly emphasise the liberal project of doing justice to the fact of pluralism and thereby allowing individuals to live as they see fit, the aim is to build on competing theories rather than rebut them.

### **3.3. Federalism, Democracy & Freedom**

The theories of federalism considered in the previous section are each substantial liberal attempts to provide grounds for favouring federal arrangements. Although, as has been observed, they have limitations that arguably prevent them from being general liberal theories of federalism, they are persuasive as limited liberal arguments for federalism. Testament to this, as the minimalist liberal theory of federalism is explained in detail in Chapter 4, it will become obvious that it incorporates many elements of the competing liberal theories of federalism considered thus far. Notwithstanding these serious attempts to advance liberal theories of federalism, other recent liberal claims about the virtues of federalism are underdeveloped. Although the minimalist liberal theory of federalism echoes many of them, albeit often in modified forms, they are frequently formulated in unpersuasive ways.

### 3.3.1. Federalism and democracy

Buchanan, Vincent Ostrom and Weinstock argue that federalism promotes democratic accountability because electors are able to exert greater political influence over the legislative processes that affect them as a result of each elector's vote competing with fewer votes at the constituent unit level.<sup>21</sup> Although the minimalist liberal theory of federalism advances the same claim, the arguments offered by Buchanan, Ostrom and Weinstock are at best inchoate.<sup>22</sup> In the case of Buchanan, the number of electors posited at the constituent unit level is implausibly small (i.e., 100).<sup>23</sup> This gives the misleading impression that individual electors exert far more political influence than they actually do in most, if not all, real world examples of federalism. Deceptive numbers are absent from Weinstock's presentation of the argument. However, he advances such a superficial version of it that it is not at all persuasive.<sup>24</sup> For his part, Ostrom rightly claims that "[c]itizens in a highly federalized political system will be able to exercise greater voice in the conduct of public affairs."<sup>25</sup> Unfortunately, his admittedly correct assertion is not accompanied by justificatory arguments. J. Roland Pennock broadly makes the same argument about the connection between federalism and democratic accountability. Despite this, he is not critiqued in this section because—as becomes clear when his argument is unpacked in Section 4.4.2., Chapter 4—his account of this connection is much more sophisticated.<sup>26</sup>

Numerous commentators, including Kincaid, Walker and Weinstock, have also

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<sup>21</sup> See J. M. Buchanan, 'Federalism and Individual Sovereignty,' *Cato Journal*, vol. 15, nos. 2–3, Fall 1995/Winter 1996, pp. 259–268, p. 262.; V. Ostrom, 'Can Federalism Make A Difference?,' *Publius: The Journal of Federalism*, vol. 3, no. 2, Autumn 1973, pp. 197–237, p. 229 (§VI). & Weinstock, *op. cit.*, p. 77.

<sup>22</sup> The same faults that can be attributed to these treatments of the argument can be found in Geoffrey de Q. Walker's version. See G. de Q. Walker, 'Ten Advantages of A Federal Constitution,' *Policy*, vol. 16, no. 4, Summer 2000–2001, pp. 35–41, p. 37.

<sup>23</sup> See Buchanan, 'Federalism and Individual Sovereignty,' *op. cit.*, p. 262.

<sup>24</sup> See Weinstock, *op. cit.*, p. 77.

<sup>25</sup> Ostrom, *op. cit.*, p. 229 (§VI). Cf. 'Gregory v. Ashcroft,' *U.S. Supreme Court*, 501 U.S. 452 (1991), no. 90–50, viewed on the 7<sup>th</sup> January 2011, <<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=501&invol=452>>.

<sup>26</sup> J. R. Pennock, 'Federal and Unitary Government—Disharmony and Frustration,' *Behavioral Science*, vol. 4, no. 2, April 1959, pp. 147–157, pp. 148–149.

suggested that federalism promotes democratic accountability because it increases the political influence of electors by increasing the number of opportunities they have to express their political preferences via the ballot box. For example, although electors may only have the opportunity to express their political preferences once every four years in a unitary system, they will have the opportunity to express their political preferences twice every four years in a federal system.<sup>27</sup> Simply put, whereas—discounting local government—electors only elect representatives to one level of government in a unitary system, they elect representatives to at least two levels of government in a federal system.

Despite having the appearance of a strength, political theorists are wrong to invest so much importance in the regularity with which electors are able to express their political preferences in federal systems. Electors express their political preferences more frequently in federal systems, and yet they only express their political preferences with respect to a limited range of areas of public policy each time (i.e., those areas of public policy under the jurisdiction of the level of government experiencing electoral renewal). Let us assume that a federal system provides electors with opportunities A and B to express their political preferences, while a unitary system only provides them with opportunity A\*. Let us further assume that there are 10 crucially important areas of public policy on which electors seek to express their political preferences. At opportunity A in the federal system, electors express their political preferences with respect to three crucially important areas of public policy, and at opportunity B, they express their political preferences with respect to seven. At opportunity A\* in the unitary system, electors express their political preferences with respect to all 10 crucially important areas of public policy. Assuming that opportunities A, B and A\* arise every four years, it follows that electors express their political preferences with respect to 10

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<sup>27</sup> Cf. Kincaid, 'Economic Policy-Making: Advantages and Disadvantages of The Federal Model,' *op. cit.*, p. 88., Kincaid, 'Federalism: The Highest Stage of Democracy?,' *op. cit.* p. 114., J. Kincaid, 'Values and Value Tradeoffs In Federalism,' *Publius: The Journal of Federalism*, vol. 25, no. 2, Spring 1995, pp. 29–44, p. 36., Walker, *op. cit.*, p. 36. & Weinstock, *op. cit.*, p. 77.

crucially important areas of public policy every four years in both the federal system and the unitary system. In other words, the way in which the federal system provides electors with more opportunities to express their political preferences than the unitary system in no way increases the political influence of electors over legislative processes and so does not give the federal system an advantage when it comes to promoting democratic accountability.

At the less sophisticated end of the spectrum, some defenders of federalism have made claims about the connection between federalism and democracy that are accompanied by essentially no argumentation whatsoever. For example, although Elazar maintains that “[c]onceived in the broadest sense ... [f]ederalism must be considered a 'mother' form of democracy like parliamentary democracy or direct democracy,” his account of the link between federalism and democracy is at best perfunctory.<sup>28</sup> Equally unpersuasive are Dimitris N. Chrysochoou's claim that “[i]t is ... possible to consider federalism as a particular type of democracy,” and Sidgwick's contention that “the development of democratic thought and sentiment, so far as it favours liberty and self-government, tends in favour of federality.”<sup>29</sup> These vague pronouncements regarding the connection between federalism and democracy do not even provide us with the basic building blocks of a liberal theory of federalism. Consequently, when the minimalist liberal theory of federalism highlights the connection between federalism and democracy, it significantly expands on the often simplistic way in which this link is presented.

### 3.3.2. Federalism and freedom

It would be, to say the least, grossly naïve to simply assume that unitary systems are

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<sup>28</sup> Elazar, 'Federalism,' *op. cit.*, p. 475.

<sup>29</sup> D. N. Chrysochoou, 'Federalism and Democracy Reconsidered,' *Regional & Federal Studies*, vol. 8, no. 2, Summer 1998, pp. 1–20, p.18. & Sidgwick, *The Elements of Politics*, *op. cit.*, p. 544 (Part II, Chapter XXVI, §5). Without providing any justification at all, Chrysochoou asserts that “the relationship between federalism and democracy is the same that exists between liberalism and individual freedom.” See Chrysochoou, *op. cit.*

likely to produce oppression by their very nature and that, by contrast, “[t]he central interest of true federalism in all its species is liberty.”<sup>30</sup> Just as surely as “the abstract assertion that federalism is a guarantee of freedom is undoubtedly false,” “federalism cannot be defended successfully on the grounds that the inevitable tendency of a unitary state is toward political repression.”<sup>31</sup> Despite this, many political theorists advance arguments about the link between federalism and liberty that display little more sophistication. For example, Weinstock claims:

Every government is a threat to individual liberty, and ... [so] the proliferation of levels of government and the counterweights so created ... favour ... liberty<sup>32</sup>

The problem with arguments of this kind is that there is no reason to think that the proliferation of levels of government that can counter-act each other will in fact minimise government's potential threat to liberty. As Levy rightly points out: “Political bodies do not automatically counterbalance, and political elites are far from averse to cartelization.”<sup>33</sup> The apparently obvious fact that bureaucrats and politicians in each level of government can collude with those in the other level means that this liberty argument is a particularly weak defence of federalism. Just as problematic is Tocqueville's claim:

Given that the sovereignty of the Union is frustrated and incomplete, the use of this sovereignty is not in the slightest bit dangerous for liberty.<sup>34</sup>

The limited sovereignty of the central government in federal systems admittedly means that it is less of a danger to liberty than the government in a unitary system. However, it can certainly be a threat to liberty in its sphere of jurisdiction.

These and other similar freedom-based arguments for federalism broadly make the

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<sup>30</sup> Elazar, *Exploring Federalism*, *op. cit.*, p. 91 (Chapter 3).

<sup>31</sup> W. H. Riker, *Federalism: Origin, Operation, Significance*, Little, Brown and Company, Boston, 1964, p. 145 (Chapter 6, §I). & F. L. Neumann, 'Federalism and Freedom: A Critique' in *Federalism: Mature and Emergent*, A. W. MacMahon (ed.), Russell & Russell, New York, 1962, pp. 44–57, p. 54 (§VI).

<sup>32</sup> Weinstock, *op. cit.*, p. 76. Cf. 'Gregory v. Ashcroft,' *op. cit.*, Buchanan, 'Federalism and Individual Sovereignty,' *op. cit.*, p. 259., *ibid.*, p. 261., Riker, 'Federalism,' *op. cit.*, p. 616., Walker, *op. cit.*, p. 37. & *ibid.*, p. 41.

<sup>33</sup> Levy, 'Federalism, Liberalism, and The Separation of Loyalties,' *op. cit.*, pp. 468–469.

<sup>34</sup> Tocqueville, *op. cit.*, p. 251 (Première Partie, Chapitre VIII).

same claim that the minimalist liberal theory of federalism makes about federalism and freedom: By constitutionally guaranteeing constituent unit autonomy, federalism is a powerful tool for protecting negative liberty.<sup>35</sup> However, the rudimentary form that these arguments take means that the minimalist liberal theory of federalism must supplement them with a significantly more sophisticated exploration of the connection between freedom and federalism.

Notwithstanding some serious but rare attempts to advance liberal theories of federalism, many other liberal arguments about the virtues of federalism are quite crude. Although the minimalist liberal theory of federalism builds on these liberal claims about federalism's virtues, the ways in which these arguments have been presented by various liberal advocates of federalism are deeply unpersuasive. As such, despite building on pre-existing literature that highlights the general connection between liberalism and federalism, the minimalist liberal theory of federalism still has much substantive work to do.

### **3.4. Two Delimitations**

As forceful as it might be, the minimalist liberal argument for federalism is not unqualified. It shies away from boldly asserting that only federalism can solve the most acute political problems or that federalism is a panacea. What is more, it acknowledges that federalism is a powerful constitutional tool for allowing individuals to live as they see fit and not an assured means of achieving this outcome.

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<sup>35</sup> As a much more nuanced freedom-based argument for federalism, Levy's valuable exploration of the relationship between federalism and freedom is a key influence on the argument in Chapter 4. See Levy, 'Federalism, Liberalism, and The Separation of Loyalties,' *op. cit.*, p. 463. & J. T. Levy, 'Federalism and The Old and New Liberalisms,' *Social Philosophy and Policy*, vol. 24, no. 1, January 2007, pp. 306–326, p. 320 (\$IV).



### 3.4.1. Federalism is not a panacea

In advancing a minimalist liberal theory of federalism, the goal is, at least in part, to compensate for the noticeable lack of attention political theorists devote to federalism.<sup>36</sup> Be that as it may, it is important to stress that the minimalist liberal theory of federalism is far from a panegyric in honour of federalism. Indeed, it fully acknowledges that federalism is neither the sole means of solving some of the most acute political problems, nor a panacea.<sup>37</sup>

As great as federalism's virtues might be, Robert Schuman's claim that "a European Federation [is] indispensable to the preservation of peace" was likely the product of the traumatic European experience of World War II rather than an accurate reading of political realities.<sup>38</sup> Without denying that the EU has, in all likelihood, significantly reduced the chance of war between member states, it is quite easy to conceive of possible worlds in which the EU does not exist and yet there are no wars between current EU member states. As it happens, the federal, or at least quasi-federal, EU has almost certainly been an important factor in solidifying peaceful relations in Europe. Nevertheless, the same result could have been achieved by other means: For example, the establishment of a free trade zone between European states and the fostering of pan-European solidarity could well have been enough to avoid war on the European continent, even in the absence of the federal structure of the EU. Without considering other historical examples, the point is simply that there are alternative solutions to even extremely challenging political problems that seem to require federalism.

Given that there are some political problems that federalism is simply incapable of overcoming, it is equally not a panacea. To illustrate this point, it suffices to consider one

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<sup>36</sup> Cf. Norman, 'Towards A Philosophy of Federalism,' *op. cit.*, p. 97., Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, *op. cit.*, p. 82 (Chapter 3, §3.3). & Wolin, 'Foreword,' *op. cit.*, p. vii.

<sup>37</sup> Cf. King, *op. cit.*, p. 146 (Part Three, Chapter 12). & Watts, *Comparing Federal Systems*, *op. cit.*, p. 191 (Chapter 14, §14.1).

<sup>38</sup> R. Schuman, 'La Déclaration Du 9 Mai 1950' in *Pour L'Europe*, Les Éditions Nagel, Paris, 1963, pp. 197–209, p. 203.

simple example: Although, as argued in the next chapter, federalism promotes democratic accountability, it will be much less effective at improving the democratic accountability of institutional structures for a national minority if that minority is either too small to form a majority in a constituent unit (e.g., Zoroastrians in Pakistan) or geographically dispersed (e.g., African Americans in the United States).<sup>39</sup> This result is hardly surprising given that, as Norman rightly observes, “for the problem of minority rights, federalism is not enough.”<sup>40</sup>

The above example makes it abundantly clear that federalism alone cannot ensure that individuals are able to live as they see fit. To overcome problems that federalism is incapable of solving, such as the vulnerability of minorities that do not form majorities in constituent units, federalism will need to be supplemented with additional constitutional tools, such as, for example, what Arend Lijphart calls “‘consociational’ democracy.”<sup>41</sup> Consociational democracy is a system of government in which there is power sharing, group autonomy, proportional representation, and minority veto.<sup>42</sup> Despite its very real benefits, it is essential to bear in mind that consociational democracy is itself not a panacea. The problem for a non-territorial approach to decentralisation, such as consociational democracy, is that many of the most important areas of public policy have an unavoidable territorial component.<sup>43</sup> It might be possible to provide greater autonomy to a minority in a consociational democracy by giving them control over, for example, family law (i.e., there would be two parallel bodies of family

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<sup>39</sup> Cf. H. Kriesi & A. H. Trechsel, *The Politics of Switzerland: Continuity and Change In A Consensus Democracy*, Cambridge University Press, Cambridge, 2008, p. 42 (Chapter 3, §3.5)., Norman, 'The Morality of Federalism and The European Union,' *op. cit.*, p. 205. & Weinstock, *op. cit.*, p. 79. Section 5.2. of Chapter 5 will explore the broader issue raised by these examples: Federalism risks creating new minorities in the constituent units that might not have been vulnerable in a unitary system.

<sup>40</sup> Norman, 'The Morality of Federalism and The European Union,' *op. cit.*, p. 205.

<sup>41</sup> A. Lijphart, 'Constitutional Design For Divided Societies,' *The Journal of Democracy*, vol. 15, no. 2, April 2004, pp. 96–109, p. 97.

<sup>42</sup> Lijphart, *op. cit.*, p. 97 & p. 107. By way of a brief critique to proportional representation, there are benefits associated with having members of parliament represent specific regions. For example, parliamentarians who represent electorates rather than quotas of electors may be less likely to act on behalf of centralised party machines because they will need to remain sensitive to the preferences of the electors in the region they represent. Nevertheless, as Dalberg-Acton rightly pointed out: “Proportional representation ... is profoundly democratic, for it increases the influence of thousands who would otherwise have no voice in the government; and it brings men more near an equality by so contriving that no vote shall be wasted, and that every voter shall contribute to bring into Parliament a member of his own opinions.” See Dalberg-Acton, 'Sir Erskine May's "Democracy In Europe";' *op. cit.*, p. 163.

<sup>43</sup> See Filippov, Ordeshook & Shvetsova, *op. cit.*, p. 8 (Chapter 1, §1.2).

law). However, it would equally be infeasible to accord them greater autonomy regarding the appropriate balance between spending on law enforcement, health care and education given that it would be fiscally and institutionally impractical to offer duplicates of these services. As such, even the most enthusiastic consociational democrat needs to accept that, as Levy notes, “[a]lthough some elements of law and regulation can be conducted on a nonterritorial basis, most cannot.”<sup>44</sup>

Interestingly, the limitations and strengths of federalism and consociational democracy seem to sit in an inverted relationship: Federalism can decentralise the areas of public policy that have a territorial basis and consociational democracy cannot, consociational democracy can effectively safeguard the interests of territorially dispersed minorities and federalism cannot, etc. Although it is beyond the scope of the current argument, in light of the above, it may well be beneficial to establish federalism and consociational democracy in tandem. Leaving this tentative proposal to one side, the key point is that the minimalist liberal theory of federalism fully acknowledges that federalism will need to be supplemented with additional constitutional tools for allowing individuals to live as they see fit in some cases. In short, just as surely as federalism is not the only means of solving certain political problems, it is not an effective solution to all political problems.

### **3.4.2. Federalism as a constitutional tool**

The Introduction stressed that the minimalist liberal theory of federalism only goes so far as to claim that federalism is a powerful constitutional tool for allowing individuals to live as they see fit. This way of conceiving of the rationale for federalism has important consequences for the scope of the minimalist liberal theory of federalism. Rather than a blanket defence of all examples of federalism, the minimalist liberal theory of federalism is rather more modest. In

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<sup>44</sup> Levy, 'Federalism, Liberalism, and The Separation of Loyalties,' *op. cit.*, p. 473.

particular, it accepts that a system of government will not be able to allow individuals to live as they see fit just by virtue of being federal. Instead, federalism is simply a constitutional tool—one that can be used and misused—for allowing individuals to live as they see fit.

Like other constitutional tools that can be used to allow individuals to live as they see fit, such as parliamentary democracy, bills of rights, divisions of power between the different branches of government, etc., federalism is imperfect. Although a division of power is on balance a beneficial constitutional tool if the goal is to protect individual liberty, a division of power may actually limit the freedom of individuals to live as they see fit if power is given to illiberal institutions that would otherwise not have power. For example, dividing power by creating a second house of parliament may actually limit the freedom of individuals to live as they see fit if the upper house's membership is unelected and unrepresentative of society-at-large. Just as defenders of the division of power must take into account possibilities of this kind, the minimalist liberal theory of federalism acknowledges that federalism will not advance the cause of individual liberty at all times. Federalism might, for example, give groups of individuals the freedom to deny others their freedom. A case in point is the United States before the abolishment of the Jim Crow laws: In simple terms, federalism allowed Southerners of European background to deny African American Southerners their freedom. The general problem posed by cases like this (i.e., federalism risks creating new vulnerable minorities in the constituent units that might not be in compromised positions in a unitary system) will be explored in greater detail in Section 5.2. of Chapter 5. At this point, it suffices to note that the implication of the many possible examples of this kind is that although the minimalist liberal theory of federalism advocates federalism as a powerful constitutional tool for allowing individuals to live as they see fit, it does not shy away from admitting that this tool will not always safeguard freedom.

To fully see how the minimalist liberal theory of federalism is consistent with the basic insight that federalism is an imperfect constitutional tool for allowing individuals to live as they

see fit, we need only consider a simple question: Do federal systems allow individuals to live as they see fit irrespective of the form they take (e.g., a despotic federation would still allow individuals to live as they saw fit)?<sup>45</sup> By way of an indirect answer to this question, S. Rufus Davis is correct when he writes:

We cannot infer that a political system by virtue of being 'federal' *is* or *is not* likely to be (by comparison with a unitary or any other system) strong or weak in war; adaptive or maladaptive in crisis; flexible or rigid, fast or slow, in constitutional adjustment; potent or impotent in satisfying 'living' demands; conservative or progressive in its politics; legalistic or political in resolving its conflicts; efficient or inefficient in the provision and delivery of its basic services; faithful or faithless to the pursuit of liberty; 'ecumenical' or 'parochial' in intergovernmental relations; centralist or decentralist in disposition; etc.<sup>46</sup>

Whether any given federal system has one or the other of these characteristics will depend on a wide range of factors that are largely independent of the constitutional division of sovereignty that makes it federal. In other words, it is not possible to infer that a particular system of government will of necessity have any specific virtues or vices from the simple fact that it meets the necessary and sufficient conditions of federalism. If the general question of which systems of government are best able to allow individuals to live as they see fit is asked, the only plausible response is, to borrow Levy's words: "What arrangement of power and authority will generate the most just political outcomes is a contingent matter."<sup>47</sup> By extension, there is no guarantee that any given federal system will be an effective tool for allowing individuals to live

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<sup>45</sup> Granted that this is a relatively unimportant hypothetical example, it is still worth noting that a truly despotic system of government could arguably not also be a federation. It is hard, if not thoroughly impossible, to reconcile the constitutional division of sovereignty between levels of government, which is an essential characteristic of all federations, with the attribution of sovereignty to one individual (i.e., the despot), which is an essential characteristic of despotic systems of government. Cf. Riker, 'Federalism,' *op. cit.*, p. 616.

<sup>46</sup> S. R. Davis, *The Federal Principle: A Journey Through Time In Quest of A Meaning*, University of California Press, Berkeley, 1978, p. 209 (Chapter 7). Cf. *ibid.*, p. 210 (Chapter 7).

<sup>47</sup> Levy, 'Federalism and The Old and New Liberalisms,' *op. cit.*, p. 320 (§IV).

as they see fit.

Although even the most committed federalist must accept that little can be said *a priori* about the advantages of federalism, it nevertheless sells federalism short to accept Davis' conclusion:

We should *not* expect to profit from the pursuit of such comparative questions as: Do federal systems produce a higher rate of citizen participation in decision-making than unitary states?<sup>48</sup>

To be sure, the governance outcomes of any given federal system will be a function of a host of political, social, cultural, economic, environmental, geographical, etc., factors that are largely unrelated to its constitutional division of sovereignty. This, however, does not entail that, as Riker claimed, "federalism ... is a fiction."<sup>49</sup> Although, as Ute Wachendorfer-Schmidt rightly points out, "[b]eing an institution, or more precisely a system of rules that structure the courses of action that a set of actors may choose ... federalism does not determine the outcome," federalism does contribute in significant ways to the outcome.<sup>50</sup> A constitutional division of sovereignty is not immaterial to the governance outcomes produced by a system of government. To name just a few relevant differences, federalism means that revising constitutions is more difficult, that not all areas of public policy are decided upon by the national majority, and that individuals are able to exert greater political influence over the areas of public policy under the jurisdiction of their constituent units. Owing to the impossibility of comparing a given federal system with its identical non-federal counterpart and *vice versa*, we cannot determine the exact net effect of a system of government being federal. Be that as it may, the above examples indicate that the net effect will not be negligible, much less non-existent. In short, although federalism will not determine in all respects the

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<sup>48</sup> Davis, *op. cit.*, pp. 209–210 (Chapter 7).

<sup>49</sup> W. H. Riker, 'Review Article: Six Books In Search of A Subject Or Does Federalism Exist and Does It Matter?,' *Comparative Politics*, vol. 2, no. 1, October 1969, pp. 135–146, p. 146 (§IV).

<sup>50</sup> U. Wachendorfer-Schmidt, 'Conclusion' in *Federalism and Political Performance*, U. Wachendorfer-Schmidt (ed.), Routledge, London, 2000, pp. 243–249, p. 246.

governance outcomes produced by a system of government, it is equally deeply misleading to claim that “federalism is no more than a constitutional legal fiction which can be given whatever content seems appropriate at the moment.”<sup>51</sup>

The implication of the above is that just as we cannot be sure that any given federal system will allow individuals to live as they see fit, federalism is not a blank slate that produces whatever governance outcomes the broader political, social, cultural, economic, environmental, geographical, etc., factors facilitate. Indeed, the crux of the minimalist liberal theory of federalism is that federalism's constitutional division of sovereignty is a powerful tool for allowing individuals to live as they see fit. Although this tool is certainly not used in all instances to increase the extent to which individuals are free to live as they see fit, it is able to do just that in unique ways when effectively employed.

In conclusion, the minimalist liberal theory of federalism does not naively suggest that a given federal system—irrespective of its other features and the broader political, social, cultural, economic, environmental, geographical, etc., factors—will allow individuals to live as they see fit simply by virtue of its federal character. Rather, the claim defended in this thesis is much more modest: Like other liberal constitutional devices, federalism has the necessary features to make it a powerful tool for allowing individuals to live as they see fit.

As indicated, the minimalist liberal theory of federalism has two important delimitations. First, it accepts that federalism is neither the only means of solving certain political problems, nor an effective solution to all political problems. Second, it acknowledges that federalism is only a powerful constitutional tool for allowing individuals to live as they see fit and not an assured means of achieving this outcome. These delimitations suggest that as well as being an unapologetically forceful liberal defence of federalism, the minimalist liberal

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<sup>51</sup> Riker, 'Review Article: Six Books In Search of A Subject Or Does Federalism Exist and Does It Matter?', *op. cit.*, p. 146 (§IV).

theory of federalism is appropriately cautious in its claims.

### 3.5. Dispelling Two Delimitations

Having highlighted two respects in which the minimalist liberal theory of federalism is suitably modest, it is equally important to explore two crucial delimitations that do *not* apply to this theory. Although much emphasis is typically placed on how federalism can help govern culturally or nationally divided societies, the minimalist liberal theory of federalism holds that the rationale for federalism is still strong even in the absence of stark national and cultural divisions. Equally, the minimalist liberal theory of federalism maintains that federalism is a powerful constitutional tool for allowing individuals to live as they see fit despite many real world examples of federalism restricting negative liberty and undermining democratic accountability.

#### 3.5.1. Federalism and nationalism

Weinstock is arguably right to observe that:

One of the strongest arguments for federal restructuring [in unitary systems] is the presence of national and cultural divisions, particularly when they are based on relatively natural territorial delineations.<sup>52</sup>

In other words, federalism's constitutionally enshrined constituent unit autonomy will allow individuals to live as they see fit in the most obvious ways in societies with clear national and cultural distinctions that reflect territorial divisions. For example, federalism would be a

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<sup>52</sup> Weinstock, *op. cit.*, p. 79. Cf. Kriesi & Trechsel, *op. cit.*, p. 42 (Chapter 3, §3.5). & Norman, 'The Morality of Federalism and The European Union,' *op. cit.*, p. 205.



particularly powerful constitutional tool for allowing individuals to live as they see fit in Sri Lanka given the obvious territorial divide between Sri Lanka's Hindu Tamils in the north and the Buddhist Sinhalese in the south. Be this as it may, the minimalist liberal theory of federalism holds that federalism is a powerful constitutional tool for allowing individuals to live as they see fit even in the absence of stark territorially delineated national and cultural divisions.<sup>53</sup> This brings us to the first delimitation that needs to be dispelled: The minimalist liberal theory of federalism serves to justify both "*territorial* and *multinational* models of federalism."<sup>54</sup> On the one hand, it serves as an argument for, as Norman describes it:

Multinational federations [that] are intended 'to accommodate the desire of national minorities for self-government,' principally by creating a province (or provinces) in which one or more minority groups can constitute a clear majority of the citizens and in which they can exercise a number of sovereign powers.<sup>55</sup>

At the same time, it also serves as an argument for what he calls:

Territorial federation[s] ... [that are] conceived of as ... 'means by which a single national community can divide and diffuse power,' perhaps accommodating a certain amount of socio-economic diversity at the same time.<sup>56</sup>

Even in a state that is not riven by stark territorially delineated national and cultural divisions, federalism is an effective constitutional tool for allowing individuals to live as they see fit because a high degree of diversity among the ways in which individuals seek to live need not solely be the result of national and cultural divisions. To consider just one example, economic distinctions have been some of the most important differences between the ways in

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<sup>53</sup> Cf. Buchanan, 'Federalism and Individual Sovereignty,' *op. cit.*, p. 263.

<sup>54</sup> Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, *op. cit.*, p. 87 (Chapter 3, §3.4).

<sup>55</sup> *ibid.*, pp. 87–88 (Chapter 3, §3.4).

<sup>56</sup> *ibid.*, p. 88 (Chapter 3, §3.4).

which individuals have sought to live in the modern era. From the extent of taxation to the scope of redistribution programs, individuals have wanted to order economic life in vastly different ways. Examples like this suggest that even if a society is culturally and nationally homogeneous, federalism may still be a powerful constitutional tool for allowing individuals to live as they see fit. Federalism can give control over, for example, certain elements of economic policy to the constituent units (e.g., consumer protection, the levels of various different taxes, the scope of state service provision in a host of critical arenas, such as healthcare and education, etc.), thereby allowing these groups of individuals to live as they see fit in these arenas.

For a system of government to allow individuals to live as they see fit, it will need to allow individuals to live as they see fit with respect to matters political, economic, moral, etc. The diversity of practical commitments found even within national and cultural groups (e.g., the great diversity of practical commitments regarding gay marriage in the United States) is testament to the significance of these non-national and non-cultural differences between the ways in which individuals seek to live.<sup>57</sup> By constitutionally guaranteeing the autonomy of constituent units in a host of critical policy arenas, federalism is able to go some of the way towards allowing individuals to live as they see fit with respect to these various political, economic, moral, etc., matters. As such, federalism will be a powerful tool for allowing individuals to live as they see fit even in the absence of stark territorially delineated national and cultural divisions.

### **3.5.2. Federalism in practice**

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<sup>57</sup> Some may object to this claim on the grounds that the different positions on the issue of gay marriage are indicative of a significant cultural cleavage. This objection is, however, only coherent on a particularly thin conception of culture. In this context, a far thicker notion of culture that denotes a fairly clearly defined set of beliefs, practices and practical commitments is being used.

The claim that federalism is a powerful constitutional tool for allowing individuals to live as they see fit is likely to raise challenging empirical questions. Do past and present federal systems bear out this claim? Or are there as many examples of federalism restricting the freedom of individuals to live as they see fit as there are examples of federalism expanding this freedom? The suspicion behind questions like these suggests that although federalism allows individuals to live as they see fit in minimalist liberalism's idealised theoretical model, it is doubtful whether there is empirical evidence to substantiate the minimalist liberal theory of federalism.

Chapter 4 argues that federalism is a powerful constitutional tool for allowing individuals to live as they see fit because of the way in which it protects negative liberty and promotes democratic accountability. Nevertheless, it might be claimed that this abstract defence of federalism ignores the test of experience: Federalism often actually restricts negative liberty and undermines democratic accountability. With respect to negative liberty, the argument might be that although the creation of constituent units protects the negative liberty of national minorities, it also produces new minorities in the constituent units whose negative liberty is put at risk. The way in which the protection of the negative liberty of the Southern States of the United States restricted the negative liberty of African Americans is a particularly striking historical case in point. Regarding the promotion of democratic accountability, Robin Boadway and Anwar Shah observe that because the glare of the media is typically directed at the federal government, the lower levels of government are actually less democratically accountable to their denizens.<sup>58</sup> Although federalism might increase the political influence of individuals over the legislative processes that affect them given that each individual vote

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<sup>58</sup> R. Boadway & A. Shah, *Fiscal Federalism: Principles and Practices of Multiorder Governance*, Cambridge University Press, Cambridge, 2009, p. 130 (Part One, Chapter 3). This specific concern is not addressed in what follows. Nevertheless, by way of a tentative response, it is worth considering Kincaid's point that because "elected regional and local officials in a federation are more likely to be tied to and held accountable to regional and local voters and taxpayers rather than to distant national officials, they might be held to a stricter regimen of propriety and accountability than would be the case without autonomy." See Kincaid, 'Federalism: The Highest Stage of Democracy?,' *op. cit.*, p. 98.

competes with fewer votes in the constituent units, it might equally undermine democratic accountability by diluting the level of media scrutiny directed at government. These and similar critiques of federalism will be explored in greater detail in the fifth and final chapter. For the moment, the key issue is the *prima facie* doubt they cast on the empirical basis of minimalist liberalism's bold defence of federalism.

There are three points that need to be made in response to objections of this kind. The first is that determining whether federalism protects negative liberty and promotes democratic accountability by looking at the track record of past and present federal systems is fraught with difficulties. No two systems of government are operating in identical political, social, cultural, economic, environmental, geographical, etc., circumstances. The consequence of this is that it is not possible to determine the net effect of systems of government when states are compared. As such, a particular federal system may not protect negative liberty and promote democratic accountability without thereby implying that federalism in general does not protect negative liberty and promote democratic accountability. This is because of the fairly obvious possibility that a particular federal system's failure to protect negative liberty and promote democratic accountability is due to political, social, cultural, economic, environmental, geographical, etc., factors that are not a product of the system of government being federal.

It is commonsensical to endorse Hamilton and Madison's empiricist principle that "[e]xperience is the oracle of truth."<sup>59</sup> However, the importance of political, social, cultural, economic, environmental, geographical, etc., variables means that simply comparing the performance of past and present federal systems will not satisfactorily answer the question of whether federalism is able to protect negative liberty and promote democratic accountability. As such, Jan-Erik Lane and Svante Ersson do not undermine the minimalist liberal theory of federalism when they conclude:

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<sup>59</sup> A. Hamilton & J. Madison, 'The Federalist No. 20' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed), Cambridge University Press, Cambridge, 2006, pp. 89–93, p. 93.

Democratic stability is fostered by other institutions and factors than federalism [and that] ... federalism does not constitute [sic] a genuine positive for democracy.<sup>60</sup>

Although Lane and Ersson marshal an impressive amount of data, it is not possible to have a firm sense of whether federalism promotes democratic accountability unless we also know what would have become of the examples of federalism on which their analysis is based if they had not taken the federal form. In the absence of such counterfactual knowledge, the conclusion must be at best tentative. The same applies, *mutatis mutandis*, to the relationship between negative liberty and federalism.

The second point is that the modesty of the minimalist liberal theory of federalism means that it is consistent with federalism restricting negative liberty and undermining democratic accountability in some cases. The minimalist liberal theory of federalism only goes so far as to claim that federalism is a powerful constitutional tool for protecting negative liberty and promoting democratic accountability. The upshot of this is that federalism has the capacity to protect negative liberty and promote democratic accountability without necessarily always doing either. In short, the minimalist liberal theory of federalism defends federalism without succumbing to the unempirical temptation of claiming that federal systems will always have certain predetermined virtues.

The third point is that examining the history of federalism and looking at extant federal systems yields results that are at least consistent with the claim that federalism is a powerful constitutional tool for allowing individuals to live as they see fit. To be sure, as noted above, considering past and present federal systems will not allow us to firmly determine whether federalism is a powerful constitutional tool for allowing individuals to live as they see fit.

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<sup>60</sup> J.-E. Lane & S. Ersson, 'The Riddle of Federalism: Does Federalism Impact On Democracy?,' *Democratization*, vol. 12, no. 2, April 2005, pp. 163–182, p. 179. Lane and Ersson go on to argue that "[o]ther institutions such as for instance the legal system (Ombudsman) or the executive (parliamentarism) or the electoral system (proportional [sic] representation, for instance) matter more positively for democracy ... federalism has no or little positive impact on the cross-country variation in constitutional democracy, generally speaking." See *ibid*

Nevertheless, the real world experiences of federal systems suggest a strong correlation between the federal form and the protection of negative liberty and promotion of democratic accountability that is at least consistent with the minimalist liberal theory of federalism.

The only two states in the world that have remained largely liberal and democratic since the 1700s—Switzerland and the United States—are also both federations.<sup>61</sup> In addition, four of the seven states that have remained largely liberal and democratic since 1901 are federations.<sup>62</sup> Political, social, cultural, economic, environmental, geographical, etc., factors have undoubtedly played important roles in this correlation between federalism and liberal democracy.<sup>63</sup> For example, it would be disingenuous to ignore Switzerland's neutrality and the United States' distance from belligerent powers, such as imperial and Nazi Germany, tsarist and communist Russia, and imperial Japan, when determining the significance of the historical correlation between federalism and liberal democracy in these countries. Be this as it may, this correlation between federalism and liberal democracy is undoubtedly striking.

The above historical evidence is in step with recent statistical analyses conducted by Kincaid:

Empirically, federal polities compare well with nonfederal systems on democracy and rights protection, although in close competition with decentralized unitary systems, but better than other systems on quality of life.<sup>64</sup>

Kincaid goes on to point out:

Federalism might very well be the highest stage of democracy. Although, on average, the world's federal polities perform no better than the

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<sup>61</sup> M. W. Doyle, 'Kant and Liberal Internationalism' in *Toward Perpetual Peace and Other Writings On Politics, Peace, and History*, I. Kant, P. Kleingeld (ed.), D. L. Colclasure (trans.), Yale University Press, New Haven, 2006, pp. 201–242, p. 208–213.

<sup>62</sup> *ibid.*

<sup>63</sup> As Tocqueville noted with respect to the United States: "The great happiness of the United States is not to have found a federal constitution that allows them to engage in great wars, but to be so situated that there are none for them to fear." Tocqueville, *op. cit.*, p. 261 (Première Partie, Chapitre VIII).

<sup>64</sup> Kincaid, 'Federalism: The Highest Stage of Democracy?,' *op. cit.*, p. 93.

world's decentralized unitary polities on democracy, freedom, and rights protection, the federal polities achieve this performance under more adverse conditions than decentralized unitary polities, namely, much larger population, larger territorial size, and greater cultural heterogeneity. At the same time, federal polities outperform all other political systems by having the lowest level of corruption, highest level of economic freedom, highest GDP per capita, highest human-development score, and longest citizen life expectancy.<sup>65</sup>

Although these results should be viewed with the same sceptical eye as Lane and Ersson's evidence purportedly showing that federalism does not enhance democracy, they at least suggest that the minimalist liberal theory of federalism is not wildly at odds with the test of experience.

As indicated, there are two crucial delimitations that do not apply to the minimalist liberal theory of federalism. In the first instance, this theory holds that the rationale for federalism is still strong even in the absence of stark territorially delineated national and cultural divisions. Put simply, federalism is a powerful constitutional tool for allowing individuals to live as they see fit in the absence of divisions of this kind because they do not exhaust the important respects in which individuals seek to live as they see fit. In the second instance, the minimalist liberal theory of federalism maintains that examples of federal systems that restrict negative liberty and undermine democratic accountability do not show that federalism is not a powerful constitutional tool for allowing individuals to live as they see fit. Not only are there many examples of federal systems that protect negative liberty and promote

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<sup>65</sup> *ibid.*, p. 106. It is of additional interest that, as Wachendorfer-Schmidt notes, "federalism ... tends to be associated with a smaller government (including smaller volumes of income distribution), and improved macro-economic outcomes, such as higher rates of economic growth and reduced inflationary pressures." See Wachendorfer-Schmidt, *op. cit.*, p. 243.

democratic accountability, but the poor outcomes of particular federal systems do not discredit federalism in general.

### 3.6. Conclusion

This chapter has explored the state of liberal theorising about federalism and indicated what is at stake in putting forward the minimalist liberal theory of federalism. In framing this theory of federalism, four key claims have been made:

1. the minimalist liberal theory of federalism builds on existing liberal theories of federalism by directly connecting federalism's many strengths to the liberal project of doing justice to the fact of pluralism;
2. the minimalist liberal theory of federalism expands and extends many of the specific claims made by competing liberal theories of federalism;
3. federalism is not a panacea and is best seen as a powerful constitutional tool for allowing individuals to live as they see fit; and
4. even in societies that do not contain national and cultural divisions, federalism is a powerful constitutional tool for allowing individuals to live as they see fit.

This chapter's two principal conclusions are that the minimalist liberal theory of federalism is simultaneously more ambitious than competing liberal theories of federalism and appropriately cautious. By tying federalism's various different strengths together in a general account of how federal systems can advance the liberal project of doing justice to the fact of pluralism, the minimalist liberal theory of federalism is more ambitious than competing liberal theories of federalism. At the same time, this theory is appropriately cautious because it recognises that there are limits on what federal constitutional structures can achieve. In short,



the minimalist liberal theory of federalism advances a general and forceful defence of federalism that is not so enthusiastic as to overlook federalism's real world weaknesses.

# Chapter 4: Negative Liberty & Democratic Accountability

## 4.1. Introduction

As Chapter 2 argued, minimalist liberalism carries forward the liberal project of doing justice to the fact of pluralism by placing no limits on individuals living as they see fit, bar the requirement that this not infringe on the freedom of others to live as they see fit. The consequence of this is that the legitimacy of institutional structures is a function of the extent to which they allow individuals to live as they see fit. This forms the basis of the minimalist liberal theory of federalism because, as this chapter aims to show, the way in which federalism protects negative liberty and promotes democratic accountability makes it a powerful constitutional tool for allowing individuals to live as they see fit.

To show that federalism is indeed a powerful constitutional tool for allowing individuals to live as they see fit, this chapter makes four key claims:

1. federalism is able to protect negative liberty because it leaves groups of individuals free to live as they see fit as regards the areas of public policy under the jurisdiction of their constituent units;
2. federalism is able to promote democratic accountability because by creating a common central government, it gives individuals political influence over legislative processes that impinge on their liberty but which would otherwise be beyond their influence;
3. federalism is able to promote democratic accountability because it increases—both by electoral and extra-electoral means—the political

influence of individuals over the legislative processes that affect them;  
and

4. federalism promotes democratic accountability because horizontal intergovernmental competition between constituent units means they have an incentive to implement public policy that accords with the political preferences of individuals.

In short, federalism's ability to protect negative liberty and promote democratic accountability makes it a powerful constitutional tool for allowing individuals to live as they see fit.

## 4.2. Federalism & Negative Liberty

According to Gray:

The fact of pluralism is not the trivial and banal truth that individuals hold to different personal ideals. It is the coexistence of different ways of life. Conventional liberal thought contrives to misunderstand this fact, because it takes for granted a consensus on liberal values.<sup>1</sup>

Notwithstanding the differences between Gray's liberalism and minimalist liberalism, the explanation and defence of minimalist liberalism in Chapter 2 suggests that Gray is right to argue that "[t]here is no one regime[, liberal or otherwise,] that can reasonably be imposed on all."<sup>2</sup> In minimalist liberalism's hands, this understanding of legitimacy means that institutional structures ought to vary with changes in individual preferences. To put the point in more

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<sup>1</sup> Gray, *op. cit.*, p. 13 (Chapter 1).

<sup>2</sup> *ibid.*, p. 67 (Chapter 2). If a wide global overlapping consensus existed, an institutional structure could obviously be universally instituted in a legitimate manner. Be this as it may, Gray's claim holds: Insofar as this institutional structure reflected the substance of the overlapping consensus among all individuals, it would *ipso facto* not be imposed. Although Gray's *modus vivendi* liberalism is distinct from minimalist liberalism, these conceptions of liberalism share a fundamental commitment to not imposing institutional structures on individuals.

poetic terms, minimalist liberalism endorses Dante's contention that "nations, kingdoms and cities have characteristics of their own, which need to be governed by different laws."<sup>3</sup> The minimalist liberal principle of legitimacy consequently entails that legitimate institutional structures incorporate diversity by ensuring that groups of individuals are free to live as they see fit. As this section shows, this conception of legitimacy lends itself to an argument for federalism: Given that federalism is able to protect the negative liberty of groups of individuals in the constituent units, it is a powerful constitutional tool for allowing individuals to live as they see fit. As such, federal systems have a distinct advantage over unitary systems when it comes to the liberal project of doing justice to the fact of pluralism.

#### 4.2.1. Dissensus and negative liberty

Federalism has been variously defined as "the balanced combination of 'unity of the whole aggregate' with 'separateness of parts'," "the approach to governance that seeks to combine unity and diversity" and "the perpetuation of both union and noncentralization."<sup>4</sup> The general accurateness of these characterisations suggests that, like unitary systems, federal systems are able to reflect the areas of consensus among individuals: Federalism can accommodate common government with respect to matters on which there is agreement. However, unlike unitary systems, federal systems are also able to reflect areas of dissensus among individuals. This is a product of federalism's ability to accommodate independent government with respect to the areas of public policy under the jurisdiction of the constituent

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<sup>3</sup> Dante, *op. cit.*, p. 24 (Book I, §xiv).

<sup>4</sup> Sidgwick, *The Elements of Politics*, *op. cit.*, p. 532 (Part II, Chapter XXVI, §2)., Kincaid, 'Values and Value Tradeoffs In Federalism,' *op. cit.*, p. 30. & Elazar, 'Federalism,' *op. cit.*, p. 479. Cf. Sidgwick, *The Elements of Politics*, *op. cit.*, p. 543 (Part II, Chapter XXVI, §5)., H. Sidgwick, *The Development of European Polity*, Macmillan and Co., London, 1903, p. 428 (Lecture XXIX, §1)., *ibid.*, p. 437 (Lecture XXIX, §6)., Pennock, *op. cit.*, p. 148., W. E. Oates, *Fiscal Federalism*, Harcourt Brace Jovanovich, New York, 1972, pp. 12–13 (Chapter One)., Elazar, *Exploring Federalism*, *op. cit.*, p. 29 (Chapter 1). & Watts, *Comparing Federal Systems*, *op. cit.*, p. 190 (Chapter 14, §14.1).

units. Federalism's advantage over unitary systems is a function of the way in which, as Proudhon put it:

The politics of federation ... consists in treating each population, ... following a regime of authority and decreasing centralisation, corresponding to its state of mind and mores.<sup>5</sup>

In other words, federalism is a powerful tool for allowing individuals to live as they see fit because it protects the negative liberty of groups of individuals by constitutionally enshrining constituent unit autonomy.<sup>6</sup>

Before delving further into the connection between federalism and negative liberty, it is helpful to briefly note that although the purpose here is not to provide a defence of negative liberty, it can nevertheless be effectively shielded from its detractors. An objection might come from the advocate of, as Pettit describes it:

The conception of freedom as non-domination which requires that no one is able to interfere on an arbitrary basis—at their pleasure—in the choices of the free person.<sup>7</sup>

They might argue that the complete non-interference demanded by negative liberty is not a prerequisite for freedom because, to quote Pettit again:

It is implausible to think that a non-mastering and non-dominating interferer would compromise people's freedom; there is interference in such a case but there is no loss of liberty.<sup>8</sup>

This suggests that the negative conception of liberty is far too austere and exacting:

Individuals can be free without needing to be completely free of interference.

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<sup>5</sup> Proudhon, *Du Principe Fédératif et De La Nécessité De Reconstituer Le Parti De La Révolution*, *op. cit.*, p. 123 (Chapitre VIII).

<sup>6</sup> Berlin famously distinguished between “negative’ freedom”—which is to say “liberty *from*; absence of interference”—and “the ‘positive’ conception of freedom as self-mastery”—which is “not freedom from, but freedom to.” See Berlin, ‘Two Concepts of Liberty,’ *op. cit.*, pp. 395–398 (§I–§II). & *ibid.*, p. 410 (§VII).

<sup>7</sup> P. Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press, Oxford, 1999, p. 271.

<sup>8</sup> *ibid.*

To be sure, advocates of negative liberty can readily accept Pettit's point when he argues that:

Those who are subject to another's arbitrary will ... [are] unfree, even if the other does not actually interfere with them; there is no interference in such a case but there is a loss of liberty. The non-interfering master remains still a master and a source of domination.<sup>9</sup>

However, it seems equally commonsensical for Pettit to acknowledge that when there is interference, there will also be a loss of liberty of some kind. Indeed, the very significance of successful interference is that an outcome is produced that would not have come to pass if the subject of the interference was free to do as they saw fit. Although Pettit might be able to offer good justifications for non-dominating interference (e.g., it may, at times, make the subjects of the interference happier), such interference would nevertheless diminish freedom in some sense.

Although the notion of interference without a concomitant loss of liberty seems conceptually confused, it can equally be argued that guaranteeing negative liberty is not enough to make individuals fully free. Freedom is a richer concept than the narrow focus on negative liberty would suggest: Despite being a necessary precondition for freedom broadly understood, negative liberty is not sufficient for guaranteeing freedom. This is essentially Taylor's point when he claims that "[f]reedom cannot just be the absence of external obstacles, for there may also be internal ones."<sup>10</sup> According to Taylor:

We can have negative liberty and so can quite easily be doing what we want in the sense of what we can identify as our wants, without being

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<sup>9</sup> *ibid.*

<sup>10</sup> C. Taylor, 'What's Wrong With Negative Liberty' in *Contemporary Political Philosophy: An Anthology*, R. E. Goodin & P. Pettit (eds.), Blackwell Publishers, Oxford, 1997, pp. 418–428, p. 427.

free; indeed, we can be further entrenching our unfreedom.<sup>11</sup>

It is first important to note that the fixation on negative liberty in the minimalist liberal theory of federalism in no way implies that negative liberty is the only form that freedom can take. The minimalist liberal can happily acknowledge that it would indeed be simplistic to reduce the concept of freedom to negative liberty. However, this acknowledgement is perfectly consistent with an account of legitimacy, such as minimalist liberalism, being exclusively concerned with negative liberty. Although the more prescriptive form of positive freedom that is concerned with, as Taylor puts it, what individuals “really want” might be philosophically coherent, it would arguably be the wrong basis for an account of legitimacy.<sup>12</sup> Put simply, an account of legitimacy that advocated a specific set of institutional structures on the grounds that they would give individuals what they “really wanted” would be dangerously illiberal.<sup>13</sup> Berlin highlighted the problematic consequences of the view that institutional structures should seek to give individuals what they “really want” when he remarked that for the advocate of positive liberty:

Freedom is not freedom to do what is irrational, or stupid, or wrong. To force empirical selves into the right pattern is no tyranny, but liberation.<sup>14</sup>

Not only should the idea of institutional structures forcing individuals to follow the “right” path be deeply worrying to anyone with an even sketchy understanding of human history, it goes against one of liberalism’s core tenets: Namely, individuals ought to be free to make mistakes, with the side-constraint that these failings not seriously harm others.<sup>15</sup> As Friedman suggested, “[t]hose of us who believe in freedom must believe also in the freedom of individuals to make their own mistakes”. In short, although the more robust positive conception of

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<sup>11</sup> *ibid.*, p. 420.

<sup>12</sup> *ibid.*, p. 421. *Cf. ibid.*, p. 428.

<sup>13</sup> *ibid.*

<sup>14</sup> Berlin, ‘Two Concepts of Liberty,’ *op. cit.*, p. 404 (§V).

<sup>15</sup> *Cf. Friedman, Capitalism and Freedom, op. cit.*, p. 188 (Chapter XI).

freedom is perfectly plausible, it is far too exacting to be the foundation for an account of what institutional structures should look like. As noted earlier, the above is by no means a comprehensive rebuttal of the possible attacks on the concept of negative liberty. However, it does at least suggest that the central role played by negative liberty in the minimalist liberal theory of federalism does not presuppose a reductionistic understanding of freedom.

#### 4.2.2. The protection of negative liberty and federalism

Let us now return to the argument regarding the connection between federalism and the protection of negative liberty. This essentially amounts to the claim that—to use the original formulation of the concept of negative liberty—federalism is able to ensure that “[I]ike kings and like gods, we only owe ourselves obedience ... [and, as such, have] negative liberty.”<sup>16</sup> To formulate this claim in slightly different terms, federalism serves to protect something akin to the modern conception of liberty described by Constant:

No one has the right to tear the citizen from his country, the property owner from his land, the merchant from his business, the husband from his wife, the father from his children, the writer from his studious meditations, the old man from his habits.<sup>17</sup>

Federalism serves to protect negative liberty because, as Hayek observed, “[f]ederal government is ... in a very definite sense limited government.”<sup>18</sup> As demonstrated in Chapter 1, federal systems are of necessity characterised by a constitutional division of sovereignty. To

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<sup>16</sup> Proudhon, *Du Principe Fédératif et De La Nécessité De Reconstituer Le Parti De La Révolution*, *op. cit.*, p. 136 (Chapitre IX). At no point in Berlin's much-lauded essay does he mention Proudhon's work in which the turn of phrase “negative liberty” originally appeared.

<sup>17</sup> Constant, 'De La Liberté Des Anciens Comparée À Celle Des Modernes: Discours Prononcé À L'Athénée Royal De Paris En 1819,' *op. cit.*, p. 610. Constant specified that “[t]he goal of the ancients was the sharing of social power among all the citizens of the same country. That is what they called liberty. The goal of the moderns is security in private enjoyments; and they call the institutional guarantees of these enjoyments liberty.” See *ibid.*, p. 603. Cf. *ibid.*, p. 595. & *ibid.*, p. 608.

<sup>18</sup> Hayek, *The Constitution of Liberty: The Definitive Edition*, *op. cit.*, p. 275 (Part II, Chapter Twelve, §5).



concretise Hayek's point, this means that federalism *qua* federalism limits the power of the central government to those areas of public policy not within the jurisdiction of the constituent units. Federalism's constitutionally enshrined constituent unit autonomy will by no means suffice to perfectly guarantee the negative liberty of the groups of individuals in the constituent units. However, it is a constitutional tool that can be employed to allow the groups of individuals in the constituent units to live as they see fit with respect to some areas of public policy. It is a dubious overstatement to claim, as Proudhon did, that "[f]ederation ... is freedom ... it excludes the idea of constraint."<sup>19</sup> Nevertheless, the constitutional division of sovereignty that is of necessity characteristic of federalism is an important check on the central government's power.

As we observed in Chapter 3, Section 3.4.2., the way in which federal systems guarantee the negative liberty of the constituent units can make it easier for constituent unit majorities to deny the negative liberty of constituent unit minorities (e.g., African Americans in the Southern States of the United States in the Jim Crow era). Despite cases in which federalism's protection of negative liberty undermines negative liberty, constitutionally guaranteed constituent unit autonomy remains a powerful—if sometimes poorly employed—tool for allowing groups of individuals to live as they see fit with respect to at least some areas of public policy. Indeed, as Chapter 1 made clear, protecting negative liberty is so integral to federalism that if constituent units and the individuals in them did not have constitutionally guaranteed negative liberty with respect to at least some areas of public policy, then the system of government in question would not be federal at all.<sup>20</sup>

The above entails that federal systems have a distinct advantage over unitary systems in which individuals are subject to the power of the central government as regards almost all

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<sup>19</sup> Proudhon, *Du Principe Fédératif et De La Nécessité De Reconstituer Le Parti De La Révolution*, *op. cit.*, p. 127 (Chapitre IX).

<sup>20</sup> *Cf. ibid.*, pp. 163–164 (Chapitre XI). & Riker, 'Federalism,' *op. cit.*, p. 616.

important areas of public policy.<sup>21</sup> As Buchanan remarked:

Political action [in a unitary state], regardless of how decisions are made, involves choices that are made for, and coercively imposed on, *all* members of the relevant political community.<sup>22</sup>

By contrast, in federal systems, groups of individuals are free to make their own decisions with respect to those areas of public policy under the jurisdiction of their constituent units. This is the general point made by Kincaid when he points out that:

Because powers are both shared and divided in a federal democracy, there are ... multiple forums of justice anchored in multiple forums of consent, and many rules of justice can vary justly among those forums according to socioeconomic and cultural conditions and to public preferences.<sup>23</sup>

The upshot of this is that unitary systems cannot protect negative liberty in the full suite of ways that federal systems can because they subject all groups of individuals in society to the same institutional structures.<sup>24</sup> As Tocqueville elegantly argued:

In large centralised nations, the legislator is obliged to give laws a uniform character that does not comprise the diversity of regions and mores; never being instructed in particular cases, it can only proceed by means of general rules; men are thus obliged to submit to the necessities of legislation, because the legislation does not know how to

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<sup>21</sup> Some crucially important areas of public policy will likely be in the hands of councils or municipal governments in unitary systems (e.g., land-use planning, etc.).

<sup>22</sup> Buchanan, 'Federalism and Individual Sovereignty,' *op. cit.*, p. 264.

<sup>23</sup> Kincaid, 'Federalism: The Highest Stage of Democracy?,' *op. cit.*, p. 112. Cf. Buchanan, 'Federalism and Individual Sovereignty,' *op. cit.*, pp. 264–265. & Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, *op. cit.*, p. 84 Chapter 3, §3.3).

<sup>24</sup> It is important to specify that unitary systems are *able* to force all groups of individuals in society to conform to the same standards. This takes account of all groups of individuals not necessarily being forced to conform to the same standards in unitary systems. In other words, there is at best unsecured regional autonomy in devolved unitary systems because the regional autonomy is not constitutionally enshrined.

accommodate the needs and morals of men; which is a great cause of troubles and miseries. This inconvenience does not exist in confederations; the congress determines the principal acts of the social existence; all the details are abandoned to provincial legislations.<sup>25</sup>

In short, federalism's constitutionally guaranteed constituent unit autonomy is a powerful tool for protecting negative liberty that unitary systems cannot employ.

Federalism's protection of negative liberty further means that, as U.S. Supreme Court Justice Brandeis noted:

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>26</sup>

As beneficial as this experimentation might be, the crucial point from the perspective of minimalist liberalism is that federal systems protect negative liberty by ensuring that groups of individuals are able to govern themselves as they see fit with respect to the areas of public policy under the jurisdiction of their constituent units.<sup>27</sup> It is not so much that, in the words of the U.S. Supreme Court, "[i]n the tension between federal and state power lies the promise of liberty."<sup>28</sup> Rather, the promise of liberty lies in the constitutionally enshrined autonomy of the states.

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<sup>25</sup> Tocqueville, *op. cit.*, p. 249 (Première Partie, Chapitre VIII).

<sup>26</sup> Justice Brandeis (dissenting), 'New State Ice Co. v. Liebmann,' *U.S. Supreme Court*, 285 U.S. 262 (1932), no. 463, viewed on the 7<sup>th</sup> January 2011, <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=285&invol=262#f54>>. Cf. 'Gregory v. Ashcroft,' *op. cit.* & Benson, *op. cit.*, p. 13.

<sup>27</sup> Wallace E. Oates observed that "[d]ecentralization may ... result in greater experimentation and innovation in the production of public goods." See Oates, *op. cit.*, p. 12 (Chapter One). Cf. *ibid.*, p. 13 (Chapter One).

<sup>28</sup> 'Gregory v. Ashcroft,' *op. cit.*

### 4.2.3. The protection of negative liberty and legitimacy

Having seen that federal systems possess an additional means of protecting negative liberty that unitary systems lack, let us now turn to the question of how in practice this makes federalism such a powerful constitutional tool for allowing individuals to live as they see fit. To concretise this point, let us consider the example of Sri Lanka. The unitary Sri Lankan state presumably reflects areas of consensus among Tamil and Sinhalese Sri Lankans on fundamental political questions (e.g., the legitimacy of democratic rule). However, it fails to reflect the substantial areas of dissensus among Tamil and Sinhalese Sri Lankans with respect to language, religion, governance structures, etc., (e.g., Tamil and Sinhala, Hinduism and Buddhism, the question of whether Sri Lanka should be a unitary state or a federation, etc.). Given that unitary systems can demand conformity and prohibit significant variation in institutional structures, it is no surprise that the unitary Sri Lankan state is not able to protect the negative liberty of the Tamil Sri Lankan minority to live as they see fit. By contrast, if the Sri Lankan state was federalised, it would be able to allow Tamil Sri Lankans to legislate for themselves and thereby offer them the opportunity to live as they see fit with respect to those areas of public policy under the jurisdiction of their constituent unit(s). This is not to naïvely suggest that federalisation would have avoided civil war in Sri Lanka or that it would mitigate any future communal tensions. The claim is simply that if the Sri Lankan state was a federation with (a) semi-autonomous constituent unit(s) in the Tamil-majority north and east of the country, Tamil Sri Lankans would have a better chance of living as they see fit.

Substantial variations in institutional structures are admittedly possible in a devolved unitary system. A unitary state of this kind might be better at protecting negative liberty—and therefore better able to allow individuals to live as they see fit—than its non-devolved unitary counter-parts. Be that as it may, it would still not be able to protect the negative liberty of

individuals to live as they see fit to the same extent as a federal system. This is because the diversity of institutional structures that devolution makes possible is not constitutionally enshrined and therefore can be removed without the consent of the denizens of the regions to which power has been devolved.<sup>29</sup> Although a devolved unitary system might be able to allow groups of individuals to live as they see fit to the same extent as a federal system at a particular point in time, this institutional diversity would not be constitutionally guaranteed in the devolved unitary system. As such, the freedom of individuals to live as they see fit would be better protected if the unitary system was replaced with a federal one that constitutionally guaranteed the autonomy of the regions to which power was devolved.

To be sure, if there was an all-inclusive consensus among groups of individuals, the federal protection of negative liberty would not be necessary for individuals to be able to live as they see fit. This is the significance of Calhoun's contention that:

Were there no contrariety of interests, nothing would be more simple and easy than to form and preserve free institutions. The right to suffrage alone would be a sufficient guaranty. It is the conflict of opposing interests which renders it the most difficult work of man.<sup>30</sup>

Given that such a convergence among groups of individuals is, however, often—if not always—absent, federal systems will still have a distinct advantage over unitary systems when it comes to allowing individuals to live as they see fit.

It must be acknowledged that there are serious conflicts of negative liberty. For example, before the American Civil War and the abolition of the institution of chattel slavery, the negative liberty of European Americans in the Southern States in practice negated the negative liberty of African Americans. This shows that the protection of negative liberty will sometimes

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<sup>29</sup> This point was starkly made by Dicey. Of Great Britain's devolved unitary system, Dicey argued: "The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament." See Dicey, *op. cit.*, p. 141 (Part I, Chapter III).

<sup>30</sup> Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., *Messenger*],' *op. cit.*, p. 417.

amount to the protection of the freedom of some to deny others their freedom. As such, it might be argued that the simple fact that federalism protects negative liberty is no guarantee that it is better able to allow individuals to live as they see fit: Federalism's protection of negative liberty may in practice allow some to deny others their freedom to live as they see fit. To judge whether federalism's protection of negative liberty is a net positive it is therefore necessary to know whose negative liberty is being protected.

Given the seriousness of the above concern, its thorough examination will be deferred to the fifth and final chapter in which critiques of federalism are analysed. For present purposes, suffice it to note that the minimalist liberal theory of federalism only holds that federalism is a powerful constitutional tool for allowing individuals to live as they see fit. Given that constitutional tools such as federalism can be used in various different ways, federalism's ability to allow individuals to live as they see fit does not ensure that federalism will be effectively used for this purpose.

#### **4.2.4. Federal systems versus liberal unitary systems**

So as to avoid any confusion as to the generality of the claim that federalism is a powerful constitutional tool for allowing individuals to live as they see fit, it is worth considering thoroughly liberal unitary systems. It would be patently wrong to hold that thoroughly illiberal federal systems will be better able to allow individuals to live as they see fit than thoroughly liberal unitary systems. Notwithstanding this concession, minimalist liberalism maintains that thoroughly liberal federal systems will still have a distinct advantage over thoroughly liberal unitary systems when it comes to protecting negative liberty and allowing individuals to live as they see fit.

The constitutional division of sovereignty that distinguishes federal systems from

unitary ones is a tool for protecting negative liberty that unitary systems cannot employ. Assuming that a federal system and a unitary system are comparably liberal in other respects, the federal system's constitutional division of sovereignty will afford it an additional means of protecting negative liberty, which will in turn give it an advantage when it comes to allowing individuals to live as they see fit. The counter-intuitive reason for this is that federalism's unique means of protecting negative liberty results in the application of decision making procedures that require "special majorities" and tend to "produce conservatism."<sup>31</sup> In practice, federal constitutions are harder to amend than non-federal constitutions because the passing of amendments requires agreement between more parties. For example, the Canadian constitution states that:

An amendment to the Constitution of Canada in relation to ... any amendment to any provision that relates to the use of the English or the French language within a province, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.<sup>32</sup>

The consequence of this federal conservatism is that federal systems have an additional tool for protecting the freedom of individuals to live as they see fit that even comparably liberal unitary systems cannot employ.

By instituting checks and balances to guarantee liberal rights and freedoms, liberal unitary systems obviously have many effective tools at their disposal to protect negative liberty and allow individuals to live as they see fit. For example, a liberal unitary system might be

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<sup>31</sup> Anderson, *op. cit.*, p. v (Preface and Acknowledgements). & Dicey, *op. cit.*, p. 169 (Part I, Chapter III). Cf. Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, *op. cit.*, p. 85 (Chapter 3, §3.4).

<sup>32</sup> 'Consolidation of Constitution Acts, 1867 To 1982,' *op. cit.*, p. 58 (1982, Part V, Article 43). Cf. *ibid.*, p. 57 (1982, Part V, Article 41).

designed in accordance with the doctrine of the division of powers, which states that, as Montesquieu famously put it:

All would be lost, if the same man, or the same body of chiefs, or the nobles, or the people, exercised these three powers: that of making laws, that of executing public resolutions, and that of judging crimes or disagreements between individuals.<sup>33</sup>

Without downplaying the liberal credentials of liberal unitary systems, the point is simply that liberal federal systems possess an *additional check and balance* that can further safeguard liberal rights and freedoms. To be more precise, when a liberal system of government is also federal, another set of minorities (i.e., the denizens of the constituent units) have their freedom to live as they see fit constitutionally guaranteed.

In summary, by constitutionally guaranteeing constituent unit autonomy, federal systems have a distinct advantage over unitary systems when it comes to the protection of negative liberty. Federalism's ability to protect negative liberty in turn makes it a powerful constitutional tool for allowing individuals to live as they see fit, thereby advancing the liberal project of doing justice to the fact of pluralism.

### 4.3. Democratic Accountability & Systems of Sovereign States

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<sup>33</sup> Montesquieu, *De L'Esprit Des Lois: Tome I, op. cit.*, p. 328 (Seconde Partie, Livre Onzième, Chapitre VI). George Washington similarly spoke of "[t]he necessity of reciprocal checks in the exercise of political power; by dividing and distributing it into different depositories, & constituting each the Guardian of the Public Weal against invasions by the others." See G. Washington, 'Farewell Address, September 19, 1796' in *The Declaration of Independence and Other Great Documents of American History, 1775–1865*, J. Grafton (ed.), Dover Publications, Mineola, 2000, pp. 47–60, p. 55. Cf. Jefferson, 'Excerpts From *Notes On Virginia* (1782),' *op. cit.*, p. 99. (Query VIII). & J. Madison, 'The Federalist No. 37' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed.), Cambridge University Press, Cambridge, 2006, pp. 168–174, p. 171.



Charles Tilly claimed that in “[j]udging the degree of democracy, we assess the extent to which the state behaves in conformity to the expressed demands of its citizens.”<sup>34</sup> This suggests that the degree of democracy is a function of the extent to which citizens have political influence over their state's legislative processes; the more political influence citizens have, the more democratic the state.<sup>35</sup> By conferring legitimacy on institutional structures to the extent that they allow individuals to live as they see fit, minimalist liberalism directly connects democratic accountability and legitimacy.<sup>36</sup> In particular, democratic accountability will be a crucial part of legitimacy because if individuals have political influence over an institutional structure we can reasonably expect it to be more likely to allow them to live as they see fit. Not surprisingly, the next three sections argue that federalism is a powerful constitutional tool for advancing the liberal project of doing justice to the fact of pluralism and thereby allowing individuals to live as they see fit because of the way in which it promotes democratic accountability. As we will see, this amounts to claiming that federalism serves to both reduce the democratic deficit suffered by the international system and increase the responsiveness of unitary systems to the political preferences of individuals.

Before delving into the specificities of these arguments, it is worth pausing to briefly address an important qualification. Federalism will only have the salutary effect of significantly promoting democratic accountability if it is combined with democracy. For example, a theocratic federal system may well be marginally more democratically accountable than a theocratic unitary system insofar as having more religious leaders in power (i.e., in the central government and in the constituent units) may slightly increase democratic accountability. However, as this case of the theocratic federal system suggests, federalism will not significantly

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<sup>34</sup> C. Tilly, *Democracy*, Cambridge University Press, Cambridge, New York, 2007, p. 13 (Chapter 1).

<sup>35</sup> Cf. D. Braybrooke, 'Can Democracy Be Combined With Federalism Or With Liberalism?' in *Liberal Democracy: Nomos XXV*, J. R. Pennock & J. W. Chapman (eds.), New York University Press, New York, 1983, pp. 109–118, p. 110.

<sup>36</sup> I use the term “democratic accountability” to refer, perhaps somewhat unconventionally, to the general attribute of being accountable to citizens by reflecting their political preferences.

promote democratic accountability and therefore not show its true ability to allow individuals to live as they see fit if federal systems are also undemocratic. This is essentially the point made by Kincaid when he claims that “a federal system does not, in itself, establish or guarantee democracy”; “[f]ederalism ... [is rather] an effective tool and enhancement of democratic governance.”<sup>37</sup> The consequence of the above is that the claim that federalism promotes democratic accountability principally applies to systems of government that are already run in generally democratic ways.

#### 4.3.1. The instrumentalisation of democracy

By way of introduction to the connection between federalism and democratic accountability, let us examine how democratic accountability is instrumentalised in the arguments that follow. As we have already seen, promoting democratic accountability makes institutional structures legitimate in a minimalist liberal sense because it is a particularly effective means of ensuring that institutional structures allow individuals to live as they see fit. This implies that minimalist liberalism considers the value of promoting democratic accountability to be parasitic on the value of individual liberty (i.e., the value of allowing individuals to live as they see fit is used to justify the promotion of democratic accountability). This instrumentalisation of democratic accountability is consistent with the classical liberal view of the value of democracy typified by Hayek's bold contention that “democracy is a means rather than an end.”<sup>38</sup> On this classical liberal account, a system of government being democratic does not in and of itself speak in its favour because, as Kukathas argues:

There is no necessary connection between liberalism and democracy,

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<sup>37</sup> Kincaid, 'Federalism: The Highest Stage of Democracy?', *op. cit.*, pp. 106–107. *Cf. ibid.*, p. 115., Kincaid, 'Economic Policy-Making: Advantages and Disadvantages of The Federal Model,' *op. cit.*, p. 88. & Kincaid, 'Values and Value Tradeoffs In Federalism,' *op. cit.*, p. 36.

<sup>38</sup> Hayek, *The Constitution of Liberty: The Definitive Edition*, *op. cit.*, p. 172 (Part I, Chapter Seven, §4).

whose marriage is simply one of convenience.<sup>39</sup>

As plausible as the above instrumentalisation of democracy might be from a classical liberal perspective, it is essential to recognise that it does not give us pause to question the value of democracy. Democratic institutions are valuable even from a classical liberal perspective because there is in practice a connection between the protection of individual liberty and, at the very least, constitutional forms of democracy.<sup>40</sup> To be sure, the mere existence of constitutional democratic rule by no means guarantees individual liberty; thoroughly illiberal public policy can be implemented in democracies with extensive checks and balances. Although constitutional democratic rule does not provide the necessary and sufficient conditions for the protection of individual liberty, it is nonetheless an effective, if not perfectly reliable, means of safeguarding individual liberty.

Two observations provide adequate justification for thinking that constitutional democratic rule will in practice be an element of liberal political systems. The first point to make is that liberal political systems have very rarely successfully operated with undemocratic systems of government. Although Emperor Asoka and Akbar the Great of India, as well as Frederick II of Prussia, are obvious counter-examples, the historical record points to a strong correlation between constitutional democratic rule and the protection of individual liberty. The second point to make, which is a plausible explanation for the first, is that an undemocratic system of government would constantly imperil a liberal political order. This is because it would be far easier to abolish liberal rights and freedoms if power was concentrated in an undemocratic manner.<sup>41</sup> As Shklar observed, "without enough equality of power to protect and assert one's rights, freedom is but a hope."<sup>42</sup> Given that enlightened despots can repeal liberal rights and freedoms as easily as they can confer them, and that it is not possible to find "angels

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<sup>39</sup> Kukathas, *op. cit.*, p. 30 (Chapter 1). Cf. Berlin, 'Two Concepts of Liberty,' *op. cit.*, p. 412 (§VII). & Hayek, *The Constitution of Liberty: The Definitive Edition*, *op. cit.*, pp. 61–63 (Chapter One, §2).

<sup>40</sup> Cf. *ibid.*, p. 173 (Part I, Chapter Seven, §4).

<sup>41</sup> Cf. Shklar, *op. cit.*, p. 164.

<sup>42</sup> *ibid.*

in the forms of kings to govern," Constant was likely correct to suggest that in practice "[p]olitical liberty is its [i.e., individual liberty's] guarantee."<sup>43</sup>

The historical and institutional reasons for positing a connection between constitutional democratic rule and the protection of individual liberty mean that although the classical liberal justification of democracy is instrumentalist, it nevertheless remains extremely powerful. As Shklar forcefully claimed, "liberalism is monogamously, faithfully, and permanently married to democracy—but it is a marriage of convenience."<sup>44</sup> The key point to take from this brief excursus into the relationship between classical liberalism and democracy is that, notwithstanding the tension between individual freedom and majoritarian democratic rule highlighted by Schmitt, democracy typically serves to buttress individual liberty.<sup>45</sup>

Like the classical liberal's instrumentalist justification of democracy, the way in which minimalist liberalism justifies the promotion of democratic accountability may well alienate those who consider democracy to be inherently valuable. The idea that promoting democratic accountability is beneficial because it allows individuals to live as they see fit is clearly at odds with the idea that democracy is an end in and of itself because, for example, it is considered a necessary precondition of political equality. Be this as it may, those who think that the promotion of democratic accountability is inherently valuable should not be sceptical of the

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<sup>43</sup> Jefferson, 'First Inaugural Address, March 4, 1801,' *op. cit.*, p. 63. Cf. Jefferson, 'To John Tyler (1816),' *op. cit.*, p. 236. & B. Constant, 'De La Liberté Des Anciens Comparée À Celle Des Modernes: Discours Prononcé À L'Athénée Royal De Paris En 1819' in *Écrits Politiques*, M. Gauchet (ed.), Éditions Gallimard, Paris, 1997, pp. 589–619, p. 612., Hayek, *The Constitution of Liberty: The Definitive Edition*, *op. cit.*, p. 173 (Part I, Chapter Seven, §4). & J. T. Levy, 'The Liberal Defence of Democracy: A Critique of Pettit,' *Australian Journal of Political Science*, vol. 29, no. 3, November 1994, pp. 582–586, p. 585. Even if examples of enlightened despots cast doubt on Dalberg-Acton's maxim that "[p]ower tends to corrupt and absolute power corrupts absolutely," leaving the task of safeguarding liberal rights and freedoms in the hands of potentially capricious despots is surely reckless. See J. E. E. Dalberg-Acton, 'Acton–Creighton Correspondence' in *Essays On Freedom and Power*, G. Himmelfarb (ed.), The Free Press, Glencoe, 1948, pp. 357–373, p. 364. Cf. M. Friedman, 'Preface: Economic Freedom Behind The Scenes' in *Economic Freedom of The World: 2002 Annual Report*, J. Gwartney, R. Lawson *et al.*, The Fraser Institute, Vancouver, 2002, pp. xvii–xxi, p. xix. It was perhaps this consideration that led Adams to suggest that "there is no good government but what is Republican ... the very definition of a Republic, is 'an Empire of Laws, and not of men.'" See Adams, *op. cit.*, p. 87 (§III). Cf. *ibid.*, p. 74 (§I). & *ibid.*, p. 80 (§II).

<sup>44</sup> Shklar, *op. cit.*, p. 164.

<sup>45</sup> See C. Schmitt, 'Preface To The Second Edition (1926): On The Contradiction Between Parliamentarism and Democracy' in *The Crisis of Parliamentary Democracy*, E. Kennedy (trans.), The MIT Press, Cambridge, 1985, pp. 1–17, p. 17. & *ibid.*, p. 15.

minimalist liberal theory of federalism simply because of its instrumentalisation of democratic accountability. The argument that federalism promotes democratic accountability should positively predispose them to federalism even if this argument presupposes the instrumentalisation of democratic accountability.

#### **4.3.2. Global interconnectedness and democratic accountability**

Karl Marx and Friedrich Engels famously claimed that:

The old isolation of self-sufficient localities and nations has been replaced ... by a universal interdependence of nations.<sup>46</sup>

In the intervening century and a half, global interconnectedness has only deepened.<sup>47</sup> The consequence of this is that the actions of sovereign states often profoundly affect other sovereign states. This is essentially the point made by David Held:

The very process of governance can escape the reach of the nation-state. National communities by no means exclusively make and determine decisions and policies for themselves, and governments by no means determine what is right or appropriate exclusively for their own citizens.<sup>48</sup>

This level of global interconnectedness in effect means that, to appropriate David Marquand's turn of phrase, systems of sovereign states suffer from "'democratic deficit[s]'.<sup>49</sup> In particular, individuals often lack influence over decisions that seriously affect them because these decisions are made in other states.

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<sup>46</sup> K. Marx & F. Engels, *Manifeste Du Parti Communiste Suivi Des Préfaces De Marx et D'Engels*, G. Raulet (ed.), É. Bottigelli (trans.), GF Flammarion, Paris, 1998, p. 78 (Chapitre I).

<sup>47</sup> Cf. A. Einstein, 'Towards A World Government' in *Out of My Later Years*, Philosophical Library, New York, 1950, pp. 138–140, p. 138. & Cavallero, *op. cit.*, p. 62.

<sup>48</sup> D. Held, 'Democracy: From City-States To A Cosmopolitan Order?', *Political Studies*, vol. 40, no. 1, August 1992, pp. 10–39, p. 21.

<sup>49</sup> D. Marquand, *Parliament For Europe*, Jonathan Cape, London, 1979, p. 65 (Chapter 3).

To concretise the above point, the decisions of the current super-power and the super-powers in waiting (i.e., the United States and China and India) with respect to carbon dioxide emissions can hardly be said to be democratically accountable because they only receive the support of a subset of the individuals they seriously affect.<sup>50</sup> If the world consisted of isolated and technologically primitive societies, public policy decisions that were only influenced by the practical commitments of a select group of individuals might be democratically accountable. However, in a globalised world of technologically advanced and economically integrated societies, public policy decisions will not be made in a thoroughly democratically accountable way if they are made solely on the basis of the practical commitments of the citizens of the state in which they are legislated.

In a similar vein to Held's defence of "the cosmopolitan model of democracy," minimalist liberalism holds that federalism is able to promote democratic accountability in a way that is beyond the capabilities of the current international system of (largely) sovereign states.<sup>51</sup> This is essentially to argue, first, that "interdependence ... require[s] democratic centralization of decision making," and second, that federalism is a form of democratic centralisation that makes it possible to maximise "each person's opportunity to influence the social conditions that shape her life."<sup>52</sup> Federalism is able to both meet the "the locality condition" and conform to the "all affected principle" by ensuring that—to appropriate "the principle of subsidiarity" (i.e., "decisions are taken as closely as possible to the citizen")—legislative decisions are made both at the lowest level possible to maximise democratic accountability and at the highest level necessary to maximise democratic accountability.<sup>53</sup> To be

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<sup>50</sup> This includes both individuals outside these three states and those individuals in these three states without significant political influence.

<sup>51</sup> Held, *op. cit.*, p. 33. & *ibid.*, p. 11.

<sup>52</sup> T. W. Pogge, 'Cosmopolitanism and Sovereignty,' *Ethics*, vol. 103, no. 1, October 1992, pp. 48–75, pp. 65–66.

<sup>53</sup> Cavallero, *op. cit.*, p. 53 (§2), 'Consolidated Versions of The Treaty On European Union and The Treaty On The Functioning of The European Union,' *op. cit.*, pp. 16 & 18 (TEU, Preamble). & A. Føllesdal, 'Survey Article: Subsidiarity,' *The Journal of Political Philosophy*, vol. 6, no. 2, June 1998, pp. 190–218, p. 191. *Cf.* The all affected principle is essentially a reiteration of a maxim of Roman law: "what touches all ought also to be approved by

more precise, federalism makes it possible for the legislative decisions that affect all to be made on the basis of the practical commitments of all, while at the same time preserving the freedom of groups of individuals to make legislative decisions as they see fit as regards matters that only affect them.<sup>54</sup> Federalism is thereby able to promote democratic accountability in a way that is beyond the capabilities of the current international system: It provides a central government with universal jurisdiction over those limited matters that are of universal concern, while at the same time preserving constituent unit autonomy regarding those matters that solely concern a subset of the population.

A measure of federalism's ability to promote democratic accountability at the international level is the extent to which it is better able to reflect the significant areas of consensus among individuals. Although systems of sovereign states may well reflect the areas of dissensus among individuals, the overlapping consensuses are unlikely to find expression in common institutional structures. For example, despite an overlapping consensus among (almost) all individuals regarding the impermissibility of genocide, the current system of sovereign states leaves states free to pursue genocidal policies.<sup>55</sup> In stark contrast, federalism provides common institutional structures that can reflect areas of consensus among

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all." See Althusius, *op. cit.*, p. 37 (Chapter IV, §20). *Cf. ibid.*, p. 45 (Chapter V, §64). & *ibid.*, p. 91 (Chapter XVII, §60).

<sup>54</sup> *Cf.* Cavallero, *op. cit.*, p. 43., Pogge, 'Cosmopolitanism and Sovereignty,' *op. cit.*, p. 67. & Watts, 'The Relevance Today of The Federal Idea,' *op. cit.* Section 5.5. of the fifth and final chapter provides a more precise account of what it means to be affected by public policy.

<sup>55</sup> The existence of the International Criminal Court (ICC), UN peace-keeping forces, a body of international human rights law, etc., would seem to suggest that it is incorrect to claim that the current system of sovereign states leaves states free to pursue genocidal policies. Despite the prevalence of "the responsibility to protect" discourse—as former Australian Foreign Minister Gareth Evans put it: "sovereign states would retain the primary responsibility to protect their own people from mass atrocity crimes ... , [b]ut if they manifestly fail to do so, through either incapacity or ill will, the international community has a collective responsibility to take appropriate action"—states are most certainly *de facto*, if not a *de jure*, free to pursue genocidal policies. See G. Evans, 'In The Name of Travellers Never Again Met,' *The Sydney Morning Herald*, 11<sup>th</sup>–12<sup>th</sup> October 2008, p. 33. & *ibid.* The difficulties associated with getting unity of purpose from UN institutions such as the Security Council, the often hamstrung position of UN peace-keepers and the lack of universal jurisdiction for institutions such as the ICC mean states are largely free to do as they see fit. To take just one particularly tragic reminder of this: "in 1994 the UN Security Council deliberated for over three months before deciding that genocide of the Tutsi population in Rwanda was actually taking place. During that time, over 800,000 Tutsis were systematically slaughtered" See M. Griffiths & T. O'Callaghan, 'Genocide' in *International Relations: The Key Concepts*, Routledge, London, 2002, pp. 118–120, p. 120.

individuals, while at the same time preserving the great diversity of institutional structures necessary to reflect the areas of divergence. Federalism's ability to promote democratic accountability in this way arguably explains why, as Elazar observed:

The world as a whole is in the midst of a paradigm shift from a world of states, modeled after the ideal of the nation-state developed at the beginning of the modern epoch in the seventeenth century, to a world of diminished state sovereignty and increased interstate linkages of a constitutionalized federal character.<sup>56</sup>

In other words, the international system is experiencing federal integration as a reaction against the way in which interconnectedness has made the global system of sovereign states democratically unaccountable.

In conclusion, federalism is able to promote democratic accountability in a way that is beyond the capabilities of the current international system of sovereign states. Unlike systems of sovereign states, federal systems create a common central government that gives individuals political influence over legislative processes that impinge on their liberty but which would otherwise be beyond their influence.

#### **4.4. Democratic Accountability & The Voice Factor**

Eleanor Roosevelt memorably suggested that “each state and each community preserves for its people the maximum voice in their own affairs” in federal systems.<sup>57</sup> This so-

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<sup>56</sup> D. J. Elazar, 'From Statism To Federalism—A Paradigm Shift,' *International Political Science Review*, vol. 17, no. 4, October 1996, pp. 417–429, p. 417. Cf. Sidgwick, *The Development of European Polity*, *op. cit.*, p. 439 (Lecture XXIX, §7).

<sup>57</sup> E. Roosevelt, 'The Universal Validity of Man's Right To Self-determination' in *The Human Rights Reader: Major*



called voice factor is the idea that not only does each individual's vote exert more of an influence over legislative processes that affect them in federal systems, but that individuals can exert greater political influence over these legislative processes by extra-electoral means.<sup>58</sup> This section will show how federalism promotes democratic accountability via the voice factor, thereby making federalism a powerful constitutional tool for doing justice to the fact of pluralism and allowing individuals to live as they see fit.

#### 4.4.1. The electoral voice factor

The first dimension of the voice factor can be explained by means of a simple example. In a unitary system of 100 million electors, an individual's vote will exert a minute amount of political influence over the legislative processes that shape the bulk of the crucially important areas of public policy.<sup>59</sup> By contrast, in a federal system with the same number of electors at the national level, an individual's vote will exert more political influence over the legislative processes that shape a significant number of the crucially important areas of public policy. In particular, each individual's vote will exert more political influence over those crucially important areas of public policy under their constituent unit's jurisdiction. Whereas an individual's vote will exert little political influence over health policy in a unitary system because it will be one of 100 million votes, their vote will exert more political influence over health policy in a federal system because it will be one of—as a rough estimate—5 million or

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*Political Essays, Speeches, and Documents From Ancient Times To The Present*, 2<sup>nd</sup> edition, M. R. Ishay (ed.), Routledge, New York, 2007, pp. 284–287, p. 285.

<sup>58</sup> See Walker, *op. cit.*, p. 37. & B. Herscovitch, 'Democratic Accountability and the Australian Federal System of Government,' *Policy*, vol. 26, no. 1, Autumn 2010, pp. 36–39.

<sup>59</sup> Some crucially important areas of public policy will likely be in the hands of councils or municipal governments in unitary systems (e.g., land-use planning, etc.). Given that the number of electors in a council or municipal area is likely to be comparatively small, an individual's vote may well exert a relatively large amount of political influence over at least some crucially important areas of public policy even in a unitary system. This, however, in no way vitiates the general point that federalism serves to further promote democratic accountability.

10 million votes at the constituent unit level. Although an elector's vote being one of 5 million or 10 million votes instead of one of 100 million might not give them the impression that they have significantly more political influence, it does nevertheless mean that the political influence of their vote is significantly less diluted.

To be sure, with respect to the crucially important areas of public policy under the central government's jurisdiction (e.g., defence, foreign policy, central government fiscal policy, etc.), an individual's vote will still exert a minute amount of political influence in a federal system (e.g., their vote will still be one of 100 million votes). However—and this is the key point—with respect to the crucially important areas of public policy under their constituent unit's jurisdiction (e.g., health, education, law enforcement, etc.), an individual's vote will exert more political influence (e.g., instead of being one of 100 million votes, their vote will be one of 5 million or 10 million votes).<sup>60</sup> As the next section shows, the real value of the way in which federalism increases the political influence of each elector's vote is clearest when individual electors are part of voting blocks in the constituent units. In scenarios of that kind, groups of electors are able to pool their increased political influence to potentially determine legislative agendas in the constituent units. The importance of geographically concentrated voting blocks notwithstanding, for the moment it suffices to observe that federalism promotes democratic accountability by increasing the political influence of electors.

#### **4.4.2. The importance of voting blocks and divided societies**

At this point, the claim that the reduced electoral competition faced by an individual's vote amounts to a real increase in political influence will likely be queried. To get a better sense of precisely what is at stake, let us go back to the example used earlier. One's vote being one of

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<sup>60</sup> Cf. Buchanan, 'Federalism and Individual Sovereignty,' *op. cit.*, p. 262., Weinstock, *op. cit.*, p. 77. & Walker, *op. cit.*, p. 37.

5 million or 10 million votes instead of one of 100 million votes is without a doubt an impressive numerical difference. However, one may not feel as if this really has the effect of increasing one's political influence in a substantive way. As a consequence, one might doubt whether federalism does in fact promote democratic accountability.

Although this concern is misplaced, it is important to firstly acknowledge that it is understandable. Indeed, it is a concern that is frequently raised in relation to forms of mass representative democracy in general. The problem is that because legislative decisions are made by representatives who are elected by thousands, or even millions, of electors, an individual elector has an infinitesimally small role to play in making legislative decisions.<sup>61</sup> This contributes to the widespread view that it does not matter which candidate one votes for, or even whether one votes at all; one's political influence is minuscule to the point of being non-existent.

As unsurprising as the above concern may be, there are two principal problems with this line of reasoning. The first problem is that it conflates the perceived with the real; it confuses phenomenology with ontology. The simple fact that individuals *feel* that federalism does not promote democratic accountability does not entail that it *actually* fails to do so. Just as the overly sensitive individual's impression that all of their colleagues dislike them is not a good indicator of whether their colleagues actually dislike them, the views of the elector who feels disenfranchised are not a reliable indicator of whether they are actually disenfranchised. The upshot of this is that although federalism's ability to promote democratic accountability via electoral means might be imperceptible to the average elector, this by no means shows that it is illusory.

The second less obvious—and yet ultimately far more serious—problem with the above

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<sup>61</sup> For example, a randomly selected voter had a 1 in 60 million chance of being decisive in the their state in the 2008 US presidential election. See A. Gelman, N. Silver & A. Edlin, 'What is the Probability Your Vote Will Make a Difference?,' *Economic Inquiry*, vol. 50, no. 2, April 2012, pp. 321–326, pp. 323–324 (II).

objection is that it fails to see that each individual is rarely, if ever, entirely alone in expressing their particular political preferences. This points to an essential element of the electoral voice factor: Given that individuals share their political preferences with other electors, we need to consider the political influence exerted by groups of often geographically concentrated electors when assessing whether federalism promotes democratic accountability. Indeed, the importance of the role of voting blocks is such that it leads us to one of the principal mechanisms by which federalism is able to allow individuals to live as they see fit.

To see why federalism is so much more effective at promoting democratic accountability when individuals are considered as members of groups with which they share political preferences, it is instructive to go back to the example used earlier. If a country of 100 million electors had a unitary system, a block of 2 million to 3 million geographically concentrated electors would, in all likelihood, have little hope of their political preferences influencing legislative outcomes. If, on the other hand, the system of government in question was a federal system in which constituent units generally had 5 million to 10 million electors, this group of electors would have a very good chance of their political preferences influencing legislative outcomes. To be sure, the influence of their political preferences might not be substantially increased with respect to the crucially important areas of public policy under the jurisdiction of the central government.<sup>62</sup> However, the key point to bear in mind is that their political influence would be immensely greater in a federal system than a unitary system with respect to the crucially important areas of public policy under the jurisdiction of their constituent unit.

Federal systems may admittedly create new constituent unit minorities whose political influence is *diminished* by federalism (e.g., Anglophones in Québec). However, even if the

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<sup>62</sup> Note that the claim is only that their political influence *might* not be substantially increased with respect to the crucially important areas of public policy under the jurisdiction of the central government. This claim is qualified in this way because it is entirely possible that the group of electors will be able to exert greater political influence over the legislative processes at the national level because they constitute a majority in one of the constituent units. For example, Francophone electors in Canada probably exert greater political influence over the legislative processes at the federal level because they constitute a majority of the electors in the province of Québec.

creation of new constituent unit minorities with diminished political influence is a relatively commonplace phenomenon in federal systems, federalism will still reduce the number of individuals who are forced to endure a lack of political influence. For example, federalism replaces a minority of a few million Francophone Canadians with a minority of a few hundred thousand Anglophone Québécois. Although federalism does not completely avoid the problem of politically impotent minorities, it does minimise its severity by giving national minorities an avenue for achieving enhanced democratic accountability—namely, constituent unit majority status.

By increasing the political influence of electors taken as members of often geographically concentrated blocks, federalism alleviates the winner-takes-all problem inherent in raw democracy.<sup>63</sup> In unitary systems, it is possible for parties to determine legislative agendas without receiving the support of 50%+1 of electors.<sup>64</sup> This is obviously still possible with respect to each level of government in federal systems: The parties that determine the legislative agendas at both the central and constituent unit levels might do so without receiving the support of 50%+1 of electors. However, while the potentially greater than 50%+1 of electors whose party of choice is not elected often do not shape legislative agendas at all in unitary systems, electors who are unable to shape legislative agendas at one level of government might well be able to do so at another level in federal systems.<sup>65</sup>

The above points to the way in which federalism minimises “vote frustration,” meaning that federalism minimises the number of electors whose political preferences as expressed by

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<sup>63</sup> Cf. Kincaid, 'Economic Policy-Making: Advantages and Disadvantages of The Federal Model,' *op. cit.*, p. 88., Riker, 'Federalism,' *op. cit.*, p. 616., Walker, *op. cit.*, p. 36., *ibid.*, p. 41. & Watts, *Comparing Federal Systems*, *op. cit.*, p. 155 (Chapter 10, §10.6).

<sup>64</sup> Political parties frequently win elections without winning 50%+1 of the votes. For example, the winning party received 49.9% and 49.0% of the two-party-preferred vote in both the 1990 and 1998 Australian federal elections respectively. See G. Newman, 'Federal Election Results 1949–2004,' The Parliamentary Library, Canberra, 7<sup>th</sup> March 2005, viewed on the 30<sup>th</sup> December 2010, <<http://www.aph.gov.au/library/pubs/rb/2004-05/05rb11.htm>>.

<sup>65</sup> For example, throughout the period between 1996 and 2007, opposing parties were in power in the federal Parliament of Australia and the state Parliament of NSW. This meant that the large number of electors in NSW whose political preferences did not shape the legislative agenda at one level of government did so at the other level. Cf. Kincaid, 'Federalism: The Highest Stage of Democracy?', *op. cit.* p. 112.

their votes are not reflected in electoral outcomes.<sup>66</sup> A system of government in which all 100 million electors voted for party *x* and party *y* took power would be one that maximised vote frustration, whereas a system of government in which all 100 million electors voted for party *x* and party *x* took power would be one that minimised vote frustration. The “federal system minimize[s] the number of voters whose will, as expressed by the ballot, is frustrated” because, as Pennock observed:

Federalism not only divides *powers*, it divides, *functions*. In this division of functions lies the possibility of maximizing satisfaction in a way that uniform national treatment could not accomplish. Federalism ... makes it possible for Democrats in predominantly Democratic states to have their way at least in certain matters under a Republican national administration, and vice-versa ... federalism ... makes for the satisfaction of more of the voters more of the time than if they acted as a single unit.<sup>67</sup>

The preceding considerations show that although electors may not feel as if the political influence of their votes is increased in federal systems, it is in fact often vastly increased because they frequently form geographically concentrated blocks. To take a particularly striking example, Canada's federal system massively increases the political influence of Francophone Canadians because many of them are likely to vote together in a particular constituent unit on important issues such as language policy. By contrast, if Canada had a unitary system, the political influence of Francophone Canadians would be drastically reduced because they would be a national minority instead of a constituent unit majority. Put simply, by significantly increasing the political influence of often geographically concentrated electoral blocks, federalism promotes democratic accountability and so is a powerful constitutional tool

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<sup>66</sup> Pennock, *op. cit.*, p. 157.

<sup>67</sup> *ibid.*, pp. 149 & 157.

for allowing individuals to live as they see fit.<sup>68</sup>

It might now be objected that although federalism is able to promote democratic accountability in societies with clear cultural, religious, linguistic, etc., divisions (e.g., the case of Canada raised earlier), it is not at all obvious that federalism has this salutary effect in more homogeneous societies. Given that clear cultural, religious, linguistic, etc., divisions are by no means always present, the persuasiveness of the claim that federalism is a powerful constitutional tool for allowing individuals to live as they see fit therefore seems to have been significantly diminished.

It should first be acknowledged that federalism's ability to promote democratic accountability may well be enhanced when cultural, religious, linguistic, etc., minorities at the national level form majorities in the constituent units. Although the democratic accountability dividend may be greatest in these cases, it does not follow that federalism is unable to promote democratic accountability in the absence of obvious divisions between national majorities and geographically concentrated minorities. The reason for this is that, as noted in Section 3.5. of Chapter 3, electors still often form geographically concentrated blocks when there are no stark and clearly visible cleavages like the Francophone/Anglophone distinction. Consequently, federalism will still often be able to increase the political influence of electors and thereby promote democratic accountability.

By way of a demonstration of the above point, although stark and clearly visible cultural, religious, linguistic, etc., cleavages generally do not exist between the constituent units in the United States, the US federal system nevertheless increases the political influence of electors and promotes democratic accountability.<sup>69</sup> Despite widespread opposition to the institutional

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<sup>68</sup> Cf. Pennock, *op. cit.*, p. 151.

<sup>69</sup> The United States is certainly characterised by great cultural, religious, linguistic, etc., diversity. However, the different cultural, religious, linguistic, etc., groups are not generally concentrated in specific constituent units. Some may object to this on the grounds that the difference in positions on the issue of the institutional recognition of same-sex relationships is indicative of a significant cultural cleavage. This view is, however, only coherent on a particularly thin conception of culture. In this context, a far thicker notion of culture that

recognition of same-sex relationships at the national level, the US federal system is able to promote democratic accountability through institutional structures in New England and the West Coast that reflect the political preferences of electors in these regions.<sup>70</sup> If the United States had a unitary system, democratic accountability would be reduced because, to take just one example, the majority of electors in New Hampshire would, in all likelihood, be forced to live under institutional structures that did not reflect their political preference for the institutional recognition of same-sex relationships.<sup>71</sup> In conclusion, even in the absence of stark and clearly visible cultural, religious, linguistic, etc., cleavages, federalism can increase the political influence of electors because of the way in which individuals in particular constituent units often share political preferences. The upshot of this is that federalism is still able to promote democratic accountability and allow individuals to live as they see fit.

#### 4.4.3. Extra-electoral democratic accountability

The above concerns addressed, let us now turn to the second dimension of the voice factor. As has already been remarked, this centres on the greater political influence that individuals can exert over legislative processes that affect them by extra-electoral means. This point can similarly be demonstrated through the use of a simple example. Consider the case of a small geographically concentrated interest group that is pushing for legislative reform because current legislation adversely affects their specific region. Let us also assume the group has

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denotes a fairly clearly defined set of beliefs, practices and practical commitments is being used.

<sup>70</sup> N. Silver, 'Gay Marriage Opponents Now In Minority,' *The New York Times*, 20<sup>th</sup> April 2011, viewed on the 30<sup>th</sup> April 2011, <<http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriage-opponents-now-in-minority/?ref=samesexmarriage>>. & D. Dougherty, 'State Policies On Same-Sex Marriage,' *Stateline.org*, Washington, viewed on the 30<sup>th</sup> April 2011, <<http://www.stateline.org/live/details/story?contentId=347390>>.

<sup>71</sup> A similar example comes from Australia. South Australians, Western Australians, and residents of the Northern and Australian Capital Territories can possess limited quantities of cannabis without facing criminal charges precisely because of Australia's federal system. See 'Cannabis and The Law,' *The National Cannabis Prevention and Information Centre*, Randwick, June 2009, viewed on the 30<sup>th</sup> April 2011, <<http://ncpic.org.au/ncpic/publications/factsheets/article/cannabis-and-the-law>>. If Australia had a unitary system, the majority of electors in these states and territories would probably be living under institutional structures that did not reflect their political preferences on this issue.



10,000 members and is proposing reforms that are broadly supported by some 2 million to 3 million equally geographically concentrated electors. If the country in this hypothetical scenario was the unitary system mentioned earlier, it would be extremely difficult for this interest group to achieve legislative reform. This is because the group's 10,000 members and the 2 million to 3 million broadly supportive electors would be dwarfed by 97 million largely indifferent electors. By contrast, if the country's system of government was federal, it would be comparatively easy for the group's 10,000 members and the 2 million to 3 million generally supportive electors to realise the desired reforms in a state of 5 million or 10 million electors.<sup>72</sup> It thus seems that, as the Australian politician Pru Goward claims, "[a]ccountability is a dish best served locally."<sup>73</sup> The lesson to take from this admittedly highly stylised example is that each individual exerts more extra-electoral political influence over the legislative processes that affect them in federal systems. As with the electoral voice factor, this means that federalism is able to promote democratic accountability and thereby allow individuals to live as they see fit.

#### **4.4.4. Democratic accountability and political atomisation**

Before concluding this section on the voice factor, it is important to address a concern that is likely to be at the forefront of the reader's mind. In principle, the above democratic accountability-based arguments seem to justify the creation of systems of government that have immensely more powerful local governments. If a system of government is democratically accountable to the extent that individuals exert political influence over the legislative processes that affect them, then surely the most democratically accountable system of government would be one that maximised the political influence of individuals by dividing political bodies into

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<sup>72</sup> Cf. Buchanan, 'Federalism and Individual Sovereignty,' *op. cit.*, p. 262.

<sup>73</sup> P. Goward, 'Canberra Is Too Far Away To Deliver Services,' *The Australian*, Friday 5<sup>th</sup> March 2010, p. 14. Cf. C. Walsh, 'Fixing Fiscal Federalism' in *Where To For Australian Federalism?*, R. Carling (ed.), The Centre for Independent Studies, St Leonards, 2008, pp. 43–62, p. 54.

small local governments. Although this objection builds on the above critique of unitary systems, it nonetheless implies that this line of reasoning has not been pushed to its logical terminus. Indeed, it seems that the preceding argument is as much a critique of federalism as it is a critique of unitary systems.

The most effective means of neutralising this objection is by simply noting that there is enough variety among the species of federalism to include the kind of radically atomised system of government that invests immense power in local governments. In claiming that the above argument is no critique of federalism because federalism can be radically atomised, a qualification needs to be added. Although radical atomisation in the name of increasing democratic accountability might be theoretically appealing, it is not advisable in practice. The economies of scale in health, education, law enforcement, and other services favour constituent units of more or less conventional size over minute constituent units that are of similar size to local governments. In attempting to make a system of government more democratically accountable through atomisation, one would likely compromise the provision of the governmental services over which one wanted to give individuals greater control. To take just one example, minute constituent units the size of local governments are unlikely to be able to provide health care systems requiring technical expertise, fiscal capacity, infrastructure, etc.<sup>74</sup>

Clearly, there are pragmatic grounds for not instituting radically atomised versions of federalism. However, many extant federal systems might derive handsome democratic accountability dividends from greater atomisation without thereby losing the ability to provide crucial services. To take the case of Australia, in light of the population and size of states such

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<sup>74</sup> Some classical liberals and libertarians are likely to object that this pragmatic rationale for avoiding radically atomised versions of federalism fails to appreciate that governments should not be in the business of providing health care at all. The most powerful response to this argument is to note that it is not actually a critique of the minimalist liberal theory of federalism. This is because, as already indicated, this defence of federalism in general extends to radically atomised versions of federalism. Without wanting to invite debate as to the appropriate scope of government, the pragmatic argument against radically atomised versions of federalism is advanced simply because it is a consideration that *may* well count in favour of federal systems with constituent units of more or less conventional size.

as NSW and Queensland, the economies of scale argument would not necessarily count against the division of large Australian states into smaller constituent units. Indeed, if one accepts the conclusion of the former NSW Farmers Association president, Mal Peters, that “country people could never get a fair hearing from 'city-centric' state governments,” the option of dividing NSW into smaller constituent units is likely to seem increasingly attractive.<sup>75</sup> At any rate, the key point to keep in mind is that even if the above democratic accountability-based argument in favour of federalism ultimately constitutes an argument in favour of a radically atomised system of government, it would not amount to an argument against federalism *per se*.

In summary, federalism substantially increases the political influence of individuals over the legislative processes that affect them by means of both electoral and extra-electoral voice factors. By promoting democratic accountability in these ways, federalism is a powerful constitutional tool for doing justice to the fact of pluralism and allowing individuals to live as they see fit.

#### **4.5. Democratic Accountability & Horizontal Intergovernmental Competition**

In addition to promoting democratic accountability by creating smaller jurisdictions with legislators representing fewer electors, federalism also promotes democratic accountability by means of interjurisdictional mobility (i.e., “If I do not like what my state does, I can move to another”).<sup>76</sup> More specifically, interjurisdictional mobility promotes democratic

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<sup>75</sup> Mal Peters as paraphrased in D. Lewis, 'Reformers Push For Tiny States In Two-Tiered Nation,' *The Sydney Morning Herald*, Saturday 13<sup>th</sup> May 2006, p. 9.

<sup>76</sup> Friedman, *Capitalism and Freedom*, *op. cit.*, p. 3 (Introduction). & Herscovitch, 'Democratic Accountability and

accountability by fostering competition between constituent units, thereby encouraging them to adopt public policy that reflects the political preferences of individuals. By promoting democratic accountability in this way, federalism once again becomes a powerful constitutional tool for doing justice to the fact of pluralism and allowing individuals to live as they see fit.

#### 4.5.1. Horizontal intergovernmental competition

Beginning with the distinction between “intergovernmental competition ... that is horizontal (between governments in the same tier) and [that which is] vertical (between the tiers),” this argument focuses on intergovernmental competition in its horizontal form.<sup>77</sup> Like competition in a market, competition between governments serves the interests of individuals more effectively than a governmental monopoly.<sup>78</sup> In contrast to the bilateral monopoly that exists within a unitary system (i.e., there is one “buyer,” namely, the citizenry, and there is one “seller,” namely, the government), the constituent units are forced into a competitive relationship in federal systems (i.e., there are multiple “sellers,” namely, the governments of the

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the Australian Federal System of Government,’ *op. cit.*

<sup>77</sup> R. Carling, ‘Overview’ in *Where To For Australian Federalism?*, R. Carling (ed.), The Centre for Independent Studies, St Leonards, 2008, pp. 5–9, p. 7. Jonathan Pincus also argues in favour of “vertical inter-governmental competition,” which consists in “pitting the central government against the states and territories, individually or collectively.” See J. Pincus, ‘6 Myths About Federal-State Financial Relations,’ *Australian Chief Executive*, February 2008, pp. 36–47, p. 41. & *ibid.* Cf. Walsh, *op. cit.*, p. 50. The case for vertical intergovernmental competition is, however, unclear. Each constituent unit must compete for individuals and businesses in the model of horizontal intergovernmental competition. By contrast, neither the central government nor the constituent units have an incentive to improve public policy outcomes due to vertical intergovernmental competition. This is because even poor public policy outcomes will not see either level of government lose individuals and businesses to the other level. Individuals and businesses do not have the option of abandoning the central government or the constituent units in the same way that they can abandon particular constituent units.

<sup>78</sup> Federalism in effect bypasses the problem raised by Paul A. Samuelson when he wrote: “Government supplies products jointly to many people. In ordinary market economics as you increase the number of sellers of a homogeneous product indefinitely, you pass from monopoly through indeterminate oligopoly and can hope to reach a determinate competitive equilibrium in the limit. It is sometimes thought that increasing the number of citizens who are jointly supplied public goods leads to a similar determinate result. This is reasoning from an incorrect analogy. A truer analogy in private economics would be the case of a bilateral-monopoly supplier of joint products whose number of joint products—meat, horn, hide, and so on—is allowed to increase without number: such a process does not lead to a determinate equilibrium of the harmonistic type praised in the literature.” See P. A. Samuelson, ‘Diagrammatic Exposition of A Theory of Public Expenditure,’ *The Review of Economics and Statistics*, vol. 37, no. 4, November 1955, pp. 350–356, p. 355.

constituent units). As Buchanan noted:

By its nature ... politics is coercive; all members of a political unit must be subjected to the same decisions. The prospect of exit, which is so important in imposing discipline in market relationships, is absent from politics unless it is deliberately built in by the constitution of a federalized structure.<sup>79</sup>

Although apparently “no ‘market type’ solution exists to determine the level of expenditures on public goods [and the general public policy frameworks that ought to be in place],” in reality, as Charles M. Tiebout famously put it, while this analysis “is valid for federal expenditures [and public policy frameworks more broadly], [it] need not apply to [the] local [i.e., constituent unit] [level].”<sup>80</sup>

The significance of the above is that horizontal intergovernmental competition promotes democratic accountability because constituent units are induced by means of competitive forces to adopt public policy that reflects the political preferences of individuals. If constituent units do not have public policy in place that reflects the political preferences of individuals, they may suffer a loss of both population and businesses. For example, a constituent unit that failed to effectively guarantee private property would risk the emigration of its populace and, crucially, the relocation of businesses. Given that, as Kincaid observes, “a federal arrangement gives citizens many choices of government jurisdictions offering different packages of taxes, public services, and civic values”:

Federalism ... permits citizens to “vote with their feet” by leaving, or threatening to leave, a jurisdiction so as to put pressure at least on constituent governments to match public services with public

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<sup>79</sup> Buchanan, 'Federalism and Individual Sovereignty,' *op. cit.*, p. 260.

<sup>80</sup> C. M. Tiebout, 'A Pure Theory of Local Expenditures,' *The Journal of Political Economy*, vol. 64, no. 5, October 1956, pp. 416–424, p. 416.

preferences.<sup>81</sup>

Put simply, whereas the government has a generally captive audience in a unitary system, individuals have numerous governments to choose from at the constituent unit level in federal systems. This in turn means that constituent unit governments have an incentive to deliver public policy that reflects the political preferences of individuals. As Section 4.5.4. acknowledges, the costs associated with moving between constituent units may make the bulk of individuals reluctant to emigrate to register their dissatisfaction with a constituent unit's public policy decisions. Notwithstanding factors that may mute the extent to which horizontal intergovernmental mobility promotes democratic accountability, the mere possibility of exit gives federalism an advantage over unitary systems when it comes to ensuring that public policy reflects the political preferences of individuals.

#### **4.5.2. Interjurisdictional mobility and supply and demand**

Interjurisdictional mobility is an essential precondition for the promotion of democratic accountability by means of horizontal intergovernmental competition.<sup>82</sup> Indeed, it is precisely the freedom of movement that typically exists in federal systems that makes the pressure of horizontal intergovernmental competition immensely more intense in federal systems than in systems of sovereign states.<sup>83</sup> Interjurisdictional mobility produces the enhanced pressure of horizontal intergovernmental competition in federal systems by creating supply and demand. In particular, interjurisdictional mobility means that individuals seek jurisdictions with

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<sup>81</sup> Kincaid, 'Values and Value Tradeoffs In Federalism,' *op. cit.*, p. 42. *Cf. ibid.*, p. 36., 'Gregory v. Ashcroft,' *op. cit.*, Anderson, *op. cit.*, p. 7 (Chapter One, §1.5). & Ostrom, *op. cit.*, p. 230 (§VI).

<sup>82</sup> As Tiebout pointed out: "Moving or failing to move replaces the usual market test of willingness to buy a good and reveals the consumer-voter's demand for public goods." See Tiebout, *op. cit.*, p. 420.

<sup>83</sup> As Friedman colourfully observed: "If I do not like what Washington imposes, I have few alternatives in this world of jealous nations." See Friedman, *Capitalism and Freedom*, *op. cit.*, p. 3 (Introduction). *Cf.* Kincaid, 'Federalism: The Highest Stage of Democracy?,' *op. cit.*, p. 111. & J. Pincus, 'In Defence of The Status Quo' in *Where To For Australian Federalism?*, R. Carling (ed.), The Centre for Independent Studies, St Leonards, 2008, pp. 27–36, p. 31.

institutional structures that reflect their political preferences (demand), and, as a consequence, constituent units seek to have institutional structures that reflect the political preferences of individuals (supply).<sup>84</sup>

In the same way that demand determines supply in the market place, the political preferences of mobile individuals help to determine the content of public policy. This means that, as Pincus observes:

Just as competition between firms safeguards consumers against high prices and shoddy goods and services, so competition between governments can safeguard citizens against bad service delivery and bad government, and encourage good government.<sup>85</sup>

Like the manufacturer of poor quality electronic equipment who loses customers, the poorly run constituent unit will lose individuals and businesses.<sup>86</sup> This indicates that in the same way that, as Oates put it, “the competitive pressures that result from an enlarged number of producers ... will tend to compel the adoption of the most efficient techniques of production,” the competitive pressures that result from an enlarged number of jurisdictions in the form of constituent units will tend to compel the adoption of public policy that reflects the political preferences of individuals.<sup>87</sup>

In summary, federalism gives individuals a means of holding governments to account that is not available to individuals in unitary systems, namely, exit. The resulting horizontal intergovernmental competition promotes democratic accountability, thereby making federalism a powerful constitutional tool for allowing individuals to live as they see fit.

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<sup>84</sup> P. A. Samuelson, 'The Pure Theory of Public Expenditure,' *The Review of Economics and Statistics*, vol. 36, no. 4, November 1954, pp. 387–389, p. 388 (§3). & Tiebout, *op. cit.*, p. 422.

<sup>85</sup> Pincus, 'In Defence of The Status Quo,' *op. cit.*, p. 29. *Cf.* Anderson, *op. cit.*, p. 7 (Chapter One, §1.5). & *ibid.*, p. 21 (Chapter Three, §3.2).

<sup>86</sup> *Cf.* Buchanan, 'Federalism As An Ideal Political Order and An Objective For Constitutional Reform,' *op. cit.*, p. 21. & Kincaid, 'Economic Policy-Making: Advantages and Disadvantages of The Federal Model,' *op. cit.*, p. 88.

<sup>87</sup> Oates, *op. cit.*, p. 12 (Chapter One). *Cf. ibid.*, p. 13 (Chapter One). & Anderson, *op. cit.*, p. 25 (Chapter Three, §3.5).

### 4.5.3. Tax wars and inequality

The counter-argument might now be advanced that horizontal intergovernmental competition actually risks making it harder for federal systems to allow individuals to live as they see fit. This is because, as Anderson observes, “[c]ompetition for mobile tax bases (at its limit, a ‘tax war’) can undermine a tax base itself.”<sup>88</sup> The by-product of horizontal intergovernmental competition that develops into “a tax ‘race to the bottom’” might well be that, as Pincus puts it, constituent units are left “with revenues inadequate to satisfy reasonable expectations for public services.”<sup>89</sup> Institutional structures would consequently lack the resources necessary to allow individuals to live as they see fit (i.e., institutional structures would be unable to provide services to meet the political preferences of individuals).

The above problem is exacerbated by varying levels of interjurisdictional mobility among different groups. As Boadway and Shah observe:

The extent of mobility may differ across different types of households or firms, in which case the most mobile command the most preferential policies ... If some firms are more footloose than others, fiscal policies will be adopted that favor them.<sup>90</sup>

The significance of this is twofold. First, rather than making public policy more sensitive to the political preferences of individuals in general, horizontal intergovernmental competition is likely to make it more sensitive to the political preferences of a specific class of individuals. Namely, those economically privileged individuals who can afford to relocate. This means that public policy decisions in the constituent units are likely to be biased in favour of wealthier

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<sup>88</sup> *ibid.*, p. 23 (Chapter Three, §3.3).

<sup>89</sup> Pincus, ‘6 Myths About Federal-State Financial Relations,’ *op. cit.*, p. 42. *Cf.* Oates, *op. cit.*, p. 7 (Chapter One).

<sup>90</sup> Boadway & Shah, *op. cit.*, p. 126 (Part One, Chapter 3).



individuals.<sup>91</sup> Second, the flip-side of the first phenomenon is that public policy is likely to be less sensitive to the political preferences of economically disadvantaged individuals. Not only are constituent units with significant income redistribution programmes likely to suffer a substantial loss in tax revenue because of the emigration of high income denizens and important business interests, other constituent units may well shy away from significant income redistribution programmes to attract both businesses and wealthy—and consequently more mobile—individuals. As Kincaid notes, “competition among jurisdictions for the most desirable citizens may drive down services for citizens regarded as less desirable.”<sup>92</sup> Horizontal intergovernmental competition might therefore make federal systems less adept at allowing individuals to live as they see fit by, firstly, encouraging a tax “race to the bottom” that jeopardises the provision of crucial services, and secondly, providing constituent units with incentives to adopt public policy that favours a small group of wealthy individuals and does not serve the interests of the economically disadvantaged.

By way of a counter-argument, the above critique ignores the possibility of a uniformly enforced tax at the national level, such as a Value Added Tax (VAT) (e.g., the Australian Goods and Services Tax [GST]). A VAT would preserve the benefits of horizontal intergovernmental competition if it safeguarded the fiscal autonomy of the constituent units through tax revenue transfers from the central government (i.e., the constituent units would still be able to compete for individuals and businesses by apportioning their VAT funds wisely). At the same time, the use of uniformly enforced national “taxes that are not likely to trigger significant interstate migration to avoid them,” such as VATs, sidesteps the problem of a tax “race to the bottom” that risks impoverishing the constituent units.<sup>93</sup> More specifically, the uniform enforcement of the tax would guarantee that businesses and tax payers emigrate from constituent units to register

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<sup>91</sup> *Cf. ibid.*, p. 130 (Part One, Chapter 3).

<sup>92</sup> Kincaid, 'Values and Value Tradeoffs In Federalism,' *op. cit.*, pp. 42–43. *Cf.* Boadway & Shah, *op. cit.*, p. 130 (Part One, Chapter 3). & Anderson, *op. cit.*, p. 22 (Chapter Three, §3.2).

<sup>93</sup> Pincus, '6 Myths About Federal-State Financial Relations,' *op. cit.*, p. 45.

their dissatisfaction with the way the tax revenue is spent by particular constituent units instead of being motivated by escaping the tax entirely. This suggests that, as Anderson points out:

The logic of centralizing revenue collection is generally stronger than that of centralizing expenditure responsibilities.<sup>94</sup>

Not only would an appropriately designed national VAT preserve the benefits of horizontal intergovernmental competition and avoid impoverishing the constituent units, it would also mitigate the other key negative effect referred to in the above critique. Given that the tax could be uniformly imposed and the revenue allocated to constituent units on a per capita basis, constituent units would not have an incentive to exclusively attract wealthy individuals as they would receive the same amount of revenue irrespective of the socio-economic composition of their populations.<sup>95</sup> Nonetheless, constituent units would still be in a competitive relationship because they would want to maximise their population so as to increase the size of their economies and receive a larger portion of the tax revenue.

The above suggests that just as economists generally acknowledge that markets only function effectively if parameters in the form of laws and institutions are in place, horizontal intergovernmental competition may only promote democratic accountability if certain uniform constraints are placed on the constituent units.<sup>96</sup> Notwithstanding that there will be an immense amount of debate as to the appropriate extent of the legal and institutional regulatory mechanisms, the crucial point for present purposes is that highlighting the benefits of horizontal intergovernmental competition need not amount to a blanket defence. In short, although horizontal intergovernmental competition can be counter-productive, it remains an

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<sup>94</sup> Anderson, *op. cit.*, p. 50 (Chapter Five, §5.1). For an in-principle objection, see G. Brennan & J. M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution*, Cambridge University Press, Cambridge, 1980, p. 183 (Chapter 9, §9.4.).

<sup>95</sup> *Cf. ibid.*, p. 38 (Chapter Four, §4.4).

<sup>96</sup> As even Friedman candidly acknowledged: "It turns out that the rule of law is probably more basic than privatization. Privatization is meaningless if you don't have the rule of law." See Friedman, 'Preface: Economic Freedom Behind The Scenes,' *op. cit.*, p. xviii.

effective means of promoting democratic accountability.

#### 4.5.4. The costs of migrating and empirical evidence

It might now be objected that the costs associated with migrating from one constituent unit to another are prohibitive to the point that horizontal intergovernmental competition is unlikely to induce constituent units to implement public policy that reflects the political preferences of individuals. There are numerous economic, cultural, linguistic, etc., barriers in most federal systems that make it difficult for individuals to move between constituent units. As Levy points out:

Mobility and competition accounts of federalism ... fit poorly with a world of federations that have relatively few, relatively large provinces many of which are defined linguistically or ethnoculturally.<sup>97</sup>

For example, although a Francophone Québécois can in principle register their dissatisfaction with the government of Québec by emigrating, they will in practice probably not do this for the simple reason that they will not want to become part of a linguistic minority.

What is more, it might be argued, as Boadway and Shah do, that:

If one takes the migration decision to be a long-run irreversible one, and governments can make budgetary decisions on a recurring basis, the Tiebout model [of horizontal intergovernmental mobility] and its consequences for optimal community formation break down.<sup>98</sup>

In other words, given that, in all likelihood, decisions to move cannot be made as readily as decisions to change public policy, the pressure on governments to enact public policy that

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<sup>97</sup> Levy, 'Federalism, Liberalism, and The Separation of Loyalties,' *op. cit.*, p. 462. Cf. Kincaid, 'Federalism: The Highest Stage of Democracy?,' *op. cit.*, p. 111.

<sup>98</sup> Boadway & Shah, *op. cit.*, p. 125 (Part One, Chapter 3).

reflects the political preferences of individuals will be minimised. To use an extreme example, a constituent unit might enact particularly attractive policies to lure individuals and then abolish these policies soon after a large number of individuals have relocated to the constituent unit in question. The high costs associated with migrating combined with the ability of constituent units to regularly alter public policy mean that horizontal intergovernmental competition is unlikely to promote democratic accountability.

As the first part of this objection suggests, there are indeed a host of economic, cultural, linguistic, etc., barriers that make it difficult for individuals to move between constituent units. Geoffrey Brennan and Buchanan rightly observe that “locational preferences of taxpayers, locational rents earned by economic resources, and positive costs of moving between locations” all mean that a model of perfect horizontal intergovernmental competition is grossly unrealistic.<sup>99</sup> Individuals cannot be expected to move to a different constituent unit solely as a result of being dissatisfied with their constituent unit’s government for the simple reason that public policy is just one of many factors that determine where individuals decide to live.

Notwithstanding the above, horizontal intergovernmental competition is still an effective means of promoting democratic accountability, particularly when the costs of moving between constituent units are low and there are no severe cultural, linguistic, economic, etc., barriers between constituent units.<sup>100</sup> Many individuals will obviously not be able to hold their governments to account by relocating. Nevertheless, the mere possibility of this happening, together with the likelihood that some well-placed mobile individuals will move and that many individuals would move if public policy decisions were extremely poor, acts as a check on the power of government. Although the democratic accountability dividend of horizontal intergovernmental competition may not be spectacular—and may in fact be negligible when there are severe cultural, linguistic, economic, etc., barriers between constituent units—it still

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<sup>99</sup> Brennan & Buchanan, *op. cit.*, p. 179 (Chapter 9, §9.3.).

<sup>100</sup> *ibid.*, p. 185 (Chapter 9, §9.6.).

provides citizens in a federal system with an additional democratic outlet.

Demographic trends give the model of horizontal intergovernmental competition under the conditions of low relocation costs and relative homogeneity among constituent units at least *prima facie* plausibility. In the Australian case, this model is a roughly accurate predictor of emigration from poorly governed constituent units. The state of NSW in the Australian federation, which almost all agree was mismanaged in recent years, experienced the largest amount of negative net interstate migration by a wide margin, which as a percentage of the population was only surpassed by South Australia.<sup>101</sup> Although other factors may well have contributed to decisions to emigrate from NSW, and although not all individuals dissatisfied with the manner in which NSW was governed were able to emigrate, it is significant that some individuals both could and likely did emigrate to register their dissatisfaction.<sup>102</sup>

As concerns the second dimension of the above objection, although there may be incentives for constituent units to cynically exploit interjurisdictional mobility, there will also be significant disincentives that militate against such tactics. For example, not only will such behaviour seriously undermine any future attempts to attract denizens, it would presumably be preferable to not make a segment of the population profoundly dissatisfied with the government's behaviour.

The very real costs associated with migrating from one constituent unit to another and the relative ease with which constituent units can alter public policy diminish horizontal intergovernmental competition's democratic accountability dividend. However, horizontal intergovernmental competition does nevertheless provide federal systems with a mechanism for promoting democratic accountability that is not available to unitary systems.<sup>103</sup> Despite

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<sup>101</sup> 'Australian Demographic Statistics,' *The Australian Bureau of Statistics*, Canberra, June 2009, viewed on the 13<sup>th</sup> January 2010, <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/FB52766C453652E1CA25768000196B47/\\$File/31010\\_jun%202009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/FB52766C453652E1CA25768000196B47/$File/31010_jun%202009.pdf)>, p. 8.

<sup>102</sup> Cf. Tiebout, *op. cit.*, p. 424.

<sup>103</sup> Although there may be a comparable amount of horizontal intergovernmental competition in a devolved

horizontal intergovernmental competition's limitations, as Boadway and Shah concede:

The main message of the Tiebout model is a powerful one. In the face of heterogeneous communities, decentralized decision makers, constrained by the need to cater to potentially mobile households and firms, will strive to provide the best mix of public goods and services for their residents that they can.<sup>104</sup>

Horizontal intergovernmental competition will certainly not make federal systems perfectly democratically accountable. However, by promoting democratic accountability—even if only in a limited way—horizontal intergovernmental competition further confirms that federalism is a powerful constitutional tool for allowing individuals to live as they see fit.

In conclusion, federalism promotes democratic accountability by avoiding governmental monopolies and fostering horizontal intergovernmental competition between constituent units. Federalism thereby puts constituent units in a competitive relationship in which it is in their interest to adopt public policy that reflects the political preferences of individuals. This competition once again makes federalism a powerful constitutional tool for doing justice to the fact of pluralism and allowing individuals to live as they see fit.

## 4.6. Conclusion

Four key propositions were defended in this chapter:

1. federalism is able to protect negative liberty because it leaves groups of individuals free to live as they see fit as regards the areas of public policy

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unitary system, this competition can never be guaranteed because constituent unit autonomy is not constitutionally enshrined in these systems.

<sup>104</sup> Boadway & Shah, *op. cit.*, pp. 125–126 (Part One, Chapter 3).

- under the jurisdiction of their constituent units;
2. federalism is able to promote democratic accountability because by creating a common central government, it gives individuals political influence over legislative processes that impinge on their liberty but which would otherwise be beyond their influence;
  3. federalism is able to promote democratic accountability because it increases—both by electoral and extra-electoral means—the political influence of individuals over the legislative processes that affect them; and
  4. federalism promotes democratic accountability because horizontal intergovernmental competition between constituent units means they have an incentive to implement public policy that accords with the political preferences of individuals.

Together, the above claims show that federalism's ability to protect negative liberty and promote democratic accountability makes it a powerful constitutional tool for doing justice to the fact of pluralism and thereby allowing individuals to live as they see fit. Although federalism will certainly not ensure that a system of government is liberal and democratic, a liberal and democratic system of government that is also federal will have an additional tool at its disposal for living up to liberal democratic ideals.<sup>105</sup>

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<sup>105</sup> Cf. Kincaid, 'Federalism: The Highest Stage of Democracy?', *op. cit.*, p. 115.

# Chapter 5: Federalism Defended

## 5.1. Introduction

This fifth and final chapter explores and responds to two key critiques of federalism—each of which corresponds to one of this thesis' two central arguments in favour of federalism. The first two sections fight the charge that federalism facilitates the implementation of illiberal public policy, which is in effect an attack on the argument that federalism is a powerful constitutional tool for protecting negative liberty. The second two sections neutralise the accusation that federalism is undemocratic, which is in effect an attack on the argument that federalism is a powerful constitutional tool for promoting democratic accountability. Four key claims are made to defend federalism against these critiques:

1. there is no necessary connection between federalism and the implementation of illiberal public policy;
2. it is misleading to accuse federalism of being a completely malleable constitutional mechanism that simply promotes the values to which a society happens to subscribe;
3. federalism's qualified rejection of the principle of majority rule actually makes federal systems more democratically accountable; and
4. the qualified rejection of the principle of majority rule does not rest on an unworkable conception of the relevant majority.

The general conclusion to be taken from this chapter is that there is no reason to think that federalism is either conducive to the implementation of illiberal public policy or undemocratic.



## 5.2. Federalism & Illiberal Public Policy

Let us first consider the critique that the minimalist liberal theory of federalism obscures the way in which the federal protection of negative liberty can facilitate the implementation of illiberal public policy.

### 5.2.1. The protection of negative liberty and the freedom to oppress

Accepting minimalist liberalism, it is entirely reasonable to endorse the sentiment that animates Calhoun's contention that:

The people have a right to establish what government they may think proper for themselves; ... every State ... has a right to form its government as it pleases.<sup>1</sup>

Despite appearing morally innocuous, Calhoun's defence of federalism's constitutionally enshrined constituent unit autonomy actually amounts to a defence of potentially deeply illiberal institutional structures. “[L]ocal freedom of action may not in fact generate true liberty” because, as Levy points out, “the local polities run the risk of becoming oppressively homogenous—of being dominated by an unjust majority faction.”<sup>2</sup> This is not just a reformulation of Dicey's claim that “[f]ederalism tends to produce conservatism” because constitutional reform requires “special majorities.”<sup>3</sup> It is the distinctly stronger contention

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<sup>1</sup> Calhoun, 'Speech On The Introduction of His Resolutions On The Slave Question [February 19, 1847];' *op. cit.*, p. 518. *Cf. ibid.*, p. 521. & A. Jackson, 'Veto of The Bank Bill, July 10, 1832' in *The Declaration of Independence and Other Great Documents of American History, 1775–1865*, J. Grafton (ed.), Dover Publications, Mineola, 2000, pp. 72–79, p. 78.

<sup>2</sup> Riker, 'Federalism,' *op. cit.*, p. 616. & Levy, 'Federalism and The Old and New Liberalisms,' *op. cit.*, p. 316 (§III). *Cf.* Norman, 'The Morality of Federalism and The European Union,' *op. cit.*, pp. 204–205. & Norman, 'Towards A Philosophy of Federalism,' *op. cit.*, p. 80.

<sup>3</sup> Dicey, *op. cit.*, p. 169 (Part I, Chapter III). & Anderson, *op. cit.*, p. v (Preface and Acknowledgements). *Cf.* Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, *op. cit.*, p. 85 (Chapter 3, §3.4). Despite the long-enduring Jim Crow laws suggesting that federal conservatism is cause for concern, this conservatism is not in and of itself deleterious. The federal conservatism that protects

that just as surely as the guarantee of constituent unit autonomy can protect the negative liberty of national minorities, it also makes possible the oppression of minorities or disadvantaged groups in the constituent units. Although protecting negative liberty by means of constituent unit autonomy may be consistent with the liberal commitment to doing justice to the fact of pluralism, curbing constituent unit autonomy may also, as Kincaid observes, “enhance individual liberty because small republics can be tyrannical too, and this may be all the more so in small communal republics.”<sup>4</sup> Given that federalism's protection of negative liberty presents “the danger of mischievous legislation in the interest of a predominant class,” unitary systems that restrict the negative liberty of sub-national groups may in fact be better able to protect individual liberty.<sup>5</sup>

A historical case study of sorts will suffice to underscore the force of the above critique. It was arguably not a product of mere historical accident that some of the staunchest US defenders of states' rights cited approvingly in this thesis, such as Calhoun, Douglas and Andrew Jackson, also advocated the preservation of the institution of chattel slavery in the Southern States of the United States. What is more, in the first half of the twentieth century, support for states' rights would have amounted to *de facto* support for the Jim Crow laws. As Riker noted:

The most persistent exponents of “states' rights”—a doctrine that makes much of the freedom-encouraging features of federalism—have been those who use the doctrine as a veiled defense first of slavery, then of civil tyranny.<sup>6</sup>

Both before and after the American Civil War, the exemplary federal system ensured that the

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the official language status of French in Canada indicates that its effects can be salutary just as surely as they can be problematic. Federalism's conservatism thus seems to have a morally ambiguous status: It can be nefarious or laudable depending on the specificities of the case.

<sup>4</sup> Kincaid, 'Values and Value Tradeoffs In Federalism,' *op. cit.*, p. 38.

<sup>5</sup> Sidgwick, *The Development of European Polity*, *op. cit.*, p. 438 (Lecture XXIX, §6).

<sup>6</sup> Riker, *Federalism: Origin, Operation, Significance*, *op. cit.*, p. 140 (Chapter 6, §1). *Cf.* Riker, 'Federalism,' *op. cit.*, p. 616.

institutional structures under which many of its people lived did *not* allow them to live as they saw fit.<sup>7</sup> Although “federal structures can clearly prevent repression and the violation of cultural rights and even human rights in culturally divided societies” because “federalism can restrict the center from *violating* rights,” federalism also provides an avenue for constituent unit majorities or powerful constituent unit minorities to violate the rights of minorities or disadvantaged groups.<sup>8</sup> In addition to protecting negative liberty, federalism thereby also seems to facilitate the implementation of deeply illiberal public policy.

### 5.2.2. Necessary and contingent features of federalism

Although it should not need highlighting, it is nevertheless worthwhile emphasizing that the defences of constituent unit autonomy advanced by the likes of Calhoun, Douglas and Jackson were deeply flawed in key respects. In particular, they were either tied to profoundly racist views or they simply glossed over the extent to which the institutional structures being defended were oppressive. An example that falls into the first category is Douglas' nakedly racist claim that:

I care more for the great principle of self-government, the right of the people to rule, than I do for all the negroes in Christendom.<sup>9</sup>

In the second category sits Calhoun's failure to acknowledge the monumental inaccuracy in his contention that “we have no artificial and separate classes of society. We have wisely exploded all such distinctions.”<sup>10</sup> Happily for myself and other defenders of federalism, the mere fact that the likes of Calhoun and Douglas were bigoted and myopic does not mean that there is a necessary connection between federalism and illiberal public policy.

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<sup>7</sup> *ibid.*, p. 617. Cf. Kincaid, 'Values and Value Tradeoffs In Federalism,' *op. cit.*, p. 38., Levy, 'Federalism and The Old and New Liberalisms,' *op. cit.*, p. 318 (§III). & Riker, 'Federalism,' *op. cit.*, p. 617.

<sup>8</sup> Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, *op. cit.*, p. 87 (Chapter 3, §3.4). & Levy, 'Federalism and The Old and New Liberalisms,' *op. cit.*, p. 319 (§III).

<sup>9</sup> Douglas & Lincoln, *op. cit.*, p. 400. Cf. *ibid.*, p. 374.

<sup>10</sup> Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., *Messenger*],' *op. cit.*, p. 418.

The preceding point of clarification acknowledged, a counter-argument remains to be made in defence of federalism. To that end, it is essential to observe that the above critique is guilty of a gross conflation that equates the contingent features of specific federal systems with the necessary features of federalism in general. Furthermore, the above critique entirely ignores the qualified nature of the minimalist liberal theory of federalism: This theory of federalism is not a blanket defence of all past, present and future federal systems, and is therefore not undermined by examples of federal systems that facilitated the implementation of deeply illiberal public policy.

With respect to the first dimension of the counter-argument, the example of the oppression of African Americans in the United States is not in and of itself an argument against federalism in general. To substantiate the view that “there is nothing intrinsically illiberal about federalism *at all*,” it is enough to point out that the above critique is guilty of conflating two distinct features of certain federal systems: Namely, constituent unit autonomy and the implementation of illiberal public policy.<sup>11</sup> If constituent unit autonomy happens to facilitate the implementation of illiberal public policy, the illiberal public policy should be criticised and not the constituent unit autonomy *qua* constituent unit autonomy. Far from federalism's constitutionally enshrined constituent unit autonomy of necessity facilitating the implementation of illiberal public policy, the relationship between the federal protection of constituent unit autonomy and the implementation of illiberal public policy is purely contingent. Observing that some unitary systems permitted genocide (e.g., the Ottoman Empire, Democratic Kampuchea, the Republic of Rwanda, etc.) is not by itself a good argument against unitary systems in general. Similarly, noting that some federal systems facilitated the implementation of illiberal public policy by means of constitutionally enshrined constituent unit autonomy is not by itself a good argument against the federal protection of constituent unit autonomy in general. To appropriate Edward A. Freeman's point, examples

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<sup>11</sup> Levy, 'Federalism, Liberalism, and The Separation of Loyalties,' *op. cit.*, p. 474.

such as the United States during the antebellum period and the era of the Jim Crow laws:

Prove no more against Federalism in the abstract than the  
misgovernment of particular Kings and the occasional disruption of  
their kingdoms prove against Monarchy in the abstract.<sup>12</sup>

A further point can be made to add weight to the above argument: It was surely just a matter of historical contingency that those who defended the institution of chattel slavery in the United States also advocated constituent unit autonomy. Those who advocated constituent unit autonomy could have just as easily done so on the grounds that they did *not* want the institution of chattel slavery established in their constituent units. This is essentially the point made by Ostrom when he notes that "racial minorities may have as much to fear from 'privileged majorities' as 'privileged minorities'."<sup>13</sup> More specifically, the roles could have been reversed and the federal government could have wanted to extend the institution of chattel slavery to the free states. Put simply, it is easy to imagine scenarios in which the source of illiberal public policy is the national government instead of the constituent unit governments. In such scenarios, far from facilitating the implementation of illiberal public policy, federalism would actually serve as a bulwark against it.

The merely contingent correlation between federalism's protection of constituent unit autonomy and the implementation of illiberal public policy is arguably presented as a necessary causal connection because many theorists of federalism, such as Riker, have a US-centric perspective. For example, it is parochial to claim, as Riker did, that "if in the United States one disapproves of racism, one should disapprove of federalism."<sup>14</sup> This view is indicative of a failure to distinguish the manner in which the US federal system functioned in the antebellum era and the period of the Jim Crow laws from the way in which federalism

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<sup>12</sup> E. A. Freeman, *History of Federal Government In Greece and Italy*, 2<sup>nd</sup> edition, J. B. Bury (ed), Macmillan and Co., London, 1893, p. 71 (Chapter II).

<sup>13</sup> Ostrom, *op. cit.*, p. 207 (§III).

<sup>14</sup> Riker, *Federalism: Origin, Operation, Significance, op. cit.*, p. 155 (Chapter 6, §IV).

functions *simpliciter*. Riker ignored that just as “[o]ne does not decide on the merits of federalism by an examination of federalism in the abstract,” one should not reach a conclusion regarding federalism’s faults simply by considering how a particular federal system functioned during a specific historical period.<sup>15</sup> The lesson is therefore that, to quote Friedman, “[h]istorical evidence by itself can never be convincing” because it will merely indicate how federalism functions given a host of contingent factors.<sup>16</sup>

As concerns the second dimension of the counter-argument, it is crucial to remember that the minimalist liberal theory of federalism is not an indiscriminate defence of all past, present and future federal systems. It is therefore not undermined by individual examples of federal systems facilitating the implementation of deeply illiberal public policy.<sup>17</sup> To see why specific examples of illiberal federal systems do not pose a threat to the minimalist liberal theory of federalism, let us briefly recapitulate some of the most important implications of the minimalist conception of liberalism on which this theory of federalism rests.

Calhoun once objected to those who were:

Ready to strike down the higher right of a community to govern themselves, in order to maintain the absolute right of individuals in every possible condition to govern themselves.<sup>18</sup>

Despite admiring the force of Calhoun’s defence of constituent unit autonomy, it is at this point that the minimalist liberal theory of federalism parts ways with him. Minimalist liberalism rejects Calhoun’s argument that the freedom of the group ought to take precedence over the freedom of the individual. At the heart of minimalist liberalism is the idea that

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<sup>15</sup> *ibid*, p. 152 (Chapter 6, §III). Cf. Neumann, *op. cit.*, p. 54 (§VI).

<sup>16</sup> Friedman, *Capitalism and Freedom*, *op. cit.*, p. 11 (Chapter I).

<sup>17</sup> To be sure, if all past and present federal systems were deeply illiberal, even the most ardent federalist would presumably ask questions about federalism’s liberal credentials. However, as the empirical evidence considered in Chapter 3, Section 3.5.2. shows, there is no such overwhelming correlation between federalism and illiberal public policy. Indeed, the evidence indicates that federalism is positively correlated with the protection of individuals liberty and democratic rule.

<sup>18</sup> Calhoun, ‘Speech On The Introduction of His Resolutions On The Slave Question [February 19, 1847];’ *op. cit.*, p. 518.

individuals ought to be free to live as they see fit, *on the condition that this not stop others living as they see fit*. This places a very strict limit on constituent unit autonomy: When there is a battle between “individual liberty and communitarian liberty,” individual liberty ought to prevail.<sup>19</sup> Just as Montesquieu sagaciously acknowledged that “so that we cannot abuse power, ... power must stop power,” so that negative liberty cannot be abused, negative liberty must sometimes limit negative liberty.<sup>20</sup> To be more precise, avoiding the abuse of negative liberty means ensuring that individual negative liberty can limit the negative liberty of the group. Unlike Calhoun, the minimalist liberal theory of federalism stops short of defending constituent unit autonomy and the negative liberty it protects when it gives a national minority the freedom to deny a constituent unit minority their freedom. In other words, the national minority's freedom to live as they see fit in their constituent unit is limited by the freedom of constituent unit minorities to live as they see fit.

The minimalist liberal theory of federalism advocates federal systems on the grounds that they protect negative liberty and so are able to allow individuals to live as they see fit. However, if instituting federalism in a specific case meant protecting the freedom of some to deny others their freedom, the minimalist liberal theory of federalism would not shy away from advocating a unitary system that guaranteed individual liberty for all. This concession is simply a function of acknowledging that, as Freeman put it:

Federal Government ... like all other forms of government, may be good or bad, strong or weak, wise or foolish, just as may happen.<sup>21</sup>

Rather than blindly defending all of the past, present and future federal systems with their many foibles, the minimalist liberal theory of federalism only maintains that federalism's protection of negative liberty in the form of its constitutional enshrinement of constituent unit

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<sup>19</sup> Kincaid, 'Values and Value Tradeoffs In Federalism,' *op. cit.*, p. 38. Cf. J. Madison, 'The Federalist No. 45' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed.), Cambridge University Press, Cambridge, 2006, pp. 223–228, p. 224.

<sup>20</sup> Montesquieu, *De L'Esprit Des Lois: Tome I, op. cit.*, p. 326 (Seconde Partie, Livre Onzième, Chapitre IV).

<sup>21</sup> Freeman, *op. cit.*, pp. 70–71 (Chapter II).

autonomy is a powerful tool for allowing individuals to live as they see fit. This obviously does not ensure that specific federal systems will use this constitutional tool effectively. Indeed, a specific federal system may use its constitutionally guaranteed constituent autonomy to allow national minorities to oppress constituent unit minorities. Despite not always being employed to allow individuals to live as they see fit, federalism's constitutional protection of constituent unit autonomy is nevertheless a powerful tool for protecting negative liberty and allowing individuals to live as they see fit.

In summary, there is no necessary causal connection between federalism and the implementation of illiberal public policy. Not only does the above critique erroneously attribute the faults of specific federal systems to federalism *simpliciter*, it ignores the qualified nature of the minimalist liberal theory of federalism.

### **5.3. Federalism Without Principle**

Insofar as federalism in general should not be held responsible for the oppressive practices of particular federal systems, it should arguably not be credited with the way in which particular federal systems protect negative liberty. Indeed, it might be further claimed that any attempt to formulate a normative theory of federalism is undermined if federalism is defended on the grounds that one illiberal federal system does not show that federalism in general is illiberal: If federalism is malleable and specific federal systems simply reflect the values of their societies, then presumably federalism in general does not have any particular strengths (i.e., the strengths of any given federal system—like the weaknesses—would come from other sources than the constitutional division of sovereignty unique to federalism).



### 5.3.1. Federalism as an empty vessel

Neumann offered a forceful critique of federalism when he argued that “it ... seems impossible to attribute to federalism, as such, a value.”<sup>22</sup> Neumann's point was that the ends advanced by any particular federal system will be a function of broad cultural, social, economic, political, etc., forces and will not be the result of the system of government in question having a federal form. As Riker pointedly asked:

Does federalism make any difference in the way people are governed? ...

[T]he answer appears to be: Hardly any at all.<sup>23</sup>

A historical example will suffice to illustrate Neumann and Riker's point: Before the reforms of the civil rights era, the US federal system facilitated the oppression of African Americans, whereas in the contemporary period, this same system of government does not seem to facilitate significant forms of oppression.<sup>24</sup> In both of these cases, the federal system seems to simply reflect the values of society-at-large.

The above account of federalism has potentially devastating consequences for the minimalist liberal theory of federalism. On this account, if some federal systems are able to allow individuals to live as they see fit, it would just be the result of cultural, social, economic, political, etc., forces that are not related to the federal structure of these systems of government. In other words, federalism looks like an empty formal structure that advances different political ends depending on the society in which it operates. Simply put, federalism “has ... almost no real content of its own and is no more than a reflection of the more profound features of the political culture.”<sup>25</sup>

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<sup>22</sup> Neumann, *op. cit.*, p. 49 (§II). *Cf. ibid.*, p. 54 (§VI).

<sup>23</sup> Riker, 'Review Article: Six Books In Search of A Subject Or Does Federalism Exist and Does It Matter?,' *op. cit.*, p. 145 (§IV).

<sup>24</sup> See *ibid.*, p. 146 (§IV).

<sup>25</sup> *ibid. Cf. ibid.*, p. 142 (§II).

### 5.3.2. Federal values

Before directly responding to this critique, it is essential to acknowledge the pivotal role played by cultural, social, economic, political, etc., forces in shaping the outcomes produced by systems of government. Indeed, it would be extremely naïve to think that the mere design of a system of government can ensure positive or negative outcomes. As Levy rightly observes:

All good political theory about institutional design ... does not conflate generally good procedures with morally desirable particular outcomes.<sup>26</sup>

In light of this, it may well be true that, as Norman suggests:

No universal generalizations about the valuable consequences of a given type of political institution will survive empirical analysis—especially if all we mean by this is that we can always imagine (or even point to) situations and scenarios in which any given political institution would fail (or has failed).<sup>27</sup>

Applied specifically to the case of federalism, just as surely as it is implausible to claim that federal systems of necessity produce oppression, it is absurd to maintain that they will always allow individuals to live as they see fit.

Given the above, the minimalist liberal theory of federalism is at pains to stress that not all federal systems will allow individuals to live as they see fit. Although the federal structure is a powerful constitutional tool for allowing individuals to live as they see fit, there is no guarantee that every federal system will actually use federal mechanisms to do justice to the fact of pluralism and allow individuals to live as they see fit. Any sensible defence of federalism will shy away from maintaining that federalism simply cannot do ill. As forceful as

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<sup>26</sup> Levy, 'Federalism and The Old and New Liberalisms,' *op. cit.*, p. 314 (§II).

<sup>27</sup> Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession In The Multinational State*, *op. cit.*, p. 90 (Chapter 3, §3.4).

an argument in favour of federalism might be, it should always be tempered by the recognition that the outcomes produced by any given federal system will be in large part a function of cultural, social, economic, political, etc., forces.

Leaving the above qualification of the minimalist liberal theory of federalism to one side, Riker's critique of federalism is misleading. Cultural, social, economic, political, etc., forces mean that, in all likelihood, no systems of government are invariably legitimate. Be this as it may, it is too strong to make the additional claim that it is not possible to reach conclusions as to the values promoted by different systems of government. It would certainly be incorrect to claim that federal systems always allow individuals to live as they see fit. However, it is nevertheless true that they have an additional mechanism not found in systems of sovereign states and unitary systems—the constitutional protection of constituent unit autonomy—that makes it easier for them to allow individuals to live as they see fit. If one simply meant that not all federal systems will always produce morally laudable outcomes, it of course would be correct to point out that “federalism *as such* has no inherent value.”<sup>28</sup> However, this does not amount to conceding that federalism simply reflects the values of society-at-large and completely lacks its own unique values. It is admittedly not possible to know in advance whether a specific federal system's protection of negative liberty will have beneficial outcomes. This is because, as noted earlier, cultural, social, economic, political, etc., forces mean that it is not possible to know in advance the nature of the negative liberty protected. Will a federal system protect the negative liberty to live as one sees fit without denying others their negative liberty, or will it protect the negative liberty to oppress others? Nevertheless, owing to the way in which federalism by its very nature protects negative liberty by constitutionally guaranteeing constituent unit autonomy, it is certainly not a valueless and empty formal structure.

The gap in Riker's analysis—the faulty inference from federalism's failure to guarantee

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<sup>28</sup> *ibid.*

positive outcomes to the conclusion that federalism advances no specific values at all—means that he is blind to federalism's many possible benefits. Riker's oversight is massive: He fails to see that even though it is not possible to be sure that a specific federal system will allow individuals to live as they see fit, the nature of federalism means that federal systems have an additional constitutional tool for allowing individuals to live as they see fit (i.e., constitutionally guaranteed constituent unit autonomy). To determine whether a given federal system will allow individuals to live as they see, it is admittedly necessary to answer the crucial question of the kind of negative liberty protected (i.e., it is necessary to take into account the impact of the broader cultural, social, economic, political, etc., forces). However, this does not detract from federalism's status as a powerful constitutional tool for allowing individuals to live as they see fit.

In conclusion, it is incorrect to accuse federalism of not advancing any particular ends and simply being a conduit for the values of society-at-large. To be sure, federal systems will not always effectively allow individuals to live as they see fit. However, by constitutionally guaranteeing constituent unit autonomy, all federal systems possess a powerful tool for realising the goal of allowing individuals to live as they see fit.

#### **5.4. Federalism & Undemocratic Modes of Governance**

Federalism's necessary constitutional division of sovereignty means that national majorities will not be able to determine legislative outcomes in all arenas. In light of the connection between majoritarianism, democracy and legitimacy, it might be argued that this frustration of majority rule makes federalism illegitimate.

#### 5.4.1. Majority rule and legitimacy

Tocqueville equated democracy with majoritarianism when he wrote that “it is the essence of democratic governments that the empire of the majority is absolute.”<sup>29</sup> Although other notable sources from the history of political thought might be cited, it suffices to observe that democracy is typically thought to entail majoritarianism of some kind.<sup>30</sup> Combining this connection with Fukuyama's contention that “in today's world the only serious source of legitimacy is democracy,” it seems reasonable to suggest that today's pre-eminent source of legitimacy is some form of majority rule.<sup>31</sup> Fukuyama's bold claim is neither uncontroversial nor precise: Not only would many dispute democracy's pretensions to being the only serious source of legitimacy, but democratic legitimacy could involve many different types of majority rule. Nevertheless, permutations of majority rule-based democracy are certainly some of the most widely used measures of legitimacy today.

Accepting majority rule's status as a contemporary gold-standard of legitimacy, it might be argued that federalism is fundamentally illegitimate. Federalism is anti-majoritarian and therefore illegitimate because the constitutional division of sovereignty—the defining feature of federalism—places at least some areas of public policy beyond the reach of the national majority. As Wolin observed, “federalism ... [has a] proven ability to frustrate the wishes of the majority.”<sup>32</sup> It might consequently be argued, as Harold J. Laski did—although admittedly for different reasons—that it is possible to speak of “the obsolescence of the federal system” because “the Constitution inhibits the federal government from exercising the authority

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<sup>29</sup> Tocqueville, *op. cit.*, p. 369 (Deuxième Partie, Chapitre VII).

<sup>30</sup> Cf. Aristotle, *The Politics*. Sinclair, T. A. & Saunders, T. J. (trans.), Penguin Books, London, 1981, p. 362 (Book VI, Chapter ii, §1317a40)., J. Locke, 'The Second Treatise of Government: An Essay Concerning The True Original, Extent, and End of Civil Government' in *Two Treatises of Government*, P. Laslett (ed.), Cambridge University Press, Cambridge, 1988, pp. 265–428, p. 332 (Chapter VIII, §97). & Lincoln, 'First Inaugural Address, March 4, 1861,' *op. cit.*, p. 85.

<sup>31</sup> F. Fukuyama, *State Building: Governance and World Order In The Twenty-First Century*, Profile Books, London, 2005, p. 35 (Chapter I). Cf. Tocqueville, *op. cit.*, p. 375 (Deuxième Partie, Chapitre VII).

<sup>32</sup> Wolin, *op. cit.*, p. ix. Cf. Pufendorf, *op. cit.*, pp. 1049–1051 (Book VII, Chapter V, §20).

inherent in the idea of a democracy."<sup>33</sup> In short, federalism restricts the power of the national majority by apportioning sovereignty to the constituent units, thereby making federalism undemocratic and illegitimate.

In addition to making federalism illegitimate according to a commonplace contemporary understanding of legitimacy, it might be further argued that federalism is even illegitimate by minimalist liberalism's standards. Given that "[d]ecisions made by constituent units are invariably minority decisions that impose high external costs on the national majority," federalism ensures that institutional structures are not democratically accountable to the national majority with respect to many important areas of public policy.<sup>34</sup> Just as surely as the US federal system was "an impediment to the freedom of everybody except segregationist whites in the South" in the Jim Crow period, it equally made government less democratically accountable to all citizens aside from segregationists.<sup>35</sup> Given that making institutional structures democratically accountable to individuals is a crucial part of allowing them to live as they see fit, it seems as if federalism is even illegitimate according to the standards of minimalist liberalism. Federalism risks being a barrier to individuals living as they see fit because it makes institutional structures less democratically accountable to the national majority.

#### **5.4.2. Majority rule and oppression**

Dahl rightly concedes that:

If one assumes the fairness of the majority principle, then it is an anomaly of federal systems that a national majority cannot always

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<sup>33</sup> H. J. Laski, 'The Obsolescence of Federalism,' *The New Republic*, vol. 98, 3<sup>rd</sup> May 1939, pp. 367–369, p. 368–369. Laski was concerned that "in every major field of social regulation, the authority of which the federal government can dispose is utterly inadequate to the issues it is expected to solve." See *ibid*

<sup>34</sup> Riker, *Federalism: Origin, Operation, Significance, op. cit.*, p. 151 (Chapter 6, §III).

<sup>35</sup> *ibid*, p. 145 (Chapter 6, §I). Cf. *ibid*, p. 142 (Chapter 6, §I).

prevail over a minority on questions of policy, if that minority happens to constitute a majority in a local unit with a constitutionally protected agenda.<sup>36</sup>

The question of whether federalism is legitimate can therefore be reduced to the question of whether majority rule, as conventionally understood, is legitimate.

By way of the start of a defence of federalism's frustration of majority rule, there are good reasons for querying the unquestioned assumption that majority rule is legitimate. Democracy that is nothing more than majority rule poses a serious threat to individual liberty because it relegates minorities to the uncomfortable side of a massive power imbalance. As Calhoun provocatively put it, democracy as simple majority rule amounts to "the government of a part over a part—the major over the minor portion," such that "*where the majority rules the minority is the subject.*"<sup>37</sup> In practice, undue reverence for the will of the majority can even facilitate particularly acute forms of oppression. As Tocqueville argued: "The power to do anything, which I deny to one of my fellow creatures, I would never accord to many" because such a concentration of power would constitute nothing less than "*the tyranny of the majority.*"<sup>38</sup> Indeed, it might be argued that "the tendency of the numerical majority to oppression and the abuse of power" in simple majoritarian versions of democracy in effect means that democracy can facilitate the kind of oppression found in undemocratic systems of government.<sup>39</sup> As Calhoun argued:

The dominant majority, for the time, would have the same tendency to oppression and abuse of power which, without the right of suffrage, irresponsible rulers would have. No reason, indeed, can be assigned why the latter would abuse their power, which would not apply, with

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<sup>36</sup> Dahl, *op. cit.*, p. 125 (§IV).

<sup>37</sup> Calhoun, 'A Disquisition On Government', *op. cit.*, p. 24. & Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., *Messenger*],' *op. cit.*, p. 425.

<sup>38</sup> Tocqueville, *op. cit.*, pp. 376 & 289 (Deuxième Partie, Chapitre VII). Cf. Dalberg-Acton, 'Sir Erskine May's "Democracy In Europe",' *op. cit.*, p. 163.

<sup>39</sup> Calhoun, 'A Disquisition On Government,' *op. cit.*, p. 25.

equal force, to the former. The dominant majority, for the time, would in reality, through the right of suffrage, be the rulers—the controlling, governing, and irresponsible power; and those who make and execute the laws would, for the time, be in reality but *their* representatives and agents.<sup>40</sup>

Although an admittedly extreme example, it is nevertheless instructive to consider that the Nazi Party won 43.9% of the vote while their nationalist partners took 8% in the Reichstag elections of 5 March 1933.<sup>41</sup> Given that this electoral result paved the way for Nazi rule in Germany, this case illustrates, in particularly striking terms, the kind of shockingly illiberal decisions that majorities are capable of making. This serves to confirm Burke's contention that even "in a democracy the majority of the citizens is capable of exercising the most cruel oppressions upon the minority."<sup>42</sup> As such, although federalism may well be inimical to majority rule, it is equally true that majority rule poses a serious threat to individual liberty.<sup>43</sup>

At this point, it will likely be objected that the above counter-argument is doing little more than attacking a straw-man. No sensible advocate of majority rule actually defends an absolutist version of it that could be used to lend a veneer of legitimacy to gross violations of individual liberty. Indeed, any reasonable majoritarian will agree with Burke:

An absolute democracy no more than absolute monarchy is to be reckoned among the legitimate forms of government.<sup>44</sup>

There is therefore nothing at all odd about advocating both majority rule and checks and balances on the majority's power. In addition to the doctrine of the division of powers mentioned earlier, majority rule can quite easily work in tandem with the protection of "the

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<sup>40</sup> *ibid.*, p. 18.

<sup>41</sup> I. Kershaw, 'Une Chronologie Du III<sup>e</sup> Reich' in *Qu'est-ce Que Le Nazisme ? : Problèmes et Perspectives D'Interprétation*, Nouvelle Édition, J. Carnaud (trans.), Éditions Gallimard, Paris, 1997, pp. 11–23, p. 11.

<sup>42</sup> Burke, 'Reflections On The Revolution In France, 1790,' *op. cit.*, p.73.

<sup>43</sup> Cf. Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., *Messenger*],' *op. cit.*, p. 431.

<sup>44</sup> Burke, 'Reflections On The Revolution In France, 1790,' *op. cit.*, p.73. Cf. Dalberg-Acton, 'Sir Erskine May's "Democracy In Europe",' *op. cit.*, p. 130. & Tocqueville, *op. cit.*, p. 238 (Première Partie, Chapitre VIII).



rights ... of man and the citizen" to "liberty, property, security and resistance to oppression," as laid out in 'La Déclaration Des Droits De L'Homme et Du Citoyen De 1789.'<sup>45</sup> This combination is essentially what Jefferson pointed to when he spoke of:

The sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.<sup>46</sup>

What is more, majority rule can be perfectly easily reconciled with Burke's idea that a responsible representative does not simply do whatever their electors wish. This is the view that, as Burke himself put it:

Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion.<sup>47</sup>

The above considerations show that a defence of majority rule need not amount to a defence of a crude dictatorship of the majority. The earlier representation of majority rule thus appears to be nothing less than a grotesque distortion of the true nature of majoritarianism as conventionally understood. So much so that, to use Dalberg-Acton's words:

The true democratic principle, that none shall have power over the people, is taken to mean that none shall be able to restrain or to elude its power. The true democratic principle, that the people shall not be made to do what it does not like, is taken to mean that it shall never be required to tolerate what it does not like. The true democratic principle, that every man's free will shall be as unfettered as possible, is taken to

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<sup>45</sup> 'Déclaration Des Droits De L'Homme et Du Citoyen De 1789,' *op. cit.*, p. 22 (Article 2).

<sup>46</sup> Jefferson, 'First Inaugural Address, March 4, 1801,' *op. cit.*, p. 62.

<sup>47</sup> E. Burke, 'Speech To The Electors of Bristol At The Conclusion of The Poll, 3 November, 1774' in *Selected Prose*, P. Magnus (ed.), The Falcon Press, London, 1948, pp. 29–31, p. 30. Cf. A. Hamilton, 'The Federalist No. 71' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed.), Cambridge University Press, Cambridge, 2006, pp. 348–352, p. 349.

mean that the free will of the collective people shall be fettered in nothing.<sup>48</sup>

In conclusion, despite the best efforts to defame majority rule in the above defence of federalism's anti-majoritarianism, majority rule does not in fact entail that the majority is absolutely free to legislate as it sees fit. Indeed, majority rule is perfectly consistent with the separation of powers, the constitutional protection of rights and liberties, and responsible representatives.

#### **5.4.3. A qualified rejection of the principle of majority rule**

Although majority rule need not amount to a dictatorship of the majority, an additional check on the majority's power will often be beneficial. This additional check on the majority's power constitutes a qualified rejection of the principle of majority rule in the form of what Lidija R. Basta Fleiner calls the "*federalist control of democracy*."<sup>49</sup> The federalist control of democracy ensures that some areas of public policy are in the hands of the national minorities in the constituent units and so are beyond the control of the national majority. Even if a unitary system has responsible representatives, a constitutional protection of rights and liberties, and a division of powers between the legislative, the judiciary, and the executive, there are likely to be very few areas of public policy that cannot be wholly shaped by the national majority.<sup>50</sup> It would certainly be unfair to maintain that unitary systems lend themselves to the oppression of national minorities. However, it is nevertheless true that federalism limits further, as Kincaid puts it, "the ability of a majority to impose rules of justice

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<sup>48</sup> Dalberg-Acton, 'Sir Erskine May's "Democracy In Europe";' *op. cit.*, p. 159.

<sup>49</sup> L. R. B. Fleiner, 'Minority and Legitimacy of A Federal State: An Outsider Perception of The Swiss Model' in *Federalism and Multiethnic States: The Case of Switzerland*, 2<sup>nd</sup> edition, L. R. B. Fleiner & T. Fleiner (eds.), Helbing & Lichtenhahn, Bâle, 2000, pp. 75–102, p. 95 (§11.4).

<sup>50</sup> Cf. Calhoun, 'A Disquisition On Government,' *op. cit.*, p. 27.

that may be unjust to minorities."<sup>51</sup> This feature of federalism led Dalberg-Acton to argue that because "[t]he federal system limits and restrains the sovereign power by dividing it," "[o]f all checks on democracy, federalism has been the most efficacious and the most congenial."<sup>52</sup>

Notwithstanding the above point, federalism only requires a *qualified* rejection of the principle of majority rule because it only limits the power of the national majority with respect to some areas of public policy. Indeed, federalism maintains majority rule within the constituent units and at the national level with respect to the areas of public policy under the jurisdiction of each level of government respectively. As Watts points out:

Federalism ... provides for majority rule relating to issues of shared interest throughout the polity [i.e., majority rule at the national level], *plus* majority rule within autonomous units of self-government dealing with matters of particular regional interest [i.e., majority rule within the constituent units].<sup>53</sup>

Federalism's qualified rejection of the principle of majority rule therefore only means that those areas of public policy under the jurisdiction of the constituent units will not be shaped by the national majority. It is not a rejection of the principle of majority rule *per se*, but a rejection of the power of the national majority with respect to all areas of public policy.

The nuanced nature of federalism's qualified rejection of the principle of majority rule represents a powerful challenge to the earlier claim that federalism is illegitimate because it frustrates the will of the majority. The plausibility of this claim depends on the highly controversial and undefended premise that the relevant majority is *always* the national majority. As Dahl points out:

On that ground [i.e., in federal systems national majorities cannot always prevail] alone federalism cannot be judged less democratic [and

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<sup>51</sup> Kincaid, 'Federalism: The Highest Stage of Democracy?', *op. cit.*, p. 112.

<sup>52</sup> *ibid.* & Dalberg-Acton, 'Sir Erskine May's "Democracy In Europe"', *op. cit.*, p. 163.

<sup>53</sup> Watts, *Comparing Federal Systems*, *op. cit.*, p. 192 (Chapter 14, §14.2).

so less legitimate] than a unitary system, except on the premise that the proper unit in which majorities should prevail is the nation or the country.<sup>54</sup>

Given that, as Dahl stresses, “such a premise is arbitrary and highly contestable,” in the absence of additional argumentation, the above critique is at best inconclusive.<sup>55</sup> Although it is true that, as Schmitt put it, “[t]he federal foundation and federalism itself are destroyed by the democratic concept of the constituent power of the *whole* people,” this does not in and of itself give us reason to regard federalism as undemocratic and illegitimate.<sup>56</sup> To reach that conclusion, it would be necessary to assume that the relevant unit of concern for democratic decision making is always the people as a whole. Simply put, it is only true to claim, as Stepan does, that “all democratic federations are more ‘*demos*-constraining’ than unitary democracies” on the assumption that the relevant *demos* is the population of the nation *in toto*.<sup>57</sup> If, by contrast, it is accepted that the relevant decision makers with respect to some areas of public policy are a subset of the people as a whole, then federalism’s qualified rejection of the principle of majority rule will in no way make federalism less democratic or legitimate.

To summarise the argument thus far, given a more sophisticated understanding of majority rule, federalism’s frustration of the majority’s power cannot be justified on the grounds that the principle of majority rule amounts to an unqualified endorsement of the majority’s ability to legislate as it sees fit. At the same time, however, federalism’s qualified rejection of the principle of majority rule only makes federalism illegitimate on the assumption that the relevant majority is always the national majority.

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<sup>54</sup> Dahl, *op. cit.*, pp. 125–126 (§IV).

<sup>55</sup> *Ibid.*, p. 126 (§IV).

<sup>56</sup> Schmitt, ‘The Constitutional Theory of Federation (1928),’ *op. cit.*, p. 55.

<sup>57</sup> Stepan, *op. cit.*, p. 23.

#### 5.4.4. A super-democratic rejection of the principle of majority rule

Building on the preceding argument, the minimalist liberal theory of federalism maintains that federalism is in fact *more* democratic because of the way in which it limits the power of the national majority. This is to defend what might be called a Calhounian conception of democracy: At least with respect to some areas of public policy, power ought to rest with “the concurrent or constitutional majority” and not “the numerical or absolute majority.”<sup>58</sup> This requires, to use Calhoun's own words:

Taking the sense of each interest or portion of the community which may be unequally and injuriously affected by the action of the government separately, through its own majority or in some other way by which its voice may be fairly expressed, and to require the consent of each interest either to put or to keep the government in action.<sup>59</sup>

In other words, unlike a unitary state with a majoritarian decision making principle that concentrates power exclusively with the national majority, the consent of majorities of subsets of the population of the nation-at-large is required. Just as federalism's qualified rejection of the principle of majority rule presupposes the Calhounian conception of democracy, the Calhounian conception of democracy presupposes that it is more democratic for individuals who are affected by an area of public policy to have control over it than for the national majority to hold sway.

To flesh out the Calhounian conception of democracy, let us consider the claim that there is nothing morally problematic about the classic principle of majority rule because it is simply a more precise formulation of the general idea that—to use Madison's formulation—

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<sup>58</sup> Calhoun, 'A Disquisition On Government,' *op. cit.*, p. 23.

<sup>59</sup> *ibid.*, p. 20.

"the ultimate authority ... resides in the people alone."<sup>60</sup> Examples of this doctrine abound, including the 'Universal Declaration of Human Rights (UDHR) (1948)': "The will of the people shall be the basis of the authority of government."<sup>61</sup> There is admittedly nothing objectionable in this suitably vague Madisonian doctrine that—as Lincoln famously formulated it—there ought to be "government of the people, by the people, for the people."<sup>62</sup> However, it stretches credibility to jump immediately from this idea to the principle according to which—subject to certain appropriate constraints (e.g., the separation of powers, the constitutional protection of rights and liberties, and responsible representatives)—the will of the national majority ought to shape all areas of public policy. The primary reason for this is that it is not specified who ought to hold power in Lincoln's intuitively appealing formulation of the basic democratic principle.

As Lincoln's formulation of the basic democratic principle would suggest, with respect to the many areas of public policy that affect the population of the nation-at-large, the more democratic approach is to attribute power to the population-at-large (i.e., the national majority). However, this version of the basic democratic principle overlooks what should be an important qualification: With respect to those public policy decisions that affect a particular segment of the population and only mildly affect the population-at-large—or perhaps do not even affect the population-at-large at all—it is surely more democratic to attribute power to the particular segment of the population that is affected (i.e., the national minority). As Calhoun argued:

Where the interests ... are dissimilar, so that the law, that may benefit one

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<sup>60</sup> J. Madison, 'The Federalist No. 46' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed), Cambridge University Press, Cambridge, 2006, pp. 228–234, p. 228.

<sup>61</sup> 'Universal Declaration of Human Rights (UDHR) (1948)' in *International Law and Politics: Key Documents*, S. V. Scott (ed), Lynne Rienner Publishers, London, 2006, pp. 335–340, p. 338 (Article 21). Cf. Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., Messenger],' *op. cit.*, p. 417., Hamilton, 'The Federalist No. 22,' *op. cit.*, p. 106., Jefferson, 'To Major John Cartwright (1824),' *op. cit.*, p. 263. & H. D. Thoreau, 'Resistance To Civil Government (Civil Disobedience)' in *Political Writings*, N. L. Rosenblum (ed), Cambridge University Press, Cambridge, 1996, pp. 1–21, p. 20.

<sup>62</sup> A. Lincoln, 'The Gettysburg Address, November 19, 1863' in *The Declaration of Independence and Other Great Documents of American History, 1775–1865*, J. Grafton (ed), Dover Publications, Mineola, 2000, pp. 92–93, p. 93.

portion, may be ruinous to another, it would be ... unjust and absurd to subject them to its [i.e., the majority's] will.<sup>63</sup>

To formulate this idea in the negative, concerning those public policy decisions that affect a national minority and only mildly affect the national majority, it would actually be *undemocratic* to apply the classic principle of majority rule that attributes all authority to the national majority.<sup>64</sup> Far from making federal systems less democratic, federalism's qualified rejection of the principle of majority rule therefore actually renders them more democratic. As Kincaid and Watts have expressed this idea, it makes federal systems "super-democratic," "'demos-enabling' and ... 'democracy-plus'."<sup>65</sup>

It suffices to consider the situation of geographically concentrated national minorities to see why federalism's qualified rejection of the principle of majority rule actually makes federal systems more democratic. Although it is surely overstating the case to claim, as Calhoun did, that "without the right of self-protection [by means of federalism], the major, would ... oppress the minor interests of the community," it is not an exaggeration to hold that in the absence of the protection of minority interests by means of federalism, decisions could be made by the national majority that would be deeply inimical to the interests of national minorities.<sup>66</sup> The reason for this is that in the absence of the constitutional protection of constituent unit autonomy, the possibility always remains, as Madison warned, that the "majority [will] be united by a common interest [and that, as a consequence], the rights of the minority will be insecure."<sup>67</sup> In other words, federalism's qualified rejection of the principle of majority rule can guard against scenarios in which decisions are imposed on national

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<sup>63</sup> Calhoun, 'To [Frederick W.] Symmes, [Editor of *The Pendleton, S. C., Messenger*],' *op. cit.*, pp. 417–418.

<sup>64</sup> To be sure, if the principle of majority rule could be stretched to cover a case in which authority rests with a constituent unit majority instead of the national majority, this argument would not be defending a qualified version of this principle. However, insofar as this would be considered an unorthodox understanding of the principle of majority rule, this argument is in fact a critique of the (orthodox) version of the principle.

<sup>65</sup> Kincaid, 'Federalism: The Highest Stage of Democracy?,' *op. cit.*, p. 108. & Watts, *Comparing Federal Systems*, *op. cit.*, p. 155 (Chapter 10, §10.6).

<sup>66</sup> Calhoun, 'To [Frederick W.] Symmes, [Editor of *The Pendleton, S. C., Messenger*],' *op. cit.*, p. 418.

<sup>67</sup> J. Madison, 'The Federalist No. 51' in *The Federalist With The Letters of Brutus*, A. Hamilton, J. Madison & J. Jay, T. Ball, (ed), Cambridge University Press, Cambridge, 2006, pp. 251–255, p. 254.

minorities despite adversely affecting the minority in profound ways. For example, decisions in a unitary Canadian state that would adversely affect Québécois are not possible in the Canadian federal system with respect to at least certain public policy arenas because federalism protects Québec's autonomy.

As the example of Québec suggests, federalism's ability to ensure that institutional structures remain responsive to minorities is dependent on the geographical concentration of minorities. If Francophone Canadians were evenly spread throughout Canada in small numbers, then the constitutional protection of constituent unit autonomy would do little to ensure that this minority was not subjected to institutional structures hostile to their interests. As Watts specifies, federalism gives "constituent groups who are in a *majority within their own region* the opportunity to decide matters of regional interest by majority rule."<sup>68</sup> Notwithstanding this caveat, federalism's ability to make institutional structures responsive to the political preferences of national minorities still gives federal systems an advantage when it comes to promoting democratic accountability and allowing individuals to live as they see fit.

To be sure, if, for example, all Canadians shared the same political preferences and so were, among other things, committed to linguistic homogeneity, the above rationale for limiting the power of the national majority by means of federalism would be absent. This was essentially the point made by Calhoun:

If the whole community had the same interests so that the interests of each and every portion would be so affected by the action of the government that the laws which oppressed or impoverished one portion would necessarily oppress and impoverish all others—or the reverse—then the right of suffrage, of itself, would be all-sufficient to counteract the tendency of the government to oppression and abuse of

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<sup>68</sup> Watts, *Comparing Federal Systems*, *op. cit.*, p. 192 (Chapter 14, §14.2). Emphasis added.



its powers, and, of course, would form, of itself, a perfect constitutional government.<sup>69</sup>

However, the diversity endemic to Canadian society—and many other societies—suggests that there will often be a good reason for not giving the national majority power over all areas of public policy. Consequently, at least with respect to some public policy decisions, it is appropriate to answer firmly in the negative in response to Madison's rhetorical question: "Is it not self-evident, that a trifling minority ought not to bind the majority?"<sup>70</sup> If one accepts that it promotes democratic accountability to give control over a public policy decision to those affected by it, then one will be forced to conclude that federalism's qualified rejection of the principle of majority rule actually makes federal systems *more* democratically accountable.

In summary, federalism's frustration of majority rule is only undemocratic on the assumption that democracy requires that power rest exclusively with the national majority at all times. As an important check on the power of the national majority, federalism's qualified rejection of the principle of majority rule actually makes federal systems more democratic by ensuring that those who are affected by certain areas of public policy are given control over them.

## 5.5. Determining The Relevant Majority

The previous section justified federalism's frustration of majority rule on the grounds that it is more democratic for public policy decisions that affect a subset of the population to

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<sup>69</sup> Calhoun, 'A Disquisition On Government,' *op. cit.*, p. 13. Cf. Calhoun, 'To [Frederick W.] Symmes, [Editor of The Pendleton, S. C., *Messenger*],' *op. cit.*, pp. 417–418.

<sup>70</sup> J. Madison, 'General Defense of The Constitution' in *The Papers of James Madison: Volume 11 – 7 March 1788–1 March 1789*, R. A. Rutland, C. F. Hobson, W. M. E. Rachel & J. K. Sisson (eds.), The University Press of Virginia, Charlottesville, 1977, pp. 78–88, p. 80.

be made by that subset alone. As *prima facie* plausible as this defence of federalism might be, it will remain unconvincing in the absence of a more precise account of what it means to be affected by public policy decisions.

### **5.5.1. A spectrum of affected individuals**

It might be argued that the plausibility of the qualified rejection of the principle of majority rule is predicated on glossing over the immensely complex question of what it means to be affected by institutional structures. The complexity of this question quickly becomes apparent when one considers that global interconnectedness means that all public policy decisions affect essentially all individuals. For example, the extent of global economic integration is such that the fiscal policy of the Japanese government will affect essentially every individual in the world in at least some way. To varying degrees, it will affect tourism operators and hawkers in Phuket, factory workers in Shenzhen, farmers in Queensland, and many others besides. As this is just one of an almost infinite number of examples of public policy decisions affecting vast numbers of individuals in vast numbers of different ways, it is possible to speak of a spectrum of sorts. At one end of the spectrum sit individuals who are affected by a public policy decision in the most profound of ways, and at the other end sit individuals who are barely affected at all. Given that essentially all individuals are affected to lesser and greater degrees, there will be a dauntingly large number of individuals sitting at an immense number of different points on the spectrum. Consequently, determining when individuals are affected by institutional structures in the morally relevant sense will involve making a fairly imprecise and contestable judgement.

In light of the voluminous number of examples in which different groups of individuals are affected to different degrees, claiming that institutional structures need to be democratically accountable to those who are affected by them provides us with little, if any,

assistance in determining to whom institutional structures should be democratically accountable. For the idea of being affected by institutional structures to do any work, it needs to be fully articulated. For example, it needs to be able to explain why the views of conservative religious groups in the United States need not be taken into account when determining whether the Indian decriminalisation of homosexuality was done in a democratically accountable manner.<sup>71</sup> Equally, it needs to be able to explain why there is a case for greater global control over the policies of particular states with respect to environmental, economic and security policy. Although there might be a *prima facie* reason for thinking that the national majority should not have authority with respect to all public policy decisions, it rests on a distinction that is vague to the point of being utterly uninformative.

In response to this objection, it is tempting to adopt the approach taken by the US Supreme Court's Justice Stewart in relation to the question of how to define hard-core pornography. This would amount to arguing that although it might not be possible to provide a precise account of what it means to be affected by institutional structures, examples of individuals being affected can be easily identified when seen.<sup>72</sup> For example, given how traumatic it would be for many Québécois if French were to lose its protected status in Québec, it is intuitively obvious that they would be affected in the morally relevant sense by decisions regarding language policy. As tempting a response as it might be, this counter-

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<sup>71</sup> Although admittedly an extreme example, consider the Westboro Baptist Church. The name of their website, *God Hates Fags*, is indicative of their views. See 'God Hates Fags,' *Westboro Baptist Church*, Topeka, 2010, viewed on the 29<sup>th</sup> December 2010, <<http://www.godhatesfags.com/index.html>>. Cf. Pogge, 'Cosmopolitanism and Sovereignty,' *op. cit.*, p. 64. In a similar vein, Robert O. Keohane argues: "Merely being affected cannot be sufficient to create a valid claim." See R. O. Keohane, 'Global Governance and Democratic Accountability' in *Taming Globalization: Frontiers of Governance*, D. Held & M. Koenig-Archibugi (eds.), Polity Press, Cambridge, 2003, pp. 130–159, p. 141 (§II). Although Keohane's pragmatic concerns about taking into account everyone's views in all public policy decisions are relevant (i.e., "virtually nothing could ever be done, since there would be so many requirements for consultation, and even veto points"), the primary issue for the purposes of advancing the analysis is moral (i.e., How do we determine to whom institutional structures ought to be democratically accountable?). See *ibid*

<sup>72</sup> Justice Stewart's original words were: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [i.e., "hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." See Justice Stewart (concurring), 'Jacobellis v. Ohio,' *U.S. Supreme Court*, 378 U.S. 184 (1964), no. 11, viewed on the 7<sup>th</sup> January 2011, <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&friend=oye&court=US&case=/us/378/184.html>>. & *ibid*.

argument would be intellectually sloppy: Identifying examples of individuals being affected in the morally relevant sense presumably requires an at least implicit criterion, and argumentative rigour demands that what is only implicit be made explicit.

### **5.5.2. The limitations on liberty criterion**

A better response to concerns about the vagueness of the idea of being affected by institutional structures in the morally relevant sense starts by going back to the minimalist liberalism detailed in Chapter 2. The minimalist liberal principle of legitimacy holds that individuals ought to be able to live as they see fit, on the sole condition that this not inhibit the freedom of others to live as they see fit. As indicated, this entails that legitimate institutional structures allow individuals to live as they see fit to the fullest extent possible. The idea of individuals being affected by institutional structures in the morally relevant sense reflects this minimalist liberal account of legitimacy. In particular, individuals are affected by institutional structures in the morally relevant sense—herein seriously affected—if those institutional structures restrict their freedom to live as they see fit.

The concern will now likely be raised that an understanding of what it means to be affected by institutional structures in the morally relevant sense is no closer to hand because it is not at all obvious what it means for an institutional structure to restrict the freedom of an individual to live as they see fit (i.e., what it means for an individual to be seriously affected by an institutional structure). To see why, it suffices to consider the earlier example of Japanese fiscal policy in more detail. It might be claimed that Japanese fiscal policy can be entirely legitimate without being democratically accountable to the Chinese people because it in no way restricts their freedom to live as they see fit. As *prima facie* plausible as this might seem, a more fine-grained analysis reveals that such a glib account of the relationship between Japanese fiscal policy and the people of China is misleadingly simple. If the Japanese

government decides that it needs to improve its budgetary position, it might substantially increase personal income tax. In part, the result of this would be that Japanese consumers have reduced spending power, which would in turn limit the number of consumer goods they purchase. Although an admittedly highly stylised scenario, this will likely lead to a reduction in the amount of goods Japan imports from China, which may well lead to an appreciable reduction in manufacturing activity in China, and a concomitant increase in the Chinese unemployment rate.

The above example suggests that many institutional structures restrict the freedom of a large number of individual to live as they see fit in serious and unexpected ways: Japanese fiscal policy even seems to restrict the freedom of Chinese people to live as they see fit in a non-trivial way (i.e., by potentially denying some of them employment). The implication of this is that many institutional structures will need be democratically accountable to vast swathes of the world's population. Given that federalism means that many institutional structures (i.e., the constituent units) will only be democratically accountable to a specific subset of individuals, this result poses a serious threat to the minimalist liberal theory of federalism. In fact, it entails that minimalist liberalism does not lend itself to a liberal theory of federalism at all. Rather, it is arguably well-placed to justify a democratic unitary world state in which the many institutional structures that restrict almost everyone's freedom to live as they see fit are democratically accountable to everyone.

Before properly responding to this criticism, it is important to acknowledge from the outset that the freedom of even distant individuals to live as they see fit is indeed restricted in some way in cases like the example of Japanese fiscal policy. The upshot of this is that the freedom of vast numbers of individuals is in some way restricted by almost all institutional structures. However, this does *not* lead to the conclusion that almost every institutional structure needs to be democratically accountable to almost every individual. The reason for this is that a further clause is added to the claim that being seriously affected by institutional

structures is a function of having one's freedom to live as one sees fit restricted by them:

When individuals with practical commitments that cannot be reconciled have their freedom to live as they see fit restricted by an institutional structure, the institutional structure should be democratically accountable to those individuals who have their freedom to live as they see fit restricted in more serious ways.

To get a better sense of the implications of this refined account of being seriously affected by institutional structures, it is instructive to consider a concrete example. The constitutional protection of French as an official language in Canada and the provincial autonomy to decide whether French or English will be used no doubt restricts the freedom of Canadians outside Québec to live as they see fit in some respects.<sup>73</sup> This is simply a function of the way in which these constitutional provisions impose norms of governance and external costs on Canadians outside Québec (e.g., needing to speak French proficiently to work and study in some parts of their country). Nevertheless, this does not give us reason to think that the majority of Canadians should decide whether French is Québec's official language. The reason for this is twofold. First, a decision by the majority of Canadians to deprive French of official language status in Québec would severely restrict the freedom of Québécois—who are for the most part Francophone—to live as they see fit.<sup>74</sup> Second, the protection of French as an official language in Québec only restricts the freedom of Canadians outside Québec to live as they see fit in a comparatively minor way. This means that Québécois alone are considered to be seriously affected by the institutional structure that protects French's official language status in Québec. Consequently, only Québécois should be included in the majority that decides

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<sup>73</sup> The Canadian constitution stipulates: "English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada." See 'Consolidation of Constitution Acts, 1867 To 1982,' *op. cit.*, p. 50 (1982, Part I, Article 16, §(1)). Cf. *ibid.*, pp. 57–58 (1982, Part V, Articles 41 & 43).

<sup>74</sup> Such a decision may also admittedly restrict the freedom of Québec's English-speaking minority to live as they see fit. However, federalism's frustration of majority rule at the national level is not thereby less democratic because English-speaking Québécois live in a constituent unit where French is protected and promoted. Just the opposite is still true: Rather than a small minority of English-speaking Québécois not having to live with the protection and promotion of French, federalism's constitutional enshrinement of constituent unit autonomy means well in excess of 6 million native French speakers are able to protect and promote their language.

whether French has official language status in Québec.

The principle that individuals are seriously affected by institutional structures if they have their freedom to live as they see fit restricted in more severe ways by those institutional structures obviously does not resolve all contentious questions. When practical commitments clash, deciding who has had their freedom to live as they see fit more seriously restricted will require making a host of contentious and complex judgements. Such a decision cannot be reduced to a matter of tabulating elementary and uncontroversial pieces of data. Although fraught, calculations about whose freedom to live as they see fit has been more seriously restricted are by no means impossible. In some cases, arriving at a conclusion will be extremely difficult: Owing to the intricate web of economic relations between China and Japan, it may well be challenging to confirm our instincts and in fact show that Japanese fiscal policy restricts the freedom of the Japanese more seriously than the Chinese, and therefore should be democratically accountable to the Japanese alone. However, in other cases, reaching a conclusion will be remarkably easy: It seems incontestable that the Sri Lankan government's decision to not give the Tamil's in the north and east of the country the autonomy they have sought for decades restricts their freedom to live as they see fit far more seriously than granting the north and east autonomy would restrict the freedom of non-Tamil Sri Lankans to live as they see fit. As these examples suggest, the criterion of who has had their freedom to live as they see fit more seriously restricted will not definitively point to simple and obvious answers. Nevertheless, this standard still provides an at least rough means of determining to whom institutional structures should be democratically accountable when practical commitments cannot be reconciled.

At this point, it might be objected that far more detail is needed to provide a satisfactory account of what it means for individuals to be seriously affected by institutional structures. In particular, a host of fundamental questions have been left unanswered: How do we measure the severity of restrictions on the freedom to live as one sees fit? Should we be

exclusively concerned with the severity of restrictions on freedom as manifest by what they stop individuals from doing? Or should we be concerned with the psychological dimension of restrictions (i.e., how much angst and internal aggravation restrictions cause individuals)? Alternatively, is the severity of restrictions on freedom measured in terms of the extent to which they touch on the vital interests of individuals?

These questions are no doubt important and will almost inevitably feature in debates about which individuals have had their freedom to live as they see fit more seriously restricted in particular cases. Despite their importance, this thesis does not attempt to answer them: Part of any thorough and satisfactory debate about who has had their freedom to live as they see fit more seriously restricted in a specific instance will involve a discussion of the relative value of the different ways in which freedom is restricted. In different contexts, different types of restrictions on freedom will be more significant. For example, in adjudicating the Québec case, great weight would need to be given to the symbolic and cultural importance of any possible decision regarding the use of languages. By contrast, any public policy regarding the Flemish-Walloon divide in Belgium would need to be framed in reference to pragmatic questions of the distribution of wealth; it would need to reflect an acute understanding of the economic gap between the prosperous Flemish north and the relatively economically depressed Walloon south. Examples such as these suggest that it would in fact be counter-productive to provide a precise account of what it means to have one's freedom to live as one sees fit seriously restricted. Depending on the nature of the specific case at hand, serious restrictions on freedom could in practice be vastly different. Consequently, to provide a sufficiently general account of to whom institutional structures should be democratically accountable, it is essential that the minimalist liberal theory of federalism simply stipulate that when practical commitments are irreconcilable, institutional structures should be democratically accountable to the individuals they more seriously affect (i.e., those individuals whose freedom to live as they see fit would be more seriously



restricted).

In conclusion, institutional structure should be democratically accountable to the individuals they affect, while an individual is affected by an institutional structure in the morally relevant sense when it restricts their freedom to live as they see fit. When individuals with conflicting practical commitments are all affected by the same institutional structure, it should be democratically accountable to the individuals whose freedom it restricts more seriously.

## 5.6. Conclusion

In this fifth and final chapter, federalism was defended by responding to the objections that it is illiberal and undemocratic. Four key claims were made to defend federalism against these charges:

1. there is no necessary connection between federalism and the implementation of illiberal public policy;
2. it is misleading to accuse federalism of being a completely malleable constitutional mechanism that simply promotes the values to which a society happens to subscribe;
3. federalism's qualified rejection of the principle of majority rule actually makes federal systems more democratically accountable; and
4. the qualified rejection of the principle of majority rule does not rest on an unworkable conception of the relevant majority.

In summary, there is no reason to think federalism is either prone to illiberal public policy or undemocratic.

# Conclusion: The Minimalist Liberal Theory of Federalism

## The Minimalist Liberal Theory of Federalism Revisited

As indicated in the Introduction, there are two interrelated and problematic tendencies in contemporary political theory:

1. the widespread inclination towards comprehensive conceptions of politics that equate legitimacy with overly determinate accounts of how society ought to be organised; and
2. the resulting dearth of normative theorising about federal systems—the umbrella term for the systems of government that incorporate diversity into their basic structures.

This thesis' overarching goal has been to simultaneously provide counterweights to both of these tendencies by offering a resolutely non-comprehensive liberal account of legitimacy and using it as the basis for a general normative theory of federalism. Fleshing out these two broad theoretical positions has depended on five specific arguments, each of which corresponds to one of the five preceding chapters. In particular, this thesis has sought to:

1. provide an accurate topography of federalism and argue that the necessary and sufficient conditions of federalism are a constitutional division of sovereignty;
2. articulate and defend a minimalist conception of liberalism, according to which institutional structures are legitimate to the extent that they allow individuals to live as they see fit;
3. frame the minimalist liberal theory of federalism and demonstrate that it

is simultaneously more ambitious than competing liberal theories of federalism and appropriately cautious;

4. show that federalism is a powerful constitutional tool for allowing individuals to live as they see fit because it protects negative liberty and promotes democratic accountability; and
5. defend federalism against the charges that it facilitates the implementation of illiberal public policy and is undemocratic.

The above précis of the preceding argument suggests that this thesis attempts to establish two general conclusions. First, the form of liberalism that carries forward the liberal project of doing justice to the fact of pluralism is a minimalist conception of liberalism that demands nothing of institutional structures beyond that they allow individuals to live as they see fit. Second, federalism is a powerful constitutional tool for allowing individuals to live as they see fit because it protects negative liberty and promotes democratic accountability. In short, minimalist liberalism flows out of the liberal project of doing justice to the fact of pluralism, while federalism is a particularly powerful tool for realising this liberal project.

## **Individual Liberty in Theory & Practice**

Beyond reiterating what has already been argued, it is perhaps useful to make a general comment about the overall position articulated and defended in this thesis. The two principal tasks of advancing both a minimalist conception of liberalism and a liberal theory of federalism are pragmatically and theoretically intertwined. As concerns the pragmatic connection, minimalist liberalism and the resulting liberal theory of federalism are jointly aimed at equipping us with an account of legitimacy and an institutional structure that can effectively

navigate the diversity endemic to human society.<sup>1</sup> The theoretical goals of fleshing out a minimalist conception of liberalism and a liberal theory of federalism are therefore both pursued to overcome a thoroughly earthly problem: Each is a dimension of the attempt to do justice to the fact of pluralism.<sup>2</sup> Regarding the theoretical connection, not only is the liberal theory of federalism an outgrowth of minimalist liberalism, but the aim is to have these two theories green the theoretical landscape together. In particular, the liberal theory of federalism has its basis in a minimalist version of liberalism with the goal of doing justice to the fact of pluralism as its core priority, thereby making this liberal theory of federalism doubly novel: It offers a normative theory of federalism and a reconceptualisation of liberalism.

It is significant that the two theories advanced in this thesis are pragmatically and theoretically intertwined in their commitment to the liberal project of doing justice to the fact of pluralism. If any more proof was needed, it shows that the minimalist conception of liberalism and the liberal theory of federalism are thoroughly liberal to the end. The liberal call-to-arms to protect individual liberty has such a powerful gravitational pull precisely because individuals differ. Liberals of all types have been acutely aware of the diversity that Les Philosophes identified when they noted that:

The diversity of feelings will always exist amongst men; the history of the human spirit is a continuous proof; and the most chimerical of projects would be to bring men back to the uniformity of opinions.<sup>3</sup>

From the European Wars of Religion to post-colonial independence struggles, and on to calls for minority rights and freedoms in Tibet, Kurdistan and beyond, liberals have always been moved by the desires of different individuals to live by different mores and systems of government. As

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<sup>1</sup> Pierre Elliott Trudeau claimed that “federalism ... was born of a decision by pragmatic politicians to face facts as they are, particularly the fact of the heterogeneity of the world’s population.” See Trudeau, *op. cit.*, p. 195.

<sup>2</sup> Cf. Rawls, ‘The Idea of An Overlapping Consensus,’ *op. cit.*, p. 1., Kincaid, ‘Federalism: The Highest Stage of Democracy?,’ *op. cit.*, p. 112. & Rawls, ‘The Domain of The Political and Overlapping Consensus,’ *op. cit.*, pp. 234–335 (§1).

<sup>3</sup> ‘Tolérance’ in *Textes Choisis de L’Encyclopédie Ou Dictionnaire Raisonné des Sciences, des Arts et des Métiers*, 10<sup>ième</sup> édition, Éditions Sociales, Paris, 1962, pp. 249–254, p. 252.

attempts to do justice to this fact of pluralism, minimalist liberalism and the liberal theory of federalism are therefore animated by the most liberal of preoccupations.

To summarise this thesis with a metaphor, we might say that it has presided over a wedding of sorts. By binding federalism to a minimalist account of liberalism, federalism and liberalism have been married: The way in which federalism enshrines constituent unit autonomy makes it a powerful constitutional tool for allowing individuals to live as they see fit and consequently an institutional embodiment of the liberal commitment to doing justice to the fact of pluralism. This union has the potential to be very long-lasting because, to appropriate Constant's words, both the committed liberal and the committed federalist can assert with equal conviction that they "do not think that there are real interests in a state aside from local interests, united when they are the same, balanced when they are different, but known and felt in all cases."<sup>4</sup>

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<sup>4</sup> Constant, 'Principes De Politique Applicables À Tous Les Gouvernements Représentatifs et Particulièrement À La Constitution Actuelle De La France,' *op. cit.*, p. 429 (Chapitre XII).

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