Ethnic Federalism: Its Promise and Pitfalls for Africa

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I. INTRODUCTION

More than forty years have passed since the first African country achieved independence from colonial rule.[1] Yet the fundamental problems that ethnic heterogeneity posed for newly emerging states when they began their

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1. In 1957, Ghana became the first colony to achieve independence. H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65, 66 (Douglas Greenberg et al. eds., 1993).

political existence have not abated.[2] Despite some notable exceptions,[3] Sub-Saharan African ("SSA") states still face two fundamental problems: the failure of national integration and the absence of political legitimacy.[4] Even now at the dawn of the new century, the failure to accommodate ethnic differences has produced Rwanda's horrific genocide,[5] Somalia's disintegration,[6] Liberia's implosion,[7] and Sudan's still-raging civil war that has already claimed thousands of lives and displaced vast portions of the population.[8] These crises highlight the dangers other SSA states face and suggest the importance of coming to terms with the phenomenon of ethnic heterogeneity within a constitutional framework.

It would oversimplify the problem to say that all of Africa's problems are attributable to ethnic heterogeneity alone.[9] Clearly, other factors are at work as well. Yet the obvious significance ethnic diversity holds for achieving a legitimate and cohesive national political order suggests that most African

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2. One noted commentator has observed that the "prime condition for the building of nations" is an opportunity to "age in the wood." Rupert Emerson, *Nation Building in Africa*, *in* NATION BUILDING 104 (Karl W. Deutsch & William J. Foltz eds., 1963). Forty years does not appear to be long enough to satisfy Emerson's condition. Even states that have had this opportunity have recently experienced ethnicity-related stress. *See* MARINA OTTAWAY, DEMOCRATIZATION AND ETHNIC NATIONALISM: AFRICAN AND EASTERN EUROPEAN EXPERIENCES 8 (Overseas Development Council Policy Essay No. 14, 1994) ("Even the democratic, industrialized countries are challenged by a revival of ethnic and regional identities."). Spain and Canada are prime examples.

3. Botswana and Mauritius are often cited as examples of countries that have coped with ethnicity in ways compatible with democracy. Both have had the enormous advantage of high economic growth for sustained periods of time. *See* David Welsh, *Ethnicity in sub-Saharan Africa*, 72 J. INT'L AFF. 477, 488 (1996).

4. According to one study, half the African states face a serious danger of collapse. I. William Zartman, *Introduction: Posing the Problem of State Collapse*, *in* COLLAPSED STATES: DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY 3 (I. William Zartman ed., 1995) [hereinafter COLLAPSED STATES] (citing John Nellier, States in Danger (1993) (unpublished mimeograph) (on file with author).

5. In 1994, between half a million and a million people were massacred in Rwanda in only three and a half months. The overwhelming majority of the victims of the Rwandan genocide belonged to the Tutsi minority ethnic group that comprised approximately 14 percent of the population. The vast majority of the killers were members of the Hutu group, which comprised 85 percent of the population. *See* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 350 (1997).

6. The strong Somali military regime that was developed during the 1970s and 1980s ended in a violent collapse in 1991. Among the main reasons for the collapse of Somalia was the manipulation of clan identity by the military regime. *See* Hussein M. Adam, *Somalia: A Terrible Beauty Being Born?*, *in* COLLAPSED STATES, *supra* note 4, at 69, 71.

7. While ethnicity alone cannot explain Liberia's implosion, it is certainly one of the underlying causes. *See* Martin Lowenkopf, *Liberia Putting the State Back Together*, *in* COLLAPSED STATES, *supra* note 4, at 91, 92 (remarking on violence between the Mano and Gio tribes and the Krahn tribe of ousted ruler Samuel Doe in the years 1985-1990).

8. The civil war in Sudan and the accompanying famine and the internal displacement of populations in the South of the country have so far claimed the lives of 1.5 million people. Chege Mbitiru, *Sudan Rebels Claim Capture of Strategic Town*, AAP NEWSFEED, June 13, 1998, LEXIS, News Library, AAP Newsfeed File. The Sudan has experienced civil war intermittently since 1956. *See generally* Dunstan M. Wai, *Geoethnicity and the Margin of Autonomy in the Sudan*, *in* STATE VERSUS ETHNIC CLAIMS: AFRICAN POLICY DILEMMAS 304 (Donald Rothchild & Victor A. Olorunsola eds., 1983) (examining the North-South conflict in the Sudan).

9. *See* Jon Abbink, *Ethnicity and Constitutionalism in Contemporary Ethiopia*, 41 J. AFR. L. 159, 159 (1997) (stating that "[t]he phenomenon of ethnicity is being declared by many to be the cause of all the problems of Africa, especially those of violent conflict").

states' practice of ignoring or suppressing this major aspect of their socio-political realities[10] constitutes a tragic policy failure.

Believing that official recognition of ethnic diversity would foster divided loyalties and separatism, virtually all African states have avoided coming to terms with the heterogeneity of their ethnic make-up.[11] Until the 1990s, it was highly uncommon for any state to reflect its ethnic diversity in its constitution or laws. This proclivity of African states to deny any constitutional space to claims based on ethnic identity is an unwarranted approach, both as a matter of practical expediency and as a matter of constitutional theory,[12] even if it finds support in the notion of liberal constitutionalism and benign state neutrality. Far from helping to achieve the goals of national integration and political legitimacy, ignoring or suppressing ethnicity has led to militant ethnic nationalism, conflict, and political disorder. Addressing ethnic diversity is therefore crucial to warding off the kinds of tragedies SSA states have already experienced. Consequently, it behooves SSA constitution-makers to devise mechanisms and institutions that best accommodate the interests of different ethnic groups cohabitating the same state[13] in such a way as to integrate ethnically diverse citizens in a broad and inclusive national society that "shares, represents, or respects their ethnicity."[14]

The degree of difficulty in ethnic accommodation depends on the nature of the interests the particular ethnic groups seek to assert. These interests fall into three broad categories.[15] First, ethnic groups may demand to share political power and to be represented in the various institutions of the state. Second, they may seek rights that affirm and preserve their particular identities, cultures, and languages. Finally, some ethnic groups may seek to establish their own independent nation-states.[16]

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10. *See generally* Issa G. Shivji, *State and Constitutionalism in Africa: A New Democratic Perspective*, 18 INT'L J. SOC. L. 381, 389 (1990) (noting that nothing in African states' constitutions reflects these states' consciousness of their ethnic diversities and conflicts).

11. *See* Abbink, *supra* note 9, at 159 (noting that "[i]n the political system and the laws of an African country . . . ethnicity seldom received official recognition").

12. Alemante G. Selassie, *Ethnic Identity and Constitutional Design for Africa*, 29 STAN. J. INT'L L. 1 (1992).

13. The international community has followed two main approaches to protecting the interests of subnational ethno-linguistic communities. The approach that prevailed after World War I under the League of Nations focused on protecting these groups pursuant to a number of special treaties or unilateral undertakings. Natán Lérner, *The Evolution of Minority Rights in International Law*, *in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW 77, 81 (Catherine Brölmann et al. eds., 1993). After World War II, however, the preferred approach for protecting the interests of these communities has been to uphold the principle of non-discrimination and guarantee the individual rights of persons belonging to such communities. *Id.* at 87. *See also* Kay Hailbronner, *The Legal Status of Population Groups in a Multinational State under Public International Law*, 20 ISR. Y.B. ON HUM. RTS. 127, 133-34 (1990).

14. Paul J. Magnarella, *Preventing Interethnic Conflict and Promoting Human Rights Through More Effective Legal, Political, and Aid Structures: Focus on Africa*, 23 GA. J. INT'L & COMP. L. 327, 330 (1993).

15. *See* Bede Harris, *Constitutional Mechanisms for the Protection of Group Rights*, 2 STELLENBOSCH L. REV. 49, 50 (1991); Joseph E. Magnet, *Collective Rights, Cultural Autonomy and the Canadian State*, 32 MCGILL L.J. 170, 176 (1986).

16. The breakup of Czechoslovakia into its component units—the Czech Republic and Slovakia—and Quebec's struggles to secede from Canada have been fueled by such ambitions.

Recent developments in Africa indicate new constitutional approaches to accommodating these interests. At one end is the South African constitution, which represents a modest but well-considered approach to claims of ethnic identity. It recognizes the rights of ethnic groups to their own languages and cultures, and reinforces these rights through a highly decentralized system which empowers each province to pursue its own distinctive course in the furtherance of these rights.[17] At the other end lies Ethiopia's formula for managing ethnic diversity. Like South Africa, the new Ethiopian Constitution affirms the rights of all ethnic groups to their own languages and cultures.[18] The two constitutions differ, however, in the significance they attach to ethnicity as a basis for the internal organization of the state. Whereas the South African constitution-makers rejected the claims of certain ethnic groups to self-governing status on the basis of their distinctive ethnic identity,[19] the organization of the Ethiopian state is founded upon ethnic federalism, which uses ethnic groups as units of self-government.[20]

To this end, the Ethiopian Constitution provides for ethnic-federal government as the principal institutional means for accommodating ethnic groups' cultural, linguistic, and political claims.[21] To accomplish this purpose, the constitution has divided the country into nine ethnic-based federal states. Each of these states, with one exception, is drawn with the aim of making it the principal vehicle for aggregating and expressing the political, cultural, and linguistic identity of the country's major ethnic groups. The animating idea behind ethnic federalism thus seems to be the desire to foster and nurture the emergence of ethnic-national groups as distinct political, geographical, cultural, and linguistic units—that is, "distinct societies" à la Quebec.[22] The

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Notwithstanding these ambitions, however, as the Supreme Court of Canada has stated, under international law, a right to unilateral secession "arises in only the most extreme of cases and, even then, under carefully defined circumstances." Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 282. According to the Court, international law clearly establishes that the "right to self-determination of a people is normally fulfilled through *internal* self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state." *Id.* Thus, it does not "grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state." *Id.* at 277. The only exceptions to this principle occur in favor of peoples under colonial rule or foreign military occupation, and peoples who are "denied meaningful access to government to pursue their political, economic, social and cultural development." *Id.* at 287. In each of these cases, secession is justified on the theory that the peoples in question are denied the ability to exercise their right to self-determination. *Id.*

17. *See* Vera Sacks, *Multiculturalism, Constitutionalism and the South African Constitution*, 1997 PUB. L. 672, 676. For a vivid account of the drafting of the South African constitution, see Hugh Corder, *Towards a South African Constitution*, 57 MOD. L. REV. 491 (1994).

18. *See infra* notes 94-97 and accompanying text.

19. The Inkatha Freedom party "promoted vigorously" a federal system based on ethnic identity so as to "ensure Zulu hegemony in KwaZulu-Natal," while the Afrikaans advocated a self-governing Afrikaans state albeit within the framework of a unitary South African state. *See* Sacks, *supra* note 17, at 674.

20. *See* David Wippman, *International Law and Ethnic Conflict on Cyprus*, 31 TEX. INT'L L.J. 141, 173 & n.220 (1996) (Ethnic federalism is "a term used to describe a particular set of governmental arrangements specifically designed to ameliorate conflict among or between subgroups in a sharply divided state"); *see also* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 603 (1985) (noting that ethnic federalism "can either exacerbate or mitigate ethnic conflict").

21. HOROWITZ, *supra* note 20, at 603.

22. The phrase "distinct society" refers to a clause in the proposal made by the Canadian government in a last-ditch effort to accommodate the demands of the French-speaking province of Quebec for special treatment under the Canadian constitution. *See* Susan Lavergne, *The Future of*

constitution further undergirds this goal by proclaiming that ethnic groups shall have the "unconditional right" to secession.[23] Ethiopia has thus embarked upon an unprecedented constitutional solution to the problems spawned by ethnic heterogeneity in Africa.[24]

The Ethiopian theory of state sovereignty is far different from that which is commonly associated with liberal constitutions. In the latter, phrases like "We the People" express a theory of popular sovereignty and governmental legitimacy based on a "body of citizens" acting in their capacities as individuals, unimpeded by their particular ethnic affiliations.[25] The Ethiopian Constitution, by contrast, declares in so many words that "[a]ll sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia."[26] By this language, the Ethiopian Constitution is, or purports to be, the product of a consensus among the constituent ethnic groups, qua groups, inhabiting the Ethiopian state. In theory, this first means that the state is founded by and belongs to all ethnic groups, and consequently that no particular ethnic group would or should be entitled to perceive the state solely as its own. Additionally and far more importantly, this method of locating sovereignty in ethnic communities implies that the new constitutional order envisions a state in which each of these communities is privileged to decide its own form of governance, identity, future association with the state, and the rights of individuals subject to its jurisdiction.

Is such a solution desirable or workable for SSA states? This Article critically examines this question by considering the potential benefits and pitfalls of using ethnicity as a basis for defining political subdivisions in a federal system. Although the Article focuses on SSA states, many of the issues it considers have resonance in other regions of the world as well. Take, for example, Iraq, which is currently attracting much media attention. According to several television news accounts, officials and policy makers of the United States government may be considering the desirability of reorganizing a post-Saddam Hussein Iraq along ethnic and religious lines. It is therefore a key intention of this Article to help policy makers locate the fine line between constructive and destructive methods of accounting for ethnicity in state design.

The Article proceeds in the following order. Part II begins by identifying the essential attributes of a federal system that are especially appealing to ethnic groups. This Part discusses the meaning of "community" that is

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Canadian Federalism, 23 GA. J. INT'L & COMP. L. 63, 65, 71 (1993) (discussing the constitutional negotiations regarding the status of Quebec within the Canadian federation).

23. ETH. CONST. art. XXXIX, § 2. The Constitution of the Federal Democratic Republic of Ethiopia is available in Amharic and English versions at the Ethiopian Parliament website, http://www.ethiopar.net.

24. One of the most fiercely debated constitutional questions in Kenya is the appropriateness of reviving *majimboism*—a system of government that, like Ethiopia's constitution, proposes to divide the country into ethnic regions. *See* Stephen Ndegwa, *Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics*, 91 AM. POL. SCI. REV. 599, 605 (1997).

25. South Africa's constitution rests on this theory. *See* A.J.G.M. Sanders, *The Freedom Charter and Ethnicity—Towards a Communitarian South African Society*, 1989 J. AFR. L. 105, 108 (1989) (noting that the "'people' referred to in the Freedom Charter are not a particular ethnic group but constitute a new grouping, namely the people of the South African nation-state").

26. ETH. CONST. art. VIII, § 1.

relevant to federal design, and profiles Ethiopia's recent experience to illustrate the ways in which ethnic claims arising from notions of community may be constitutionally expressed and accommodated. Part III considers in greater detail normative and instrumental reasons advanced to justify such a formula for ethnic accommodation. Part IV focuses attention on the potential risks and pitfalls inherent in such a system, arguing that the marriage of ethnicity and federalism is unwise because it is bound to exacerbate, not abate, difficulties SSA states already face: lack of national unity, sluggish economic development, and human rights violations. In this writer's view, these three difficulties constitute the core of Africa's predicament. Whether ethnic federalism is a desirable or workable system of government should thus be evaluated in terms of its potential for making progress in these areas. Part V then proceeds to establish that the fostering of values embedded in ethnic communities, while important, should not trump concern with national unity, economic development, and human rights. Part VI concludes by suggesting a federal model that takes the ethnic factor into account, but not at the expense of these other important factors.

II. FEDERALISM AND THE VALUE OF COMMUNITY

Many commentators have observed that federal systems of government are inherently fragile even without adding ethnicity into the mix.[27] Nevertheless, there are two fundamental reasons why constitution-makers may resort to a federal solution. First is a fear of the governmental tyranny that often results from the concentration of power in a single governmental actor. In the United States, for example, the weight of scholarly commentary[28] and judicial opinion[29] indicate that the main impetus to the design of the U.S. federal system was concern about the concentration of power. Federalism can

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27. The charge that a federal form of government is inherently "weak" has a long pedigree. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. 1915). For a detailed account of federalism's undistinguished record as a stable form of government in different parts of the developing world see WHY FEDERATIONS FAIL: AN INQUIRY INTO THE REQUISITES FOR SUCCESSFUL FEDERALISM (Thomas M. Franck et al. eds., 1968). *See also* DANIEL J. ELAZAR, EXPLORING FEDERALISM 240-44 (1987); Lapido Adamolekum & John Kincaid, *The Federal Solution: Assessment and Prognosis for Nigeria and Africa*, 21 PUBLIUS 173, 174 (1991). Even U.S. federalism, despite its being the "most philosophically and legally sophisticated" system, could not prevent a civil war among the states. Robert Howse & Karen Knop, *Federalism, Secession, and the Limits of Ethnic Accommodation: A Canadian Perspective*, 1 NEW EUR. L. REV. 269, 271 (1993) (noting that "when [ethnic] nationalism is added to the equation, the chances for success become even slimmer").

28. *See, e.g.*, Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 498 (1991) ("The best argument for federalism, then, is neither experimentation, nor diversity, nor residential self-selection, but protection against abusive government."); Dave Frohnmayer, *A New Look at Federalism: The Theory and Implications of "Dual Sovereignty,"* 12 ENV. L. 903, 911 (1982) ("The consuming objective of the federalist political theory was to fragment power."); A.E. Dick Howard, *The Values of Federalism*, 1 NEW EUR. L. REV. 143, 146 (1993) (noting that federalism as well as the separation of powers is a fundamental structural device for guarding against governmental abuse); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 927 (1994) (noting that "concern about the concentration of power was one of the guiding forces in the design of our entire political system").

29. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting that the "principal benefit of the federalist system is a check on abuses of government power").

have this salutary effect in SSA states as well. Federalism's main attraction for SSA states, however, lies in the second fundamental reason why constitution-makers resort to a federal solution, namely its potential for accommodating ethnic diversity and fostering the values embedded in ethnic community.

Section A of this Part begins by highlighting the key attributes that may make federalism particularly attractive to societies in which membership in a community plays a major role in one's self-definition and definition by others. Section B then briefly discusses the meaning of community and explains its significance for federal design. Section C concludes by profiling Ethiopia's recent experiences in constitutional design in order to illustrate the ways in which group claims deriving from the notion of ethnic community may be given expression in constitutional arrangements, including federalism.

A. *Federalism's Attributes*

Like most broad political or legal concepts such as "democracy" or "constitutionalism," "federalism" can mean different things to different people.[30] The indeterminacy of its meaning must be due, in part, to the sheer proliferation of governments that purport to be federal.[31] Still, commentators generally agree that a federal system has two essential attributes. First, federalism requires that political power be structurally dispersed among many centers of authority.[32] The purpose and effect of such dispersion is to create a "set of nested, geographically based governmental institutions in which the central authority and each of the subauthorities exercise separate normative control over segments of the political environment."[33] In Daniel Elazar's concise formulation, the essence of federalism is "self-rule plus shared rule."[34] By virtue of this principle, the subunits have the right to enjoy part of the autonomy they would have possessed as independent states, while the central government has the right to retain a certain level of authority over the entire territory. Federalism's second attribute lies in the nature of a constitutional mandate guaranteeing the legitimacy of the authority of the various centers and their claims of right against the central government.[35] In a unitary system, decentralized power is a matter of grace liable to be reclaimed at the discretion of the central government. By contrast, in a federal system, "subordinate units possess prescribed areas of jurisdiction that cannot be invaded by the central authority, and leaders of the subordinate units draw their power from sources independent of that central authority."[36]

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30. A.S. NARANG, ETHNIC IDENTITIES AND FEDERALISM 71 (1995); Rubin & Feeley, *supra* note 28, at 910.

31. According to a leading scholar of federalism, however, by 1987 only nineteen of the world's independent states were federal according to their constitutions. *See* ELAZAR, *supra* note 27, at 42.

32. *Id.* at 34.

33. *See* Kim Lane Scheppele, *The Ethics of Federalism*, *in* POWER DIVIDED: ESSAYS ON THE THEORY AND PRACTICE OF FEDERALISM 51, 52 (Harry N. Scheiber & Malcolm M. Feeley eds., 1989).

34. ELAZAR, *supra* note 27, at 12.

35. *See id.* at 34.

36. Rubin & Feeley, *supra* note 28, at 911 (citing CHRISTOPHER HUGHES, CONFEDERACIES

Why does federalism disperse political power in this way and limit the authority of the central government from prescribing norms that apply across the board to all subunits? By way of answering this question one will surely discover the promise of a federal solution for ethnic groups. A constitutionally mandated diffusion of power allows normative disagreements among the subunits so that each community may live by its own lights and according to its own values, while retaining membership in the wider national community.[37] A federal system thus aims to provide a mechanism for uniting different communities within the framework of an overarching political system which still allows each community to maintain its fundamental integrity.

B. *The Meaning of Community*

The idea of community has a "protean" quality and covers many different types of social groups,[38] as demonstrated by the expressions "university community," "business community," and even "international community." As Rubin and Feeley have noted, however, only two types of communities are relevant for purposes of state design: "affective" and "political" communities.[39] Affective communities are groups of people who function together because of a "personal or emotional connection to one another."[40] They are characterized by notions of group membership, personal loyalty, emotional connection, and a tendency to exclude others.[41] Political communities, by contrast, are bound together by common decision-making processes, rather than emotional ties.

Thus, insofar as members of ethnic groups are, or perceive themselves to be, united by common languages, cultures, and myths of common descent, they constitute affective communities par excellence. The nature of their ethnic attachment is rooted in emotion. As Connor writes, "The essence of [the ethnic group] is a psychological bond that joins a people and differentiates it, in the subconscious convictions of its members, from all non-members."[42] It is this psychological bond that commands a person's loyalty to his or her ethnic group, and nourishes the feeling that members of an ethnic group are like a "fully extended family."[43] This sense of kinship accounts for the affectivity characteristic of ethnic communities—a characteristic that ethnic-based political movements like the Inkatha in South Africa and the

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(1963)); *see also* M.J.C. VILE, *Federal Theory and the "New Federalism," in* THE POLITICS OF "NEW FEDERALISM" 1 (Dean Jensch ed., 1977); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d. ed. 1986).

37. *See* Scheppele, *supra* note 33, at 52.

38. Kenneth L. Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME LAW. 183, 183 (1980).

39. Rubin & Feeley, *supra* note 28, at 937-39.

40. *Id.* at 937.

41. *Id.* at 939.

42. *See, e.g.*, Walker Connor, *Beyond Reason: The Nature of the Ethnonational Bond*, 16 ETHNIC AND RACIAL STUD. 373, 377 (1993); *see also* Welsh, *supra* note 3, at 485 (noting the "emotional intensity or affection" inherent in ethnicity).

43. Connor, *supra* note 42, at 382; *see also* Daniel Bell, *Nationalism or Class? Some Questions on Due Potency of Political Symbols*, THE STUDENT ZIONIST, May 1947, at 10 ("[N]ationalism is potent because it recapitulates psychologically the family structure.").

Tigray People's Liberation Front ("TPLF") in Ethiopia have manipulated as a political resource. To be sure, the notion of sharing a common bloodline among a large body of people sounds irrational[44] and even ludicrous, especially in countries like Ethiopia where ethnic groups have intermarried over the course of their long and shared history. However, that observation notwithstanding, the key to understanding ethnic attachments is not reason but emotion. As long as a group of people thinks of itself as "we" because of kinship ties and seeks to distinguish itself from "others" in the relevant social environment, that group constitutes an affective community.

A political community, by contrast, consists of a group of people held together not by ethnicities but because its members "engage in a collective decision-making process regarding major questions of self-governance."[45] According to this view, the notion of political community refers only to those groups of people who engage in "public debate" as a key element of the process by which they reach collective decisions.[46] Equally important, the political communities that engage in such decision-making rarely combine affective bonds with political governance and seldom coincide with affective communities.[47] As a result, political communities generally offer larger units of decision-making than affective communities,[48] and allow individuals to enjoy the benefits of political participation without regard to their affective ties.[49] By contrast, the sense of participation affective communities offer "consists of mutual assistance, sharing, and, less nobly but just as centrally, the exclusion of outsiders."[50]

The distinction between affective and political communities disappears, however, when ethnic group identity serves not just as a source of affectivity but also as a source of political identification. Thus, for example, when ethnic groups in a society engage in political competition among themselves or seek "to impress ethnically defined interests on the agenda of the state," they signal their conversion into political communities.[51] There are several overlapping ways in which this transformation may be manifested. One is when an ethnic group seeks to assert a right to practice its own culture and traditions, or to speak its own language.[52] Another is when an ethnic group demands self-rule, or control over resources found in its own homeland.[53] Finally, an ethnic group may also aspire to become an independent state. Whatever the nature of the demand, each of these aspirations imbues the group with a "sense of

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44. Connor, *supra* note 42, at 382 (noting that "*in nearly all* cases, the claim of blood-sharing '*will not*' . . . accord with factual history") (emphasis in original).

45. Rubin & Feeley, *supra* note 28, at 937.

46. *Id.* at 938.

47. *Id.* at 939.

48. *Id.*

49. *Id.*

50. *Id.*

51. MILTON J. ESMAN, ETHNIC POLITICS 27 (1994) (defining "ethnic political movement").

52. The case of the Kurdish language and culture in Turkey is illustrative. The Turkish government continues to repress both heavily. *See* David Miller, *Secession and the Principle of Nationality*, *in* NATIONAL SELF-DETERMINATION AND SECESSION 62, 66 (Margaret Moore ed., 1999).

53. ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 50 (1991).

shared enterprise"[54] where a common cultural allegiance and ethnic identity serve to sustain in the members of the group the sense that "we are all in this together."[55] Thus, the function as well as the upshot of such ethnic movements is to convert ethnic groups—affective communities par excellence—into political communities. Ethnic identity is especially convenient as a basis for building political community precisely because it often provides the unconditional and blind support and loyalty of ethnic members who view themselves as family members.[56]

The confluence of affective and political communities constitutes a major source of the crises of political legitimacy and national integration that continue to bedevil many SSA states. In Sudan, Nigeria, Uganda, South Africa, and Ethiopia—to name but a few—ethnic groups have staged uprisings against the central government demanding official recognition of their separate social identities as a source of rights—particularly the right to self-rule in a federal arrangement. Yet, few SSA states have shown a willingness to embrace constitutional recognition of ethnic self-rule, many condemning it as being either "diabolical"[57] or a "neo-colonial trick."[58]

Despite official hostility to the idea, however, ethnicity-based demands for self-rule have not abated. Several factors account for the staying power of these demands. One is the fact that ethnic groups in SSA states are almost invariably associated with or concentrated in particular regions of the country,[59] thereby serving to support a group's claim that it constitutes a distinct society entitled to self-rule. Another is that many ethnic communities in Africa exercised a degree of self-rule prior to becoming part of the current unitary states,[60] lending apparent legitimacy to their demands. Finally, even when an ethnic group is otherwise indistinguishable from and forms part of a larger population, geographical and historical factors have fostered a distinctive sense of regional consciousness that has fueled demands for self-rule.[61] Much the same may be said of the sense of distinctiveness that has led

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54. Rubin & Feeley, *supra* note 28, at 938.

55. Karst, *supra* note 38, at 183 (defining an essential quality of community).

56. Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INT'L L. 433, 439 (1996).

57. *Id.* at 453 (quoting Patrick Bulger, *IFP Denies Secession*, STAR INT'L WEEKLY, May 25-31, 1995, at 1.

58. Welsh, *supra* note 3, at 484.

59. *See* Mwangi S. Kimenyi, *Harmonizing Ethnic Claims in Africa: A Proposal for Ethnic-Based Federalism*, 18 CATO J. 43, 51-52 (1998) (advocating the establishment of ethnic-based federations in SSA states on the basis of economic efficiency); *see also* Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1038 (1997) (noting that the "existence of separate social identities among territorial groups within a unitary state often constitutes an ongoing demand for federalist rights").

60. The case of Uganda is illustrative. The British colonial policy of indirect rule recognized the special status of preexisting kingdoms, thereby reinforcing among these regions a sense of distinctiveness that has persisted to this day as a source of claims to autonomy. *See* Nelson Kasfir, *Cultural Sub-Nationalism in Uganda*, *in* THE POLITICS OF CULTURAL SUB-NATIONALISM 51-148 (Victor A. Olurunsola ed., 1972); *see also* Augustine Wamala, *Federalism in Africa: Lessons for South Africa*, *in* EVALUATING FEDERAL SYSTEMS 251, 253-54 (Bertus de Villiers ed. 1994).

61. For example, although the Tigrinya-speaking peoples of Eritrea and Ethiopia comprise the same ethnic group, accidents of history and geography have given these peoples particular sub-identities. *See* Patrick Gilkes, *The Effects of Secession on Ethiopia and Somalia*, *in* THE HORN OF AFRICA 1, 3-4 (Charles Gurdon ed., 1994).

to the formation of two separate states (one of which is still de facto) out of the otherwise ethnically and religiously homogeneous Somali people.[62]

SSA states will achieve national integration and political stability only when they can effectively grapple with the challenges that ethnic distinctiveness poses. Arguably, the most promising response to these challenges inheres in federalism as a form of governance and as a means of constitutional accommodation. If appropriately designed and implemented, a federal solution can have salutary effects, not the least of which consists of averting the never-ending ethnic conflict, loss of lives, and state atrophy in SSA states.

Ethiopia's recent experiment with ethnic-based federalism offers valuable lessons in constitutional accommodation of ethnicity in Africa. Specifically, the Ethiopian formula for ethnic accommodation serves to highlight the kinds of claims dissatisfied ethnic groups in SSA states (or political elites purporting to speak on their behalf) are likely to make, the ways in which constitutional accommodation of these claims may be attempted, and the limitations and pitfalls inherent in such constitutional accommodation. Given that most SSA states comprise a patchwork of ethnic groups and given that these ethnic groups have shown, in the closing decades of the twentieth century, a remarkable proclivity to flaunt their group distinctiveness and identity, Ethiopia's constitutional reforms related to ethnicity have special significance for other SSA states. These states "may one day soon . . . rewrite their . . . constitutions"[63] in light of the lessons gained from Ethiopia's experience with constitutional accommodation of ethnicity. The next section of this Article briefly examines the ways in which the Ethiopian Constitution seeks to accommodate ethnic groups as affective and political communities.

C. *Constitutional Accommodation of Ethnicity in Ethiopia: A Brief Look*

1. *Political Background*

For many centuries, the Ethiopian state has been home to as many as eighty[64] ethnic communities with different languages, cultures, and religious beliefs. Ethiopian statehood reaches back for millennia, and is the shared product of a creative and dynamic process of interaction and development among these communities.[65] Despite its longevity, however, the Ethiopian state has, since the early 1970s, faced the same political predicament—the

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62. *See* John Markakis, *Ethnic Conflict & the State in the Horn of Africa*, *in* ETHNICITY AND CONFLICT IN THE HORN OF AFRICA 217, 232-33 (Katsuyoshi Fukui & John Markakis eds., 1994).

63. Charles E. Ehrlich, *Ethnicity and Constitutional Reform: The Case of Ethiopia*, 6 ILSA J. INT'L & COMP. L. 51, 52 (1999).

64. *See* MWANGI S. KIMENYI, ETHNIC DIVERSITY, LIBERTY AND THE STATE: THE AFRICAN DILEMMA, 12 SHAFTESBURY PAPERS 105 (1997).

65. *See* CHRISTOPHER CLAPHAM, TRANSFORMATION AND CONTINUITY IN REVOLUTIONARY ETHIOPIA 20-23 (1988).

crises of national integration and political legitimacy—that has troubled the rest of Africa. While a variety of factors have contributed to these crises, the role of ethnicity has been decisive.

Over the last three decades, "elites"[66] purporting to speak in the name of their ethnic groups came to question the historical validity and the current reality of Ethiopian nationhood. They perceived the Ethiopian state to be not so much the fusion of Ethiopia's many ethnicities as the political manifestation of one ethnic group—the Amhara—writ large, masquerading as an all-inclusive national identity. Identifying the Ethiopian state with just the Amhara, however, is grossly inaccurate because it reduces an issue of great complexity to a simple political expedient for purposes of ethnic mobilization.[67]

Accurate or not, however, the fall of Ethiopia's centuries-old monarchy and the takeover of the government by a brutal military junta in 1974 created auspicious circumstances for such mobilization. Because the junta lacked legitimacy in either traditional or democratic politics, its claim to rule was, from the beginning, highly precarious. The junta rejected calls for political reform and resorted instead to violence to enforce its claim to rule.[68] Political power became increasingly concentrated in the hands of one man, and military rule became a veritable tyranny that gradually "helped to fuel regional rebellions and an increased ethnic consciousness."[69] In time, taking up arms to fight a brutal government—and doing so in the name of "ethnic liberation"—required no further justification.

The articulation of a strategy of "ethnic liberation" and the impetus for the search for a new identity for the Ethiopian state came chiefly, if not exclusively, from two ethno-regional movements: the Tigray People's Liberation Front (TPLF) and the Oromo Liberation Front (OLF). Both of these movements purported to speak on behalf of their respective ethnic communities, and in each case their resentment came from their perception that the Ethiopian state had historically been dominated by the Amhara, the country's other major ethnic group.

Although all three groups—the Tigray, Oromo, and Amhara—have intermingled over centuries and have shared a long and common history, the use of Amharic as the sole official language of government and instruction, in conjunction with the relatively greater visibility of Amharic-speaking officials

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66. JOHN BREUILLY, NATIONALISM AND THE STATE 50 (2d ed. 1993) (stating that nationalist politics are "frequently elite affairs conducted in politically fragile states"); ESMAN, *supra* note 51, at 28 (referring to these elites as "ethnic entrepreneurs" who politicize ethnicity ostensibly so as to defend collective ethnic interests and aspirations). For an account of the role of elites in articulating real or imagined cultural differences between the North and the South in the United States, see James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study of Constitutional Argument*, 76 TEX. L. REV. 1219, 1232-33 (1998).

67. CLAPHAM, *supra* note 65, at 24-26. Unlike the rest of Africa where the state is the product of nineteenth-century European colonialism, which tossed into a common and arbitrary political unit many ethnic groups that previously had little or no contact, the longevity of the Ethiopian state has allowed its ethnic groups to intermingle and interact with one another in numerous ways, including trade and intermarriage, and to come together for the defense of their country against foreign aggression.

68. *See* Markakis, *supra* note 62, at 224.

69. Paul H. Brietzke, *Ethiopia's "Leap in the Dark": Federalism and Self-Determination in the New Constitution*, 39 J. AFR. L. 19, 20 (1995).

in the higher echelons of the government in the days before the 1974 revolution, signaled to the TPLF and OLF both cultural oppression and the government's intention to assimilate all groups to the Amhara culture.[70] The elites leading these movements perceived Amharic not just as a means of communication, but rather as a symbol of Amhara domination and the eventual extinction of their own ethnic identities. Language thus became an important issue not only in its own right but also as a proxy for other issues, namely cultural preservation, equal access to state power, and a redefinition of the identity of the state and the terms of its relationship to these groups. Using the powerful emotions the issue of language tends to evoke among its speakers, the TPLF and OLF mobilized their followers to rid themselves of ethnic oppression and to achieve self-determination.

Each of these movements had its own particular grievances as well. The TPLF complained that the central government neglected the economic development of the Tigray region, thereby causing the region to lag behind.[71] The fact that Tigray has been a scene of recurrent famines was held up as proof and added fuel to the ethnic fire for "self-determination." For its part, the OLF claimed that its case for ethnic self-determination was even more compelling. The main basis for this claim was the assertion that the central historical institutions of the Ethiopian state—the now defunct monarchy and Orthodox Christianity—along with all of their normative and cultural underpinnings, have been the common heritage of the Amhara and Tigray ethnic groups but had no connection to the Oromo ethnic group.[72] Oromo culture, they further argued, is largely defined by Islam[73] and a traditional system of democratic governance common only among the Oromo ethnic group.[74]

2. *Protection of Community Under the Ethiopian Constitution*

In 1991, the military regime that had ruled Ethiopia for seventeen years collapsed, and a coalition government comprised chiefly of the TPLF and OLF took over the reins of state power with significant United States support. The central question that confronted the new rulers was how best to

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70. Markakis, *supra* note 62, at 225. For a more elaborate, though partisan, account of the link between state language policy and ethnic conflict in Ethiopia, see Mekuria Bulcha, *The Politics of Linguistic Homogenization in Ethiopia and the Conflict over the Status of Afaan Oromoo*, 96 AFR. AFF. 325 (1997).

71. Markakis, *supra* note 62, at 230 (noting that the absence of "a single factory in the entire province [of Tigray]" was an important source of resentment against the central government). Curiously, Markakis ignores the fact that the same could be said of the economies of the Amhara regions as well. There is not a single factory in Gordar, Wello, or the Amharic speaking parts of Shoa—all Amhara regions. *See, e.g.*, GOV'T OF ETH., INDUSTRIAL POLICY PAPER (1995), http://www.africa.upenn.edu/eue_web/indust2.htm ("Many of the industrial establishments are concentrated in a few regions of the country with Addis Ababa, and the Shewa region, and Dire Dawa and the Hararge Region accounting for 91.7% of all industrial establishments 89.5 % of the industrial employment and 93% of the GVP. Wello, Gojam, Sidamo and Arsi regions account for only 3%, 2% and 1% of public enterprises, respectively.").

72. *See* Bulcha, *supra* note 70, at 326-27 (referring to these groups as "Abyssinians" in contradistinction to Oromos).

73. *Id.*

74. *See* Abbink, *supra* note 9, at 161.

restructure the state and institutions of government to reflect the ethnic and cultural make-up of their society in a way that would accommodate the demands arising from the arguably separate social identities that the new rulers purported to represent.

Robert Cover once remarked that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[75] His observation seems especially pertinent to the Ethiopian Constitution, which derives so much of its distinctive identity and meaning from the TPLF's and OLF's narratives of ethnic oppression and liberation. They decided, as constitution-makers, to accord official recognition to Ethiopia's affective communities with the aim of transforming them into political communities in the process. The Ethiopian Constitution thus allows every ethnic group to form its own state of homogeneous ethnicity. These narratives are expressed constitutionally in the foundational principle that state sovereignty in Ethiopia resides in all its ethnic groups rather than in its individual citizens or in the federation itself.[76] Underlying the principle is the notion that every ethnic group is the bearer of sovereign powers in its own right. This principle, in turn, has two important corollaries that form the core of Ethiopia's constitutional edifice: equality among ethnic groups[77] and ethnic groups' right to self-determination.[78]

The Ethiopian Constitution actuates these two ideals by providing a variety of rights and protections for ethnic communities. The most important of these is the right of an ethnic group to secede from the country in order to establish its own state. Prior to the framing of the constitution, the TPLF and OLF had frequently and vehemently complained of "unfair treatment of ethnic groups" and "forceful attempts at eliminating ethnic identities" in Ethiopia

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75. Robert M. Cover, *Supreme Court 1982 Term Forward: Nomos And Narrative*, 97 HARV. L. REV. 4, 4 (1983).

76. ETH. CONST. art. VIII; *see also* Minasse Haile, *The New Ethiopian Constitution: Its Impact Upon Unity, Human Rights and Development*, 20 SUFFOLK TRANSNAT'L. L. REV. 1, 20 (1996) (noting that the recognition of ethnic groups as states with the right of secession in addition "raise[s] questions as to [sic] juridical existence of the central or 'federal' government for the whole country").

77. *See* ETH. CONST. art. XLVII, § 4 ("Member States of the Federal Democratic Republic of Ethiopia shall have equal rights and powers."). Although the constitution does not say in so many words that all ethnic groups are equal, it seeks to accomplish that result by providing that states shall primarily be created on the basis of language and ethnic identity. *Id.* art. XLVI, § 2. In a related vein, the Ethiopian constitutional design seeks to advance the principle of cultural pluralism, whereby distinct social groups coexist harmoniously in a pluralistic society. The essence of cultural pluralism is the belief that the state should undertake measures to help different communities preserve and develop their languages and cultures. Such a policy thus aims at linguistic and cultural equality, with the avowed goal of promoting social harmony, national integration, and governmental legitimacy. *See* Will Kymlicka, THE RIGHTS OF MINORITY CULTURES 9-10 (Will Kymlicka ed., 1995) [hereinafter MINORITY CULTURES].

78. *See* ETH. CONST. art. XXXIX, § 1. As compared with the South African constitution, which understands the right to self-determination in its cultural and linguistic sense, the Ethiopian Constitution construes the right more comprehensively to include additional aspirations of ethnic groups—most notably political power-sharing and self-government. For a brief discussion of the right to self-determination under the South African constitution see Sacks, *supra* note 17, at 678-82 (noting that while "[t]he interim constitution had recognized the right of self-determination for 'peoples,'" the final constitution envisages only the establishment of cultural and other councils for the promotion of the cultural, linguistic, and religious interests). Self-determination under the Ethiopian Constitution is discussed below. *See infra* notes 79-99 and accompanying text.

which, in their view, constitute the single most important reason for the growth of ethnic conflict in the country.[79] These movements thus sought to address the "national question" head-on by openly embracing the notions of ethnic equality and sovereignty as the cornerstones of political community. In furtherance of this goal, they framed the constitution to allow every affective community to form its own state of homogeneous ethnicity. This transformed each ethnic group into a political community in its own right which, in addition, was granted the right to self-determination.[80] Ethiopia's constitutional recognition of ethnic groups' right of secession is an unprecedented measure in Africa, and it strongly tracks Lenin's famous, though extremely naive, formula for dealing with the "national question" in a multi-ethnic state.[81]

In addition to the right to secede, self-determination includes the more narrow and immediately relevant right of ethnic groups to self-government in their own defined territories.[82] For the larger ethnic groups, the constitution provides for states as the main framework for self-governance. Within this framework, ethnic groups have been granted the power to administer their internal affairs by establishing all the necessary trappings and institutions of government, including legislative councils, courts, and educational institutions all using the native language.[83] The Ethiopian Constitution also carves out "special districts" within the states for smaller ethnic groups that have not formed their own political jurisdictions. Theoretically, the smaller ethnic groups may exercise a measure of autonomy within "their" own territories.[84]

Some commentators have expressed doubt as to the real significance of the right to self-government in Ethiopia, suggesting that the member states have "few real powers to take care of their own internal affairs."[85] The pervasive and dominant role that the TPLF, as the current ruling party that

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79. The quotes are from the remarks of Ethiopia's Prime Minister, Meles Zenawi, during a trip to Washington, D.C. in 1995. *See* Dele Olojede, *Ethiopia's Ethnic-Rule Experiment*, NEWSDAY, Jan. 21, 1996, at A6, LEXIS, News Library, CURNWS File.

80. *See* ETH. CONST. art. XXXIX, § 4.

81. For a discussion of the principles that underlay the federal organization of the ex-Soviet Union, the role it played as a model for other socialist federations, and Lenin's contributions to the development of this model, see Viktor Knapp, *Socialist Federation—A Legal Means to the Solution Of The Nationality Problem: A Comparative Study*, 82 MICH. L. REV. 1213 (1984). *See also* V.M. CHKHIKVADZE, THE SOVIET STATE AND LAW 92-113 (V.M. Chkhikvadze ed., 1969). Unlike the constitutions of the former socialist countries, however, the Ethiopian Constitution does not contain provisions proclaiming the unity or sovereignty of the federal state. For example, the Czechoslovak Federal constitution states in article 1(5): "Both Republics [i.e. the Czech Socialist Republic and the Slovak Socialist Republic] mutually respect their sovereignty, as well as the sovereignty of the Czechoslovak Socialist Republic . . . ." *See* Knapp at 1215 (quoting USTAVNI ZAKON O CESKOSLOVENSKEE FEDERACI (Constitutional Law on the Czechoslovak Federation) art. 1, § 5 (1968, amended 1970, 1971, 1975)).

82. ETH. CONST. art. XXXIX, § 3. These communities also have the power to adopt their own constitutions, presumably reflecting their particular socio-cultural conditions and levels of development. *Id.* art. LII, § 2, cl. b.

83. *See* ETH. CONST. art. XXXIX, § 3 and text accompanying note 82. *See also id.* art. III, § 3 (states have right to their own flags and emblems); *id.* art. V, § 3 (states have right to use their own languages); Abbink, *supra* note 9, at 168 (suggesting that the constitution-framers chose ethnicity and language, in part, as a means of dealing with the educational system).

84. Abbink, *supra* note 9, at 167.

85. *Id.* at 167-68.

brooks no real opposition, plays in shaping and guiding the politics and administration of the entire federation suggests that this skepticism is warranted. Notwithstanding such skepticism, however, there are reasons to think that the territorial devolution of power to ethnic groups constitutes an important step toward ethnic self-government. First, the states and other subunits have been constitutionally granted (and do appear to enjoy) significant levels of autonomy in matters dealing with language, culture, and education. [86] Second, the system is designed to allow for the emergence of local leaders who strongly identify with the subunits. Such local rooting of political leadership and institutions, even if illusory, tends to satisfy the desire for collective status and recognition among both the rulers and the ruled alike.[87] Finally, the fact that the states and other subunits of government are named after particular ethnic groups is bound to reinforce the feeling that these entities belong to the groups officially identified with them. Under this arrangement, therefore, the State of Tigray, for example, belongs to the Tigreans, the State of Amhara to the Amharas, and so on, thereby giving legitimacy to the claims of a particular ethnic group to a particular territory,[88] and providing it with the necessary framework in which its language, culture, and political institutions may flourish.

The Ethiopian Constitution also understands self-determination as the right of each ethnic group to be equitably represented in the institutions of the federal government. The constitution's implementation of this right is evident in the composition of the federal legislature, consisting of the House of Peoples' Representatives[89] ("Peoples' House") and the House of the Federation ("Federation House").[90] The members of the Peoples' House are elected from districts set up in each state on the basis of the state's population.[91] Of the 550 seats in the Peoples' House, the constitution reserves twenty for minority ethnic groups, apparently to ensure some representation for minorities whose populations are not large enough to constitute electoral districts under the formula used by the government.[92] The second house, the Federation House, purports to represent the specific interests of each ethnic group and to ensure the political equality of all.[93]

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86. ETH. CONST. art. V, § 3 (languages), art. XXXIX, § 2 (cultures), art. LI, § 3 (federal government creates education standards), art. LII, § 1 (powers not exclusively or concurrently given to federal government given to states).

87. *See* YAEL TAMIR, LIBERAL NATIONALISM 71 (1993).

88. The Russians used to refer to the ethnic group to whom sovereignty and legitimacy were accorded in this way as the "titular nationality" because its name is reflected in the name of the subunit in which it was dominant. Donald L. Horowitz, *Self-Determination: Politics, Philosophy, and Law*, 39 NOMOS 421, 438 (1997).

89. ETH. CONST. art. L, § 3.

90. *Id.* art. LXI.

91. *Id.* art. LIV, §§ 1, 2.

92. *Id.* art. LIV, § 3.

93. *Id.* art. LXI, § 2. Members of the Federation House are elected by State Councils. *Id.* art. LXI, § 3. State Councils constitute the "highest organ of State authority" and are responsible to the people of the state. *Id.* art. L, § 3. Cumulatively, these provisions seem designed to establish a bicameral constitutional structure that is unmistakably similar to that of the ex-Soviet Union, comprised of the "Soviet of the Union" and the "Soviet of Nationalities." *See* CHKHIKVADZE, *supra* note 81, at 129. The "Soviet of the Union" was elected by "citizens of the U.S.S.R. voting by electoral districts on the basis of one deputy for 300,000 of the population." In contrast, the "Soviet of Nationalities" was elected by

The constitution articulates the right to self-determination in linguistic and cultural terms as well as political ones. Linguistically, the constitution expresses its respect for the collective worth and status of all ethnic groups by declaring that "[a]ll Ethiopian languages shall enjoy equal state recognition."[94] By virtue of this equality, all ethnic groups are entitled to speak, write, and develop their respective languages.[95] While such unbridled multilingualism in a country with more than eighty languages might seem like reconstructing the Tower of Babel,[96] the principle of ethnic equality to which the constitution-makers were committed seemed to require no less.[97] Also, a constitution that is willing to go as far as endorsing ethnic secession cannot be expected to ignore one of its underlying motivations: the desire to foster linguistic security and cultural preservation.

For similar reasons, the constitution entitles ethnic groups to express, develop, and promote their cultures, and to preserve their histories.[98] Cultural self-determination, like linguistic equality, thus seeks to accord respect to and affirm the existence of a pluralist society in which no single culture dominates.[99] Ethiopia's constitution thus seeks to protect ethnic groups' linguistic and cultural interests, as well as to foster their development as self-governing political communities. Cumulatively, these rights are intended to encourage affective communities to preserve and foster their cultural distinctiveness and to become self-governing political communities. In the pursuit of this goal, an ethnic group may choose to form an independent state of its own or, if it prefers, to retain its membership in the federation. In either case, the constitution views the ethnic group as a bearer of state sovereignty, which it has the right to enjoy alone or to share with other groups inhabiting the same territorial state. Because it ostensibly seeks to represent the sum total

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citizens of the U.S.S.R., voting by nationality, whereby each nationality, regardless of its population size, was represented by an equal number of members, ostensibly so as to ensure the political equality of all nationalities and peoples of the Soviet Union. *Id.* at 130.

The thought underlying the Soviet system was that, absent such representation, the bigger nationalities such as the Russians and Ukrainians would dominate the second legislative chamber. Despite striking similarities, however, there is one minor difference between the Soviet of Nationalities and the House of the Federation: in the latter, the principle of equality is not absolute. Whereas in the Soviet system, every nationality, big or small, had an equal number of representatives, the Ethiopian system retreats from the equality principle by providing that each ethnic group shall be represented by at least one member and an additional member for each one million in population. *See* ETH. CONST. art. LXI, § 2.

94. ETH. CONST. art. V, § 1.

95. *Id.* art. XXXIX, § 2.

96. According to the Bible, multilingualism was the curse God imposed on the monolingual people who tried to construct the Tower of Babel—a tower that would reach up into the heavens. The Lord said, "Come, let Us go down and there confuse their language, that they may not understand one another's speech." *Genesis* 11:1-9 (New American Standard).

97. For Marxist-Leninists, the notion of ethnic equality is a pragmatic formula for exorcising the cultural milieu of ethnic mistrust and suspicion so as to hasten the process of creating one out of the many. *See* WALKER CONNOR, THE NATIONAL QUESTION IN MARXIST-LENINIST THEORY AND STRATEGY 201-02 (1984). Although history has since disproved him, the formula was based on Lenin's belief that a policy of equality would dissipate ethnic antagonisms and encourage ethnic groups to "move closer together." *Id.* at 201.

98. ETH. CONST. art. XXXIX, § 2.

99. Ethiopia's ethnic groups, however, have not been particularly strident in pressing claims for cultural self-determination. One reason for this may be the fact that many of these groups practice broadly similar cultures. Moreover, to the extent language and culture are inseparably connected, the struggle for linguistic self-determination may have subsumed the desire for cultural self-determination.

of the country's multiple ethnic identities, the restructured Ethiopian state can no longer—at least in theory—be identified with one ethnic group.

Ethiopia's experience with ethnic demands and its choice of a federal solution squarely present the question of whether the marriage of ethnicity with federalism holds promise for the accommodation of such demands. The answer to this question has significance for many SSA states, particularly those in which demands for self-rule have been a constant source of turmoil and instability. It may also have resonance in other regions of the world where similar pressures exist. Part III of this Article examines the reasons why proponents might find a positive answer to the foregoing question appealing.

III. ETHNIC FEDERALISM: ITS JUSTIFICATIONS

Kim Scheppele insightfully observes that "[w]e design institutions not just to *do* things, but also to *stand for* things."[100] In other words, while an institution is not a value in itself, it embodies normative as well as instrumental values. If this is correct, we must then ask what moral or instrumental reasons justify granting an ethnic group the right to form its own political community—that is, what is it about ethnic community that justifies its use as a basis for redesigning SSA states?[101]

A. *The Ethnonationalist Argument*

A principal justification for ethnic federalism derives from the idea of ethnonationalism.[102] Ethnonationalism is the belief that "proclaims the distinctiveness of a particular people and their right to self-rule in their homeland."[103] The right to self-rule can be satisfied through a variety of

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100. Scheppele, *supra* note 33, at 51.

101. Despite its importance, political theorists have generally paid scant attention to the normative justification for ethnic federalism or the right to self-determination of which it is an integral part. *See* Harry Beran, *A Liberal Theory of Secession*, 32 POL. STUD. 21, 21 (1984) ("Secession is a forgotten problem of political philosophy."); Yael Tamir, *The Right to National Self-Determination*, 58 SOC. RES. 565, 565 (1991) (noting that although "[t]he right to national self-determination has often been at the crux of the modern political debate . . . theoretical analyses of this right are few and far between"). A recent flurry of scholarship, however, has endeavored to fill this gap. *See, e.g.*, Wayne J. Norman, *Towards a Philosophy of Federalism*, *in* GROUP RIGHTS 79 (Judith Baker ed., 1994) (discussing normative and practical factors for evaluating and designing a federal system in a liberal democratic society); Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 44-56 (1998) (discussing the question of how international law should respond to claims of ethnic movements to establish their own states). Scheppele, *supra* note 33, at 51 (discussing the "ethics" and moral values of federalism).

102. *See* BUCHANAN, *supra* note 53, at 48 (noting that the "normative principle of nationalism" is one of the "most familiar and stirring" justifications offered for the right to self-determination); MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM 7-8 (1993) ("Ethnic nationalism claims . . . that an individual's deepest attachments are inherited, not chosen. It is the national community that defines the individual, not the individuals who define the national community."); Asbjorn Eide, *In Search of Constructive Alternatives to Secession*, *in* MODERN LAW OF SELF-DETERMINATION 139, 143 (Christian Tomuschat ed., 1993) (defining "ethno-nationalism" as the ideology that holds that nations should be defined in ethnic terms, should have their own states, and that members of nations owe overriding loyalties to their own nation).

103. ESMAN, *supra* note 51, at 28; *see also* Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 315 (2000) (distinguishing

institutional arrangements. The right to secede and establish an independent state represents one such arrangement; regional autonomy within a federal state represents another. In either case, the ethnonationalist principle requires political communities to be defined in such a way that "political and cultural (or ethnic) boundaries must, as a matter of right, coincide."[104]

Ethiopia's federal constitution exemplifies this foundational principle. The notion of ethnic group sovereignty, which animates the entire constitution, is premised on and intended to fulfill this idea, as is the division of the country into many subunits with the aim of ensuring coincidence between political and linguistic boundaries.[105] To ethnonationalists, such a framework is essential because it allows ethnic communities to live in accordance with their customs and traditions and to use their own languages. Viewed comprehensively, the ethnonationalist principle is thus both the source and touchstone of various rights for ethnic groups.

Ethnonationalism, however, can be a force for evil as well as good. Writing in 1995, Lea Brilmayer noted the consequences of such evil:

> At this particular time, we are more likely to think in terms of the evil nationalism brings about; this association is the legacy of the war in the former Yugoslavia, the killings in Rwanda, the ongoing fighting in Chechnya, and many other examples that all too easily come to mind. Nationalism now tends to be associated with barbarism: with genocide, ethnic cleansing, rape and wanton murder.[106]

Ethiopia's experience under the new constitutional dispensation tends to bear out Brilmayer's observations. Although ethnic conflict in Ethiopia has not reached the odious and tragic levels seen in Yugoslavia and Rwanda, the numerous ethnic conflicts that have occurred since ethnic identity gained constitutional salience in the country bear all the earmarks and warning signs of a similar mischief. Take, for example, the case of the Gedeo and Guji, two ethnic groups that claim descent from a common ancestor, although they speak different languages.[107] In the past, they apparently maintained cordial and peaceful relations, viewing themselves as kinsfolk.[108] After the

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ethnonationalism as "that form of nationalism in which the nation is defined in terms of assumed blood ties and ethnicity") (internal quotes and citations omitted).

104. BUCHANAN, *supra* note 53, at 48; *see also* ERNEST GELLNER, NATIONS AND NATIONALISM 1 (1983) ("[N]ationalism is a theory of political legitimacy, which requires that ethnic boundaries should not cut across political ones.").

105. Although the constitution confers sovereignty upon "nations, nationalities and peoples" defined as "a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identity, a psychological make-up, and who inhabit an identifiable, predominantly contiguous territory," ETH. CONST. art. XXXIX, §§ 2, 5, language alone has been used as the decisive basis for identifying ethnic groups. *See* Abbink, *supra* note 9, at 166. Abbink also correctly observes that "[n]ot all groups identifying themselves as a community do so on the basis of [the foregoing] criteria, only on a number of them, and some groups may primarily refer to territorial, economic, religious or even a sub-ethnic clan identification . . . ." *Id.* Given the fact that the TPLF and OLF have used language as a useful means for political mobilization in defense of collective interests of their ethnic communities, this result is not surprising.

106. Lea Brilmayer, *The Moral Significance of Nationalism*, 71 NOTRE DAME L. REV. 7, 7 (1995) (arguing that it is necessary to distinguish between those nationalisms that have legitimate ends and use legitimate means, on the one hand, and those that pursue illegitimate ends, on the other).

107. Press Release on the Gedeo-Guji Incident, *at* http://www.zzapp.org/enset/press_release.htm (last visited Oct. 17, 2002).

108. *Id.*

government, purportedly following its "50% + 1 kililization policy" for naming regions, incorporated what the 1994 census showed to be a Gedeo majority district into the Borena zone in the Oromiya region, the two groups came to serious blows over control of the territory. The result, according to one estimate, was the death of 3,000 people and the displacement of more than 160,000 others.[109] Similar incidents have been reported in other regions of the country,[110] the latest[111] of which attracted international attention when the European Union called upon the government of Meles Zenawi to hold a public inquiry.[112] Thus, to the extent that claims of self-determination including ethnic federalism and secession are animated by nationalism, the moral legitimacy of those claims is dubious.

B. *Promoting the Value of Community*

There are, of course, ways in which nationalism may be a force for the good. Proponents tend to cast ethnonationalism in an instrumental role, and suggest that possession by ethnic groups of their own state—or a greater degree of political autonomy than is possible under a unitary state—is essential to preserve or promote certain values individuals need.

A useful way to appreciate this claim is to focus on the needs ethnic community satisfies. There are several reasons why membership in an ethnic community may be crucial to a person's well-being. While individuals have many identities, membership in an ethnic community provides them with a primary form of belonging.[113] Membership is important because it serves as an "anchor for [people's] self-identification and the safety of effortless secure belonging."[114] The argument here is based on the essential fact that we all identify with some sort of community and in doing so we identify ourselves.

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109. *Id.*

110. Ethiopian Human Rights Council, *Ethnic Conflict: A Dangerous Problem of the Utmost Concern*, http://www.ehrco.net/reports/special_report35.html (Nov. 2, 2000).

111. *Ethiopia: Southern State Officials Arrested over Rights Violations*, IRIN NEWS, http://www.irinnews.org/report.asp?ReportID=29433&SelectRegion=Horn_of_Africa&SelectCountry=ETHIOPIA (Aug. 21, 2002). This latest incident claimed the lives of 100 people and displaced 5,800 people when the Sheko-Mezhenger ethnic group, claiming to be the sons of the soil, sought to "dislodge other ethnic groups in an attempt to take over the main town of Tepi." *Id.*

112. *Ethiopia: EU Calls for Public Inquiry into Tepi*, Awasa Killings, IRIN NEWS, http://www.irinnews.org/report.asp?ReportID=28858&SelectRegion=Horn_of_Africa&SelectCountry=ETHIOPIA (July 17, 2002).

113. Michael Ignatieff explains the importance of national belonging:

> When nationalists claim that national belonging is the overriding important form of all belonging, they mean that there is no other form of belonging—to your family, work, or friends—that is secure if you do not have a nation to protect you. This is what warrants sacrifice on the nation's behalf. Without a nation's protection, everything that an individual values can be rendered worthless. Belonging, on this account, is first and foremost protection from violence.

IGNATIEFF, *supra* note 102, at 10; *see also* Ibrahim J. Wani, *Cultural Preservation and the Challenges of Diversity and Nationhood: The Dilemma of Indigenous Cultures in Africa*, 59 UMKC L. REV. 611, 640 (1991) (noting that in Africa secondary identities which derive from class, educational, or professional status are less important than ethnic attachments, but that "tribalism would be less crucial in politics with the ascendancy of class and ideology and increased literacy"); Gordon R. Woodman, *Constitutions in a World of Powerful Semi-Autonomous Social Fields*, 1989 THIRD WORLD LEGAL STUD. 1.

114. Avishai Margalit & Joseph Raz, *National Self-Determination, in* MINORITY CULTURES, *supra* note 77, at 86.

Helen Lynd aptly conveys this idea: "Some kind of answer to the question Where do I belong? is necessary for an answer to the question Who am I?".[115] In much of Africa, belonging to an ethnic community provides the primary form of membership and personal identity. It is the "hub around which life revolves."[116]

Membership in an ethnic community is also important because it provides individuals with a cultural context in which they are able to make meaningful choices about how to lead their lives, set their goals, and establish relationships.[117] Individual fulfillment in all these respects not only takes place through some sort of participation in a culture, but is also determined by it.[118] This is not to suggest that strangers cannot participate in activities marked by a culture not their own. Yet, as those who have experienced life outside of their own culture will readily recognize, cultural handicaps often set limits on a stranger's possibilities. As Margalit and Raz observe, "[f]amiliarity with a culture determines the boundaries of the imaginable" and the "limits of the feasible."[119] Membership in a community is important to individual well-being because it shapes the individual's opportunities and his or her ability to engage with relative ease in the kinds of relationships and goals marked by a culture. As a community flourishes, so do a member's well-being and life chances.

Ethnic-based movements have made much of these arguments. For example, in Ethiopia, before the changes that occurred in 1991, the TPLF, OLF, and other groups often complained that members of non-Amhara communities had suffered educational, economic, and other disadvantages because they were required to compete in an allegedly unfamiliar, Amhara-centered cultural and linguistic environment.[120] Similar complaints by geographically concentrated ethnic communities stand behind calls for the disaggregation of unitary states in the name of ethnic self-determination.[121] In Kenya, for example, minority ethnic groups have long advocated, so far

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115. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 307-09 (1986) (quoting HELEN LYND, ON SHAME AND THE SEARCH FOR IDENTITY 210 (1958)).

116. Selassie, *supra* note 12, at 12.

117. Margalit & Raz, *supra* note 114, at 86; *see also* Neil MacCormick, *Is Nationalism Philosophically Credible?*, *in* ISSUES OF SELF-DETERMINATION 16-17 (William Twining ed., 1991).

118. Margalit & Raz, *supra* note 114, at 87.

119. *Id.* at 86.

120. *See supra* note 70 and accompanying text; *see also* Charles E. Ehrlich, *Ethnicity and Constitutional Reform: The Case of Ethiopia*, 6 ILSA J. INT'L & COMP. L. 51, 63 (1999) (noting non-Amharas will "lose access to the state apparatus"); Aaron P. Micheau, *The 1991 Transitional Charter of Ethiopia: A New Application of the Self-Determination Principle?*, 28 CASE W. RES. J. INT'L L. 367, 372 (1996) ("The task of learning Amharic . . . was one factor that disadvantaged other groups in competing for university education."); Makau Wa Mutua, *The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa*, 17 MICH. J. INT'L L. 591, 611 (1996) (book review) ("[P]ast regime... sought the destruction of other cultural heritages and their replacement with the dominant Amhara language and tradition.").

121. Stanley A. de Smith, *Federalism, Human Rights, and the Protection of Minorities*, *in* FEDERALISM IN THE NEW NATIONS OF AFRICA 279, 286 (David P. Currie ed., 1964) (noting that these communities "want to be sure of their fair shares of jobs in the public service, of schools, scholarships, and funds for economic development; they [also] feel that their religion, their language, or their traditional ways of life will be eroded and submerged unless they are allowed a measure of self-determination").

unsuccessfully, a *majimbo* constitution to create an ethnic-based federal government much like Ethiopia's.[122]

Membership in an ethnic community is significant in other ways. An individual is more easily recognized and understood by others—peers and superiors alike—in his or her own community than in another. Because belonging is effortless, even automatic, it enables one to understand the "tacit codes" of one's community, and to be "understood without having to explain" oneself.[123] As Isaiah Berlin has noted: "Although I may not get 'negative' liberty at the hands of members of my own society, yet they are members of my group; they understand me, as I understand them; and this understanding creates within me the sense of being somebody in the world."[124]

The benefits of belonging may appear intangible, but they are real. They are so real that individuals are willing to relinquish their personal freedoms and civil liberties—or even kill and die[125]—in order to secure status and recognition for their ethnic group. Individuals are willing to make such sacrifices because they perceive their self-worth to be contingent on their being members of a flourishing and worthy community.[126]

In the ethnic context, language plays a critical role in establishing the link among these benefits and in underwriting the political claim that these benefits cannot be enjoyed without self-determination. Language plays this role because it functions not only as a means of communication, but also as an important part of one's personal identity and sense of belonging. Thus, the status and recognition accorded to one's language affects one's self-esteem or, to use Isaiah Berlin's expression, "one's sense of being somebody in the world."[127] Language is also critical to the survival of an ethnic community because it serves as a "valuable depository"[128] of an ethnic group's historical experiences as well as a "vehicle and expression" of its cultural values.[129] If these claims are accurate, the disappearance of a language might signify the disappearance of an ethnic group in a historical and cultural sense.[130]

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122. *See id.*; *see also* Ndegwa, *supra* note 24, at 605 (noting that the Kenya African Democratic Union "represented minority groups joined by the fear of domination" by the two largest ethnic groups in Kenya—the Kikiyu and Luo).

123. IGNATIEFF, *supra* note 102, at 10.

124. ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 42 (1958); *see also* TAMIR, *supra* note 87, at 71 (criticizing the United Nations Human Rights Committee for failure to recognize that the right to national self-determination has "little to do with civil rights and political participation").

125. In South Africa, for example, Chief Bathelezi, the leader of the Zulus, exhorted his followers to "die in defense of their right to self-determination." Wilson, *supra* note 56, at 451 (quoting Rich Mkhondo, *South Africa's Buthelezi Digs in on Federalism*, REUTERS, July 17, 1993, LEXIS, News Library, Non-U.S. File).

126. Tamir, *supra* note 101, at 584 (criticizing the United Nations Human Rights Committee for failure to recognize that the right to national self-determination has "little to do with civil rights and political participation").

127. BERLIN, *supra* note 124, at 42.

128. Leslie Green, *Are Language Rights Fundamental?*, 25 OSGOODE HALL L.J. 639, 655 (1987) (arguing that language rights are fundamental because they provide a shared cultural environment in which human relations and interactions may flourish) (quoting PETER L. BERGER, FACING UP TO MODERNITY 161 (1977)). As Ethiopia's constitution indicates, language is a defining characteristic of ethnic identity as well. *See* ETH. CONST. art. XXXIX, § 5 (defining ethnic community in terms of "mutual intelligibility of language").

129. Green, *supra* note 128, at 656.

130. *See id.* at 653.

To the extent that membership in a community provides individuals with the foregoing benefits, arguably it makes sense to preserve, nurture, and promote affective communities. As Yael Tamir argues:

> The existence of a shared public space is a necessary condition for ensuring the preservation of [an ethnic group] as a vital and active community. The ability to enjoy the liveliness of public life is one of the major benefits that accrue from living among one's own people. Only then can the individual feel that he lives in a community which enables him to express in public and develop without repression those aspects of his personality which are bound up with his sense of identity as a member of his community.[131]

On this view, ethnic federalism looks like the right institutional arrangement to promote the values embedded in community. Proponents would argue that by devolving power to territorially concentrated ethnic groups federalism provides a framework in which the more overt manifestations of ethnic distinctiveness, especially culture and language, may be publicly expressed and nurtured. This framework, they might add, allows individuals to live in an environment "where one can feel a sense of familiarity or even identification with the rulers, irrespective of whether this is indeed true or merely a comfortable illusion."[132]

The comfort such an environment seemingly provides individuals, however, is at risk of being "run over by the collective steamroller."[133] As Yael Tamir notes, "[t]he version of nationalism that places [ethnic] commitments at its center is usually perceived as the most conservative and anti-liberal form of nationalism."[134] Because this kind of system fosters closed societies, the individual runs the risk that his or her rights will be sacrificed for the good of the ethnic community. This is no idle imagination. Before the recent cracks in the leadership of the TPLF, the current ruling party in Ethiopia, the silence of most members of the Tigrean intelligentsia was deafening. Few would speak out against the TPLF despite its many political abuses for fear of betraying their ethnic community, for whose welfare and in whose name the party purported to speak and to function. A similar debility, if not as pervasive, has tended to cripple individuals from other ethnic groups as well. The point is that highlighting group identity and the good of the community comes at a terrible price: loss of self-identity and individual rights. Part IV, *infra*, will discuss other risks inherent in a system of government that relies exclusively on group identity.

C. *Promoting Equality*

Proponents might justify an ethnofederalist arrangement on yet another ground. This particular justification relies on the moral imperative that all citizens be treated with genuine equality. Most African constitutions prohibit discrimination on the basis of ethnicity and provide for equal rights for

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131. TAMIR, *supra* note 87, at 73-74 (internal citations omitted).

132. *Id.* at 584.

133. Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CAN. J.L. & JURIS. 217, 227 (1991).

134. TAMIR, *supra* note 87, at 83.

individuals regardless of their ethnic identity.[135] Such a vision of equality is evidently sound, but it assumes that the state stands above and is benignly neutral with respect to ethnicity. It is a common complaint in many African states, however, that one or two ethnic groups either so dominate the state or are so identified with it that other ethnic groups feel excluded from the governing coalition.[136] If this is true, a state's claim of benign neutrality is suspect and thus cannot be taken at face value. Equally important, the claim of state neutrality is severely undercut in cases where an ethnic group receives no official support or equal recognition for its language or culture.

Again, language illustrates the problem of inequality that state identification with a particular ethnicity engenders. One of the critical conditions that determines the flourishing or survival of an ethnic group's culture is whether its language is the language of government and education.[137] Giving official recognition to a language ensures that it is passed on to future generations along with the culture with which it is inseparably linked.[138] Conversely, if a language lacks official recognition, the culture it represents risks marginalization or even extinction.[139] It is fear of these consequences that fuels ethnic mistrust and suspicion, and provides the impetus for ethnic communities to engage in political action to defend their collective interests.[140] The fact that the civil war in Sudan has been ongoing intermittently since 1956 can be understood, at least in part, in terms of such fear.[141] Similarly, as noted, the TPLF's and OLF's grievances against the Ethiopian government have stemmed in large measure from the lack of official recognition for their respective languages.

Viewed from this angle, ethnic federalism may seem like an effective means to address the problem of ethnic inequalities. For proponents, its major value lies in its sensitivity and responsiveness to the volatile emotions associated with feelings of subordination that result from lack of esteem for one's culture and language. According to this argument, ethnic groups whose language or culture are not manifested in the public life of the society lack

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135. *See* Selassie, *supra* note 12, at 14-16 (noting that liberal constitutionalism has held sway in Africa since the time of independence).

136. Kimenyi, *supra* note 59, at 59 (noting that SSA governments "often adopt discriminatory policies that oppress groups that are outside the ruling coalition").

137. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 111 (1995).

138. *Id.*

139. *Id.*

140. As one ethnic delegation to a Nigerian Constitutional Conference stated:

> We all have our fears of one another . . . . These fears may be real or imagined; they may be reasonable or petty. Whether they are genuine or not, they have to be taken account of because they influence to a considerable degree the actions of the groups towards one another and, more important perhaps, the daily actions of the individual in each group towards individuals from other groups.

A.H.M. KIRK-GREENE, CRISIS AND CONFLICT IN NIGERIA: A DOCUMENTARY SOURCEBOOK 1966-1969 14-15 (1971) (footnote omitted). For an account of how "fear of domination" by Kenya's larger ethnic groups (the Kikuyu and Luo) led to the creation of a coalition of smaller ethnic groups under the banner of the Kenya African Democratic Union, see Ndegwa, *supra* note 24, at 605.

141. *See generally* Wai, *supra* note 8, at 319-20 (noting that in the Sudan, the Arab North required the use of Arabic in public schools, and imposed various Islamic practices on the Christian and animist South).

equal dignity, resulting in low self-esteem among group members. An institutional framework that allows all ethnic groups to manifest their cultures and languages publicly and equally will forestall this result and exorcise the feelings of ethnic mistrust and suspicion that trouble ethnically divided societies. On this view, ethnic federalism is arguably well-suited to the task because it allows each ethnic group its own political unit in which it may exercise self-government, use its language, and promote its culture. In this vein, the Ethiopian Constitution has gone even so far as to adorn each political unit with the name of a particular ethnic group, with the apparent aim of officially legitimizing every ethnic group as the equal of every other.

In practice, however, Ethiopia's constitutional vision of ethnic equality has not been translated into reality. To begin with, anyone vaguely familiar with current Ethiopian politics realizes that the TPLF—claiming to represent the Tigrean ethnic community—dominates the main levels of government as well as the finances and economy of the country. To appreciate the extent of the domination, one need only recall that, when the previous government fell in 1991, it was the TPLF that took over the reins of power and transmuted its own guerrilla forces into the country's "national" army. Thus, although the central government has launched a process of ethnic regionalization, it is still reluctant to relinquish sufficient authority to the regions so they may really govern themselves free from control and interference by the central authorities.[142]

Also, although the Ethiopian Constitution declares the equal status of all of the country's languages,[143] in reality, promoting eighty plus languages equally is a pipe dream. The constitution itself evinces the difficulty of promoting all languages equally by declaring Amharic to be the official language of the federal government.[144] And in several regions of the country, smaller ethnic groups have themselves opted to use Amharic as the language of instruction and local government, rather than their own dialects.

D. *The Democratic Argument*

Advocates might also draw on democratic principles to justify ethnic federalism. Several arguments might be made in this vein. The first derives some legitimacy from John Stuart Mill's suggestion that "it is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities."[145] Mill was referring here to the need for ethnic homogeneity in the context of a separate and independent nation-state (i.e., not a substate joined in a federal union). Nevertheless, his essential insight is equally applicable to the latter circumstance. To begin with, as noted in Part IV, the line that separates an independent "nation-state" from an "ethnicity-based" substate is a thin one.

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142. Abbink, *supra* note 9, at 168.
143. ETH. CONST. art. V, § 1.
144. *Id.* art. V, § 2.
145. John Stuart Mill, *Considerations on Representative Government*, *in* ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 109, 294 (R. B. McCallum ed., 1948).

Moreover, the impetus for the creation of both forms of state is the desire to establish a political unit of homogeneous ethnicity. Thus, proponents of ethnic federalism might derive support from Mill's observation that "[a]mong a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist."[146] Mill, thus, emphasizes the crucial role a common language (which usually means a common ethnicity) can play in the emergence of a democratic government in a polity. He suggests that common ways of feeling and thinking and shared sympathies are likely to prevail only among a people who speak a common language. For him, these conditions are a prerequisite to mutual trust and cooperation among a people, without which self-government cannot exist.[147] In this sense, then, linguistic ethnic homogeneity may be a "necessary" condition for ensuring the emotional attachment that a democratic government requires for its viability.

Diane Orentlicher considers two different views of democracy that might legitimate ethnic federalism.[148] Under the first view, the justification for democracy is "the claim that it is the form of government most likely to secure the interests of the greatest number of persons subject to governmental authority."[149] For utilitarians, democracy is not an end in itself but a means by which individuals maximize their interests by aggregating their private preferences.[150] Interest aggregation, however, is likely to prove difficult or even unattainable if a polity is characterized by too much ethnic diversity and rivalry. In the ethnic context, individuals tend to see their political interests in terms of the well-being of their ethnic group. Homogeneity would thus ensure political outcomes that reflect the wishes of the greatest number of people in a defined jurisdiction.[151] Proponents might argue accordingly that ethnic federalism offers the best institutional framework, short of independent statehood, for aggregating the interests of the members of an ethnic group and for promoting democratic governance.[152] This is the utilitarian view.

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146. Mill, *supra* note 145, at 292.

147. According to one stream of liberal thought—of which Mill is one exponent—"democracy is government by the 'people,' but self-rule is only possible if 'the people' are 'a people'—a nation." KYMLICKA, *supra* note 137, at 52. *See also* William Schroeder, *Nationalism, Boundaries and the Bosnian War: Another Perspective*, 191 S. ILL. U. L.J. 153, 161 (1994) (noting that "only after an ethnic group has achieved self-government within secure and definite boundaries is democracy likely to take root").

148. Orentlicher, *supra* note 101, at 53-56 (observing that political theorists have generally failed to "consider the implications of democratic theories for the unit within which self-government should be exercised"). *Id.* at 46. Orentlicher's article is concerned with justifying ethno-separatist movements, but her justifications are equally relevant to ethnic federalism.

149. *Id.* at 53.

150. *Id.*

151. For a similar point, see Kimenyi, *supra* note 59, at 51:

> Because tribes are composed of people who, as a result of their past experiences, family ties, and aspirations, have preferences that are closely related on a variety of matters, decisions that are made by the tribal units are likely to be more representative of individual preferences than would result when many tribes are involved.

152. For this reason, minority ethnic groups in Kenya have long advocated ethnic regions as the best units for organizing democratic politics. Ndegwa, *supra* note 24, at 611.

A second vision of democracy—republicanism—offers a different argument in support of ethnic federalism.[153] This particular vision focuses on ethnic federalism's potential to create for citizens an enabling environment in which they can consider the common good in their public deliberations. Among the core principles of the republican vision, two are of particular significance to the question under discussion: deliberation about the common good and political participation.[154] In republican thought, deliberation is intended to promote or achieve political outcomes that are supported by the consensus of the community.[155] Yet, as Cass Sunstein has noted, "deliberation about the common good is most easily sustained when there is homogeneity and agreement about foundations."[156] Sunstein's argument that too much diversity will strain citizens' ability to deliberate on the common good[157] is especially pertinent in the ethnic context. As Ethiopia's experience demonstrates, an ethnic movement's political behavior is motivated not by the pursuit of the national common good but rather by a desire to indoctrinate a duty of ethnic loyalty above all other loyalties, and a jealous vigilance against threats to the ethnic identity.[158] Under these circumstances, ethnic federalism might arguably provide a suitable framework for promoting deliberation and achieving consensus about the common good at the subunit level because the group's members share broadly similar interests, culture, and traditions.[159]

This framework may also offer advantages in terms of citizen participation. In the republican vision, citizen involvement in the deliberative process is most easily accomplished in small and decentralized political units. Such units are more likely to bring government closer to the people, drawing ordinary citizens into the political process, and offering greater opportunities for political participation than a large and distant government.[160] Underlying this argument is the belief that an individual is more likely to be involved in or

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153. Orentlicher, *supra* note 101, at 54-56.

154. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-58 (1988).

155. *Id.* at 1550.

156. *Cf. id.* at 1556. Sunstein is not specifically addressing the significance of ethnic homogeneity for enhancing citizens' capacity to engage in democratic deliberations, but his point is highly pertinent to that context.

157. *Id.* (noting that "where such agreement is entirely absent, deliberative processes may break down").

158. *See* ESMAN, *supra* note 51, at 28.

159. Even in the United States where state boundaries bear little "correlat[ion] with deep ethnic, cultural, religious, and linguistic divisions," Amar, *supra* note 28, at 505, opponents of a strong national government (anti-federalists) emphasized during the country's formative years the importance of similarity of manners, sentiments, and interests among the people for the deliberative process. *See* Sunstein, *supra* note 154, at 1556 n.91 (footnotes omitted).

160. Michael McConnell explains that "the natural sentiment of benevolence, which lies at the heart of public spiritedness, is weaker as the distance grows between the individual and the objects of benevolence." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1510 (1987). *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 7 (1988) (stating that "[t]he greater accessibility and smaller scale of local government allows [sic] individuals to participate actively in governmental decisionmaking"). *But see* Rubin & Feeley, *supra* note 28, at 916 (questioning the idea that a small political unit necessarily fosters local participation by pointing to the United States' experience where the federal government was more "solicitous of black communities" than the white-dominated governments of the Southern states).

concerned about the affairs of his or her own immediate community than the affairs of the national community.[161]

These considerations arguably lend some credibility to the claim that ethnic federalism fosters deliberation and political participation. In light of the unique role ethnic attachments play in commanding and cementing group loyalty, these values are more likely to be realized among smaller ethnic communities than in the heterogeneous polities of the typical SSA state. Similarly, and equally importantly, ethnic homogeneity enhances citizens' capacity to empathize with one another more readily than would be the case in a heterogeneous setting.[162]

It is too sanguine, however, to take these claims at face value. In Ethiopia, for example, one could argue that the benefits of deliberation and participation could be more effectively secured by empowering better nuanced regional governments than by legitimizing entire ethnic groups as units of self-government and as founders of the state. Some ethnic groups, like the Amhara and Oromo, are so large in terms of relative population and territorial distribution that greater regionalization within these groups would be necessary in order to assure a wider range of diverse local responses to public issues that take into account differences in regional circumstances and preferences. Also, although members of either the Amhara or the Oromo may speak the same language, differences exist within each group owing to geography, history, and culture. Such differences are real and need to be taken into account.

Even more importantly, the potential for realizing the benefits of deliberation and participation critically depends on the existence of an enabling political environment. Ethnic federalism may serve to promote these values but only in polities that are committed to constitutionalism and the rule of law. Without these critical conditions, including the acceptance of the legitimacy of political opposition, meaningful deliberation and participation by citizens cannot occur.[163] Ethiopia has not yet succeeded in establishing the conditions for the realization of these values. Constitutionally, the country has proclaimed itself "federal." In reality, however, the state is so dominated by

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161. *See* Merritt, *supra* note 160, at 7 ("[A] major advantage of federalism lies in the ability of state and local governments to draw citizens into the political process."). Montesquieu observed long ago: "In a large republic, the common good is subject to a thousand considerations; it is subordinated to various exceptions; it depends on accidents. In a small republic, the public good is more strongly felt, better known and closer to each citizen; abuses are less extensive, and consequently less protected." *Quoted in* Richard E. Simeon, *Criteria for Choice in Federal Systems*, 8 QUEEN'S L.J. 131, 151 (1982).

162. As Mill notes:

> A portion of mankind may be said to constitute a Nationality if they are united among themselves by common sympathies which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively.

Mill, *supra* note 145, at 291. *See also* Orentlicher, *supra* note 101, at 55.

163. *See* Richard Briffault, *"What about the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1323 (1994) (noting that in the United States it is not federalism that serves to protect freedom from government tyranny; rather, the "critical variable is constitutionalism, including the acceptance of limits on government power and protection of the legitimacy of political opposition").

the TPLF, which brooks no serious political opposition, that democratic participation is as yet only a pipe dream.[164]

A final strand of democratic theory in support of ethnic federalism stresses the basic liberal notion that the consent of the governed forms the basis of government and political obligation.[165] Implicit in the notion of popular sovereignty is the claim that territorially concentrated ethnic groups should have the right to constitute themselves as independent states or subunits of a federal union. Although the principle of popular sovereignty has some appeal as an argument for either secession or ethnic federalism, to the extent that this principle completely sidesteps the crucial question of who owns the territory in which the establishment of self-rule is sought, it provides a weak justification for either outcome.[166]

E. *Economic Arguments*

Ethnic federalism might be justified on economic grounds as well. A familiar economic argument stresses federalism's potential for inducing or fostering competition among the constituent subnational jurisdictions.[167] Economists and political scientists who have focused on the link between political institutions and economic performance[168] have suggested that federal subunits provide a necessary foundation for fostering economic competition, expanding resources, and enhancing the efficiency of a nation as a whole.[169] In this view interstate competition provides incentives for jurisdictions to adopt policies and strategies of economic development that are likely to retain

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164. *See, e.g.*, Ethiopian Human Rights Council, Report on the May General Election: Problems of the Registration Process, http://www.ehrco.net/reports/may_general_election.html (Mar. 10, 2000) (describing the many difficulties and obstacles the government party created for opposition candidates in the 2000 "elections").

165. Proponents of this view assert that "[b]ecause liberalism regards the justified civil society as that which comes as close as possible to being a voluntary scheme, people ought to be able freely to choose their political associations." Fernando R. Tesón, *Ethnicity, Human Rights and Self-Determination*, *in* INTERNATIONAL LAW AND ETHNIC CONFLICT 86, 97-98 (David Wippman ed., 1998) (paraphrasing Beran, *supra* note 101, at 25). Under this view, "commitment to the freedom of the self-governing choosers to live in societies that approach as closely as possible to voluntary schemes, requires that the unity of the state itself be voluntary." *Id.* at 98. Accordingly, "liberalism must grant 'territorially concentrated groups' the right to form their own state." *Id.*

166. For a refutation of the arguments related to consent and popular sovereignty, see generally Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991). As Brilmayer has shown, the fact that a particular ethnic group living in a territory wishes to secede does not mean that it can lawfully take the territory. *Id.* at 187-89. Moreover, "[g]overnment by the consent of the governed does not necessarily encompass a right to opt out. It only requires that within the existing political unit a right to participate through electoral processes be available." *Id.* at 185.

167. Rubin & Feeley, *supra* note 28, at 920.

168. In the forefront of the movement to study the link between economic performance and political institutions are scholars of the new institutional economics. *See, e.g.*, Jonathan Rodden & Susan Rose-Ackerman, *Does Federalism Preserve Markets?*, 83 VA. L. REV. 1521 (1997). These scholars "emphasize the importance of secure, predictable political foundation for markets—an appropriate governance structure." *Id.*

169. *See, e.g.*, Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 5-8 (1995). *See also* Gabriella Montinola et al., *Federalism Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50, 57 (1995).

or attract desirable firms and individuals and that will "[r]eplace poorly chosen strategies with variants of strategies that appear to succeed elsewhere."[170] As a result, those jurisdictions that are reluctant or fail to adopt favorable economic policies will likely face declining economic activity.

The validity of these arguments depends, in part, on whether the subnational governments possess sufficient independent economic authority within their own jurisdictions.[171] If the national government has a monopoly of regulatory authority over the entire national economy the salutary effects of competition are unlikely to be realized. Where subnational governments lack primary economic authority, the arrangement, though federal in name, provides few or no incentives for subunits to compete among themselves.[172]

Ethiopia's federal structure is illustrative. As with the former Soviet Union, Ethiopia's federal government shares little of its political or economic power with the subnational governments.[173] At first glance, the constitution seems to grant the ethnic subunits the power to adopt and implement their own economic development initiatives and strategies.[174] On closer inspection, however, the constitution makes clear that the federal government has the overall power and responsibility to manage the national economy.[175] Moreover, the subunits lack the means to undertake such activities because they possess few sources of funds free from central control. Thus, the impulse toward decentralization of financial authority is rather weak. Indeed, because the subnational governments lack economic and political power, the central government uses its monopoly power to engage in economic favoritism toward certain regions of the country. It is a common lament heard throughout Ethiopia today that the ruling party unfairly diverts national resources to a region of the country that constitutes the core base of its political support. Such a practice is clearly anti-competitive and, as experience in Nigeria has shown, is bound in time to lead to competition of a different and debilitating kind: ethnic rivalry and political competition for control over natural resources

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170. Montinola, *supra* note 169, at 59 ("To the extent that some jurisdictions are better at promoting markets, generating wealth, and caring for the needs of their citizens, their policies are likely to be imitated by others that have been less successful."). Justice Louis Brandeis also made a similar point in a 1932 Supreme Court opinion: "[O]ne of the happy incidents of [a] federal system [is] 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." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

171. Montinola, *supra* note 169, at 55. At the same time, however, the national government must have the authority to "police the *common market* and to ensure the mobility of goods and factors across subgovernment jurisdictions." *Id.* at 55. In addition, the subnational government should face "hard budget constraints." For example, it should not be bailed out of its financial problems by the national government. *Id.* at 55-56. This is essential so as to provide incentives for officials of subnational governments to ensure their own fiscal situation. *Id.* at 56.

172. *Id.* at 55-57 (noting that whether a political system calls itself federal is irrelevant if five specific authority and responsibility allocating conditions do not exist).

173. *See* Abbink, *supra* note 9, at 167 (stating that "[t]he actual division of federal powers between member states and federal government (as defined in the constitution) is 'not federal enough'").

174. *See* ETH. CONST. art. LII, § 2, cl. c-e (granting the states the power to "formulate and execute economic, social and development policies, strategies and plans," to levy and collect taxes, and to administer land and other resources).

175. *See* ETH. CONST. arts. LI, § 2, LII, § 1.

via capture of the national government.[176] A further impediment to interstate competition in the Ethiopian case is the central government's monopolization of land ownership and other natural resources.[177] Without access to these resources, the subnational governments lack the freedom to experiment with different development strategies that an appropriately nuanced federalism might otherwise allow.[178]

A properly structured and genuine federal system may offer additional economic benefits. Beyond promoting competition and experimentation, such a system allows subnational governments to "serve as semi-independent and entrepreneurial poles of development, both for resource mobilization and for the provision of public goods and services in a manner that is more responsive to citizens' needs and demands than provision by a single central government." [179] Being closer to the people, such governments have greater access to information about the needs, preferences, and local conditions of particular groups of citizens than a remote national government would have. The identity of interests between an ethnic group and its state government also helps improve economic performance because it might be far easier for a government to mobilize a people united by ethnic and linguistic loyalties than one which is not.[180] One commentator has even claimed that ethnic-based governments "[m]ay be more efficient in the provision of public goods than the state" because they are less prone to face prisoner's dilemma and free-rider problems.[181]

Finally, such a form of government might offer ethnic groups greater opportunities for control over local resources and revenues, and provide a basis for spreading some of the benefits of development among subnational jurisdictions. Daniel Elazar has pointed out that:

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176. *See* Adamolekun & Kincaid, *supra* note 27, at 173, 179.

177. *See* ETH. CONST. art. XL, § 3 (providing that "[t]he right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange"). Monopolization of these resources by the central government inevitably imposes severe restrictions on the power and capacity of the subnational governments to manage their local economies. This is especially significant in light of the fact that agriculture plays a dominant role in the economies of virtually all the subnational jurisdictions.

178. The benefits of competition and experimentation cannot be gained solely by giving subnational governments freedom to manage their local economies. It is also crucial that the territorial distribution of economic and human resources among the subunits is more or less even. In the Ethiopian case, however, decentralization of power on an ethnic basis has created immense inequalities among the regions. For example, based on population estimates for 1994, the Amhara and Oromo regions alone account for 60% of the population of the country. *See* FED. DEMOCRATIC REPUBLIC OF ETH., CENT. STATISTICAL AUTH., 1 THE 1994 POPULATION AND HOUSING CENSUS OF ETHIOPIA: RESULTS AT COUNTRY LEVEL 66-67 (June 1998) (demonstrating that 62.3% of the Ethiopian population resides in the Amhara and Oromo regions).

179. Adamolekun & Kincaid, *supra* note 27, at 183.

180. *See* Mill, *supra* note 145, and accompanying text; *see also* Kimenyi, *supra* note 59, at 58.

181. Kimenyi, *supra* note 59, at 55-58. The argument here is that "[b]ecause people have long-term attachment to their groups . . . they are more likely to have continuous dealings with members of their ethnic group than with members of other ethnic groups." *Id.* at 54. In turn, these dealings allow the members of the group to develop norms of cooperation that will reduce cheating in prisoner's dilemma situations. *Id.* at 54-56. Similarly, "[t]he free-rider problem is likely to be less prevalent when the group is made up of one ethnic group than when several ethnic groups are involved." *Id.* at 56. These arguments assume, however, that members of the same ethnic group are not otherwise divided by class, religion, and other differences and preferences that may make cooperation difficult.

> [B]ecause of the existence of federalism . . . resources are inevitably spread over a number of centers. At the very least, the capital of every federated state has some claim on the national resources, and together they work to prevent the single metropolis syndrome. This means that more people have a chance to benefit from development efforts. At least, it means that some of the worst excesses of resource concentration are eliminated, and a basis for truly national development begins to emerge.[182]

Nigeria's federal experience for more than four decades[183] and early indications in Ethiopia confirm Elazar's essential observation.[184]

F. *National Unity and Political Legitimacy*

A final argument for ethnic federalism derives from what John Rawls refers to as the "fact of pluralism."[185] Pluralism manifests itself differently in different societies. In Africa, ethnic pluralism is far and away the most fundamental fact of social existence. By itself, this fact is unremarkable. But when politicians imbue ethnic differences with political salience, ethnic groups gradually come to entertain divergent conceptions of citizenship based on such differences.[186]

As ethnic conflicts from Bosnia to Chechnya and from Rwanda to Sudan have shown, the most important question for many governments today is how to handle these differences. Three broad approaches are possible. One approach would be for the state to require universal acceptance of hegemonic norms, regardless of ethnic differences. In the ethnic context, however, state-mandated uniformity is often counterproductive and morally unappealing. For example, the post-1956 Sudanese government [187] and the pre-1991 Ethiopian government have each sought to promote national integration by promoting the use of one language for conducting official business and education.[188] As

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182. ELAZAR, *supra* note 27, at 252.

183. Indeed, in Nigeria the ability of a subunit to lay claim on national resources has led to greater demands for the creation of more states. *See* Adedotun O. Phillips, *Managing Fiscal Federalism: Revenue Allocation Issues*, 21 PUBLIUS 103, 104 (1991).

184. The Ethiopian Constitution indicates as much. *See* ETH. CONST. art. XCV (providing that "[t]he Federal Government and the States shall share revenue taking the federal arrangement into account"). This provision is totally silent, however, about the formula for allocation of national revenue. For a list of the factors that can be considered in the design of a revenue allocation system see Phillips, *supra* note 183, at 104-05. In Nigeria, the principles of "derivation, population, and equality" have featured prominently. *Id.* at 104.

185. *See* John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 234-35 (1989) (referring to the "diversity of comprehensive religious, philosophical, and moral doctrines found in modern democratic societies").

186. *See* ESMAN, *supra* note 51, at 28 (noting that ethnic awareness is promoted by "ethnic entrepreneurs"); Wilson, *supra* note 56, at 439 (stating that in "exploit[ing] ethnicity for political power," ethnic entrepreneurs find ethnic groups to be "especially convenient bases . . . because they provide the loyalty not merely of ideologues but of family members"). By nurturing and emphasizing this "family" connection, these leaders then "promise to secure, given sufficient political support, the survival of the family as against the out-group, typically by way of self-government or secession." *Id.* To bolster the case for autonomy, they invoke the model of "internal colonialism." *Id.* This observation aptly describes the claims of the OLF in Ethiopia. *See, e.g.*, ASAFA JALATA, OROMIA & ETHIOPIA: STATE FORMATION AND ETHNONATIONAL CONFLICT, 1868-1992, at 55-59 (1993) (discussing "Ethiopian Colonialism"); *see also* P.T. W. Baxter, *The Creation & Constitution of Oromo Nationality*, *in* ETHNICITY & CONFLICT IN THE HORN OF AFRICA 167, 170-71 (Katsuyoshi Fukui & John Markakis eds., 1994) (noting that the declared goal of the OLF is the "creation of an independent state of Oromiya").

187. *See* Wai, *supra* note 8, at 305-07, 316.

188. *See supra* note 70 and accompanying text.

noted, this policy led to ethnic resentment, disaffection, and ultimately civil war with all of its debilitating costs—material, spiritual, and human.[189] Given these consequences, it is neither practically prudent nor morally defensible to use state power to coerce acceptance of universalist norms.

At the other end of the spectrum, as a second approach, secession seemingly provides a simpler and tidier solution to the dilemma of ethnic pluralism. Under this approach, if a particular ethnic group is dissatisfied with or questions its membership in a polity, it would be allowed to simply secede.[190] This option, however, is no more practically feasible or morally defensible than the first one.[191]

This leaves federalism, the third and final option, as the most promising alternative for handling ethnic diversity. Part of its appeal lies in the fact that it occupies the middle ground between two extremes—a unitary form of government at one extreme and secession at the other. The alternative option of federalism thus constitutes a "compromise between those favoring a unified state and those favoring the dissolution of the state or the separation of some portion of that state."[192]

Further, as a compromise, ethnic federalism arguably provides a sound strategy for promoting national unity and political legitimacy. Advocates might argue that the creation of distinct ethnic homelands with cognate rights of language, culture, and self-governance will help to blunt the ethnonationalist desire to possess one's own independent state. Underlying this argument is the thought that if an ethnic group "can be convinced that their national state is already a fact, secession becomes a logical extravagance."[193] Referring to a state by the name of the titular ethnic group, as Ethiopia has done, could also engender positive feelings of affection for and loyalty to the subunit, and indirectly to the federation of which it is a part. By thus constituting each ethnic group as a unit of self-government, ethnic federalism might be said to guard against "the problem of rule by remote leaders having insufficient identification with or knowledge of subunits."[194] Arguably, ethnic federalism might help to quell ethnic nationalism, and thereby promote state legitimacy and political stability.

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189. *See supra* note 69 and accompanying text.

190. *See* Okechukwu Oko, *Partition or Perish: Restoring Social Equilibrium in Nigeria Through Reconfiguration*, 8 IND. INT'L & COMP. L. REV. 317, 321-22 (1998) (arguing that because political stability in Nigeria through constitutional democracy "is an unattainable ideal" and an "illusory notion" promoted by political elites who manipulate ethnicity, the most effective and only viable option is partitioning the country).

191. *See* Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 664 (1991) (noting that "[w]hether a claim to cultural integrity [based on ethnic homogeneity] justifies secession as a matter of political morality is a complex matter"). Secession is not a practical solution because the seceding unit is rarely homogeneous and as a result a "vicious" cycle starts afresh. OTTAWAY, *supra* note 2, at 74. Even when it succeeds, secession frequently results in morally unacceptable costs: refugee exodus, civil war, ethnic cleansing, massive violation of human rights, economic dislocations, etc. The experiences of Bosnia, Kosovo, Chechnya, and Eritrea, to name but a few, amply demonstrate these costs. For a brief but very thoughtful analysis of the dangers of secession as a solution to ethnic differences see Amitai Etzioni, *The Evils of Self-Determination*, 89 FOREIGN POL. 21, 21-35 (1992).

192. Rubin, *supra* note 59, at 1031.

193. CONNOR, *supra* note 97, at 219.

194. Sunstein, *supra* note 191, at 664.

Despite its apparent appeal, however, this argument needlessly ignores reality. Ethnic federalism, as Ethiopia's own experience indicates, far from quelling ethnic nationalism, has encouraged and aided in its growth. Thus, the OLF and Ogaden National Liberation Front, to name only two, are currently engaged in armed struggle[195] intended to realize the avowed aim of seceding from Ethiopia.[196] Part IV will further consider the inherent weaknesses of ethnic federalism and suggests reasons why such a system is prone to failure.

The arguments in favor of ethnic federalism as a form of governance for SSA states can thus be measured against the model provided by the Ethiopian Constitution. As Ethiopia's constitution demonstrates, most of these arguments center on the principle of ethnic self-determination and its corollary: the right of all ethnic groups to political equality. As an embodiment of this principle, ethnic federalism thus seems designed not just to "*do* things," but also to "*stand for* things."[197]

IV. THE PITFALLS OF ETHNIC FEDERALISM

Despite the apparent validity of arguments which view ethnic federalism as a strategy for accommodating ethnic differences in SSA states, these arguments inadequately address the workability and desirability of such a strategy for these states.

The question of workability or desirability can be approached from many angles. This Article assesses the workability and desirability of ethnic federalism in light of three fundamental problems that constitute the core of the African predicament: threats to national unity, lack of economic progress, and persistent and pervasive abuse of human rights. Although these problems are discussed separately, it is important to note that they are all "inextricably linked."[198]

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195. Ogaden National Liberation Front, Military Communique, *at* http://www.onlf.org/militarycommuniquemay252002.htm (May 25, 2002). *See also* Omoro Liberation Front, Our Mission *at* http://www.oromoliberationfront.org/OLFMission.htm (last visited Dec. 10, 2002) [hereinafter Our Mission]. This mission statement clearly reveals that the OLF's declared objective is "national self-determination" in accordance with the "principle enshrined" in the United Nations Charter. The reference here is unmistakably to Article 1(2) of the Charter which states that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . ." U.N CHARTER art. 1, para. 2. As asserted by the OLF, the Oromo people still live under "Abyssinian colonial rule" which, in their view, entitles the Oromo people to exercise their right to self-determination including the right to "decide the type of sovereignty they want to live under and the type of political union they want to form with other peoples." Our Mission, *supra*. But this union should result from the "freely expressed will" of the people. *Id.* Stated more simply and forthrightly, this statement means nothing short of secession because the ultimate goal of any colonized people is independence. To maintain otherwise would simply run counter to the observed experiences of all colonized peoples.

196. Ogaden National Liberation Front, Fundamental Considerations of the ONLF, *at* http://www.onlf.org/fundamental_onlf.htm (last visited Oct. 19, 2002) (declaring secession as political objective).

197. Scheppele, *supra* note 33, at 51.

198. ZIYAD MOTALA, CONSTITUTIONAL OPTIONS FOR A DEMOCRATIC SOUTH AFRICA: A COMPARATIVE PERSPECTIVE 99 (1994) (noting the inextricable link between national unity and socioeconomic change in Africa).

A. *National Integration and Political Stability*

Promoting national unity and political stability has been a major concern of most SSA states since attaining independence from foreign rule.[199] Forging unity among the medley of ethnic communities which typically comprise these states is a goal that needs little or no justification. One need only look at the tragedies in Sudan, Rwanda, the Democratic Republic of the Congo, Kosovo, Bosnia, and Northern Ireland to appreciate the need for national unity and political stability. Thus, the constitution of an SSA state must strive to be an "instrument and framework" for achieving national unity and resolving the problem of economic backwardness.[200]

Ethnic-based federalism, however, is a poor constitutional approach for these purposes. Indeed, this form of government seems inherently at odds with them. To begin with, federalism, even when it is not coupled with ethnicity, has generally not had a distinguished record as a stable form of government.[201] It is noteworthy that "virtually every federal state of any standing has had sooner or later to face a concerted bid for secession by one or more of its component regions."[202] This sobering fact dampens enthusiasm for such a system of government especially when one considers that even a "philosophically and legally" sophisticated federal system—that of the United States—has not been spared the tragedy of a costly civil war due to separatist demands.[203] Federalism's track record as a source of instability and secession might well counsel against choosing this form of government for SSA states. Yet, it has not been shown that a unitary form of government is immune to these dangers. In fact, the reason why a federal form of government is chosen over a unitary form in the first place is to accommodate preexisting and divergent local interests that cannot bear centralized rule.[204]

Given that the government systems that are presently destabilizing most SSA states are unitary and centralized, a well-considered and appropriately nuanced federal system may be the only viable way to accommodate these divergent interests. The marriage of federalism with ethnicity, however, invokes too many difficulties to be viable or workable. By its very nature, such a system relies on dividing citizens along ethnic lines and institutionalizes their division. Once reified in this way, ethnic differences

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199. B.O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 81 (1973) ("The primary problem confronting constitutionalism in [SSA] states is . . . one of national unity.").

200. MOTALA, *supra* note 198, at 99.

201. J.A.A. Ayoade, *Federalism in Africa: Some Chequered Fortunes*, 9 PLURAL SOCIETIES 3, 3 (1978) (commenting that "[t]he federal mortality rate has undoubtedly been highest in Africa"); Greg Craven, *Of Federalism, Secession, Canada and Quebec*, 14 DALHOUSIE L.J. 231, 243 (1991) (stating that "It must be admitted as a simple matter of statistics, the picture for an ardent supporter of federalism is not an encouraging one").

202. Craven, *supra* note 201, at 243.

203. Howse & Knop, *supra* note 27, at 271. For an early study of the reasons federations have failed, see Thomas M. Franck, *Why Federations Fail*, *in* WHY FEDERATIONS FAIL: AN INQUIRY INTO THE REQUISITES FOR SUCCESSFUL FEDERALISM 167 (Thomas M. Franck et al. eds., 1968).

204. Craven, *supra* note 201, at 243; Rubin, *supra* note 59, at 1046 (noting that the adoption of federalism in the United States was not a matter of constitutional choice but rather a "pre-constitutional reality on which [the] Constitution and [the] government were grounded").

have very little chance of fading away over time.[205] Indeed, as Ethiopia's experience indicates, when the state deliberately uses ethnicity as a source of political identity, citizens who might not have been aware of their ethnicity will regroup under its banners purporting to be a distinct people. The formal division of a country into so many ethnic substates is thus bound to create "strong incentives for members of each ethnic community to live in what they will perceive as their own substate."[206] Similarly, far from encouraging leaders from different ethnic groups to use the political process to work together toward a shared national goal, ethnic federalism provides the leaders of each ethnic group with incentives to separate themselves from other groups' leaders and to separate their people from other ethnic groups. As a result, the various ethnic communities exist "side-by-side, but will not integrate."[207] It is true that in many SSA states ethnic groups are already geographically concentrated in separate regions of the country. Nonetheless, deliberately giving explicit constitutional recognition to such division formalizes and exacerbates the physical and psychological separation of the groups, thereby hindering efforts to promote their interaction and intermingling.[208] By throwing up fences to corral ethnic groups, ethnic federalism also encourages each ethnic group to become absorbed with the pursuit of its own interest. Under these circumstances, it becomes difficult for the national government to persuade the ethnic substates to cooperate for the sake of national unity, or to make sacrifices for members of other ethnic groups. This is precisely the lesson to be drawn from Yugoslavia's failed experiment with a similar federal arrangement. The richer and more industrialized republics such as Slovenia resented sharing their wealth and resources with the least developed areas of the country. Because such a system of government merely yields a modus vivendi among separate ethnic groups, it lacks any intrinsic bond that fosters cooperation, sharing, and mutual solidarity.[209] A U.S. federal court has observed:

> [e]ffective action by the nation-state rises to its peak of strength only when it is in response to aspirations unreservedly shared by each constituent culture and language group. As affection which a culture or group bears toward a particular aspiration abates, and as the scope of sharing diminishes, the strength of the nation-state's government wanes.[210]

Thus, because it fosters and reinforces the political, social, and psychological separation of ethnic groups, ethnic federalism limits the ability of the national

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205. *See* Wippman, *supra* note 20, at 176 (stating that "if it is successfully implemented," ethnic federalism "will render internal ethnic divisions immutable").

206. *Id.*

207. *Id.*

208. *See e.g.*, OTTAWAY, *supra* note 2, at 15.

209. KYMLICKA, *supra* note 137, at 182. Such an arrangement is "inherently unstable, given its dependence on [what Rawls calls] 'happenstance and a balance of relative forces.' As the history of international relations demonstrates so clearly, such [arrangements] tend to evaporate when changes in relative strength make breaking them more advantageous than keeping them." Norman, *supra* note 101, at 87.

210. Guadalupe Org., Inc. v. Temple Elementary Sch. Dist. No. 3, 587 F.2d 1022, 1027 (9th Cir. 1978).

government to promote the common good, to forge national consensus, or to be otherwise effective.

Far more serious, such a system is prone to remain vulnerable to the threat of desertion by one or more of the constituent subunits. This is not merely because ethnic groups have been given, as they have in Ethiopia, the constitutional right to secede. Rather, it is because recognizing rights of self-government for regionally concentrated ethnic groups—even short of recognizing a right to secession—means that each group is entitled to perceive itself as a separate people with its own government, territory,[211] and official language. As a result, the continued existence of the national community is always provisional and contingent.[212] This point is worth emphasizing because those who purport to accommodate ethnic nationalism through ethnic federalism are prone to ignore or downplay its inherent dangers. Proponents may indulge the thought that an ethnic group's desire for self-government will be sated with such an accommodation. This view is too sanguine, however, and ignores the risk that autonomy for ethnic groups may "simply fuel the ambitions of nationalist leaders who will be satisfied with nothing short of their own nation-state."[213]

Ethnic federalism is a useful tool in the pursuit of such ambitions. In the hands of ambitious ethnic leaders, the existence of independent ethnic governments will serve as a means for "collating," articulating and disseminating ethnic demands and grievances against the central government.[214] Particularly during adverse times, these governments will seek to deflect blame from themselves onto the central government, and thereby inflame secessionist feelings,[215] whereas in normal times, ethnic nationalists are likely to use, openly or surreptitiously, the regional state apparatus in ways calculated to promote and cement the identification of ethnic members with the local government. As this identification solidifies, citizens will gradually withdraw their identification with and support of the central government. The existence of an ethnically based governmental structure is thus of great assistance in the struggle to create a new and independent state.

These arguments suggest that ethnic-based federalism is seriously flawed as a mode of governance. Its basic flaw lies in the fact that it

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211. *See* KYMLICKA, *supra* note 137, at 182 (stating "[i]f democracy is the rule of 'the people,' [ethnic groups] claim that there is more than one people, each with the right to rule themselves [sic]").

212. *Id.* at 181 ("In the case of self-government rights, the larger political community has a more conditional existence . . . . While they are currently part of a larger country, this is not a renunciation of their original right to self-government.").

213. *Id.* at 182; *see also* Norman, *supra* note 101, at 93 ("When its appetite is sufficiently whetted, nationalism, almost by definition, is sated with nothing less or more than a nation-state."). As several commentators have recognized, the drive toward independent statehood is fueled by the desire to be "predominant over others within their territory who are deemed not fully part of the nation." Howse & Knop, *supra* note 27, at 272. Howse and Knop rely on a quote from Michael Walzer who writes: "It often seems as if the chief motive for national liberation is not to free oneself from minority status in someone else's country but to acquire (and then mistreat) minorities of one's own. The standard rule of intertribal relations is: do unto others what has been done to you." *Id.* (quoting Michael Walzer, *The New Tribalism*, DISSENT 164, 169 (Spring 1992)).

214. Craven, *supra* note 201, at 245.

215. By its very nature, ethnic claims have a "peculiar tendency to inflame both subunits and those who want them to remain part of the nation." Sunstein, *supra* note 191, at 650.

necessarily gives rise to two very divergent and potentially conflicting visions of citizenship: national and subnational.[216] As the experiences of the former Soviet Union, Yugoslavia, and Czechoslovakia demonstrate, rival citizenships cannot coexist—at least not for a long time—in the same political space. These experiences also serve to demonstrate that individuals are far more willing to exchange their national citizenship for ethnic citizenship than vice-versa. Furthermore, they illustrate that when the two compete, country-wide nationalism is often the loser because it lacks the emotional force and cohesiveness that ethnic citizenship can so readily muster.[217]

The struggle between these two forms of citizenship has often resulted in disastrous civil wars, economic dislocations, ethnic cleansing, and the internal displacement of large numbers of people. Accordingly, it behooves SSA states to ponder the advisability of embarking upon a constitutional path which is fraught with such difficulties. While it might be comforting to think that these difficulties were experienced only by authoritarian states such as Yugoslavia, it is, however, noteworthy that even democratic states have not succeeded in eliminating the risk of national fragmentation, economic dislocation, or population transfer. For example, Canada and Belgium have been among the "most prosperous, benign, and socially just nations in the world, yet the separatist demands of their French-speaking citizens have only increased in intensity."[218] Consequently, it is important to recognize that ethnic federalism would be a perilous enterprise for SSA states, probably more prone to fail than to succeed in forging national unity among the various constituent ethnic communities that typically comprise these states. And without national unity, so essential to political stability, it is impossible for constitutionalism to take root in these countries.[219]

A further reason that dampens enthusiasm for the devolution of power purely on an ethnic basis is that neither ethnicity nor federalism has enjoyed a good name in Africa. Both have been associated with colonialism, and in all but a few states they have been viewed as a colonial or "neo-colonial trick" and as elements of a sinister plan designed to keep African states weak and

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216. KYMLICKA, *supra* note 137, at 182 ("If citizenship is membership in a political community, then, in creating overlapping political communities, self-government rights necessarily give rise to a sort of dual citizenship, and to potential conflicts about which community citizens identify with most deeply."); Ndegwa, *supra* note 24, at 606. *See also* Federation for American Immigration Reform, *Issue Brief: Dual Nationality*, http://www.fairus.org/html/04122608.htm (May 2001) ("Other arguments go to the core of the symbolic meaning of citizenship. Some point out that dual citizenship makes possible the use of citizenship as a badge of convenience rather than of undivided loyalty, and impairs the "singleness of commitment" that is the hallmark of allegiance.").

217. *See* Alan C. Cairns, *Constitutional Government and the Two Faces of Ethnicity: Federalism is not Enough*, *in* RETHINKING FEDERALISM 15, 18 (Karen Knop et al. eds., 1995) (noting that because "[p]an-Canadian nationalism [is] devoid of linkage to a homogeneous ethnic base, [it] has difficulty competing with the emotional force of its Quebec and Aboriginal sub-state rivals, which are driven by a more cohesive sense of national selfhood").

218. Rubin, *supra* note 59, at 1039.

219. NWABUEZE, *supra* note 199, at 81 ("National unity may . . . be described as the infrastructure for constitutionalism; it is a condition precedent for a viable constitutionalism."). The existence of a written constitution, however elegant or solemn, is incapable of functioning among a people "fundamentally at odds with one another." *Id.* For an interesting and insightful analysis of why SSA states have persisted in a commitment to the idea of a constitution while rejecting the core values of constitutionalism see Okoth-Ogendo supra note 1, at 65-82.

internally divided.[220] Fearing ethnic autonomy as an imperialist tool that might provide a "toe-hold for potential secessionist movements,"[221] SSA states have generally reacted to the notion with hostility.

B. *Economic Development*

The second major problem that has threatened SSA states is lack of economic progress. "Africa's economic history since 1960 fits the classical definition of tragedy: potential unfulfilled, with disastrous consequences."[222] As a result, most people in SSA states are as poor today as, or perhaps even more impoverished than, they were nearly four decades ago at independence. The reasons for this unfortunate state of affairs are many and complex, but one recurrent and critical factor is the failure of these states to create or sustain an appropriate governance structure for the management of ethnic diversity.[223]

From the standpoint of economic development, ethnic federalism appears an unsound institutional arrangement. To begin with, as discussed above, this form of governance is marred by its great tendency to be a source of endemic political instability and constitutional insecurity. As scholars of the new institutional economics have emphasized, secure and predictable political foundations play a critical role in economic progress.[224] Without confidence in the long-term viability of these foundations, it is obvious that economic actors will not feel secure enough to invest or otherwise engage in desirable economic activities.

More specifically, there are at least three reasons why ethnic federalism may impede economic progress. First, it has the potential to restrict the mobility of labor, goods, and capital across subnational jurisdictions, and thus to undermine the notion of a common market. As noted, the chief desideratum of structuring a polity along ethnic lines is fostering ethnic communities. Emphasizing this value, however, invariably leads to an attitude of intolerance and exclusivism on the part of members of these communities.[225] Such an attitude negates the theory of interstate competition on which ethnic-based federalism might otherwise be justified.

According to this theory, a federal structure promotes gains in efficiency as its constituent subunits compete with one another to attract mobile factors of production. Consequently, a state that fails to offer an appealing

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220. *See* Welsh, *supra* note 3, at 483-84. One scholar has stated that "the precipitation of ethnic identities becomes incomprehensible if it is divorced from colonial rule." JEAN-FRANÇOIS BAYART, THE STATE IN AFRICA: THE POLITICS OF THE BELLY 51 (1993). For example, the Igbo of Nigeria and the Kikuyu of Kenya lacked a sense of wider ethnic identities before the advent of colonial rule. Welsh, *supra* note 3, at 481.

221. Welsh, *supra* note 3, at 484.

222. William Easterly and Ross Levine, *Africa's Growth Tragedy: Policies and Ethnic Divisions*, 112 Q. J. ECON. 1203, 1203 (1997) (noting that in the 1960s Africa's growth potential was ranked ahead of East Asia's).

223. *See id.* at 1203-07.

224. Rodden & Rose-Ackerman, *supra* note 168, at 1521; *see also* Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1 (1998).

225. *See* NWABUEZE, *supra* note 199, at 112 (describing how Nigerian federalism in the early days after independence "created an attitude of self-sufficiency, of separatism and of intolerance among the regions").

combination of low taxes and high quality public services risks losing investors and productive labor to other parts of the federation.[226] This argument may well have validity in federal polities, such as the United States, where the subnational jurisdictional boundaries bear no correlation with deep ethnic divisions.[227] But where, as in Ethiopia, the boundaries of the subnational jurisdictions are deliberately made to coincide with and highlight ethnic divisions in order to nurture the political aspirations of ethnic groups to become nation-states, the theory of interstate competition loses much of its credibility.

In such a polity, the emphasis given to ethnic identity and community generates such powerful ethnic allegiances and rivalries that even "capital, labor, political parties, and many other sectors of social life 'are often organized along ethnic lines.'"[228] Equally significant is the notion that, because they are designed to be "ethnocratic" to the core, subnational governments essentially view themselves as agents of their own ethnic communities.[229] As agents, ethnic leaders inevitably face incentives to create or enforce barriers to interjurisdictional factor mobility. They also face pressures to pander to their ethnic communities, or portray themselves as strong advocates of their communities' interests. Thus, when an ethnic group controls or otherwise becomes identified with a particular substate, its agents will generally seek to define distribution and control of economic assets including land, capital, credit, and licenses to operate commercial and financial enterprises so as to benefit their own ethnic constituents.[230] In the process, market rules of competition are either superseded or otherwise manipulated, with the result that members of other ethnic communities are excluded from participation in the local economy.[231]

A few examples illustrate these market-distorting and exclusionist policies and practices. In Nigeria, the subnational government in the North of the country adopted a policy of "North for Northerners," thereby barring southerners from "operating hotels and . . . doing contract works for the [state] government, native authorities or private enterprises."[232] Even foreign firms

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226. Daniel Hardy & Dubravko Mihaljek, *Economic Policy Making in a Federation*, FIN. & DEV., June 1992, at 14, 15; Rodden & Rose-Ackerman, *supra* note 168, at 1531.

227. *See* Amar, *supra* note 28, at 505 (noting that a major difference between federalism in the United States and federalism in the ex-Soviet Union is that "[i]n America, state boundaries have rarely strongly correlated with deep ethnic, cultural, religious, and linguistic divisions").

228. Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 35 (1998) (quoting DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 7-9 (1975)). In this Article, Professor Chua discusses the uneasy relationship between the goals of marketization and democratization that the West is promoting in developing countries and the reality of ethnic tensions in these countries. She offers a model for exploring the consequences of pursuing markets and democracy in the context of deep ethnic divisions. The sobering thrust of the model is that in such societies simultaneous marketization and democratization will likely lead to one of three outcomes: (1) an ethnically fueled anti-market backlash; (2) actions directed at eliminating the market dominant minority; or (3) a retreat from democracy.

229. *Id.* at 47.

230. ESMAN, *supra* note 51, at 229.

231. *Id.* at 230.

232. NWABUEZE, *supra* note 199, at 130. The policy of Northernization even preferred expatriates to fellow compatriots from the South. *Id.* at 129-30.

were required to replace southerners within a prescribed period of time.[233] Similarly, southerners and others considered as non-natives were barred from acquiring land.[234]

India provides a similar example where the politicization of ethnicity has limited access to economic assets to only "sons of the soil."[235] In Bombay, for example, "the 'nativist' Shiv Sena party rose to political prominence in just two years by attacking the economically dominant South Indian minority and championing 'Maharastra for Maharastrans.'"[236] Similarly, in Assam, the Assamese party swept to power vowing to expel members of other ethnic groups for no other reason than that they were perceived to have taken "[t]he jobs, the businesses and other economic activities and precious land which rightly belonged to the indigenous people."[237] In the face of such ethnic animosity and discrimination, members of an ethnic minority inevitably face a powerful incentive to stay within, or limit their activities to, the subunit in which they constitute a majority. Investments or other opportunities in an area controlled by a different ethnic group are viewed as unsafe and imprudent. The U.S. Constitution provides a useful insight here. The framers found it necessary to guard against state impairment of contracts so as to encourage commercial interactions between citizens of different states.[238] But because ethnic federalism involves placing such a high premium on ethnic criteria, it is not as easy to ensure the movement of goods and services across jurisdictions by simply barring the states from passing "any . . . Law impairing the Obligation of Contracts."[239]

Ethnic federalism faces yet another difficulty. Such a structure may exacerbate, rather than reduce, interjurisdictional disparities in wealth. Vast differences in human and natural resources separate ethnic groups. Some ethnic groups may be well endowed with oil deposits, or other mineral resources; they may have large populations, or may inhabit economically important regions, such as port cities. In contrast, other ethnic groups may lack these attributes.[240] All ethnic groups may benefit by pooling together

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233. *Id.*

234. *Id.* at 130 ("It was a criminal offence for a non-Northerner to occupy or use any land without . . . consent [of the government of the North].").

235. The phrase surely predates recorded history. Perhaps the earliest Western literary usage occurs in *Beowulf*. The aged Beowulf's kingdom is attacked by the vengeful dragon who "[b]y its wall no more was it glad to bide, but burning flew folded in flame: a fearful beginning for sons of the soil." BEOWULF 122 (Francis B. Gummere trans., The MacMillan Company 1909). More recently, Terence Steward and Margaret Png appear to have first used the term in the contemporary international law literature. Terence P. Stewart & Margaret L.H. Png, *The Growth Triangle of Singapore, Malaysia, and Indonesia*, 23 GA. J. INT'L & COMP. L. 1, 34 & n.172 (1993) (explaining that native-born bumiputras of Malaysia are literally the "sons of the soil").

236. Chua, *supra* note 228, at 45.

237. *Id.* (quoting Sanjoy Hazarika, *India's Assam State Demanding Ban on Migration*, N.Y. TIMES, Sept. 13, 1987, at A12).

238. Sunstein, *supra* note 191, at 652.

239. U.S. CONST. art. I, § 10, cl. 1.

240. Ethnic federalism is unappealing for another reason. A number of countries in Africa are home to numerous ethnic groups. Nigeria alone has as many as 250 ethnic groups. Karl Vick, *A Delicate Democracy: Violent Ethnic Rivalries Threaten Nigerian Unity*, WASH. POST, Jan. 29, 2000, at A1. Although not as numerous, Ethiopia has eighty ethnic groups. A federal government comprising so many component units seems too unwieldy and cumbersome to be effective. Even if such a federal

their respective resources in a federal arrangement. But given the tendency of ethnic governments to view themselves primarily as agents of their own ethnic groups, they have little or no incentive, much less any sense of obligation, to share any of their resources with other ethnic groups. On the contrary, ownership of important resources may foster in them an attitude of economic self-sufficiency, and a willingness to go it alone politically. Thus, a federal structure that emphasizes ethnicity alone is bound to lead to uneven economic development, or may fuel demands for political separation as the central government attempts to redistribute resources among the subunits more equitably.

This connection between separation and uneven control over economic resources is not idle speculation. The separatist tendencies of Katanga in the Democratic Republic of the Congo and Biafra in Nigeria were inflamed, in no small part, by the desire to have "maximum independence and control over their resources."[241] Similarly, and equally importantly, one of the major problems that plagued Yugoslavia's federalism was the attitude of the richer and more industrialized republics that "resented the fact that they were subsidizing the least developed areas of the country."[242] This attitude stood in the way of the central government's policy of equitable distribution used to address regional disparities, eventually contributing to the breakup of the country.[243] The Yugoslav experience also suggests that even if subunits compete for mobile resources, without intervention by the central government, such competition will consistently be won by ethnic groups who control relatively greater resources, leaving other ethnic groups as "backwaters of poverty and poor public services"[244]—a result which may well prove to be a source of political instability.

A final difficulty with ethnic federalism remains to be mentioned. As explained above, this system of government tends to encourage, even require, political leaders to view themselves primarily, if not exclusively, as agents of their own ethnic communities. As agents, they perceive their main economic role to be the protection and enhancement of the economic well-being of the members of their own ethnic group. Preoccupation with ethnic interests,

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union were theoretically conceivable, as a practical matter, a number of ethnic groups may be so small as to be incapable of standing on their own. These groups may not only lack the population size, but also the economic resources, climatic conditions, or a large enough territory in order to form viable governments. Reliance on ethnic homogeneity alone may produce large states with large populations and vast economic resources, leading to an asymmetrical federal system. Federal asymmetry is worrisome because it tends to foster among the larger and more viable states an attitude of self-sufficiency, separatism, and intolerance. *See* NWABUEZE, *supra* note 199, at 112-113.

241. MOTALA, *supra* note 198, at 87. In each of these cases, a particular region possessed access to a strategic resource: the Katanga region is richly endowed in mineral resources while Biafra is well endowed with oil deposits. *Id.* It is similarly possible that Eritrea's strategic location astride the Red Sea contributed to its separatist ambitions prior to gaining independence from Ethiopia in 1993. Eritrea's economy has suffered since independence, however, in part because Ethiopia decided to forego the use of Eritrean ports following military conflict in 1998, and in part because Eritrea lost access to its only economic hinterland.

242. OTTAWAY, *supra* note 2, at 15.

243. WILLIAM FOX & CHRISTINE WALLICH, FISCAL FEDERALISM IN BOSNIA-HERZEGOVINA: THE DAYTON CHALLENGE 7 (World Bank, Policy Research Working Paper No. 1714, 1997).

244. Hardy & Mihaljek, *supra* note 226, at 15 ("Unlike an enterprise, a region that is not well endowed does not go out of business but declines and loses its tax base, while the needs of its remaining population go unmet.").

however, will from time to time conflict with the interests of the nation as a whole. When this occurs and when the power to resolve such conflict is in the hands of ethnic leaders, the logic of ethnic self-interest inevitably combines with ethnic passion to produce results that are inconsistent with the interests of the nation as a whole. An ethnic-federal system may similarly taint decisions by the central government. Although the central government may more clearly and dispassionately perceive the benefits of pursuing an economic policy aimed at enhancing national growth, it may nevertheless be compelled to forego these benefits in an effort to thwart the danger of inflaming ethnic passion that could destabilize the federation.[245]

Even if the common national interest is not so frustrated, an ethnic-particularist view of economic interests increases the costs of reaching agreement on important economic policies affecting the whole nation. A genuinely ethnic-federal arrangement, by its very nature, requires all important decisions to be made with the consent of all ethnic groups.[246] Achieving consensus among all ethnic groups, however, would be cumbersome because different ethnic groups have different preferences for particular national policies. For example, a nation-wide policy of land privatization may be an essential step in making progress toward a market economy. Yet, if some ethnic groups perceive that the burdens of such a policy fall disproportionately on them, they will likely resist it. Even if a compromise is eventually reached, the benefits of the policy will have been unnecessarily delayed. Consequently, polarized preferences lead either to a deficit of public policies or to a delay in the implementation of such policies.

C. *Human Rights*

The third and final area of concern with the viability of ethnic federalism involves its impact on the enjoyment of human rights by persons belonging to ethnic minorities. As discussed above, ethnic federalism is primarily concerned with devolving power to a set of subnational jurisdictions in which ethnic and political boundaries are deliberately made to coincide. It is, of course, impossible to achieve absolute coincidence of ethnic and political boundaries. As a result, subnational jurisdictions necessarily contain ethnic minorities. The status and treatment of these minorities within the jurisdiction present myriad opportunities for abuse and deprivation of rights.

From a human rights perspective, ethnic federalism is "inherently problematic."[247] First, reliance on ethnicity as the sole basis for restructuring a state is fundamentally at odds with the universally accepted principle of

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245. Howse & Knop, *supra* note 27, at 275, 276. *See also* Easterly & Levine, *supra* note 222, at 1215-16 (noting that in a situation of "polarized preferences" a public good brings less satisfaction to everyone concerned, so fewer public goods are chosen by society as a whole).

246. This was apparently the case in Yugoslavia. *See* Bogomil Ferfila, *Yugoslavia: Confederation or Disintegration*, PROBS. OF COMMUNISM, July-Aug. 1991, at 18, 19 ("Decisions of the most important issues regarding the implementation of joint economic policies within the Federation are achieved by consensus and unanimous agreement within the Council of the Republics and Provinces of the General Assembly of the [Socialist Federal Republic of Yugoslavia].").

247. David Wippman, *Practical and Legal Constraints on Internal Power Sharing*, *in* INTERNATIONAL LAW AND ETHNIC CONFLICT 211, 230 (David Wippman ed., 1998).

nondiscrimination embodied in various U.N. instruments. By conferring sovereign powers on an ethnic group, ethnic federalism allows a group to control the apparatus of government within the subunit and to put its own imprimatur on the identity of the substate. The controlling ethnic group is then in a position to frame and enforce rules and practices calculated to enhance its status as a political community and privilege its members as individuals.[248] Under this system, those who do not belong to the ethnic majority are considered "outsiders" and are liable to be excluded or subordinated within their respective substates. Such discrimination violates, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, which specifically outlaws

> any distinction, exclusion, restriction or preference based on race . . . *national* or *ethnic* origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[249]

Such discrimination has occurred in Nigeria, where "[r]ecruitment to elite positions in the civil service, armed forces, and government is disproportionately and overwhelmingly from the ethnic majority."[250] Similarly, among certain communities of Kenya, there are moves to discourage "nonindegenes" from buying or leasing land "belonging" to these communities.[251] A similar desire to be internally dominant, or to be "*maîtres chez nous*," lies behind the drive of Quebec nationalists to ban the use of languages other than French on commercial signs within the province.[252] While each of these policies is ostensibly intended to ensure the survival and integrity of the particular community in question, each clearly undermines the individual rights of those who do not belong to the ethnic majority. Fashioning a federal system along purely ethnic lines is clearly at odds with the fundamental and universal human rights norm of nondiscrimination.

Ethnic federalism also violates the guarantee of equal rights to political participation as mandated by international human rights law. For example, Article 25 of the International Covenant on Civil and Political Rights recognizes the right of every citizen to "take part in the conduct of public affairs," the right to "vote and to be elected at genuine periodic elections," and the right to "have access, on general terms of equality, to public service in his country."[253] Yet, ethnic federalism effectively nullifies these guarantees in

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248. One commentator calls this system of government "constitutional nationalism" by which he means "[a] constitutional and legal structure that privileges the members of one ethnically defined nation over other residents in a particular state." Robert M. Hayden, *Constitutional Nationalism in the Formerly Yugoslav Republics*, 51 SLAVIC REV. 654, 655 (1992); *see also* Chua, *supra* note 228, at 47 ("[T]he constitutions, laws, and political structures of an ethnocratic state generally serve to reinforce the monopolization of power by the ethnic majority.").

249. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 1, 660 U.N.T.S. 195, 216 (emphasis added).

250. *See* Chua, *supra* note 228, at 47 (discussing ethnocratic states generally). *See e.g.*, Nwabueze, *supra* note 199, at 130.

251. Ndegwa, *supra* note 24, at 612.

252. Howse & Knop, *supra* note 27, at 272-73.

253. International Covenant on Civil and Political Rights, Dec. 19, 1966, 1966 U.S.T. LEXIS

some circumstances and seriously dilutes them in others. Ethiopia provides a good illustration. In the ethnic substate of Harar, ethnic Hararis comprise a tiny fraction (7.2%) of the state's population,[254] but the state and its governance constitutionally belong to them. This is conveyed by the fact that the substate is named after the group, thereby conferring constitutional legitimacy to its claim that it constitutes what Uri Ra'anan calls the "*Staatsvolk*," i.e., "the ethnic group that created the state, is largely identified with it, constitutes the bulk of its elite, and is the source of the predominant culture."[255] As a result, those who do not share the dominant identity, even when they comprise, as in Harar, the overwhelming majority, are denied participation in the governing institutions of the polity. Thus, although the Ethiopian Constitution formally recognizes the right of all citizens to vote and to be elected, the electoral law bows to the requirements of *Staatsvolk* by limiting the franchise to those who speak the language of the *Staatsvolk*.[256] Passing the linguistic hurdle, however, does not guarantee enfranchisement. Voters are further required to identify their ethnic identity on a voter registration card,[257] a practice with the transparent intention of disenfranchising them.

Finally, ethnic federalism infringes on international human rights norms that guarantee citizens the right to move freely and to reside wherever they choose within their country. To be sure, even a state that institutionalizes ethnicity may pay lip service to these norms, as Ethiopia has done, by incorporating them in its constitution. But the notion of a *Staatsvolk* is fundamentally at odds with these norms. Because employment opportunities, political power, and rights of political participation all depend on belonging to the "right" ethnic group, those who do not belong have no incentive to move into areas controlled by such a group. And those who are already in the "wrong" ethnic region face the prospect of being expelled from their lands, fired from their jobs, and forced to return to their "homelands." Ethiopia's experiences to date demonstrate as much.[258]

These arguments demonstrate that ethnic federalism is neither workable nor suitable, particularly when tested against SSA states' core difficulties—threats to national unity, lack of progress in economic performance and human rights violations. By deliberately and openly highlighting ethnic differences that would otherwise fade in time, such a system corrals citizens into ethnic enclaves, encourages aggressive ethnic identification and separatism, and exacerbates ethnic distrust and social discord. The political process is bound

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521, 6 I.L.M. 368, 375 (1967).

254. Research and Action Group for Peace in Ethiopia and the Horn of Africa, *Ethiopia: A Tragedy in the Making* 5 (n.d.) (unpublished manuscript, on file with the author). In Harar regional state, the two numerically dominant ethnic groups are Oromos (52%) and Amharas (32.6%). *Id.* at 5-6. Nevertheless, the state has been declared to belong to the Hararis by constitutional fiat.

255. Uri Ra'anan, *Nation and State: Order Out of Chaos*, *in* STATE AND NATION IN MULTI-ETHNIC SOCIETIES 3, 5 (Uri Ra'anan et al. eds., 1991).

256. *Id.* at 27.

257. Research and Action Group for Peace in Ethiopia and the Horn of Africa, *supra* note 254, at 7-8.

258. More than 12,000 people belonging to the Amhara ethnic group were recently expelled from the substate of Oromia. *AAPO Says Perpetrators Should Face Trial*, Feb. 16, 2001, ADDIS TRIB., http://www.addistribune.com/Archives/2001/02/16-02-01/AAPO.htm.

to be fractious and contentious as well, as every group jockeys to maximize its own narrow interests, or as one or more of these groups strive to satiate its ultimate ethnonationalist desire—the creation of an autonomous nation-state. Under these circumstances, it is highly unlikely for SSA states to be able to forge national unity or to promote economic progress and human rights. Making progress in these areas requires, at a minimum, a stable political environment. Consequently, while ethnic federalism offers some advantages in accommodating ethnicity, it involves far too many pitfalls to be an appealing constitutional option for SSA states.

V. TOWARD A BALANCED APPROACH TO ETHNIC ACCOMMODATION

For the reasons delineated above, the most appealing constitutional option for most SSA states historically has been one which avoids giving ethnicity any "visible expression in the institutional structure of the society."[259] Under this vision, the state is supposed to view ethnicity with the same detachment as it does religion: with "benign neutrality."[260]

Such a vision, however, fails to account for the fact that in many SSA states a particular ethnic group so dominates, or is perceived to dominate the state that the desired official impartiality of public institutions is often belied by the reality or appearance of ethnic domination. The claim of a benign neutrality is especially unconvincing in those states in which a particular ethnic group's language or religion is accorded official recognition.[261] As a result, the gap between purported neutrality and ethnic group dominance of state structures by particular ethnic groups continues to be a source of ethnic rivalry and conflict fueling demands for ethnic equality and autonomy. Thus, in countries where this situation prevails, opposition to federalist solutions might look like a ploy designed to eliminate ethnic diversity or to perpetuate ethnic domination.[262]

The solution to problems spawned by demands for constitutional recognition of ethnic identity does not lie in denying ethnicity any "visible expression in the institutional structure of the society."[263] Nor does it lie in a risky constitutional formula that, by marrying ethnicity with federalism, erects permanent walls of ethnic separation and impairs the chances for inter-ethnic cooperation, the development of a common citizenship, and the unity and security of the state. Instead, the solution lies in steering a middle course between an outright rejection of constitutional space for ethnicity and an all-consuming commitment to it in the manner of Ethiopia. This balanced

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259. The expression is from Iris Marion Young, *Together in Difference: Transforming the Logic of Group Political Conflict*, *in* MINORITY CULTURES, *supra* note 77, at 162.

260. Will Kymlicka, *Liberalism and Politicization of Ethnicity*, 4 CAN. J.L. & JURIS. 239, 241 (1991).

261. Sudan, for example, has been in civil war since the mid-1950's because the Arab North has sought to impose its cultural identity on the non-Arab South. *See* Wai, *supra* note 8, at 316.

262. *See* ELAZAR, *supra* note 27, at 248.

263. Young, *supra* note 259, at 162.

approach gives due consideration to ethnicity as one of several relevant factors. The following sections address these additional factors.

A. *National Unity and Security*

The first and most important factor to consider in designing the internal organization of the typical SSA state should be the need to foster national unity and preserve state integrity. The pursuit of these goals "is of course the legitimate concern of any government"[264] and needs little or no apology. Any measure of state restructuring that is prone to create or exacerbate ethnic tension or disharmony, and thereby undermine national unity and state integrity, will inevitably affect the welfare of all citizens.

Students of African history are well aware that in their scramble to divide up Africa, the colonial powers tossed a collection of disparate ethnic communities into single states for their own selfish reasons.[265] The artificiality of the typical SSA state's origin and its continuing fragility have led some to advocate self-determination for ethnic groups, or a redrawing of the map of Africa along these lines.[266] In a similar vein, one commentator questions the value of pursuing nation-building within the framework of the existing states:

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264. Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* at 54, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979); *see also* A.F.K. ORGANSKI, THE STAGES OF POLITICAL DEVELOPMENT 8 (1965) (noting that the "primary function of government is one: the creation of national unity").

265. S. K. B. Asante, *Nation Building and Human Rights in Emergent African Nations*, 2 CORNELL INT'L L.J. 72, 83 (1969) (discussing the challenges of nation building in Africa).

266. *See, e.g.*, Wilson, *supra* note 56, at 480-84 (arguing that from a human rights perspective, the benefits of secession outweigh those of state sovereignty); Oko, *supra* note 190, at 321-22. Oko advocates partition as the "most efficacious, and perhaps the only viable way to preserve order in Nigeria." He despairs that "political stability through constitutional democracy is an unattainable ideal, an illusory notion sedulously promoted by dominant ethnic groups and their foreign allies." *Id.* at 322. He bases this pessimistic conclusion on the contention that Nigeria's ethnic rivalries and tendency toward aggressive ethnic identification "provide an inhospitable environment for implementation of democracy." *Id.* at 321.

Makau Wa Mutua seems to favor a similar solution when he argues that "in principle sovereignty should be returned to pre-colonial entities who should then 'trade it in' for consensual map-making to voluntarily create larger democratic entities." Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1150 (1995). Mutua basically argues that "at independence, the West decolonized the colonial state [in Africa], not the African peoples subject to it." *Id.* at 1116. In his view, therefore, the right to self-determination has not really been exercised by the victims of colonialism—the ethnic groups that prior to colonialism existed as separate entities. Instead, "[s]uch groups . . . even though they belonged to different pre-colonial states and ethnicities, were seen and treated as having the same destiny, and becoming independent within the same state, regardless of their will." *Id.* at 1141. Mutua concludes by proposing that "pre-colonial entities within the post-colonial order be allowed to exercise their right to self-determination," at 1118, and then "trade in" their sovereignty to voluntarily create larger entities. *Id.* But this argument is "akin to suggesting that a married couple running a mom-and-pop store will, after divorce, be more able to work together on behalf of their joint business than during marriage." Etzioni, *supra* note 191, at 30.

Secession has attracted more attention than most other issues in contemporary politics. The scholarly literature reflects this attention. For discussion of the "costs and benefits" of secession, see VIVA ONA BARTKUS, THE DYNAMIC OF SECESSION (1999). For a discussion of the justifications for secession, see BUCHANAN, *supra* note 53; LEE BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978). For additional arguments in favor of secession, see J. Klabbers & R. Lefeber, *Africa: Lost Between Self-Determination and Uti Possidetis*, *in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW, *supra* note 13, at 37. *But see* Tom M. Franck, *Postmodern Tribalism and the Right to Secession*, *in* PEOPLES AND MINORITIES in INTERNATIONAL LAW, *supra* note 13; Hurst Hannum,

> It is not always clear what is the intrinsic or instrumental value attributed to nation-building, nor whether it has any objectives other than the enhancement of the power of those who control the state, and the advancement of modes of production from which they primarily benefit.[267]

The problem with such views, however, is that they give insufficient attention to the enormous human and material costs the breakup of existing states would spawn. As the aftermath of the secession of Eritrea from Ethiopia in 1991 and the breakup of Yugoslavia and the former Soviet Union have shown, state disintegration causes massive disruption and breeds further division, more ethnic strife, massive human rights violations, economic dislocation, and new rounds of wars to define the boundaries of the new states.[268] In short, unscrambling the whole African continent and remaking it in the name of ethnic self-determination involves far too many risks and imponderables to make such an approach worthwhile or viable. Moreover, it is important to recognize that the breakup of states in the name of self-determination does not necessarily result in the establishment of new, stable, and democratic states.[269] It is far more prudent and reasonable to reaffirm the validity of the existing SSA states while restructuring them in order to address the needs of ethnic accommodation "before self-determination groups take a wrecking ball to [these] countries."[270]

Accordingly, the question is how to accommodate these differences so that ethnic groups are allowed to express their identities within the framework of existing states in ways that do not impair the basis for national unity and territorial integrity. It is reasonably clear that these twin objectives—national unity/state integrity and institutional expression of ethnic identity—have not been well reconciled within the framework of the unitary-state. Many SSA states have used the unitary state formula as well as single-party and military forms of governance in the name of promoting national unity and preserving territorial integrity. They have even avoided couching decentralization within the framework of a unitary formula for fear that decentralization could "reinforce tribal loyalty at the expense of loyalty to the nation."[271]

Unitary state approaches, however, have largely failed because they ignore a patent and fundamental reality of Africa's socio-cultural condition.

Rethinking Self-Determination, 34 VA. J. INT'L. L. 1 (1993). For a discussion of sovereignty and international political reform, see generally Michael Walzer, *The Reform of the International System*, *in* STUDIES OF WAR AND PEACE 227 (Øyvind Østerud ed., 1986).

267. *See* Woodman, *supra* note 113, at 16-17.

268. *See* Etzioni, *supra* note 191, at 23-24, 28.

269. *Id.* at 24-25 ("Those concerned with promoting responsive governments, by and for the people, can no longer assume that breaking up large entities provides movement in the desired direction"—i.e. democratization. Etzioni offers the example of the Yugoslav federation which, after its dismemberment, yielded a bunch of local governments that have proved "even less democratic, and more murderous.").

270. *Id.* at 33. *See also* I. William Zartman, *Putting Things Back Together*, *in* COLLAPSED STATES, *supra* note 4, at 268 ("It is better to reaffirm the validity of the existing unit and make it work, using it as a framework for adequate attention to the concerns of its citizens and the responsibilities of sovereignty, rather than experimenting with smaller units, possibly more homogeneous but less broadly based and less stable."); Case Concerning the Frontier Dispute (Burk. Faso v. Rep. of Mali), 1986 I.C.J. 554, 567 (Dec. 22) ("[M]aintenance of the territorial status quo in Africa is . . . the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice.").

271. Kimenyi, *supra* note 59, at 44.

SSA states, with few exceptions, are comprised of ethnic communities that inhabit distinct territories, practice different cultures, engage in varying forms of land use and tenure, and speak different languages. In other words, these states constitute at bottom a federation of ethnic groups—in fact, if not in law. The goal of nation-building on the basis of unitary principles of state organization is thus belied by the stubborn realities on the ground.

Nevertheless, it does not follow, as ethnic fundamentalists insist, that ethnic federalism is the only alternative. As discussed above, this option offers some advantages, but is ultimately unworkable at best and dangerous at worst. By recognizing specific regions of a country as the "homeland" of particular ethnic groups, it serves to encourage loyalty to one's ethnic group (at the expense of loyalty to the nation) and to whet the appetite for ethnic nationalism. And "[w]hen its appetite is sufficiently whetted, [ethnic] nationalism, almost by definition, is sated with nothing less or more than a nation-state,"[272] with all the horrors that attend the pursuit of such a goal—genocide, ethnic cleansing, rape, and wanton murder. Hence, it behooves African constitution-makers to ponder carefully the dangers ethnic federalism poses, and to "search, from the outset for institutions that will help to deprive it of sustenance,"[273] without impairing ethnic groups' rights to express and preserve their languages, cultures, and identities.

What kind of institution is best suited for these purposes? Given their ethnoterritorial cleavages, it is apparent that for most SSA states federalism provides an indispensable tool for ethnic accommodation, and any search for institutions should begin with it. To be workable, however, such a model must eschew using shared ethnicity *alone* as a basis of state organization. In other words, each ethnic group qua group should not necessarily be given its own separate state for purposes of self-government merely because it inhabits a particular section of the country. Instead, a region inhabited by a particular ethnic group should, where necessary, be subdivided into subunits which take into account the size of its population, territory, resource base and other relevant considerations such as geography, history, and the wishes of its inhabitants. Thus, while the ethnic make-up of a region should certainly play a major role in boundary-drawing, it should not play such a decisive role that it trumps all these other considerations.

The territorial structure of Nigerian and Swiss federalism offers a useful model for SSA states. Under this model, the subunits of the federal system are not derivatives of the spatial structure of large-scale ethnolinguistic divisions. Nigeria's constitution-makers learned early on after gaining independence from British rule that a workable federal system requires fostering an awareness that each subunit by itself is relatively insignificant vis-à-vis the whole. At independence, Nigeria's federal system comprised three regions, each controlled by a single ethnic group around which a number of minority ethnic groups were clustered.[274] This structure proved unworkable, however,

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272. Norman, *supra* note 101, at 93.

273. *Id.*

274. NWABUEZE, *supra* note 199, at 113. *See also* J. Isawa Elaigwu, *Nigeria From Unitarism to Federalism*, *in* EVALUATING FEDERAL SYSTEMS 225, 233 (Bertus de Villers ed., 1994).

because it fostered an attitude of self-sufficiency, intolerance, and separation among the dominant ethnic groups controlling the regions.[275] Subsequent constitutional reforms have therefore striven to mitigate these consequences by subdividing the regions into so many subunits whose boundaries do not necessarily correspond exactly with ethnicity.[276] In addition, Nigeria's structure is remarkable for "its tendency to sub-divide and also for the equality of the population size among the states and among the local government areas."[277]

The result of the "Nigerian structure is to give legitimacy to territory over ethnicity."[278] Thus, some subunits are inhabited by a number of different ethnic groups while other subunits are dominated by the three largest ethnic groups, the Hausa-Fulani, the Yoruba, and the Ibo, but each subunit is only one of several units in which these groups are predominant.[279] By thus distributing the core population of each ethnic group in several states, Nigeria's federal structure helps avoid the crystallization of ethnic identity around a particular territory.

This arrangement has other beneficial effects. One is that "[n]o ethnic group feels that it is in danger of total domination by another."[280] Another is that the dispersion of the larger ethnic groups among several states discourages a subunit from openly putting forward political claims in the name of an entire ethnic group.[281] Finally, if the boundary lines of political subunits are drawn independently of ethnic territorial boundaries, then the heterogeneous population within the political subunit will be free to participate in political and economic activities in a way that develops loyalty to the national polity.[282]

Much the same can be said about the internal boundaries of the Swiss federal system. Switzerland has four ethnolinguistic groups.[283] Had it followed a federal model that rendered its territories mere derivatives of its linguistic divisions, Switzerland would have been divided into four subunits. The Swiss model, however, eschews such a dogmatic approach, preferring instead, like Nigeria, to divide each major linguistic region into multiple cantons—twenty-six in all—which, by and large, are linguistically

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275. NWABUEZE, *supra* note 199, at 112.

276. Martin Dent, *Ethnicity and Territorial Politics in Nigeria*, *in* FEDERALISM: THE MULTIETHNIC CHALLENGE 128, 139 (Graham Smith ed., 1995) [hereinafter MULTIETHNIC CHALLENGE].

277. *Id.* (noting the enormous difference in population between the largest and smallest states in other federations including the United States, Canada, India, and Australia).

278. *Id.*

279. *Id.*

280. *Id.* at 140.

281. *Id.*

282. Adamolekum & Kincaid, *supra* note 27, at 176. To be sure, Nigeria has so far not taken full advantage of this potential. Two reasons account for this. First, citizen loyalty to the federal polity has been constrained by the frequent intervention of military rule. *Id.* Obviously, military rule is the very negation of democratic politics and the rule of law. Second, excessive centralization and regulation of the economy has not "encouraged participatory and entrepreneurial development in the private or public sectors." *Id.*

283. These groups are: German, French, Italian, and Romansche. *See* Ivo D. Duchacek, *Antagonistic Cooperation: Territorial and Ethnic Communities*, 7 PUBLIUS 3, 17 (1977).

homogeneous.[284] As a result, although there are issues that break down along language lines, "[t]he territorial structure of Swiss federalism discourages the development of ethnonationalism across language community lines."[285] At the same time, the fact that the cantons are largely unilingual means that they are in a position to guarantee the linguistic status quo while retaining the ability to enter into shifting coalitions among themselves in ways that disentangle issues of ethnolinguistic identity from economic and social issues.[286]

The Nigerian and Swiss examples demonstrate that the salutary ideas of ethnic accommodation and self-rule do not require giving effect to the ethnoterritorial principle: "To each ethnic community its own territorial home rule."[287] To be sure, linguistic homogeneity helps ensure the emotional response and internal cohesiveness that is essential for home rule and administrative convenience. For example, it might be necessary that, if the legislature of a sub-unit is not to degenerate into a veritable Babel of languages, it be able to conduct its work in one language—i.e., the main language of the area. Similarly, considerations of administrative convenience might require that civic communication be conducted through the medium of a language widely spoken in a region. Yet, these needs require, at most, no more than that the political, administrative, and educational activities of a federal unit be conducted in the dominant language of the region and that linguistic homogeneity be an important criterion in designing a federal system. As the Nigerian and Swiss federal models demonstrate, the principle of linguistic homogeneity does not require that an entire ethnic group be organized into one federal subunit. Preserving languages and cultures, which is one of the motivations for a federal solution, is one thing. Feeding ethnic nationalism by making each ethnic region a constituent subunit in the guise of promoting cultural and linguistic diversity is quite another. Thus, in terms of territorial structure the Nigerian and Swiss federal systems highlight the advantages of a workable federal system for SSA states—one which promotes ethnic accommodation but avoids the pitfalls inherent in the Ethiopian formula.

B. *Historical and Geographical Factors*

A balanced approach to ethnic accommodation should also consider historical and geographical factors. A common historical tradition is important in federal design because like ethnicity, a shared history fosters a sense of kinship and unity. Like ethnicity, such shared experiences are constitutive of individual and group identity.[288] The case of the Amhara of Ethiopia is

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284. *See* Alexander Murphy, *Belgium's Regional Divergence: Along the Road to Federation*, *in* MULTIETHNIC CHALLENGE, *supra* note 276, at 73, 95.

285. *Id.* (noting that "political parties do not correspond to language regions and the press rarely refers to language regions when discussing economic and political affairs").

286. *Id.* (noting that "crosscutting cleavages are easily expressed in the cantonal system," and that the "voting behaviour of the cantons on constitutional issues is associated far more with sociopolitical patterns than with language").

287. Duchacek, *supra* note 283, at 18-19.

288. Christo de Coning, *The Territorial Imperative: Towards An Evaluation of the Provincial Demarcation Process*, *in* BIRTH OF A CONSTITUTION 189, 209-10 (Bertus de Villiers ed., 1994).

illustrative. While the Amhara community is homogeneous from a linguistic standpoint, historically it has never viewed itself as possessing a common, cohesive, and overarching sense of ethnic identity. Instead, members of the community identity themselves by and express particularistic attachments to distinct regions—regions that have evolved historically and have doubled as sources of personal and regional identification.[289]

Geographical factors may also foster regional distinctiveness. Thus, even an otherwise homogeneous ethnic group may develop a subgroup with a distinct regional consciousness because of its geographical isolation. The creation of the Swiss federal system, for example, was in large part influenced by the country's rugged topography, where mountains and valleys have isolated communities and engendered in them a sense of distinctiveness.[290]

Even when geography may not have played such a role, it may be necessary to consider geography as an important factor in the design of a federal system. For example, it does not make much sense to combine two or more regions into the same federal unit when the regions are otherwise separated by natural barriers (such as harsh deserts, non-navigable rivers, or high mountains) merely because those regions are inhabited by the same ethnic group. Similarly, an approach that dogmatically focuses on ethnic identity leaves out of consideration the need to make federal units geographically compact for administrative convenience, economic efficiency, and improved constituent service.

Considerations of history and geography offer additional advantages over the monolithic approach advocated by ethnic fundamentalists. First, restructuring a federal state along regional lines that have evolved historically and have received particular legitimacy by the passage of time upholds settled political expectations and administrative relationships, and, in turn, stands a better chance of gaining ready acceptance among the population. Whatever the origin of existing regional identities, and however artificial they may be, they are real and do provide a degree of stability to historical connections and links. By contrast, breaking up old ties and creating new associations solely on the basis of ethnicity involve changes so radical that they may provoke unnecessary resistance.

Taking geographical factors into account has the additional advantage of dividing the country into multiple areas of manageable size rather than a few large areas corresponding to the number of ethnic groups in the country. From the time of Montesquieu, commentators have stressed that smaller units are better able to encourage governmental responsiveness and citizen participation

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289. Thus, although the primary self-identification of Amharas is frequently national (Ethiopian) in scope, the erstwhile provinces of Gondar, Gojjam, Wello, and Shoa—much like Virginia or the Carolinas—serve as strong sources of regional identification. These regional identities are a product of the country's long and checkered history. As such, they cannot be erased by official fiat merely by lumping these regions into one federal unit as the new Ethiopian Constitution has done.

290. KIMENYI, *supra* note 64, at 85-86 (discussing the similarity of Ethiopia's to that of Switzerland: "In Ethiopia, high mountains make contact between groups living on opposite sides of the mountains almost impossible."). *See also* Duchacek, *supra* note 283, at 6 ("The configuration of the land surface in some cases literally invites territorial fencing off alongside such obvious divides as mountain ridges, rivers, lakes, and deserts.").

than larger ones.[291] In light of the fact that communications in Africa are generally poor, geographically incoherent and unwieldy subnational units lose the advantages of administrative convenience and manageability.[292] Large subnational units also reduce the chances for creating closer links between citizens and their political leaders. Similarly, political leaders are more likely to be sensitive to public opinion in smaller communities.[293] Participation and accountability are essential to promote the sense of community and, in turn, to enlist citizens' support for various programs of public activity. Therefore, geography is an essential consideration if subnational units are to be manageable.

C. *Economic and Financial Factors*

The design of a federal system for SSA states should also pay adequate attention to the need to promote economic development. As noted in Part IV (B), a major consequence of basing a federal system purely on ethnic criteria is that the resulting structure may create or exacerbate disparities of wealth and resources among the subnational units. The initial territorial distribution of these resources in any given SSA state is likely to be uneven. As a result, some units will lack the financial and economic base to raise, on their own, the resources needed for their development and the maintenance of an adequate standard of living for their residents comparable to that prevailing in the better-endowed regions. Although it is impossible to equalize economic potential among all subunits without doing violence to the other factors, care should be taken to ensure that each unit, as far as possible, possesses an amount of economic resources equal to that possessed by other subunits.

It may be argued that in a federation it is not necessary for every unit to possess equal economic strength because transfers from the wealthier units via the federal government could, in this regard, remedy deficiencies. The principle underlying such transfers—fair allocation of resources—is sound, but in the context of a federal structure that emphasizes ethnicity alone its implementation is fraught with serious difficulties. As noted, ethnic-based governments have a tendency to view themselves as primarily concerned with the welfare of their own citizens with little or no incentive to share income or resources with other ethnic groups. Compelling them to share their resources, constitutionally or otherwise, is possible, but this will sooner or later create resentment and become a source of political friction and instability. It is well to recall that one of the sources of the Yugoslav tragedy was the reluctance of the richer republics to subsidize their less fortunate sister republics.[294]

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291. In South Africa, administrative considerations including "the need to minimize inconvenience to the people" were among the most important criteria used by the Commission for Demarcation and Delimitation of Regions in developing a framework for regionalization. *See* de Coning, *supra* note 288, at 208.

292. Briffault, *supra* note 163, at 1313 (noting that "smaller units are said to have a greater sense of community, which facilitates participatory decision making . . . . [s]imilarly, the individual is more likely to be heard, to influence, and to make a difference in a smaller unit than in a larger one."); *see also* Simeon, *supra* note 161, at 151 (quoting Montesquieu).

293. *Id.* at 162.

294. A similar resentment prevails in Ethiopia today. Many political groups have complained

It is also important to consider the fact that some ethnic groups are too small to constitute an entire political unit by themselves. As such, it is unrealistic to expect them to compete effectively with other, larger and wealthier subnational governments. Viewed from this angle, the familiar economic argument that stresses federalism's advantages in terms of fostering interstate competition and promoting gains in efficiency is unconvincing.

D. *The Wishes of the People*

Finally, in determining the boundaries of the component units of a federation, SSA states will do well to consider the wishes of the inhabitants of a particular region. This is important for two reasons.

The first reason concerns the legitimacy of a federalist structure that requires citizens to aggregate themselves in particular political subunits. Such aggregation inevitably raises issues of political identity and membership in separate political units. But who determines the particular unit to which citizens must belong?[295] The answer necessarily involves the problem of the legitimacy of a constitution that draws boundaries among groups of people and determines their composition.[296] Legitimacy is a complex topic,[297] but for our purposes here it is basically concerned with how to make the legal and political organization of the state "command the loyalty, obedience and confidence of the people."[298] The importance of ensuring the legitimacy of constitutional order and nurturing constitutionalism in Africa cannot be overemphasized. Experience has demonstrated that a major cause of the collapse of governments in many SSA states has been lack of respect for and identification with the constitution among the people "and even among the politicians themselves."[299] Given federalism's inherent fragility as a form of government, on the one hand, and its fundamentality as a political expedient for addressing basic tensions among social groups, on the other, it behooves African constitution-makers to pay particular attention to people's preferences as to the way in which they choose to organize themselves into sub-national entities. Every effort should therefore be made to provide citizens an adequate

about the TPLF's practice of transferring resources to Tigray from the richer regions of the country.

295. Political theorists have generally failed to address the issue of how to "identify nations that are entitled to their own state or local populations entitled to home rule." Orentlicher, *supra* note 101, at 46. Professor Orentlicher, however, suggests that in a democratic setting where the principle of popular sovereignty is used to establish governmental legitimacy, the "boundaries of political commitment should be determined in accordance with the principle of [the] consent [of the governed]." *Id.* at 48.

296. *See* NWABUEZE, *supra* note 199, at 24 (discussing the importance of the legitimacy of a constitution and the system of government it sets up for SSA states).

297. Rubin, *supra* note 59, at 1026 (stating that legitimacy "is an extremely tulgy [sic] topic, one that has been bouncing around Western Civilization for at least twenty-five hundred years").

298. NWABUEZE, *supra* note 199, at 24. *See also* Rubin, *supra* note 59, at 1026 (stating that the "most common definition of legitimacy is . . . 'precisely the belief in the rightfulness of a state, in its authority to issue commands, so that those commands are obeyed not simply out of fear or self-interest, but because they are believed in some sense to have moral authority, because subjects believe they ought to obey'") (quoting RODNEY BARKER, POLITICAL LEGITIMACY AND THE STATE 11 (1990)).

299. NWABUEZE, *supra* note 199, at 24.

and equal opportunity to express their preferences regarding the particular sub-units to which they will belong.[300]

Allowing individuals to make such constitutive choices does not merely promote constitutional legitimacy and democratic participation. Equally important, it also goes a long way towards fulfilling and giving effect to the ideal of self-determination. As understood here, self-determination means the right of individuals to choose to affiliate themselves with a particular political subunit so as to express, preserve, and protect their own culture and traditions. This emphasis on elective membership in a subnational community thus rejects the nationalist argument for ethnic self-determination. Accordingly, non-voluntary criteria such as ethnicity should not be relied upon as the only way by which the units entitled to self-determination are to be identified. Also to be resisted is the narrow view that holds self-determination to require coincidence between ethnic and political boundaries.

Various considerations may influence ethnic groups to elect association with political units that are not coterminous with their ethnicities. Three such reasons will be sufficient to illustrate this assertion. First, as noted, a distinct sense of regional identity, borne out of geographical isolation or historical circumstances, may influence a group that is otherwise ethnically homogeneous to wish to subdivide into several subunits, or even to share one with an adjoining ethnic group. Failure to acknowledge the influence of such differences on ethnic consciousness accounts for the dogmatism in the logic of ethnic identity advocated by proponents of ethnic federalism. Second, economic interaction and urbanization may also create such interdependence among different groups that they may prefer to form a common unit rather than to break along ethnic lines. Under the right political circumstances, it is not unreasonable or farfetched to imagine that individuals will perceive, or be persuaded to perceive, the advantages of cooperation and the sharing of preferences with members of other ethnic groups. By the same token, those with whom they share a common ethnic identity may not share their ideological or political preferences, or their aspirations for the country as a whole. Finally, groups that are not politically or economically viable on their own may prefer to live in a larger multi-ethnic unit.

VI. CONCLUSION

A salient characteristic of SSA states is ethnic heterogeneity. Most SSA states contain a number of ethnic groups (as many as 250 in Nigeria). These groups view themselves not only as being different from other ethnic groups, but also frequently self-identify, or are identified, with particular regions of a country.

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300. In Ethiopia, regional boundaries were redrawn solely to reflect the wishes of the TPLF and OLF. The inhabitants of the various regions were neither involved nor consulted. *See* Alemante G. Selassie, *Ethiopia: Problems and Prospects for Democracy*, 1 WM. & MARY BILL RTS. J., 205, 214 (1992).

Despite, or because of, this diversity, the vast majority of African states have carefully avoided giving ethnic identity institutional or official expression. Instead, believing that multiple ethnicities foster divided loyalties and a sense of separateness, they have assiduously pursued policies and practices aimed at supplanting their citizens' particularistic ethnic attachments with a shared and overarching national identity. In pursuit of this aim, they have typically employed unitary state structures and political institutions, including single party systems and even military forms of government, but to no avail. For the most part, these formulas for nation-building and political stability have neither avoided ethnic conflict, nor engendered feelings of belonging to a broader national community.

Against this background, Ethiopia's unprecedented and radical experiment with ethnic federalism may appear to be a sound alternative for fostering ethnic accommodation and building a legitimate and cohesive national political order. Much of the appeal and promise of this formula for governance comes from the fact that it accords constitutional recognition to the claims of ethnic groups to constitute themselves as self-governing polities within their "own" regions. In theory, self-government allows ethnic groups to pursue their distinctive courses and manifest their identities in the public institutions of their respective jurisdictions, all without interference by the central authority. At the same time, self-government within a federal arrangement embodies—again in theory—a commitment to a broader national community. Thus, such a structural arrangement, arguably, offers a means to defuse ethnic conflicts by accommodating ethnicity. Equally important, it should theoretically engender among ethnic groups feelings of common citizenship and loyalty to a common state.

While there is some merit to these claims, the arguments considered in this Article and the experiences of countries that have pursued such an approach demonstrate that the marriage of ethnicity to claims of territorial sovereignty is a perilous enterprise—bound to produce a confluence of circumstances that will make the survival of a common national identity unlikely in the best of circumstances and impossible in the worst of circumstances. Because ethnic federalism is built upon and encourages two divergent and often conflicting visions of citizenship—national and ethnic—it is inherently unstable. Ethiopia's experience demonstrates that when the state deliberately fosters ethnicity as a basis for political identity and organization, citizens who were not concerned with their ethnic affiliation quickly regroup under its banners and purport to be a distinct people. Equally important, this experience demonstrates that individuals are far more willing to exchange their national citizenship for ethnic citizenship than vice-versa because the former lacks the emotional force that the latter can so readily muster. Under these circumstances, the national government will likely face difficulties persuading the various ethnic groups to cooperate for the sake of national unity, to share economic resources, and to make sacrifices for the benefit of other groups.

For much the same reason, ethnic autonomy leads to the establishment of closed, self-reliant economies. By throwing up fences around ethnic

groups, ethnic federalism encourages subnational governments to view themselves as agents of their own ethnic communities, and to be absorbed with the pursuit of their own economic interests and welfare. As such, they face incentives to define distribution and control of economic resources so as to benefit members of the ethnic community identified with the particular substate. Similarly, they face incentives to enforce barriers to the movement of goods, services, and labor across jurisdictions. As a result, such incentives are bound ultimately to play a disintegrative economic role with respect to the national economic system and the notion of a common market.

Ethnic federalism is also inherently at odds with the human rights of individuals belonging to the "wrong" ethnic group. The vision of a federal system with perfectly coinciding ethnic and territorial boundaries is virtually impossible to attain. Thus, in practice such a vision inevitably traps some minorities within substates which belong to the ethnic majority. As a result, members of the minority are treated as "outsiders," liable to be excluded or discriminated against while members of the majority are privileged as "sons of the soil." Worse still, minorities may face ethnic cleansing, as has already occurred in Ethiopia in the wake of the 1991 constitutionalization of ethnicity.

The arguments considered in this Article suggest three important lessons for African states. The first is that it behooves African constitution-makers to recognize that ethnicity is an important source of individual and group self-identification. As such, if the integrity of an SSA state as a unit of politics is to be preserved, it must accommodate collective claims rooted in ethnic identity. An equally important lesson is that, in cases where pressures for ethnic autonomy exist, it is unwise to retain unitary state structures in the face of such pressures. Dogged resistance to these pressures will only help exacerbate ethnic tension and discord. The final lesson pertains to the actual configuration of the federation and the particular manner in which ethnicity is accommodated territorially. Devolution of territorial power to discrete ethnic groups exacerbates ethnic tension even more than a unitary state system does. Accordingly, African states would do well to consider alternative approaches when faced with the question of how peoples of varying cultural and ethnic identities may harmoniously coexist within the same polity. In this writer's view, federalism should certainly serve as the starting point in the search for a solution. To prove workable, however, such a solution must result from the weighing of a number of factors, including the need to promote national unity and state integrity, economic interdependence, human rights, and the wishes of the people.