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Edward L. Rubin

Vanderbilt University, ed.rubin@vanderbilt.edu

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# THE ROLE OF FEDERALISM IN INTERNATIONAL LAW

EDWARD L. RUBIN\*

**Abstract:** Because federalism grants partial autonomy to subunits of a nation, it has potentially broad implications for the prevailing system of international law, which is centered around the integrity of nation states. Military intervention in the internal affairs of a nation to protect human rights or combat terrorist activity might be regarded as more justifiable if the people being protected are members of a federalized subunit. Alternatively, foreign nations may feel more justified in establishing trade or cultural relations with a subunit of a nation, over objections by the nation's government, if the subunit has federalized status. In other words, federalism can be viewed as modifying the principle of national sovereignty. This important possibility is largely unexplored in the international law literature. In recent years, a great deal of attention has been devoted to the implications of American federalism for the treaty powers of our national government and for the foreign relations powers of the state governments. While these questions refer to international law, they are basically domestic law inquiries about the relationship between state and national government. This article, in contrast, deals directly with federalism's implications for relations between different nations. On the basis of a theory that treats federalism as a sub-optimal compromise for dealing with conflicts of political identity, the article concludes that federalism does not justify increased levels of intervention, nor does it permit foreign nations to establish relations with subunits in violation of national policy. But the article does recognize an important role for federalism in international relations. One nation should not intervene by force in another nation unless it has some reason to believe its intervention can be effective in solving the problem that provided the basis for the intervention. In a number of cases, federalism may be such a solution. In addition, while nations should not establish trade or cultural relations with subunits in violation of national policy, federalism creates a presumption that certain relations are acceptable to the national government, and thus requires

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\* University Professor of Law and Political Science, Vanderbilt University. Thanks to Bruce Ackerman, Robert Ahdieh, Nicholas Aroney, Olivier Beaud, James Blumstein, Mark Brandon, Hugo Cyr, Erin Delaney, James Ely, Roderick Hills, Nicole Huberfeld, Allison LaCroix, Amnon Lev, Gillian Metzger, Robert Mikos, Judith Resnik, Christopher Schoenberger, Ganesh Sitaraman, Kevin Stack, and Ingrid Wuerth for their helpful thoughts and comments, to the University of Copenhagen Law School, Vanderbilt University Law School, Xi'an University Law School, and Yale University Law School for providing forums for earlier versions of this article, and to Malcolm Feeley, my co-author on my prior federalism work and my close advisor on this project.

the national government of a federal regime to be more explicit in prohibiting such relations than the government of a unitary regime would need to be.

## INTRODUCTION

Ever since the seventeenth century, international relations in the Western World have been structured as interactions among separate sovereign entities, an approach generally known as the Westphalian system.<sup>1</sup> This model, which served as the basis for the United Nations (U.N.), was extended after World War II to the entire world. But the model seems to conflict with federalism, a subject of continued and perhaps increasing interest in the modern scholarship of government. Federalism challenges the concept of a nation as a single entity by granting various forms of autonomy to subunits within the nation. The question then arises whether it provides a justification for one nation to ignore or violate the wishes of another nation's central government and intervene in that nation's affairs, either by force or through contract with a federalized subunit.

The debate has acquired increased significance as a result of two recent developments, one legal and the other factual, that establish normative grounds for intervention. The legal development is the incorporation of the so-called Right to Protect, or R2P provisions, in the United Nations' World Summit Outcome Document, adopted by the General Assembly in 2005.<sup>2</sup> Strongly supported by the African Union, various Latin American nations, and Canada,<sup>3</sup> the Document states, *inter alia*, that the signatories "are prepared to take collective action, in a timely and decisive manner, through the Security Council . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide,

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<sup>1</sup> For the classic statement of this principle, see EMER DE Vattel, *THE LAW OF NATIONS* (Knud Haakonssen ed., 2008) (originally published in 1758). For a discussion of the modern doctrine, see Charles R. Beitz, *Sovereignty and Morality in International Affairs*, in *POLITICAL THEORY TODAY* 236, 236–54 (David Held ed., 1991); ANTONIO CASSESE, *INTERNATIONAL LAW* 46–59 (2d ed. 2005); James Crawford, *Sovereignty as a Legal Value*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 117, 117–33 (James Crawford & Martti Koskeniemi eds., 2012); ALAN JAMES, *SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY* 14–22, 266–79 (Paul Wilkinson ed., 1986); and MALCOLM N. SHAW, *INTERNATIONAL LAW* 409–14 (6th ed. 2008).

<sup>2</sup> See G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–139 (Sept. 16, 2005) [hereinafter World Summit Outcome]. For an account of its adoption, see GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 31–54 (2008). For discussions, see EVANS, *supra*; and THOMAS G. WEISS, *HUMANITARIAN INTERVENTION* 97–132 (2d ed. 2012).

<sup>3</sup> Not the United States, however. John Bolton, the U.S. Ambassador to the United Nations at the time, attempted to delay or derail the process. See EVANS, *supra* note 2, at 47; Brian Urquhart, *One Angry Man*, N.Y. REV. BOOKS (Mar. 6, 2008), <http://www.nybooks.com/articles/2008/03/06/one-angry-man/?printpage=true> [<https://perma.cc/7FPH-WNHF>].

war crimes, ethnic cleansing and crimes against humanity.”<sup>4</sup> The U.N. Security Council expressly reaffirmed these provisions the following year,<sup>5</sup> and the Secretary General issued a report on their implementation in 2009.<sup>6</sup> While the primary effect of the World Summit Outcome remains aspirational, it represents a developing norm that interventions into the affairs of sovereign nations are justified under certain circumstances.<sup>7</sup>

The factual development is the rapid rise of international terrorism.<sup>8</sup> Nations that have been attacked by terrorists headquartered in another nation can argue that this other nation has, in effect, attacked them directly by tolerating or supporting the terrorist organization. They can thus claim justification for a variety of interventions, often grouped under the general heading of counterinsurgency, that range from sanctions, to interdiction of the terrorists within the other nation’s borders, to outright invasion and regime change of that other nation.<sup>9</sup>

In recent years, a great deal of scholarly attention has been devoted to a topic that is often described as the role of federalism in international rela-

<sup>4</sup> World Summit Outcome, *supra* note 2, ¶ 139.

<sup>5</sup> See S.C. Res. 1674, ¶ 4 (Apr. 28, 2006) (“Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”).

<sup>6</sup> See U.N. Secretary-General, *Implementing the Responsibility to Protect*, at 1, U.N. Doc. A/63/677 (Jan. 12, 2009) (“The present report responds to one of the cardinal challenges of our time, as posed in paragraphs 138 and 139 of the 2005 World Summit Outcome: operationalizing the responsibility to protect . . .”).

<sup>7</sup> For academic support for the World Summit Outcome, see *infra* note 65.

<sup>8</sup> See generally BRUCE HOFFMAN, *INSIDE TERRORISM* (rev. ed. 2006) (describing the origins of modern terrorism and the motivations of particular terrorist groups); MARK JUERGENSMEYER, *TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE* (3d ed. 2003) (comparing various religious traditions’ justifications for violence); Ariel Merari, *The Readiness to Kill and Die: Suicidal Terrorism in the Middle East*, in *ORIGINS OF TERRORISM: PSYCHOLOGY, IDEOLOGIES, THEOLOGIES, STATES OF MIND* 192, 192–207 (Walter Reich ed., 1998) (describing the psychology of terrorists and their general attitude toward human life); BRIGITTE L. NACOS, *TERRORISM AND COUNTERTERRORISM: UNDERSTANDING THREATS AND RESPONSES IN THE POST-9/11 WORLD* (2d ed. 2008) (analyzing the varying motivations for terrorists in the United States and in other nations); JOBY WARRICK, *BLACK FLAGS: THE RISE OF ISIS* (2015) (discussing the rapid emergence of ISIS after the U.S. invasion of Iraq following Sept. 11, 2001).

<sup>9</sup> See DANIEL BYMAN & MATTHEW WAXMAN, *THE DYNAMICS OF COERCION: AMERICAN FOREIGN POLICY AND THE LIMITS OF MILITARY MIGHT* 48–86, 132–34 (2002); SETH G. JONES, *WAGING INSURGENT WARFARE: LESSONS FROM THE VIETCONG TO THE ISLAMIC STATE* 9, 176–203 (2017); DAVID J. KILCULLEN, *COUNTERINSURGENCY* 1–2 (2010); GANESH SITARAMAN, *THE COUNTERINSURGENT’S CONSTITUTION: LAW IN THE AGE OF SMALL WARS* 5–20 (2013); Karl W. Eikenberry, *The Limits of Counterinsurgency Doctrine in Afghanistan*, 92 *FOREIGN AFF.* 59, 66, 69 (2013). Conflicts of this sort are often viewed as a new development. *But see* JOHN A. NAGL, *LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA TO VIETNAM* (2005) (discussing the British conflict in Malaysia from 1948 to 1957 as well as U.S. involvement in Vietnam); DOUGLAS PORCH, *COUNTERINSURGENCY: EXPOSING THE MYTHS OF THE NEW WAY OF WAR* 145–52, 175–79, 268–88 (2013) (describing earlier counterinsurgency conflicts such as Algeria, Palestine, and Northern Ireland).

tions. A good deal of this literature addresses the question of whether the subunits of a federal nation or quasi-federal nation, particularly the United States, should be able to maintain relations of one sort or another with other nations.<sup>10</sup> Another theme is whether certain international agreements by the national government infringe American state sovereignty by delegating decision making authority to international institutions.<sup>11</sup> These are interesting

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<sup>10</sup> See, e.g., MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* (2016) (arguing that the extensive role American states and cities play in international relations should be recognized as a basic feature of the governmental structure of the United States); Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1221 (2008) (describing “intersystemic governance” as a theory of dual federalism that accounts for the growing independent voices of states and localities in the international arena while recognizing that this trend “involves no displacement of national voice”); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001) (examining state and local attempts to “adopt” international human rights norms and treaties and arguing for a new analytical model that balances national and state/local sovereignty claims in the context of international human rights obligations); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008) (investigating the expanding role of translocal organizations of government actors (TOGAs) in shaping law and policy in the context of climate change and arguing for according TOGAs “special forms of legal status”); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000) (arguing that the Treaty Clause, enforced through the dormant treaty power, precludes states from bargaining with foreign nations, but permits incidental effects and presidential exceptions). Other works challenge the conventional view that the national government possesses exclusive authority over foreign relations in a federal system. See, e.g., Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997) (observing that the U.S. constitutional system does not grant the national government exclusive authority over international relations and that it would not be possible to do so); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007) (exploring “translocal transnationalism” and judicial and congressional responses to its growth); Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115 (2007) (advocating for a “polyphonic” understanding of federalism and applying it to the transnational and domestic contexts).

<sup>11</sup> See, e.g., Enid F. Beaumont, *Domestic Consequences of Internationalization*, in *GLOBALIZATION AND DECENTRALIZATION: INSTITUTIONAL CONTEXTS, POLICY ISSUES, AND INTERGOVERNMENTAL RELATIONS IN JAPAN AND THE UNITED STATES* 374, 374–86 (Jong S. Jun & Deil S. Wright eds., 1996) (describing the effects of globalization and international trade agreements on federal arrangements); JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* 66–79 (1998) (arguing that global governance conflicts with federalism); George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. 463 (1998) (observing that international agreements that grant authority to institutions with ongoing decision making authority can impose requirements in matters allocated to state authority); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003) (arguing that international treaties enable the federal government to increase its range of authority over the states); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004) (observing that international agreements that grant authority to international institutions may interfere with some aspects of federalism, but serve a similar purpose by diffusing power); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX.

and important questions for any nation, and particularly for federalized ones, but most of the discussion relates to the internal organization of a nation, that is, to domestic law, not to international law. If the nation's domestic law permits contacts between its subunits and foreign nations, there is really no international law question worth discussing. It goes without saying that a foreign nation can engage in the permitted contacts; no principle of international law forbids contacts with a nation that the nation itself has authorized.<sup>12</sup> The international law question is whether one nation is allowed to intervene in the affairs of another nation against that second nation's will, either by force or through agreements with subunits of that second nation. This subject seems to be rarely discussed in the existing literature.<sup>13</sup> It is the topic that this article will address.

The basic argument is that the federalized structure of a nation does not provide a separate ground for intervention. That is, the fact that a nation has granted autonomy rights to one or more of its subunits should not be seen as justifying intervention that would otherwise be unjustified. But fed-

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INT'L L.J. 527, 537 (2003) (arguing that international agreements that grant authority to institutions with ongoing decision making authority can undermine American federalism).

<sup>12</sup> It is difficult to prove a negative, but I have been unable to find any discussion of federalism in a number of the major contemporary monographs and collections by international law and relations scholars discussing intervention. The term "federalism" and its cognates is absent from the alphabetical place in the indices of these works where it would appear if it had been included. *E.g.*, BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 317 (Gene M. Lyons & Michael Mastanduno eds., 1995); EVANS, *supra* note 2, at 335; K. M. FIERKE, DIPLOMATIC INTERVENTIONS: CONFLICT AND CHANGE IN A GLOBALIZING WORLD 218 (2005); STEPHEN A. GARRETT, DOING GOOD AND DOING WELL: AN EXAMINATION OF HUMANITARIAN INTERVENTION 208–09 (1999); AIDAN HEHIR, HUMANITARIAN INTERVENTION: AN INTRODUCTION 296 (2d ed. 2013); ERIC A. HEINZE, WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION 199–200 (2009); HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 219 (Jennifer M. Welsh ed., 2004); HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 340 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); HUMANITARIAN INTERVENTION 301 (Terry Nardin & Melissa S. Williams eds., 2006); INTERVENTION IN WORLD POLITICS 197 (Hedley Bull ed., 1984); KILCULLEN, *supra* note 9, at 242; FIONA TERRY, CONDEMNED TO REPEAT? THE PARADOX OF HUMANITARIAN ACTION 278 (2002); SAMUEL TOTTEN, THE PREVENTION AND INTERVENTION OF GENOCIDE: AN ANNOTATED BIBLIOGRAPHY 1136 (2007); WEISS, *supra* note 2, at 189; NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 324 (2000); HIKARU YAMASHITA, HUMANITARIAN SPACE AND INTERNATIONAL POLITICS: THE CREATION OF SAFE AREAS 210 (2004).

<sup>13</sup> This same distinction applies to alliances such as the European Union that place limits on certain international contacts by the members of the alliance. Again, if the alliance allows contacts, there is no international law question; if it does not, then the international law question is whether a foreign nation is entitled to violate the terms of the alliance. *See* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1156 (2007) (arguing for a "jurisgenerative" theory of the global legal environment that accounts for the interplay of multiple normative actors, communities, and commitments). *See generally* Dennis C. Mueller, *Federalism and the European Union: A Constitutional Perspective*, 90 PUB. CHOICE 255 (1997) (examining the structure, decision-making process, and goals of the European Union from a constitutional perspective).

eralism should be treated as a potential remedy once intervention is deemed justifiable on some other ground. To the extent that the decision to intervene depends, as it often should, on the availability of a practicable remedy, the possibility of granting some subunit autonomy rights might thus be regarded as a ground for intervention that might otherwise be deemed inadvisable. In addition, the federalized structure of a nation can be viewed as creating a presumption that certain trade and cultural relations with that nation's subunits are authorized, a presumption that the central government would need to counteract by explicit declaration.

The inquiry begins with a definition of federalism and, more specifically, with an account of the features that make federalism a distinctive mode of internal governance (Part I). Part II explores the effect of federalism on intervention. After defining the range of possible justifications for intervention—which run from rescue through humanitarian aid, suppression of terrorism and protection of human rights, establishment of self-determination, and finally regime change (Part A)—it assesses the impact of federalism on each of these justifications (Part B). It concludes with a more detailed discussion of the main impact that it finds, which is that federalism serves as a long-term solution following certain types of interventions and helps justify those interventions (Part C). Part III proceeds to discuss the less dramatic, but more widespread form of intervention that federalism might affect: the decision of one nation to respond to a request for trade or cultural relations with a subunit of another nation that potentially violates that other nation's national policy.

## I. DEFINING THE ISSUE: FEDERALISM'S INTERNATIONAL SIGNIFICANCE

In order to evaluate the role of federalism in international relations, it is necessary to determine what federalism actually means. This has been a source of continued debate among scholars in the field. In some sense, of course, definitions are arbitrary, but federalism carries with it an array of associations that makes the term itself contested territory.<sup>14</sup> A wide range of virtues have been claimed to flow from it.<sup>15</sup> As a result, there is a certain

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<sup>14</sup> See generally DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* (1987) (describing the way political controversies focus on control of terminology).

<sup>15</sup> See, e.g., SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 386–88 (1993) (diffuses government power and protects liberty); Robert P. Inman & Daniel L. Rubinfeld, *A Federalist Fiscal Constitution for an Imperfect World: Lessons from the United States*, in *FEDERALISM: STUDIES IN HISTORY, LAW, AND POLICY* 79, 84–86 (Harry Scheiber ed., 1988) (allows people to choose preferred combination of government services); WILLIAM S. LIVINGSTON, *FEDERALISM AND CONSTITUTIONAL CHANGE* 7–10 (1956) (diffuses government power and protects liberty); WALLACE OATES, *FISCAL FEDERALISM* (1972) (allows people to choose preferred combination of government services); Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433 (2002) (diffuses government power, protects liberty,

argumentative and normative force that inheres in taking control of the term and asserting that one's own view constitutes its real meaning. This leads, unfortunately, to conceptual confusion. In an effort to avoid these tendencies, the discussion here focuses on the essential features of federalism, rather than attempting to settle on a particular definition. It will identify those features as a grant of juridical autonomy to subunits of a nation, a means of resolving questions of political identity, and a pragmatic solution that does not apply universally, but only to certain groups of people under certain circumstances.

The most basic feature of a federal regime, as identified by William Riker, is that it has two levels of functioning government, one superior and the other subordinate; that it grants the subordinate level of autonomy over some significant areas of governance; and that it enforces this autonomy by some means that is regarded as definitive, typically judicial review of government decisions.<sup>16</sup> Federalism can be contrasted with a unitary regime, where all political authority resides in the central government and no subordinate entity is granted any legal autonomy. In other words, in a unitary or non-federal regime, subordinate entities, or subunits of the state, have no rights and are regarded as mere creatures of the central authority.

Malcolm Feeley and I have pointed out in several previous publications that federalism must be distinguished from decentralization.<sup>17</sup> Decentralization is a managerial device whereby decisions are made by subordinate units of an entity. In the context of government, decentralization, like federalism, involves at least two levels of governance and provides that some decisions will be made at the subordinate level. Unlike federalism, however, decentralization does not necessarily grant the subordinate entities, or subunits, any measure of autonomy. The allocation of decision-making authority to subunits can be regarded as a matter for the central au-

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and allows people to choose preferred combination of government services); Charles Fried, *Federalism: Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y 1 (1982) (fosters experimentation); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979) (encourages experimentation); Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL'Y 196, 205–09 (1991) (diffuses power and protects liberty); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (allows people to choose preferred combination of government services); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 3 (1995) (preserves the free market).

<sup>16</sup> WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 11 (1964).

<sup>17</sup> MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 20–29 (2008) [hereinafter FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*]; MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 171–77* (1998); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910 (1994) [hereinafter Rubin & Feeley, *Federalism: Some Notes on a National Neurosis*].



thority to determine, in its own discretion. While all federal regimes are necessarily decentralized to some extent—the subunits must be given some authority in order to possess any autonomy—not all decentralized regimes are federal. In a unitary regime, the central government can grant extensive authority to the subunits if it chooses, but it can also cancel any authority it has granted or countermand any one of the subunits' decisions.

The reason to insist on this distinction is that it is essential to understanding different modes of governance. Every nation larger than Monaco is decentralized to some extent.<sup>18</sup> So are most large and medium-sized corporations or non-profits, universities and colleges, athletic leagues, religious organizations, criminal organizations, and virtually every other institution of any magnitude. Of course, the extent of decentralization will vary from institution to institution, and even from time to time within the same institution. But decentralization is a basic management technique, like hierarchy or record-keeping, that is almost universally employed in institutional design.<sup>19</sup>

Federalism is a different matter. It is generally associated with political entities, and more specifically with nation states, and it is rare, though not unknown, in other types of institutions.<sup>20</sup> It is not universal, but it represents

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<sup>18</sup> See THOMAS M. ECCARDT, *SECRETS OF THE SEVEN SMALLEST STATES OF EUROPE* 12–13 (2005) (describing internal governance of Monaco and other diminutive European states); LOCAL GOVERNMENT AND URBAN AFFAIRS IN INTERNATIONAL PERSPECTIVE: ANALYSES OF TWENTY WESTERN INDUSTRIALIZED COUNTRIES 9 (Joachim Jens Hesse ed., 1991). The only nation smaller than Monaco, which has an area of 0.76 square miles, ECCARDT, *supra*, at 269, is the Vatican, with an area of 0.2 square miles. ECCARDT, *supra*, at 315. San Marino, which measures twenty-four square miles, ECCARDT, *supra*, at 291, is divided into nine districts, called castelli. ECCARDT, *supra*, at 12. Liechtenstein, at sixty-two square miles, is divided into two regions, one with six communes and the other with five. ECCARDT, *supra*, at 12.

<sup>19</sup> See Kenneth Arrow & Leonid Hurweiz, *Decentralization and Computation in Resource Allocation*, in *ESSAYS IN ECONOMICS AND ECONOMETRICS* 34, 34 (Ralph W. Pfouts ed., 1960); ERNEST DALE, *ORGANIZATION* 104–30 (1967); Sumantra Ghoshal & Christopher Bartlett, *The Multinational Corporation as an Interorganizational Network*, in *ORGANIZATION THEORY AND THE MULTINATIONAL CORPORATION* 77, 77 (Sumantra Ghoshal & D. Eleanor Westney eds., 1993); MANFRED KOCHEN & KARL DEUTSCH, *DECENTRALIZATION: SKETCHES TOWARD A RATIONAL THEORY* (1980); WILLIAM T. MORRIS, *DECENTRALIZATION IN MANAGEMENT SYSTEMS* (1968); John Tomaney, *A New Paradigm of Work Organization and Technology?*, in *POST-FORDISM: A READER* 157, 157 (Ash Amin ed., 1994).

<sup>20</sup> Most corporations are unitary, although the Japanese zaibatsu may be regarded as federal, in that the component companies are separate entities, see MARIUS B. JANSEN, *THE MAKING OF MODERN JAPAN* 605–06 (2000); EDWIN O. REISCHAUER, *THE JAPANESE* 180–82 (1977), and modern multinational corporations may be moving toward federal-type organization, see Ghoshal & Bartlett, *supra* note 19. Most colleges and universities are unitary as well, but the Claremont Colleges can be described as federal. See ROBERT J. BERNARD, *AN UNFINISHED DREAM: A CHRONICLE OF THE GROUP PLAN OF THE CLAREMONT COLLEGES* (1982). The point is that a federal, or federal-type structure, is not impossible in non-political settings, but it tends to be rare.

a specific, often controversial, and in some ways problematic choice.<sup>21</sup> Naturally, there are gradations between unitary and federal regimes, as well as borderline cases that may be difficult to categorize; it seems safe to say that no nation organizes its internal affairs on the basis of conceptual purity. But the endpoints of the continuum reflect real, qualitative differences based on whether the subordinate units of the government have inviolable areas of autonomy, or, to use a different formulation, whether they have enforceable rights against the center. For example, proponents of American federalism often speak about the virtues of localities: they place the government closer to the people, they encourage participation, and they offer a choice between different bundles of government services.<sup>22</sup> In fact, these are the principal reasons the U.S. Supreme Court has given for reviving the federalism doctrine.<sup>23</sup> But local jurisdictions in the United States have nothing to do with

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<sup>21</sup> See FEELEY & RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE, *supra* note 17, at 38–68; Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1025–41 (1997).

<sup>22</sup> See, e.g., Jason Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487 (2003) (discussing advantages and disadvantages of local and state resource management); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (discussing the value of local governments in responding to diverse interests and implementing competition and innovation in government); Resnik, *supra* note 10 (discussing international relations conducted by American cities); Tiebout, *supra* note 15 (arguing that federalism allows people to choose among local jurisdictions with different combinations of taxes and public services). In fact, much of the literature on fiscal federalism, which celebrates people's ability to choose different bundles of taxation and government services by moving from one jurisdiction to another, is primarily about local communities, even if it uses the term "states." While people may move from one state to another for these reasons (which generally requires them to change jobs or retire), the much more common pattern is that they keep the same job, but consider the tax and service pattern of different local jurisdictions when making residential choices. Michael McConnell's defense of "federalism," for example, states: "smaller units of government have an incentive, beyond the mere political process, to adopt popular policies . . . . It is well known, for example, that families often choose a community on the basis of the school system; a better school system encourages development and raises property values." McConnell, *supra*, at 1498–99.

<sup>23</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (discussing how federalism places government close to the people, gives people a choice among different jurisdictions, and allows experimentation with different solutions to widely-shared problems). *Gregory* was a statutory interpretation case involving the federal Age Discrimination in Employment Act. *Id.* at 455. But in holding that the Act must be interpreted in light of federalism concerns, Justice O'Connor articulated the rationale that the Court subsequently relied upon in the constitutional cases that revived federalism doctrine, viz., *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992). For discussions, see Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995); and Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199 (2003).

federalism,<sup>24</sup> since no locality has any juridical rights against its own state or the national government as a matter of national law.<sup>25</sup> Only states can be vehicles of federalist virtue under our system.

In recent years, federalism scholarship regarding the United States has been greatly enriched by shifting its focus from rights enforced by the judiciary to political and administrative relationships that are implemented by executive and legislative actors.<sup>26</sup> This literature can be regarded as a sustained inquiry into the mechanisms of decentralization. While juridical questions of state rights and sovereignty are not ignored, the new insights this literature has produced stem largely from its ability to go beyond such questions and consider issues of governance. For present purposes, the lesson that the recent federalism literature offers is that relations between a central government and its subsidiary units are inevitably varied and complex. Subsidiary units necessarily carry out various governmental functions in all nations, whether they are federal or unitary.

Thus, allowing one nation to deal with subsidiary units of another on the basis of the fact that the subsidiary possesses a decision-making role would in effect dissolve the nation-state as the unit of international relations, and would constitute a complete rejection of the Westphalian system. The question here is whether the distinctive organization of some nations that characterizes true federalism—the grant of definitive rights to a subunit—should be recognized as a modification within that system. This ques-

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<sup>24</sup> See Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1307–08 (1994); Rubin & Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note 17, at 914–20.

<sup>25</sup> See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (powers of localities rest "in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers . . . constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers . . . All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest"). For recent restatements, see *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 70–72 (1978); and *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967).

<sup>26</sup> See, e.g., ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* 272–80 (2011); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1938–39 (2014); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); William Wade Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 12 (1997); Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 KAN. L. REV. 1219 (1997); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011); Robert A. Mikos, *Enforcing State Law in Congress' Shadow*, 90 CORNELL L. REV. 1411 (2005); Cristina M. Rodriguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2101 (2014); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

tion necessarily depends on the those features of federalism that illuminate its meaning and purpose.

Feeley and I argue that the meaning and purpose of federalism is derived from issues of political identity.<sup>27</sup> Political identity refers to the way that people perceive their relationship toward controlling governmental institutions. Do they see themselves primarily as members of the nation in which they reside or as members of a distinct group that either crosses national boundaries or exists as a minority within a single nation?<sup>28</sup> Perceptions of this sort are, of course, socially constructed, as Benedict Anderson has noted.<sup>29</sup> There is no single factor apart from the perceptions themselves that determines people's sense of political identity.<sup>30</sup> In some cases, language can be determinative, but many different nations, such as Australia and the U.K, Peru and Chile, Portugal and Brazil, Algeria and Saudi Arabia, or Germany and Austria, speak the same language, while other nations, such as India, China, Cameroon, and Papua New Guinea maintain a national identity despite a multiplicity of languages.<sup>31</sup> This is equally true for reli-

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<sup>27</sup> FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*, *supra* note 17, at 7–12, 43–60.

<sup>28</sup> See, e.g., GEOFFREY BARRACLOUGH, *THE ORIGINS OF MODERN GERMANY 406–40* (1984) (development of German national identity during the nineteenth century); EDMOND J. KELLER, *IDENTITY, CITIZENSHIP, AND POLITICAL CONFLICT IN AFRICA* (2014) (disjunction of citizenship and political identity in Nigeria, Ethiopia, Côte d'Ivoire, Kenya, and Rwanda); NATIONAL IDENTITY, NATIONALISM AND CONSTITUTIONAL CHANGE (Frank Bechhofer & David McCrone eds., 2009) (changing political identity in modern Britain); SERHII PLOKHY, *THE GATES OF EUROPE 147–73* (2015) (emergence of Ukrainian political identity, with a poet and a historian playing crucial roles); EUGEN WEBER, *PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870–1914* (1976) (emergence of national identity in rural France as a result of conscription and national media); ADAM ZAMOYSKI, *THE POLISH WAY: A THOUSAND-YEAR HISTORY OF THE POLES AND THEIR CULTURE 259–85* (1994) (maintenance of Polish national identity after partition eliminated Poland as a nation-state).

<sup>29</sup> BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 13–16* (1983); see also BERNARD YACK, *NATIONALISM AND THE MORAL PSYCHOLOGY OF COMMUNITY 2–5* (2012) (socially constructed sense of community, based on “social friendship,” serves as the basis for nationalism in the individualistic modern era).

<sup>30</sup> For general discussions of the issue of identity, and specifically of the way it affects people's sense of political and social community, see, for example, ANDERSON, *supra* note 29; MANUEL CASTELLS, *THE POWER OF IDENTITY 1–67* (1997); JAMES FENTRISS & CHRIS WICKHAM, *SOCIAL MEMORY: NEW PERSPECTIVES ON THE PAST 87–143* (1992); AMIN MAALOUF, *IN THE NAME OF IDENTITY: VIOLENCE AND THE NEED TO BELONG 9–15* (Barbara Bray trans., 2000); ALAIN TOURAINE, *CAN WE LIVE TOGETHER?: EQUALITY AND DIFFERENCE 186–88* (David Macey trans., 2000); JAMES A. VELA-McCONNELL, *WHO IS MY NEIGHBOR?: SOCIAL AFFINITY IN A MODERN WORLD 30–33* (1999); YACK, *supra* note 29, at 4. Regarding Somalia, a source of particular concern at present, see AFYARE ABDI ELMU, *UNDERSTANDING THE SOMALIA CONFLAGRATION: IDENTITY, POLITICAL ISLAM AND PEACEBUILDING 28–47* (2010).

<sup>31</sup> For a useful catalogue of languages and linguistic groups, see DAVID CRYSTAL, *THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE 292–339* (1987). There are some 500 Indo-Aryan languages spoken in north India and about twenty Dravidian languages, belonging to an entirely different linguistic family, spoken in south India. *Id.* at 301, 308. Apart from numerous Altaic,

gion and ethnicity. The same two religions that split Ireland into separate regimes<sup>32</sup> produce no major difference in political identification in modern Canada or the United States.<sup>33</sup> Within Africa, ethnic differences have produced separatist movements in Nigeria, Ethiopia, and the Sudan, but not in Kenya, Senegal, or Cameroon.<sup>34</sup>

Federalism offers a way for a nation whose people have divided political identities to remain intact or to function effectively. It provides a prag-

Tai, Tibetic, and Miao-Yao languages spoken by ethnic minorities in China, the Han Chinese majority speaks eight different languages, which use the same written form, but are mutually unintelligible when spoken. *Id.* at 307, 310–13. Most sub-Saharan African nations have a number of different languages. *See id.* at 314; JOSEPH H. GREENBERG, *THE LANGUAGES OF AFRICA* 161–77 (1966); Vic Webb & Kembo-Sure, *The Languages of Africa*, in *AFRICAN VOICES: AN INTRODUCTION TO THE LANGUAGES AND LINGUISTICS OF AFRICA* 26, 26–27, 47–52 (Vic Webb & Kembo-Sure eds., 2000). In Cameroon, which is the size of California and has a population of about twenty million, over 200 different languages are spoken. *See* JOHN MUKUM MBAKU, *CULTURE AND CUSTOMS OF CAMEROON* 1, 5, 14–15 (2005). Papua New Guinea, roughly the same size but with only about six million people, has over 600 languages. CRYSTAL, *supra*, at 317.

<sup>32</sup> *See* David Fitzpatrick, *Ireland Since 1870*, in *THE OXFORD HISTORY OF IRELAND* 174, 180–229 (R. F. Foster ed., 1989); DAVID MCKITTRICK & DAVID McVEA, *MAKING SENSE OF THE TROUBLES* 1–25 (2000); CLAIRE MITCHELL, *RELIGION, IDENTITY AND POLITICS IN NORTHERN IRELAND: BOUNDARIES OF BELONGING AND BELIEF* 1–20 (2006).

<sup>33</sup> *See* MARK A. NOLL, *THE OLD RELIGION IN A NEW WORLD: THE HISTORY OF NORTH AMERICAN CHRISTIANITY* 113–85 (2002) (Christian pluralism, acculturation, and fragmentation in Canada and the United States). European-Americans have remained more religious than their ancestors because religion in the United States serves as an important basis for people's cultural identities. *See* STEVE BRUCE, *GOD IS DEAD: SECULARIZATION IN THE WEST* 31–36, 219–20 (2002); WILL HERBERG, *PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* 13 (1955). At the same time, these identities possess relatively low political salience for Americans, at least at the national level. Instead, the role of religion in people's political identities has been to serve as a generalized commitment to a particular set of values, not a set of particularized doctrines. Thus, Americans who see themselves as religious, whether Protestant, Catholic, or Jewish, tend to affiliate with conservative political forces, while those for whom religion is relatively unimportant affiliate with liberal ones. *See* EDWIN S. GAUSTAD & LEIGH E. SCHMIDT, *THE RELIGIOUS HISTORY OF AMERICA* 398–412 (2002); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 107–32 (1991). The upshot is that religion itself is an important source of political identity for Americans, but the religious distinctions that loomed so large in European history have only cultural significance, and are thus not a source of political division. This demonstrates the way that similar belief structures can have different meanings in different political contexts.

<sup>34</sup> *See* TOYIN FALOLA & MATTHEW M. HEATON, *A HISTORY OF NIGERIA* 158–208 (2008); ROBERT D. KAPLAN, *SURRENDER OR STARVE: TRAVELS IN ETHIOPIA, SUDAN, SOMALIA, AND ERITREA* 99–104 (2003); KELLER, *supra* note 28, at 51–86, 103–24 (Nigeria, Ethiopia, and Kenya); HAROLD G. MARCUS, *A HISTORY OF ETHIOPIA* 199–201 (1994); MARTIN MEREDITH, *THE FATE OF AFRICA: A HISTORY OF FIFTY YEARS OF INDEPENDENCE* 193–217, 270–71, 399–400 (2005) (Nigeria, Senegal, and Cameroon); RAPH UWECHUE, *REFLECTIONS ON THE NIGERIAN CIVIL WAR* 62–67 (1971). Several observers suggest that, despite unquestionable ethnic differences within the new African nations, the ethnic conflict was generated by political factors, either the legacy of colonialism, *see* BASIL DAVIDSON, *THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE* 228–230 (1992), or the divisive policies of political leaders, *see* BILL BERKELEY, *THE GRAVES ARE NOT YET FULL: RACE, TRIBE AND POWER IN THE HEART OF AFRICA* 124–125, 139–40 (2001).

matic alternative to secession, oppression, or deep and continuous dissatisfaction. The reason a central government would agree to permanently relinquish some of its authority to a governmental subunit is to satisfy a group of citizens who have a separate political identity and demand some sort of autonomy for the subordinate government that rules their region. The reason any group of people within the society would expend their energy and political capital on such a challenging demand is that they possess a separate identity of this sort. In fact, if they did not have a separate political identity, they could probably not even conceptualize a demand for federalism, and they would most likely be unable to mobilize any significant political support for it.

An important limit on the applicability of federalism as a governance strategy, and one that emphasizes its pragmatic character, is that the group of people who have a separate political identity must be geographically concentrated.<sup>35</sup> More particularly, a significant portion of the group must be located in a delimited region and they must generally constitute the dominant population of that region. Since federalism, by definition, grants autonomy to geographic subunits of the nation, it serves no value if the group in question is geographically dispersed. Muslims in France, Christians in Lebanon, Russians in Kazakhstan, and African-Americans in the United States may have separate political identities, but because they do not dominate any specific region of their country, federalism cannot do them any good and they must turn to other mechanisms. Thus, federalism cannot be viewed as something that should be provided to all people, or even all people of a given nation. It is a device that can be used to satisfy particular demands by groups of people who, due to accidents of history, are in a position to make use of it.

This intrinsic limit on the applicability of federalism leads to a more general point. Federalism is not an independent principle of government, like liberty, social equality, or self-determination. There is no normative account that makes federalism desirable per se. Rather, as will be discussed in greater detail below, it is a pragmatic strategy; a means of organizing the internal structure of a nation in order to solve a specific set of problems. It can thus be described as a tragic compromise.<sup>36</sup> Arguably, it would be pref-

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<sup>35</sup> RAMESH DUTTA DIKSHIT, *THE POLITICAL GEOGRAPHY OF FEDERALISM: AN INQUIRY INTO ORIGINS AND STABILITY* 10–12 (1975); see IVO D. DUCHACEK, *COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS* 53–57 (1970); Will Kymlicka, *Is Federalism a Viable Alternative to Secession?*, in *THEORIES OF SECESSION* 111, 119–22 (Percy B. Lehning ed., 1998); James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 *VAND. L. REV.* 1251 (1994).

<sup>36</sup> FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*, *supra* note 17, at 38–60.

erable if everyone in a given nation possessed the same political identity so that there was no problem of this sort to be resolved. This is not a Panglossian fantasy; rather, it is the situation that applies in many nations, such as France, Chile, Japan, and, as Feeley and I have argued elsewhere, the contemporary United States.<sup>37</sup> Where it does not apply, however, and a sub-optimal solution must be found, federalism is often a satisfactory choice, and sometimes a particularly good one.

## II. FEDERALISM AND DEFINITIVE INTERVENTION

The single most important way in which federalism might be relevant in international relations is to affect the crucial decision about whether one nation should intervene in the internal affairs of another. As noted at the outset, the Right to Protect provisions in the 2005 Outcome Document recognize and, under certain circumstances, encourage such intervention, while international terrorism often provides a strong motivation for it. The federalist character of a nation—that is, the degree to which the nation grants autonomy to its subsidiary units—might well change what constitutes an internal affair and thereby change another nation's willingness to intervene. It might be said that the federalized nation's subunits are visible to outside nations in a way that the fully subordinated divisions of a unitary state are not. A natural question, therefore, is whether outside nations can rely on or respond to these divisions.<sup>38</sup>

### A. *The Spectrum of Definitive Intervention*

The starting point for answering this question is the basic principle of the Westphalian system: the sovereignty of each nation and the consequent presumption against intervention in its internal affairs by any other nation.<sup>39</sup> If one is prepared to argue that sovereignty is irrelevant, and that nations should intervene in the affairs of other nations to the same extent they police themselves,<sup>40</sup> then the fact that a particular nation is federal will make

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<sup>37</sup> *Id.* at 96–123; see Rubin & Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note 17, at 944–48; Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 *ANNALS AM. ACAD. POL. & SOC. SCI.* 37, 38 (2001); Rubin, *The Fundamentality and Irrelevance of Federalism*, *supra* note 21, at 1049–63.

<sup>38</sup> There are many other international law issues of course, but they generally do not implicate the federal character of the nations involved. Even so closely allied a question as whether it is permissible for a particular nation to act as intervener (as opposed to a particular nation being the subject of intervention) does not depend on federalism-related concerns. There does not appear to be any international law argument that would make Canada, Belgium, and Switzerland better or worse interveners than France, Japan, and Uruguay.

<sup>39</sup> See sources cited *supra* note 1.

<sup>40</sup> Stated in this way, few people would fully subscribe to this view. But some scholars favor intervention strongly enough to suggest that the federal nature of the subject nation might well be

no difference. If one believes that sovereignty is sacrosanct and that intervention is never justified except in cases of genuine self-protection or protection of an ally, then the federal nature of a given nation will be similarly irrelevant. But in the vast middle ground, where distinctions are made and there is room for movement in one direction or another, the federal nature of the regime against which intervention is contemplated could well make a considerable difference.

As widely noted, there is a range of ways by which one nation might intervene in the affairs of another.<sup>41</sup> For purposes of this discussion, the main qualification is that the intervention must be definitive, that is, it must be an identifiable, specific action by one nation that intentionally affects another nation in opposition to the second nation's desires.<sup>42</sup> Otherwise, the action in question merges into ordinary relations among nations, since nearly all international relations can be said to affect the internal affairs of the interacting nations to some extent.

Definitive interventions, as just defined, can be arranged along a spectrum based on the extent to which the intervening nation is affecting the internal affairs of the subject nation. At one end, which can be described as the weakest form of intervention, is rescue—an effort by one nation to extract its own citizens, or the citizens of an ally, from dangers to which the subject nation has exposed them. Implicit in the idea of a true rescue is that the intervener has no desire to affect the subject nation at all; the intention is to take control of the endangered group and get them out.<sup>43</sup>

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irrelevant to their considerations. *See, e.g.*, Simon Caney, *Humanitarian Intervention and State Sovereignty*, in *ETHICS IN INTERNATIONAL AFFAIRS* 117, 120–22, 131 (Andrew Valls ed., 2000); LEONARD W. DOOB, *INTERVENTION: GUIDES & PERILS* 143–45 (1993); EVANS, *supra* note 2; David Luban, *Just War and Human Rights*, 9 *PHIL. & PUB. AFF.* 160, 166, 170–73 (1980); W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 *AM. J. INT'L L.* 642, 644–45 (1984).

<sup>41</sup> *See, e.g.*, FIERKE, *supra* note 12 (categorizing interventions as moral, legal, military, economic, cultural, and therapeutic); Rosalyn Higgins, *Intervention and International Law*, in *INTERVENTION IN WORLD POLITICS*, *supra* note 12, at 29, 29–44; Stanley Hoffman, *The Problem of Intervention*, in *INTERVENTION IN WORLD POLITICS*, *supra* note 12, at 7, 7–28.

<sup>42</sup> The other qualification is that the action must constitute a true intervention. For example, initiating legal action under a treaty is not an intervention, because the subject nation has submitted itself to the treaty regime and the acting nation is only insisting on its rights under that treaty. Again, this is a large topic that need not be discussed at length for present purposes. The question for the article is whether federalism affects those actions that are viewed, by general agreement, as true interventions.

<sup>43</sup> *See* Friedrich Kratochwil, *Sovereignty as Dominium: Is there a Right of Humanitarian Intervention?*, in *BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION*, *supra* note 12, at 21, 36–37; SHAW, *supra* note 1, at 1032–34; C. H. M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *RECUEIL DES COURS* 451, 488–94 (1952); Michael Walzer, *The Politics of Rescue*, 62 *SOC. RES.* 53, 56, 61 (1995).



The next step along the spectrum involves humanitarian assistance, which can be distinguished from rescue on two grounds.<sup>44</sup> First, it generally involves citizens of the subject nation, not of the intervening nation. Second, the goal is not to extract these citizens, but to alleviate their situation within the nation to which they belong. This will generally require the intervener to produce a considerably greater impact on the subject nation's regime than would be necessary for a rescue.<sup>45</sup> The normative bases for humanitarian intervention stated in the U.N.'s World Summit Outcome Document are "genocide, war crimes, ethnic cleansing and crimes against humanity."<sup>46</sup> Genocide is strictly and narrowly defined by the U.N. Convention,<sup>47</sup> but the other terms are general and cover a wide range of actions by the subject nation.<sup>48</sup> To these might be added naturally occurring disasters such as famine, epidemic, earthquake, or flood if the nation in which they occur is either unable to respond, refuses, or seriously impedes external assistance.<sup>49</sup>

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<sup>44</sup> For discussions of humanitarian intervention generally, see Michael Akehurst, *Humanitarian Intervention*, in INTERVENTION IN WORLD POLITICS, *supra* note 12, at 95, 95–118; EVANS, *supra* note 2; GARRETT, *supra* note 12, at 5–6; HEHIR, *supra* note 12, at 20, 22–24; HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS, *supra* note 12, at 4–5; HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 12, at 130; Thomas Franck, *Legality and Legitimacy in Humanitarian Intervention*, in HUMANITARIAN INTERVENTION, *supra* note 12, at 143, 143–57; TERRY, *supra* note 12, at 17; WEISS, *supra* note 2; Thomas G. Weiss & Jarat Chopra, *Sovereignty Under Siege: From Intervention to Humanitarian Space*, in BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION, *supra* note 12, at 87, 87–114; WHEELER, *supra* note 12, at 33–34; and YAMASHITA, *supra* note 12, at 1–4.

<sup>45</sup> See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 143–44 (2d ed. 2003) (noting that it is generally regarded as justifiable to provide humanitarian assistance to a reprehensible regime).

<sup>46</sup> World Summit Outcome, *supra* note 2, ¶ 139.

<sup>47</sup> See Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 (“[A]cts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . .”). For a discussion, see SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE (2002); and WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 72–73 (2000). The term “genocide” was first introduced in RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79–82 (1944). Lemkin was also instrumental in securing the adoption of the Convention. See JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION 173–88 (2008).

<sup>48</sup> See, e.g., Walzer, *supra* note 52, at 101–08 (limiting military intervention to these extreme situations). Combating some of these actions might not constitute intervention, however. In many cases, and particularly in the category of war crimes, the acts about which the Outcome Document is concerned might occur in the course of armed conflict between nations, and might involve the behavior of the subject nation's armed forces in occupying another nation. Combatting those forces cannot be regarded as intervention in the internal affairs of the subject nation.

<sup>49</sup> One common basis for humanitarian intervention involves a failed state that can no longer protect its citizens from either human violence or natural disasters, with Somalia being a prime example. See BYMAN & WAXMAN, *supra* note 9, at 181–83. The internal structure of the subject nation does not seem to make a difference in this case, since that structure, whatever it was, has ceased to function. On the moral and pragmatic aspects of the humanitarian intervention in Somalia, see JOHN L. HIRSCH & ROBERT B. OAKLEY, SOMALIA AND OPERATION RESTORE HOPE: RE-

Intervention to counteract the abuse of human rights or to suppress terrorism represents a further step along the spectrum.<sup>50</sup> In addition to military force, which is necessary for either rescue or humanitarian intervention, this further intervention can consist of economic sanctions such as boycott or embargo.<sup>51</sup> As a result, it may seem to be a milder form of intervention than rescue or humanitarian aid.<sup>52</sup> In fact, counteracting human rights abuses or suppressing terrorism produces a greater impact on the subject nation's regime—first, because it addresses the political status of people who reside in, and are often citizens of, that nation; and second because it generally involves an ongoing, rather than an emergency, situation. Of course, such an intervention can overlap with humanitarian assistance. It is not difficult to argue that a nation that allows a group of its citizens to starve or die of a curable disease is committing a human rights violation of its own, or that a nation that allows terrorists to flourish in its midst is subjecting to danger its own citizens and citizens of other nations.<sup>53</sup> Despite this overlap, it is quite

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FLECTIONS ON PEACEMAKING AND PEACEKEEPING 161–63 (1995); Andrew S. Natsios, *Humanitarian Relief Intervention in Somalia: The Economics of Chaos*, in *LEARNING FROM SOMALIA: THE LESSONS OF ARMED HUMANITARIAN INTERVENTION* 77, 77–95 (Walter Clarke & Jeffrey Herbst eds., 1997); and KENNETH R. RUTHERFORD, *HUMANITARIANISM UNDER FIRE: THE US AND UN INTERVENTION IN SOMALIA* 178–79 (2008).

<sup>50</sup> In international law, the leading definition of human rights is the United Nations' Universal Declaration of Human Rights. G.A. Res. 217 (III) A (Dec. 10, 1948) [hereinafter Universal Declaration]. This was supplemented by the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], and the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The three documents are collectively known as the International Bill of Human Rights.

<sup>51</sup> *See generally* ROBERT D. BLACKWILL & JENNIFER M. HARRIS, *WAR BY OTHER MEANS: GEOECONOMICS AND STATECRAFT* 20 (2016) (discussing geoeconomics, which is defined as “[t]he use of economic instruments to promote and defend national interests, and to produce beneficial geopolitical results”); *ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY* (Richard N. Haass ed., 1998) (observing that economic sanctions are increasingly central to American foreign policy and assessing their effectiveness in specific instances); *HONEY AND VINEGAR: INCENTIVES, SANCTIONS, AND FOREIGN POLICY* (Richard N. Haass & Meghan L. O’Sullivan eds., 2000) (arguing for the expansion of “engagement,” that is, positive incentives, as a way for the United States to influence foreign nations); *SANCTIONS AS ECONOMIC STATECRAFT: THEORY AND PRACTICE* (Steve Chan & A. Cooper Drury eds., 2000) (analysis, using varied methodologies, of the effectiveness of sanctions and incentives in international relations); *GEOFF SIMONS, IMPOSING ECONOMIC SANCTIONS: LEGAL REMEDY OR GENOCIDAL TOOL?* (1999) (describing economic sanctions, and arguing that they often make innocent people within the subject nation suffer); *cf.* BYMAN & WAXMAN, *supra* note 9 (discussing various ways for the United States to exercise coercion, which is defined as any means short of brute force).

<sup>52</sup> Economic sanctions may thus be contrasted with a blockade, which is an act of war. *See* SHAW, *supra* note 1, at 1155–66; MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 172–75 (5th ed. 2015).

<sup>53</sup> It can also conflict with humanitarian concerns, since boycotts and embargoes often produce their effect by causing the citizens of the subject nation to suffer, and put pressure on their government in response. *See* *POLITICAL GAIN AND CIVILIAN PAIN: HUMANITARIAN IMPACTS OF ECONOMIC SANCTIONS* 16–21 (Thomas G. Weiss et al. eds., 1997).

possible to distinguish between the two situations, as Michael Walzer does in his well-known discussion of just war.<sup>54</sup>

Further along the definitive intervention spectrum are interventions to establish or enforce the self-determination of a group of people in the subject nation.<sup>55</sup> Such intervention affects the subject nation's political regime directly and intensively, being a direct challenge to its basic structure. Once again, this category can be merged with the prior one by simply defining self-determination as a human right. But there are conceptual advantages to making the distinction, despite its theoretical difficulties. Human rights involve the status of people, either individually or as a group, within the subject nation, while self-determination involves a group's entire relationship to that nation.

The extreme end of the intervention spectrum consists of efforts to impose a particular kind of government on the nation as a whole. This produces the most extensive impact on the nation's political regime, apart from outright conquest, since it represents an effort to change that regime in its entirety. Interventions of this sort were a particular feature of the European religious wars of the sixteenth and seventeenth centuries, where nations aligned with

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<sup>54</sup> WALZER, *supra* note 52, at 101–08. For a discussion, see *infra* pp. 215–20. The situations are distinguishable because the subject nation may not have the capacity to prevent a group of citizens from starving or dying of disease, but nonetheless object to outside assistance as an intrusion on its sovereignty, in which case its only human rights violation would be the tautological one of objecting to assistance. On the other hand, denying a group of citizens due process of law or their ability to follow their religion cannot be described as an emergency; it represents an ongoing situation resulting from a political choice by the subject nation. The point here, as in the case of federalism and decentralization, is to allocate two different terms to two distinguishable situations, an approach that is useful for analytic purposes. While the choice of terms is intended to correspond as closely as possible to ordinary meaning, no assertion is being made that these terms are invariably used in this manner in the literature. In fact, they are often conflated, sometimes for rhetorical impact. See, e.g., HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE (Philip Alston & Euan MacDonald eds., 2008) (discussing interventions to protect human rights, but describing them as humanitarian, Chapter 3 being titled “Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?”); Caney, *supra* note 40 (describing intervention as based on the duty of a nation to ensure that other nations respect human rights); Nancy Sherman, *Empathy, Respect, and Humanitarian Intervention*, 12 ETHICS & INT’L AFF. 103 (1998) (describing humanitarian intervention as protecting people’s right to pursue autonomous projects); Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 93 (J. L. Holzgrefe & Robert O. Keohane eds., 2003) (describing humanitarian intervention as “forcible intervention to protect human rights”).

<sup>55</sup> On the principle of self-determination generally, see ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 331–425 (2007); ANTONIO CASSESE, SELF DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (rev. ed. 1996); THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES (2000); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW (1977); and Daniel Philpott, *In Defense of Self-Determination*, 105 ETHICS 352 (1995).

two rival ideologies, Catholic and Protestant, contested with each other for control of individual principalities or states.<sup>56</sup> The savagely destructive character of this struggle, together with the injection of French *realpolitik*,<sup>57</sup> lead to the Peace of Westphalia and its principle of sovereignty. A similarly ideological struggle occurred during the Cold War, when both the United States and the Soviet Union intervened to impose capitalist or communist regimes on European and then Asian, African, and Latin American nations.<sup>58</sup> But the end of the Cold War did not end this mode of intervention. The rise of international terrorism has led to arguments that an attack by terrorists tolerated or encouraged by another nation is equivalent to an attack by that other nation itself, and justifies an effort to overthrow that other nation's government. This argument has merged with the belief that democracy is the only legitimate form of government<sup>59</sup> in order to justify efforts to effect regime change in several nations, including Afghanistan, Iraq, and Libya.

### *B. The Impact of Federalism in General*

In exploring the impact of federalism on these various types of interventions, a number of questions present themselves. First, is the federal character of the subject nation, considered on its own, a relevant consideration for an external nation's decision about whether it should intervene? Second, does a request for intervention from a subunit of a federalized nation provide greater justification for intervening than a request from some other group within that nation, or from a subunit of a unitary nation? Third,

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<sup>56</sup> See RICHARD S. DUNN, *THE AGE OF RELIGIOUS WARS 1559–1715* (2d ed. 1979); MARK KONNERT, *EARLY MODERN EUROPE: THE AGE OF RELIGIOUS WAR 1559–1715* (2d ed. 2006); DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY* (2003).

<sup>57</sup> See DAVID OGG, *EUROPE IN THE SEVENTEENTH CENTURY 120–274* (1960); GEOFFREY TREASURE, *SEVENTEENTH CENTURY FRANCE 146–80* (1967). Catholic France was an inveterate enemy of the Habsburg Empire, which championed the Catholic cause, and thus generally intervened on behalf of the Protestants, despite its suppression of Protestantism within its own boundaries. See OGG, *supra*, at 293–97; TREASURE, *supra*, at 368–95. Thus, once France had resolved its internal religious wars in favor of Catholicism and resumed its leading role in international affairs, the ability of the pro-Catholic forces to put pressure on Protestant regimes essentially came to an end. This example cautions against interpreting international conflict in purely ideological terms, even when the participants cast the conflict in those terms.

<sup>58</sup> See Philip Windsor, *Superpower Intervention*, in *INTERVENTION IN WORLD POLITICS*, *supra* note 12, at 45, 45–65.

<sup>59</sup> See LARRY DIAMOND, *THE SPIRIT OF DEMOCRACY: THE STRUGGLE TO BUILD FREE SOCIETIES THROUGHOUT THE WORLD 12–13* (2008); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 47 (1992); see also BUCHANAN, *supra* note 55, at 142–47, 314–22 (new states should only be recognized if they are democratic, other states should eventually become democratic); DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY xviii–xix* (2011) (arguing that globalization will often conflict with democratization, and that, in such cases, the requirements of the global economy should yield to nations' superior right to establish and protect democratic government).

does the possibility of imposing or restoring federalism offer a pragmatic resolution of the presenting problem that renders the initial intervention more justifiable?

It is difficult to formulate an answer to these questions by referring to the juridical concept of federalism. That concept only establishes that the subunits of the nation have certain rights against the central government. It emerges from the competing forces of regional autonomy and centralized control, but offers no criterion by which these forces might be balanced against each other. If federalism is conceived as a question of political identity, however, then the value of federalism in a given situation can be tested by asking whether the basis for intervention is the conflicting political identities of the people in the subject nation, and whether intervention can resolve the situation. Further clarity can be achieved by recognizing that federalism, although defined in terms of rights, is in fact a pragmatic political compromise. It makes no sense to ask whether people have a right to federalism. The relevant question is whether federalism is a means by which people's real rights can be secured.

Beginning with the weak, or least intrusive, end of the intervention spectrum, it would appear that the federal nature of the subject nation makes no difference in a case of rescue. The rescuer has no normative interest in the internal affairs of the subject nation, although of course it may need to be knowledgeable about those affairs at the pragmatic level to effectuate the rescue. Rather, it is simply trying to extract a group of people, generally its own citizens or the citizens of an ally, and leave the subject nation to its fate. The request for intervention is coming from a group of people whose political identity is that of foreigners and thus is unlikely to have any connection to the unitary or federal structure of the subject nation. The remedy consists simply of their rescue, which will enable them to leave the nation, although they may, of course, choose to go back when the crisis is resolved.

Humanitarian assistance necessarily engages the internal situation in the subject nation more directly, since it typically involves that nation's citizens and, as a general matter, anticipates that those citizens will remain within the nation, even if they must be temporarily evacuated.<sup>60</sup> Again,

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<sup>60</sup> It might involve encamped refugees, but in most such cases, humanitarian assistance would not be a form of intervention. The arrival of the refugees might result from either a decision of the host nation, as sovereign, or from a breach of its sovereignty, but in either case, humanitarian aid to those refugees would generally not be regarded by the host nation as a separate breach of its sovereign status. The question involving refugees is whether there are any obligations, on the part of the host nation or other nations, to provide assistance. See generally Chris Brown, *The Only Thinkable Figure? Ethical and Normative Approaches to Refugees in International Relations*, in REFUGEES IN INTERNATIONAL RELATIONS 151, 151–67 (Alexander Betts & Gil Loescher eds., 2011) (discussing moral duties of nations toward refugees in terms of the host nation, rather than

however, the federal or unitary character of the subject nation would not appear to make a difference in deciding whether intervention is justified. The criteria for intervening in this case depends on the scope and intensity of the victims' suffering, not on the political structure of the subject nation. Ethnic cleansing, for example, is just as serious and just as valid a basis for intervention if it is carried out against people who regard themselves as members of the nation, as did Germany's Jews or Ruanda's Tutsi, as it is if it is carried out against people who regard themselves as members of a conquered or potentially independent nation, as Nigeria's Biafrans or the former Yugoslavia's Croats apparently did.<sup>61</sup>

A much more complex set of questions, and ones that implicate federalism issues to a much greater extent, involve the next step along the spectrum: interventions to prevent violations of human rights, to support demands for self-determination, or to suppress terrorist activity. These interventions generally respond to on-going situations in the subject nation, rather than an immediate life-threatening crisis. To validate them, therefore, constitutes a more extensive rejection of the sovereignty principle.

It does not appear that federalism would be relevant to interventions directed toward suppressing a terrorist organization headquartered in the subject nation. The justification for the intervention is the impact on the intervener, and the subject nation's toleration or encouragement of the ter-

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the nation of origin); Jack Snyder, *Realism, Refugees, and Strategies of Humanitarianism*, in REFUGEES IN INTERNATIONAL RELATIONS, *supra*, at 29 (describing realistic strategies for host nations to provide refugees with effective humanitarian assistance); TERRY, *supra* note 12 (describing moral dilemmas that aid agencies face when providing aid to refugees and recommending realistic and strategic action).

<sup>61</sup> On Nigeria and Biafra, see CHINUA ACHEBE, *THERE WAS A COUNTRY: A PERSONAL HISTORY OF BIAFRA* (2012) (personal account by a Biafran novelist of the conflict); FALOLA & HEATON, *supra* note 34, at 159–60, 175–76; MICHAEL GOULD, *THE STRUGGLE FOR MODERN NIGERIA: THE BIAFRAN WAR 1967–1970*, at 1–4 (2012); MEREDITH, *supra* note 34, at 193–205; JOHN DE ST. JORRE, *THE BROTHERS' WAR: BIAFRA AND NIGERIA* 236–38 (1972); and UWECHUE, *supra* note 34, at 50–52. On Yugoslavia, see DAVID N. GIBBS, *FIRST DO NO HARM: HUMANITARIAN INTERVENTION AND THE DESTRUCTION OF YUGOSLAVIA* 10–14 (2009) (account of American and NATO intervention in Yugoslavia); and LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* 26–27 (1997). In many cases of ethnic cleansing, the political identity of the victims is uncertain and confused because the actions are being carried out by those who define the victims in ethnic, rather than political terms. This applies to the expulsion of the Germans from Eastern Europe, see R. M. DOUGLAS, *ORDERLY AND HUMANE: THE EXPULSION OF THE GERMANS AFTER THE SECOND WORLD WAR* 101 (2012); ALFRED-MAURICE DE ZAYAS, *A TERRIBLE REVENGE: THE ETHNIC CLEANSING OF THE EAST EUROPEAN GERMANS* (2d ed. 2006), and the expulsion of the Georgians from Abkhazia, which was condemned by United Nations General Assembly Resolution 62/249. G.A. Res. 62/249 (May 29, 2008); see TOM TRIER, HEDVIG LOHM & DAVID SZAKONYI, *UNDER SIEGE: INTER-ETHNIC RELATIONS IN ABKHAZIA* 2 (2010). Although the structural criteria for political identity can be determined in these cases (both the Germans and Georgians were ethnically distinct, and belonged to a group which constituted the majority in another nation), the attitudinal criteria are uncertain because the victims are not initiating the action involved.

rorist organization.<sup>62</sup> Neither depends on the internal organization of the nation in question. It is conceivable that a nation might attempt to deny responsibility by asserting that the terrorists were headquartered in a region that it was unable to control. But this would be equivalent to a concession by the subject nation that this region had seceded, thus precluding that nation from resisting intervention on grounds of Westphalian sovereignty. In effect, the region would have become a separate nation and thus be subject to attack on the same grounds as any nation that harbored or encouraged terrorists.

The situations where federalism might be directly relevant involve an intervention to protect the human rights or secure the self-determination of the people in one region of the nation who claim that they are being oppressed by the central government. In contrast to humanitarian intervention, these interventions are not recognized as legitimate in international law at present<sup>63</sup> and receive more limited scholarly support.<sup>64</sup> Nevertheless, inter-

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<sup>62</sup> The extent to which a nation subject to a terrorist attack is entitled to intervene in another nation that is arguably the source of the attack is, of course, a matter of controversy. See BYMAN & WAXMAN, *supra* note 9, at 130–51 (American public demands that intervention be framed in terms of both national interest and morality and often confuses the two); MATTHEW EVANGELISTA, LAW, ETHICS, AND THE WAR ON TERROR 1 (2008) (efforts to combat terrorism may undermine the legal order that these efforts purport to protect); MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE 85–140 (2003) (intervention to preserve international order is subject to changing and evolving norms); SITARAMAN, *supra* note 10 (modern counterinsurgency will only be effective if guided by legal rules); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 714 (2004) (existing laws of war are not applicable to attacks on terrorist networks); Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism,"* 46 VA. J. INT'L L. 165, 190 (2005) (complexity results from the fact that terrorist groups do not follow the laws of war).

<sup>63</sup> See G.A. Res. 20/2131, Declaration on the Inadmissibility of Interference in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (Dec. 21, 1965) (adopted by a vote of 109-0-1); G.A. Res. 36/103, Declaration on the Inadmissibility of Interference and Intervention in the Internal Affairs of States (Dec. 9, 1981) (adopted by a vote of 120-6-2). The later Resolution declares: "No State or group of States has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States." *Id.* para. 1. It also imposes a duty on states "to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States." *Id.* para. II(l). The World Summit Outcome can be seen as a qualification of this definitive endorsement of the sovereignty principle, but it is limited to humanitarian assistance, and does not extend to the enforcement of human rights. World Summit Outcome, *supra* note 2.

<sup>64</sup> For criticisms, see, for example, Kratochwil, *supra* note 43 (people cannot be forced to be free); JOHN RAWLS, THE LAW OF PEOPLES 35–44, 59–82 (1999) (nations that do not protect human rights, as defined by Western democracies, are nonetheless entitled to respect it if they govern effectively); David Copp, *The Idea of a Legitimate State*, 28 PHIL. & PUB. AFF. 3 (1999) (same); and Bhikhu Parekh, *Rethinking Humanitarian Intervention*, 18 INT'L POL. SCI. REV. 49 (1997) (intervention to protect human rights unjustifiably imposes values of one culture on another). For support, see Caney, *supra* note 40; Luban, *supra* note 40, at 179–81; Sherman, *supra* note

vention to protect human rights or to enforce self-determination possesses strong normative appeal in many situations. External nations are urged to intervene by the citizens of the subject nation whose rights are being violated or whose self-determination is being denied.<sup>65</sup> Suppose these citizens are members of a federalized unit, that is, a unit whose partial autonomy is recognized by the central government. Does this change the justifiability of intervention on human rights or self-determination grounds? Does the greater international visibility of a federalized unit mean that external nations should be permitted to respond in ways that would be considered impermissible in the case of unitary nations?

There would appear to be an argument on either side of this question. Federalism constitutes a partial recognition that the citizens of the subordinate unit in question, or at least a significant proportion of them, possess a separate political identity. This might mean that they are more likely to be oppressed by the central government from a human rights perspective or that they are more entitled to full independence from a self-determination perspective. But if the nation is federal, it means that these citizens have already been granted some element of autonomy. That would seem to place them in a better position than citizens of a unitary nation who suffer an equivalent denial of human rights or self-determination.

The question is necessarily one of perspective. From the perspective of a group of people who possess a separate political identity, the federal character of the nation to which they belong can be viewed as the basis for their membership in that nation. That is to say, their willingness to be part of the larger nation depends on their being granted partial autonomy. The nation's federal structure thus reflects a concession on their part, and a promise of fair treatment from the central government that they should be able to enforce, if necessary with outside assistance. In contrast, from the perspective of the nation's central government, and, in many cases, the majority of the population whose political identity is aligned with that government, the

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54, at 103, 105; and Tesòn, *supra* note 54, all of whom regard intervention to protect human rights as a form of humanitarian intervention.

<sup>65</sup> See, e.g., FALOLA & HEATON, *supra* note 34, at 158–80 (Biafra); MEREDITH, *supra* note 34, at 204 (Biafra); Natsios, *supra* note 49, at 57–79, 163–69 (South Sudan); RICHARD SISSON & LEO E. ROSE, *WAR AND SECESSION: PAKISTAN, INDIA, AND THE CREATION OF BANGLADESH* (1990); WILLEM VAN SCHENDEL, *A HISTORY OF BANGLADESH 159–90* (2009); MATTHEW LERICHE & MATTHEW ARNOLD, *SOUTH SUDAN: FROM REVOLUTION TO INDEPENDENCE* 97–112 (2012); GIBBS, *supra* note 61, at 76–105 (Croatia's appeal to Germany), 106–70 (Bosnia's appeal to the United States), 171–204 (Kosovo's appeal to the United States). Several of these authors, particularly Gibbs and Meredith, point out that the appeals are often generated by cynical efforts by the schismatic region's elite. But it is hardly to be expected that the central government would be the embodiment of evil while the schismatic region would consist of pure and innocent sufferers. That is one reason why difficult questions arise about whether intervention is morally justifiable and pragmatically effective.



grant of autonomy is a favor that has been conferred on a subgroup of their nation's citizens. The federal character of the nation thus represents a concession to that subgroup by the majority. Therefore, the subgroup is not justified in requesting external assistance, perhaps even less justified than groups that have not been granted that concession.

One possible way to resolve the conflict between the two perspectives in a systematic way is to determine whether the central and subordinate governments are separate polities that have joined together to form a single nation or a single nation that, like virtually all nations, has decentralized subunits.<sup>66</sup> This question, however, is often too theoretical or counter-factual to answer. History can be invoked, but its meaning is likely to be uncertain and open to conflicting interpretations that reiterate the basic disagreement.<sup>67</sup> Even more awkwardly, given the current prevalence and popularity of democracy, the question cannot be resolved by the democratic means of voting because it requires a preliminary, and necessarily non-democratic, determination of whether the electorate consists of the subunits, voting separately, or of the nation as a whole.<sup>68</sup>

The dependence of these questions on the perspective one adopts reveals a lack of clarity in Michael Walzer's discussion of forcible intervention.<sup>69</sup> Walzer wants to limit such interventions, which he regards as a type of war, to the egregious situations that "shock the conscience of mankind."<sup>70</sup> These are, presumably, the ones envisioned by the World Summit Outcome Document. His justification for this limit relies heavily on John Stuart Mill's idea that the government and the oppressed population are part of the same community<sup>71</sup> and thus should be left alone to resolve their own political problems, except

<sup>66</sup> See FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*, *supra* note 17, at 40–48; Rubin, *supra* note 21, at 1013–20.

<sup>67</sup> Consider Spain, a nation with a rich, well-documented history and a current controversy over secession, federalism, and unity. At the beginning of the Reconquest (dating roughly from the fall of the Caliphate in 1031) there were five or six small Christian kingdoms in the north. See JOSEPH F. O'CALLAGHAN, *A HISTORY OF MEDIEVAL SPAIN* 163–90 (1975). By the Golden Age (16th century) all of modern Spain was ruled by a single, and in fact absolutist monarchy. See J. H. ELLIOTT, *IMPERIAL SPAIN: 1469–1716*, at 66 (1963). A number of regions, including Catalonia, the Basque Country, and Galicia, have retained separate, strongly felt identities. See JOHN HOOPER, *THE NEW SPANIARDS* 217–82 (2d ed. 2006). An enormous amount of historical evidence supports the contention that these regions, and others, should be regarded as separate entities that joined together, and a similar amount supports the contention that they are parts of a single entity that are demanding partial (or total) autonomy.

<sup>68</sup> FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*, *supra* note 17, at 40–43; see Rubin, *supra* note 21, at 1013–18.

<sup>69</sup> See WALZER, *supra* note 52, at 101–08; Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 *PHI. & PUB. AFF.* 209 (1980).

<sup>70</sup> WALZER, *supra* note 52, at 107.

<sup>71</sup> JOHN STUART MILL, *DISSERTATIONS AND DISCUSSIONS: POLITICS, PHILOSOPHICAL, AND HISTORICAL* 238 (1867). For Walzer's discussion of Mill, see WALZER, *supra* note 52, at 87–95.

in cases of the most egregious abuse.<sup>72</sup> What we would need to know in order to apply this test, however, is how to determine whether the minority is a member of the same community, and can therefore be left under the control of the majority, or whether it is a separate community whose human rights—the issue at stake—need outside protection. The nation’s federal character is ambiguous in this regard. As argued above,<sup>73</sup> it might indicate that the nation consists of separate communities that have agreed to join together under certain conditions, or it might indicate that the nation is a single community that has granted partial autonomy to groups within it for various purposes, such as achieving internal harmony or fostering cultural diversity.

Allen Buchanan, one of the few international law scholars to discuss federalism, points to a further complexity.<sup>74</sup> Suppose, he says, international law were to accept the principle that “a federal unit may secede if there is a very substantial majority voting in favor of secession, in a free and fair plebiscite, within the boundaries of that federal unit.”<sup>75</sup> Such a principle would create “perverse incentives” because “[n]onfederal states will understandably be reluctant to entertain proposals for federalism if doing so may make them vulnerable to dismemberment by plebiscite.”<sup>76</sup> While Buchanan

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<sup>72</sup> This is the point that has been most consistently challenged by Walzer’s critics, who accuse him of granting states too much authority or legitimacy. See, e.g., Caney, *supra* note 40, at 123; Jeff McMahan, *The Ethics of International Intervention*, in *ETHICS AND INTERNATIONAL RELATIONS* 24, 36 (Anthony Ellis ed., 1986); Charles R. Beitz, *Bounded Morality: Justice and the State in World Politics*, 33 *INT’L ORG.* 405, 409 (1979); Gerald Doppelt, *Walzer’s Theory of Morality in International Relations*, 8 *PHIL. & PUB. AFF.* 3, 4–5 (1978); Luban, *supra* note 40, at 179–81; Tesòn, *supra* note 54, at 102–08; Richard Wasserstrom, Book Review, 92 *HARV. L. REV.* 536, 544 (1978). Walzer responds to some of these in Walzer, *supra* note 69. Since this article is not about the justifiability of intervention generally, but about the impact of federalism on such justifications, the argument in the text, to reiterate, is that Walzer does not offer any useful criteria for determining community, the very issue that federalism renders problematic. Thus, even if one agrees that external nations should not interfere with a community on human rights grounds, his argument does not provide any useful guidance on the issue being addressed.

<sup>73</sup> See *supra* pp. 206–07.

<sup>74</sup> Allen Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 *ARIZ. L. REV.* 53 (1995) [hereinafter Buchanan, *Federalism*]. For Professor Buchanan’s other discussions of plebiscites, see BUCHANAN, *supra* note 55, at 373–79; ALLEN E. BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* 70–74 (1991) [hereinafter BUCHANAN, *SECESSION*].

<sup>75</sup> Buchanan, *Federalism*, *supra* note 74, at 56 (emphasis omitted). For a similar argument, see Donald L. Horowitz, *Self-Determination: Politics, Philosophy, and Law*, in *ETHNICITY AND GROUP RIGHTS* 421, 431 (Ian Shapiro & Will Kymlicka eds., 1997).

<sup>76</sup> Buchanan, *Federalism*, *supra* note 74, at 56. He concludes: “International recognition of a presumptive right of federal units to secede, in the absence of other substantive conditions for the ascription of the right to secede, therefore, can serve to block the emergence of federal systems or distort the policies of those that already exist.” *Id.* Again, this does not quite address the topic of this article, which is whether federalism makes intervention more justifiable, but it seems to be a fair extension of Professor Buchanan’s point to assume that he would be skeptical of such a possibility.

does not discuss the issue of intervention explicitly,<sup>77</sup> one can assume that the situation he envisions would arise, as it did in the Sudan, because external nations were inducing or compelling the subject nation to conduct the plebiscite in question.

Viewed in pragmatic terms, Buchanan's argument seems to rest on an overly sanguine understanding of federalism. Although the virtues of federalism are regularly celebrated by the U.S. Supreme Court and various scholars,<sup>78</sup> it is in fact unlikely that any central government would voluntarily embrace true federalism. As noted above, all the policy advantages that are asserted to derive from federalism can be achieved by decentralization.<sup>79</sup> The central government will only accept federalism, which requires that it relinquish partial control over some region or regions of the nation, in order to avoid an even less appealing alternative, such as a total loss of control. In such a serious situation, the future possibility of a compelled plebiscite may not be much of an additional disincentive.

As a normative matter, however, Buchanan's point seems more convincing. Federalism represents a real concession by the central government and an effort to recognize a sub-region's insistent demands. It seems odd to conclude that a nation that makes this effort should be more rather than less subject to outside intervention. In the end, therefore, no clear normative conclusion can be derived from the federal character of the nation in question. Because it recognizes or concedes the subunit's separate political identity, federalism suggests that intervention might be more readily justified, but because it represents a significant concession to that separate identity by the national government, it suggests the opposite. This inability to derive any clear normative conclusion from a nation's federal character is not surprising. Federalism, as argued above, is not a normative principle but a pragmatic arrangement, a means of resolving identity conflicts within a polity. Its role in international relations, therefore, is to be found in this pragmatic realm.

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<sup>77</sup> Theoretical discussions of international intervention in secession crises do not seem to have been as prevalent as discussions of its role in humanitarian crises, at least in recent scholarship. For examples, see Allen Buchanan, *The International Institutional Dimension of Secession*, in THEORIES OF SECESSION, *supra* note 35, at 227; Diane Orentlicher, *International Responses to Separatist Claims: Are Democratic Principles Relevant?*, in MACEDO & BUCHANAN, SECESSION AND SELF-DETERMINATION 19 (2003) [hereinafter Orentlicher, *Are Democratic Principles Relevant?*]; CHRISTOPHER HEATH WELLMAN, A THEORY OF SECESSION: THE CASE FOR POLITICAL SELF-DETERMINATION 157–80 (2005); and Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 44 (1998) [hereinafter Orentlicher, *Separation Anxiety*].

<sup>78</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 452 (1991) (federalism increases public participation, achieves economic efficiency, allows citizen choice, and encourages experimentation); BEER, *supra* note 15 (citing scholarly sources).

<sup>79</sup> See *supra* pp. 201–04; see also FEELEY & RUBIN, *supra* note 17, at 20–29.

Once a nation's sovereignty has been breached in order to provide humanitarian relief, which appears to represent at least a trend if not a developing consensus,<sup>80</sup> it seems difficult not to view other questions about intervention in terms of balancing the importance of sovereignty against the urgency of the problem, rather than as a matter of inviolate principle. In striking this balance, the ability of the intervening nation or nations to produce a practical and lasting resolution to the problem is a major consideration,<sup>81</sup> as the United States learned to its sorrow with its counterinsurgency efforts in Afghanistan and Iraq.<sup>82</sup> Humanitarian intervention can be effective in preventing or alleviating an immediate crisis, even if no long-term solution is achieved, but intervention to resolve on-going problems of human rights or self-determination is likely to produce nothing but disruption and resentment unless it can achieve some sort of structural resolution.<sup>83</sup>

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<sup>80</sup> See World Summit Outcome, *supra* note 2; Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 12, at 130; Evans, *supra* note 2, at 223–41; Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 12, at 204; Nicholas Onuf, *Intervention for the Common Good*, in BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION, *supra* note 12, at 43; Kok-Chor Tan, *The Duty to Protect*, in HUMANITARIAN INTERVENTION, *supra* note 12, at 84.

<sup>81</sup> See GANESH SITARAMAN, *THE COUNTERINSURGENT'S CONSTITUTION: LAW IN THE AGE OF SMALL WARS* 14–15 (2013). Sitaraman argues that the intervening nation should adopt a “progressive” strategy, which attempts to “gain the trust, obligation, and support of the population.” *Id.* at 8. This approach relies on legal regularity that “embrace[s] the mutual interdependence of every aspect of local life.” *Id.* at 14–15. Leonard Doob adopts a related perspective, using the model of the helping professions to argue that intervention should be regarded as a form of problem solving. See DOOB, *supra* note 40, at 63–67. Doob assumes that intervention is normatively acceptable, which is admittedly a less controversial claim for an individual voluntarily consulting a therapist than it is for a nation that is subject to military action. Having done so, however, he proceeds to the useful notion that the intervention must be designed to provide a lasting solution to the problem that has motivated it. *Id.* at 63–67.

<sup>82</sup> See HEHIR, *supra* note 12, at 247–50; ERIC HERRING & GLEN RANGWALA, *IRAQ IN FRAGMENTS: THE OCCUPATION AND ITS LEGACY* (2006); DAVID KILCULLEN, *THE ACCIDENTAL GUERRILLA: FIGHTING SMALL WARS IN THE MIDST OF A BIG ONE* 264–78 (2009); DOUGLAS PORCH, *COUNTERINSURGENCY: EXPOSING THE MYTHS OF THE NEW WAY OF WAR* 289–316 (2013); THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* 3 (2006); RORY STEWART, *THE PRINCE OF THE MARSHES: AND OTHER OCCUPATIONAL HAZARDS OF A YEAR IN IRAQ* 6 (2006); see also TOBY DODGE, *INVENTING IRAQ: THE FAILURE OF NATION BUILDING AND A HISTORY DENIED* 9 (2003) (failure of prior nation-building efforts). For an argument that these concerns should limit the President to two-year-long involvement in foreign engagements unless the action is specifically authorized by Congress, see Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447 (2011). Both these efforts are probably better regarded as regime change than as counterinsurgency or human rights protection, despite Bush Administration statements to the contrary, and will be discussed in that context. See *infra* pp. 228–29. But the need for a long-term solution is crucial in justifying those lesser interventions as well, as the examples seem too salient to ignore.

<sup>83</sup> See EVANS, *supra* note 2, at 148–74; GIBBS, *supra* note 61, at 10–14; TERRY, *supra* note 12, at 219–21 (arguing that humanitarian intervention generally fails and tends to produce large

Federalism is precisely that sort of structural resolution. As a compromise between subordination and secession, it allows a subunit of the nation partial autonomy. It thus provides a measure of protection for the group whose rights or sense of self-determination has been violated but avoids the disruption that would result from dismembering the nation.<sup>84</sup> Moreover, it renders the subsequent treatment of the group by the central government more visible, both in political terms, because the group has been given its own governmental voice, and in juridical terms, because real federalism involves rights that can be enforced, typically by a constitutional court. As a result, it is easier for the external nations that originally intervened to monitor the subsequent treatment of the group that they were trying to protect.

As a long-term solution, federalism offers additional advantages in terms of both the impact on the subject nation and the behavior or motivation of the intervening nation. Being partial, the level of autonomy federalism provides can be calibrated or adjusted to respond to the particular problems in the subject nation that triggered the intervention.<sup>85</sup> For example, the relevant issues in Belgium and Canada have been linguistic,<sup>86</sup> rather than

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numbers of refugees who are condemned to live in camps for extended periods). Imposing a constitution and then departing without further effort is likely to produce few real effects, and can be viewed largely as an attempt to conceal an abdication of responsibility. See Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 873 (2005).

<sup>84</sup> On secession generally, see VIVA ONA BARTKUS, *THE DYNAMIC OF SECESSION* (Steve Smith et al. eds., 1999); BUCHANAN, *SECESSION*, *supra* note 74; LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (1978); *CONTEXTUALIZING SECESSION: NORMATIVE STUDIES IN COMPARATIVE PERSPECTIVE* (Bruno Coppieters et al. eds., 2003); MACEDO & BUCHANAN, *supra* note 77; *SECESSIONIST MOVEMENTS IN COMPARATIVE PERSPECTIVE* (Ralph R. Premdas, S.W.R. de A. Samarasinghe & Alan B. Anderson, eds., 1990); GNANAPALA WELHENGAMA, *MINORITIES' CLAIMS: FROM AUTONOMY TO SECESSION: INTERNATIONAL LAW AND STATE PRACTICE* 112 (2000); and Philpott, *supra* note 55, at 362. There is general agreement that secession, whether justified or not, is disruptive and dangerous.

<sup>85</sup> For the contrary view, see Kymlicka, *supra* note 35, at 137–38. Part of Kymlicka's argument is that American federalism has not been able to grant autonomy rights to ethnic minorities such as Indian tribes or non-English speaking overseas territories such as Puerto Rico. See *id.* The short answer here is that the United States is not truly federal. See FEELEY & RUBIN, *FEDERALISM*, *supra* note 17, at 96–123; Rubin, *The Fundamentality and Irrelevance of Federalism*, *supra* note 21, at 1049–63; Rubin & Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note 17, at 944–48. Thus, its inability to use federalism in a situation where it might be appropriate is no surprise. In situations where it is more relevant, such as Quebec, Kymlicka argues that the asymmetry between the region or regions that want autonomy and the regions that control or feel comfortable with the central government will produce irresolvable tensions. Kymlicka, *supra* note 35, at 136–37. But this may not be true in cases of recognized differences in political identity, particularly when those differences might otherwise lead to secession.

<sup>86</sup> See KEITH G. BANTING ET AL., *THE COLLAPSE OF CANADA?* 120 (R. Kent Weaver ed., 1992); ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 248–56 (1995) (Quebec); JAN ERK, *EXPLAINING FEDERALISM: STATE, SOCIETY AND CONGRUENCE IN AUSTRIA, BELGIUM, CANADA, GERMANY AND SWITZERLAND* 31–56 (2008); JOHN FITZMAURICE, *THE POLITICS OF BELGIUM: A UNIQUE FEDERALISM* (1996); *THE POLITICS OF BELGIUM: INSTITUTIONS AND POLICY UNDER BIPOLAR AND CENTRIFUGAL FEDERALISM* 15–20 (Marleen Brans et

religious, since the Belgians are nearly all Catholic and the Canadians are generally a mixture. In contrast, religion has loomed large in the internal conflicts in Nigeria and Côte D'Ivoire, but language has been less of an issue, because the religiously defined communities each speak a mixture of languages and agree on the use of the colonial language, English and French respectively, as their common tongue.<sup>87</sup> This suggests that the clearest grants of autonomy to the subunits in these cases should involve linguistic practices in Belgium and Canada, but religious practices in Nigeria and Côte D'Ivoire. The situation in Somalia is currently too fluid to permit definitive conclusions, but it would appear that one region, Somaliland, and perhaps a second, Puntland, have managed to avoid the anarchy that has gripped the remainder of the nation by establishing semi-autonomous regimes.<sup>88</sup> It is unclear whether the possibility that such regimes would be established served as the basis for the humanitarian intervention of the 1990s;<sup>89</sup> in any event, this basis has since been overlaid by counterinsurgency intervention designed to achieve regime change.<sup>90</sup>

Treating federalism as a pragmatic remedy, rather than an initial justification, also resolves the problem that Buchanan raises.<sup>91</sup> This approach would not create perverse incentives—that is, it would not use a nation's adoption of federalism as an invitation or justification for intervening and thereby discourage nations from adopting federalism in the first place. If federalism is treated as a remedy, the subject nation's prior adoption of it would have no effect on the decision to intervene.<sup>92</sup> What would matter is

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al. eds., 2009); KENNETH MCROBERTS, *QUEBEC: SOCIAL CHANGE AND POLITICAL CRISIS* 139 (3d ed. 1993); Kymlicka, *supra* note 35, at 116–19 (Quebec).

<sup>87</sup> See FALOLA & HEATON, *supra* note 34, at 110–80 (Nigeria); MIKE MCGOVERN, *MAKING WAR IN CÔTE D'IVOIRE* 10–13 (2011); MEREDITH, *supra* note 34, at 193–205 (Nigeria), 678–79 (Côte d'Ivoire); ST. JORRE, *supra* note 61, at 15–16 (Nigeria); UWECHUE, *supra* note 34, at 49–68 (Nigeria).

<sup>88</sup> *CONFLICT AND PEACE IN THE HORN OF AFRICA: FEDERALISM AND ITS ALTERNATIVES* 114–123 (Peter Woodward & Murray Forsyth eds., 1994); JAMES FERGUSSON, *THE WORLD'S MOST DANGEROUS PLACE: INSIDE THE OUTLAW STATE OF SOMALIA* 181–281 (2013).

<sup>89</sup> Regarding this intervention generally, see HIRSH & OAKLEY, *supra* note 49; RUTHERFORD, *supra* note 49; and Natsios, *supra* note 49.

<sup>90</sup> See ELMI, *supra* note 30, at 89; FERGUSSON, *supra* note 88, at 25–56; MARY HARPER, *GETTING SOMALIA WRONG? FAITH, WAR AND HOPE IN A SHATTERED STATE* 170–91 (2012); *infra* pp. 228–29.

<sup>91</sup> Buchanan, *Federalism*, *supra* note 74.

<sup>92</sup> In his more extensive consideration of self-determination and secession, see BUCHANAN, *SECESSION*, *supra* note 74, Buchanan argues for recognition of the right to secede in international law when secession is a response to extensive human rights violations or the unjust taking of another nation's territory. He repeats this argument in BUCHANAN, *supra* note 55, at 353–57, giving as an example of the former the treatment of East Pakistan by West Pakistan, and of the latter the Soviet Union's annexation of the Baltic States after World War II. *Id.* at 357. But he also discusses a third situation: “serious and persisting violations of intrastate autonomy agreements by the state, as determined by a suitable international monitoring inquiry.” *Id.* It is not quite clear from the

whether, once the intervention had been carried out, federalism could be imposed as a long-term structural resolution. The decision to federalize the subject nation would be made by the intervener, presumably in consultation with the people it had intervened to protect. But it would not depend on the previous decision of the subject nation, whose judgment and treatment of the potentially federalized sub-group or groups had been discounted by the intervener at the beginning of the process.

In addition to its advantages for resolving the situation in the subject nation, a long-term federal solution also has the advantage of constraining the behavior of the intervening nation. Some nations might be tempted to intervene in the affairs of others to benefit from the dissolution of the subject nation into its component parts.<sup>93</sup> Other nations would justifiably fear such interventions and adopt defensive or preemptive measures that would exacerbate international tensions. It is these sorts of concerns that have led to the principle of recognition, which holds that even existing arrangements of dubious or improper origin should be recognized as valid.<sup>94</sup> For example, the division of Africa by the 1884 Berlin West Africa Congress was carried out by oppressive colonial powers, ignored issues of political identity, history and culture, and paid scant attention to the economic viability of the entities that were created,<sup>95</sup> but the African states that succeeded these colonial regimes have generally maintained their prior boundaries and opposed efforts to rearrange them.<sup>96</sup>

The pragmatic advantages that might tempt a nation to intervene and dissolve another nation are much weaker if the intervening nation were only imposing federalism as a solution. To begin with, nations are less likely to be motivated by a desire to eliminate an economic rival if the solution is to fed-

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discussion whether violation of such “intrastate autonomy agreements” (presumably equivalent to genuine federalism) would only constitute international law violations if the agreements were imposed as a remedy for the previously mentioned situations, i.e., extensive human rights violations or unjust conquest. *Id.* If so, then this third condition is simply supportive of the first two. If not, it would create precisely the problems that Professor Buchanan wants to avoid. In any case, he expresses uncertainty about whether this third situation should generate an internationally recognized right to secede. *See id.* at 358–59.

<sup>93</sup> One criterion that is regularly mentioned as a ground for justifiable intervention is that the intervener should not benefit, in political or economic terms, from its actions. *See* EVANS, *supra* note 2, at 143–44; CHARLES GUTHRIE & MICHAEL QUINLAN, *JUST WAR: THE JUST WAR TRADITION: ETHICS IN MODERN WARFARE* 24–26 (2007).

<sup>94</sup> IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 89–98 (7th ed. 2008).

<sup>95</sup> *See* BASIL DAVIDSON, *AFRICA IN HISTORY* 283–301, 330–37 (rev. ed. 1991); ADAM HOCHSCHILD, *KING LEOPOLD’S GHOST* 84–87 (1998); THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: WHITE MAN’S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912*, at 239–55 (1991).

<sup>96</sup> DAVIDSON, *supra* note 95, at 330–37; JOHN HATCH, *A HISTORY OF POSTWAR AFRICA* 169–207 (1965). *See generally* BASIL DAVIDSON, *supra* note 34 (imposition of European nation-state model on African independence movements has disserved African interests).

eralize the subject nation rather than to dissolve it. Federalism may not make a nation stronger economically, as its most enthusiastic proponents claim,<sup>97</sup> but it does not necessarily make the nation weaker, or at least not by enough of a margin to motivate so dangerous a policy as intervention. Nor is the intervening nation as likely to benefit in political terms from imposing a federal regime. It cannot gain a new ally or client as it might if it dissolved the nation into smaller entities, and the friendlier relations it might have with the newly federalized subunit might be more than counterbalanced by the increased distrust or hostility of the still-controlling central government.

The final step along the continuum involves interventions to effectuate a complete change in the subject nation's regime, either to protect human rights or to combat terrorism. There does not appear to be any justification in international law for employing this level of intervention to protect human rights,<sup>98</sup> and its use to prevent terrorism is a matter of current debate.<sup>99</sup> A realist approach to international relations, however, must acknowledge that regime-changing intervention is actually quite common. It was a particular feature of the Cold War, for obvious reasons,<sup>100</sup> but the end of that great power rivalry has not eliminated it, as recent U.S. and Western European actions in Afghanistan, Bosnia, Haiti, Iraq, Libya, Panama, and Somalia demonstrate.<sup>101</sup> The question for this inquiry is whether the federalized

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<sup>97</sup> See, e.g., INMAN & RUBINFELD, *supra* note 15; OATES, *supra* note 15; Weingast, *supra* note 15. This position is generally known as fiscal federalism.

<sup>98</sup> A nation's effort to impose a new regime on another nation that declared war against it and was defeated is different, as a normative matter, but may raise some of the same pragmatic issues as an intervention designed to impose regime change. See, e.g., AMERICA AND THE SHAPING OF GERMAN SOCIETY, 1945–1955 (Michael Ermarth ed., 1993) (varying perspectives on the role of the American military occupation and Americans in unofficial capacities, in establishing a post-Nazi regime); JOHN GIMBEL, THE AMERICAN OCCUPATION OF GERMANY: POLITICS AND THE MILITARY, 1945–1949 (1968) (general account of the military role after the War); RICHARD L. MERRITT, DEMOCRACY IMPOSED: U.S. OCCUPATION POLICY AND THE GERMAN PUBLIC, 1945–1949 (1995) (description of the impact of the American occupation on ordinary German people, concluding that they were more receptive to American values than the German elites); TOSHIO NISHI, UNCONDITIONAL DEMOCRACY: EDUCATION AND POLITICS IN OCCUPIED JAPAN, 1945–1952 (1982) (account of the way the American occupying forces developed an ethos of democracy and pacifism in Japan, counteracting the authoritarian militarism of the pre-War era).

<sup>99</sup> See sources cited *supra* note 9.

<sup>100</sup> The list of nations that the United States intervened against for this purpose during the forty-five Cold War years is long, and includes at least Chile, Cuba, Dominican Republic, Grenada, Guatemala, Iran, Korea, Nicaragua, and Vietnam. See generally, THOMAS CAROTHERS, IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS (1991); JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY (2005); MARTIN WALKER, THE COLD WAR: A HISTORY (1993); ODD ARNE WESTAD, THE GLOBAL COLD WAR: THIRD WORLD INTERVENTIONS AND THE MAKING OF OUR TIMES (2005). The list for the Soviet Union is at least equally long, of course. See VLADISLAV M. ZUBOK, A FAILED EMPIRE: THE SOVIET UNION IN THE COLD WAR FROM STALIN TO GORBACHEV 118 (2009).

<sup>101</sup> See GIBBS, *supra* note 83 (discussing Bosnia); MICHAEL R. GORDON & BERNARD E. TRAINOR, THE ENDGAME: THE INSIDE STORY OF THE STRUGGLE FOR IRAQ, FROM GEORGE W.



character of the subject nation would make this questionable, but common mode of intervention more justified, or less unjustified, either in general or because it provided a potential long-term resolution to the ground for intervention.

The answer must be no. The goal of these most extreme interventions is to change the regime in its entirety, without regard to its internal structure. The reason the United States intervened in Chile and Guatemala, for example, was because of its concerns that the governments that had come to power were inclined toward communism, not because they were treating their native American populations unfairly or discriminating in favor of one region and against another.<sup>102</sup> The reason it intervened in Afghanistan, Iraq, and Somalia was to protect itself from actual or perceived threats to its own security.<sup>103</sup> The concern in these situations is the nature of the central regime itself, not the way that the central regime allocates authority among the different regions or demographic components of the nation. No level of federalism could have saved the regimes in Chile, Guatemala, Afghanistan, and Iraq from the American hostility that they had engendered by their overall political orientation.

Federalism might be relevant as a solution for all the reasons stated above with respect to interventions designed to protect human rights or secure self-determination. It can be argued that a nation should not displace another nation's political regime unless it believes it can impose a better one. Arguably, both Iraq and Somalia now include federalized subunits as a result of the various regime-changing interventions to which they have been subject.<sup>104</sup> Future settlements in Syria and Libya might also involve auton-

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BUSH TO BARACK OBAMA 1–8 (2012); JOHN KEEGAN, *THE IRAQ WAR* (2004); ALISON PARGETER, *LIBYA: THE RISE AND FALL OF QADAFI* 214–47 (2012); ORDER AND DISORDER AFTER THE COLD WAR 154 (Brad Roberts ed., 1995); KARIN VON HIPPEL, *DEMOCRACY BY FORCE: US MILITARY INTERVENTION IN THE POST-COLD WAR WORLD* (2000) (discussing Panama, Somalia, Haiti, and Bosnia).

<sup>102</sup> See TANYA HARMER, *ALLENDE'S CHILE AND THE INTER-AMERICAN COLD WAR* 90 (2011); STEPHEN SCHLESINGER & STEPHEN KINZER, *BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA* 99–101 (rev. ed. 2005); RALPH LEE WOODWARD, JR., *A SHORT HISTORY OF GUATEMALA* 136–42 (2005).

<sup>103</sup> See ELMI, *supra* note 30, at 73–89; GORDON & TRAINER, *supra* note 101; HERRING & RANGWALA, *supra* note 82, at 260; SETH G. JONES, *IN THE GRAVEYARD OF EMPIRES: AMERICA'S WAR IN AFGHANISTAN* 86–150 (2010); KEEGAN, *supra* note 101; PORCH, *supra* note 9, at 289–316; RICKS, *supra* note 82, at 3. The intervention in Somalia discussed here is the counterinsurgency effort of the twenty-first century, as opposed to the humanitarian effort of the 1990s, *see supra* note 89. This counterinsurgency has actually been carried out by Ethiopian troops, and more recently by the African Union (AMISOM) with troops from Burundi, Djibouti, Ethiopia, Kenya, and Uganda, *see ELMI, supra* note 30, at 73–107; FERGUSSON, *supra* note 88, at 29–56, 64, but as Elmi notes, the Ethiopian effort was at least supported, if not initiated, by the United States.

<sup>104</sup> CONFLICT AND PEACE IN THE HORN OF AFRICA: FEDERALISM AND ITS ALTERNATIVES, *supra* note 88; FERGUSSON, *supra* note 88, at 181–281; Liam Anderson & Gareth Stansfield, *The*

omous subunits covering some or all of the nation. But the argument that federal solutions justify regime-change intervention should be viewed with skepticism. When a nation decides to undertake regime change, it is necessarily claiming that the existing regime, in its entirety, is so objectionable or threatening that it should be entirely eliminated. Such a strong claim needs to be justified on its own terms because it asserts, in effect, that anything would be better than the existing regime. To take an extreme example, the Allies' decision to invade Nazi Germany was not truly based on the availability of any particular alternative regime. That would also appear to be true for the American invasion of Afghanistan and Iraq. One might question the accuracy or the sincerity of the Bush Administration's claim that Iraq possessed weapons of mass destruction. That would lead to the conclusion that the invasion was unjustified. But if one assumes that the invasion was justifiable on the asserted ground, the availability of a particular replacement regime would not seem to contribute very much to the justification.

It might be argued that a nation could invade another nation in order to impose federalism per se. But this logical possibility is unlikely to occur in any real-world situation. Federalism, as discussed above, is an instrumentality designed to deal with certain features of political entity, almost always differences in political identity among its citizens. It is not an ideology, like democracy, capitalism, communism, Catholicism, or Protestantism, to which nations are committed and which motivates their most basic foreign policy decisions.

It is sometimes said that federalism protects liberty.<sup>105</sup> Therefore, it might be regarded as an important or even necessary element of democracy, and thus a basis for recent interventions by the United States and other Western nations, which have tended to regard the imposition of democratic government as a major reason for intervention in the post-Cold War era.<sup>106</sup> But the connection between federalism and liberty is an essentially rhetorical assertion by those who favor federalism for other reasons.<sup>107</sup> As an em-

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*Implications of Elections for Federalism in Iraq: Toward a Five-Region Model*, 35 PUBLIUS 359, 368 (2005); Dawn Brancati, *Can Federalism Stabilize Iraq?*, 27 WASH. Q. 7, 20 (2004); Sean Kane et al., *Iraq's Federalism Quandry*, 118 NAT'L INT. 20, 20, 22 (2012); Kanan Makiya, *A Model for Post-Saddam Iraq*, 14 J. DEMOCRACY 5, 22 (2003).

<sup>105</sup> See BEER, *supra* note 15, at 386–88; Baker & Young, *supra* note 23, at 136–39; Miller, *supra* note 15.

<sup>106</sup> See, e.g., BUCHANAN, *supra* note 55, at 314–22; VON HIPPEL, *supra* note 101; Franck, *supra* note 59; Orentlicher, *Separation Anxiety*, *supra* note 77.

<sup>107</sup> There are also grounds for opposing intervention on this basis, of course. See Robert H. Jackson, *International Community Beyond the Cold War*, in BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION, *supra* note 12, at 59, 72–74 (arguing that intervention is intrinsically antithetical to democracy, and thus that democracy is a particularly unpromising goal for interventionist efforts); MILL, *supra* note 71 (same); Walzer, *supra* note 69, at 210 (nations should be left to resolve their own problems except in cases of egregious abuse). As Jackson says, “[i]f democracy is becoming an international norm [in the post-Cold War era], then

pirical matter, some of the nations with the very best human rights records, such as, Italy, Japan, the Netherlands, and Sweden, are unitary regimes.<sup>108</sup> There is simply no coherent definition of political liberty that would deny that description to these regimes and confer it on federalized democracies such as Brazil, India, Malaysia, and Mexico.<sup>109</sup> As a matter of theory, federalism only protects the partial autonomy of a nation's geographical subunits. The subunits may use their autonomy to either enlarge or restrict the rights that its inhabitants would otherwise possess as citizens of the nation. Nothing in the nature of federalism itself tells us which will be the case. Similarly, the central government of a nation that employs federalism as its means of internal organization can be either solicitous or dismissive of individual rights. Again, there is nothing in the grant of autonomy to geographical subunits that can tell us what its stance on this subject will be. In short, if one nation seeks regime change in another in order to impose a democratic system, the federal nature of the subject nation, either before or after the intervention, will not be a significant factor in its decision to intervene.

### C. Federalism as a Structural Remedy

Having concluded that federalism has one identifiable and important role in justifying intervention by one nation against another—namely, as a

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we should expect that even fewer acts of international intervention would be justifiable than was the case previously.” Jackson, *supra*, at 73. The recent American experience in Iraq would seem to confirm this observation. See DODGE, *supra* note 82; HEHIR, *supra* note 12, at 221–40; HERRING & RANGWALA, *supra* note 82, at 260; RICKS, *supra* note 82. But there are countervailing examples as well, such as the U.S. occupation of Germany and Japan after World War II, see JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* (1999); EDWARD M. MARTIN, *THE ALLIED OCCUPATION OF JAPAN* (1948); EDWARD N. PETERSON, *THE AMERICAN OCCUPATION OF GERMANY: RETREAT TO VICTORY* (1977); FREDERICK TAYLOR, *EXORCISING HITLER: THE OCCUPATION AND DENAZIFICATION OF GERMANY* (2011), and the more recent intervention in Panama, VON HIPPEL, *supra* note 101, at 27–54. Von Hippel proposes some criteria for making more modulated judgments about the possibilities of imposing democracy via regime change. VON HIPPEL, *supra* note 101, at 168–206.

<sup>108</sup> In the Freedom House rankings for the two categories of Political Rights and Civil Liberties, all these nations received the highest score, a “1” in both categories. See *Freedom in the World 2017: Table of Scores*, FREEDOM HOUSE, <https://freedomhouse.org/report/fiw-2017-table-country-scores> [<https://perma.cc/37CU-4HXU>]. With respect to freedom of the press (180 nations ranked from most to least free), the four unitary nations in the text were ranked 52, 72, 5, and 2, respectively, and all were designated “Free.” See *Freedom of the Press 2016: Table of Scores*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press-2016/table-country-scores-fotp-2016> [<https://perma.cc/FSH3-F3B2>].

<sup>109</sup> Freedom House scored Brazil 2 and 2 in Political Rights and Civil Liberties, while India scored 2 and 3. Malaysia scored 4 and 4, and Mexico scored 3 and 3, with both being characterized as only “Partly Free.” See *Freedom in the World 2017: Table of Scores*, *supra* note 108. For freedom of the press, India was 136 (Partly Free), Brazil was 103 (Partly Free), Mexico was 147 (Not Free), and Malaysia was 144 (Not Free). See *Freedom of the Press 2016: Table of Scores*, *supra* note 108.

promising long-term solution when the intervention is based on violations of human rights, self-determination, and perhaps the need for regime change—the next step in the inquiry is to consider that role in greater detail. To begin with, federalism has several significant limitations as a long-term structural solution. The first is that, as described above, it is only applicable to groups of people who are geographically concentrated.<sup>110</sup> If the people who appeal to external nations on the grounds that their rights are being violated are scattered throughout the subject nation, federalism does not offer any pragmatic assistance in fashioning a long-term solution. One might appeal to other types of solutions, like the consociational structure championed by Arend Lijphart, which permits groups participating in central government decision-making to share power and exercise limited autonomy.<sup>111</sup> Democracy itself may provide a structural solution, even if it is not the basis of the intervention. But the effect of federalism on questions of international intervention is limited to protecting the human rights or self-determination of geographically concentrated groups.

A second limitation results from the awkward empirical fact that even geographically concentrated groups are rarely the exclusive inhabitants of their region. Any region around which a boundary is drawn for the purpose of granting the residents autonomy rights such as control over language, family law, or an established religion will likely include significant numbers of people who do not identify with the dominant group in the region.<sup>112</sup> They may be a smaller minority within the region, or they may be members of the national majority who constitute a minority within that more limited domain. The first possibility is quite common, given the diversity, complexity, and mobility of human groups, while the second is virtually inevitable, given the tendency of the dominant group to spread throughout the nation's boundaries. From the perspectives of these minorities, particularly the second type, federalism may be preferable to secession, but that does obviate the fact that it creates serious difficulties. Any long-term solution should

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<sup>110</sup> See sources cited *supra* note 35.

<sup>111</sup> See AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 25–52 (1977); AREND LIJPHART, PATTERNS OF DEMOCRACY 30–45 (2012). As he explains: “Power-sharing means the participation of the representatives of all significant groups in political decision-making, especially at the executive level; group autonomy means that these groups have authority to run their own internal affairs, especially in areas of education and culture.” Arend Lijphart, *The Wave of Power-Sharing Democracy*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY 37, 39 (Andrew Reynolds ed., 2002).

<sup>112</sup> See Allen Buchanan, *The Quebec Secession Issue: Democracy, Minority Rights and the Rule of Law*, in THEORIES OF SECESSION, *supra* note 35, at 238, 254–55; WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 10–33 (1995); Arend Lijphart, *Self-Determination Versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems*, in ETHNICITY AND GROUP RIGHTS, *supra* note 75, at 275.

provide for the protection of minorities within the federalized area to combat the inevitable enthusiasm of the regionally dominant group to impose uniformity in support of its newly granted autonomy.

A further consideration is whether the particular basis for intervention, within the general area of human rights and self-determination, suggests additional limitations. Thus far, all human rights violations and violations of self-determination have been treated together. Does federalism provide a superior justification for intervention based on the kind of human rights that are being violated, or on the type of group whose self-determination is being secured? There are so many variations to these questions that the answers can only be offered on a preliminary basis. Even so, these answers provide further illumination regarding the role of federalism with respect to definitive interventions.

The standard approach in human rights theory is to distinguish among first generation (or negative) rights, which protect people against specific government oppressions; second generation (or positive) rights, which grant people specific entitlements such as subsistence, health care, or education; and third generation (or group) rights, which grant communities protections or benefits that extend beyond those granted to any of its members as individuals.<sup>113</sup> As an initial matter, the extent to which human rights violations can justify intervention would seem to depend on the degree of consensus regarding the rights in question. Negative rights are the best established; they have long been recognized in Western society<sup>114</sup> and are currently controversial only at their margins.<sup>115</sup> Second generation rights are more controversial, but figure prominently in the U.N.'s Universal Declaration of

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<sup>113</sup> The classic distinction between positive and negative rights is Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

<sup>114</sup> The origins of negative rights are often traced back to the Middle Ages. See Arthur Stephen McGrade, *Ockham and the Birth of Individual Rights*, in *AUTHORITY AND POWER: STUDIES ON MEDIEVAL LAW AND GOVERNMENT PRESENTED TO WALTER ULLMANN ON HIS SEVENTIETH BIRTHDAY* 149, 149–53 (Brian Tierney & Peter Linehan eds., 1980); ARTHUR STEPHEN MCGRADE, *Rights, Natural Rights, and the Philosophy of Law*, in *THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY: FROM THE REDISCOVERY OF ARISTOTLE TO THE DISINTEGRATION OF SCHOLASTICISM 1100–1600*, at 738, 738–42 (Norman Kretzmann et al. eds., 1982); BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150–1625*, at 28–29, 343 (1997); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 5–7 (1979). Other scholars argue that rights originated in the early modern period, see C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 263–69 (1962), or the Enlightenment, see LYNN AVERY HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 26–32 (2007); Edward L. Rubin, *Rethinking Human Rights*, 9 *INT'L LEGAL THEORY* 5, 8 (2003).

<sup>115</sup> Universal Declaration, *supra* note 50. Articles 2 to 21 articulate a full set of negative rights, including a few that might be regarded at the outer edge of this concept, such as the right to asylum in Article 14.

Human Rights<sup>116</sup> and its supplemental International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>117</sup> to which most nations in the world are signatory.<sup>118</sup> In addition, they appear in most modern constitutions<sup>119</sup> and are strongly endorsed by many scholars.<sup>120</sup>

<sup>116</sup> Universal Declaration, *supra* note 50. Articles 22 to 26 specifically affirm positive rights: the right to social security, the right to employment, the right to rest and leisure, the right to health and well-being, and the right to an education. Article 25 reads: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security." *Id.* art. 25.

<sup>117</sup> ICESCR, *supra* note 50, reiterates these second generation rights, *see id.* art. 11 (recognizing "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing"); *id.* art. 12 (recognizing "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"); *id.* art. 13 (recognizing "the right of everyone to education"), and at least gestures at third generation rights, although from an individual rights perspective, *see id.* art. 15 (recognizing "the right of everyone . . . to take part in cultural life").

<sup>118</sup> The United States is a significant exception, having declined to ratify the ICESCR. *See* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 371 (1990); Ann M. Piccard, *The United States' Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, 13 SCHOLAR 231, 232 (2010).

<sup>119</sup> For a discussion of the modern trend towards increasing acceptance of positive rights around the world, *see* SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 21–26 (1991) (examining the democratization of Latin America and Asia after the 1970s); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 868–72 (1986) (discussing the German constitution); and Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 521–29 (1992). The South African constitution of 1996, which has received particular attention, contains the following provisions: Article 24, the right to a healthful environment; Article 26, the "right to have access to adequate housing;" Article 27, rights to "have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security;" and Article 29, the right to education. S. AFR. CONST., 1996, arts. 24, 26, 27, 29; *see* Richard J. Goldstone, *A South African Perspective on Social and Economic Rights*, 13 HUM. RTS. BRIEF 1, 4–6 (2006); Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137, 142–47 (2003).

<sup>120</sup> *See* DONNELLY, *supra* note 45, at 30–31; WILLIAM F. FELICE, *TAKING SUFFERING SERIOUSLY: THE IMPORTANCE OF COLLECTIVE HUMAN RIGHTS* 144 (1996); JAMES GRIFFIN, *ON HUMAN RIGHTS* 12, 96 (2008); PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 20–21 (2d ed. 2003); JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 111 (2d ed. 2007); HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 35–53 (2d ed. 1996). For arguments that such rights should be recognized as being required by the U.S. Constitution, *see* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2346–47 (1990); Albert M. Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407, 407–08 (1966); William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1771–73 (1994); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 412–13 (1990); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1295 (1984); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1278 (1993); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L.

The problem, in both cases, is that denials of these rights frequently lack drama. Unless they are extreme, they represent contested political arrangements within the nation that are difficult to articulate as a basis of definitive intervention. Free speech is perhaps the best known negative right, for example, but all governments place some restrictions on speech; at what point can these restrictions be regarded as so severe that they justify even an embargo, to say nothing of an invasion? Similarly, subsistence and health care seem crucial for even a minimally acceptable human existence, but treating these needs as rights runs into the common objection that they depend on the availability of resources. At what point can the failure to provide them be regarded as a violation that triggers intervention, as opposed to a misfortune that merits voluntary assistance?

The most compelling circumstance probably involves a deprivation focused on a single group within the nation. This will often have the character of a conscious effort to oppress, rather than a general political condition in the case of first generation rights or a general shortage of resources in the case of second generation rights. It overlaps with circumstances where federalism, although it does not provide an initial justification for intervention, offers a pragmatic remedy that possesses justificatory force. From this perspective, second generation rights, while more controversial generally, appear to provide a better case for intervention because their denial serves as a basis for humanitarian aid. Denial of sustenance or health care can cause threats to life that generally would not occur in the case of first generation rights.

The significance of groups in identifying the effects of federalism on potential interventions directs attention to third generation rights, which attach to groups, rather than individuals.<sup>121</sup> These include a group's right to preserve its culture, to transact business and provide education in its language, and to be protected against efforts to assimilate it into a national majority. A number of United Nations treaties and declarations have recognized group rights to some extent,<sup>122</sup> and scholars have provided both theo-

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REV. 7, 9–11 (1969); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 659–60 (1979); and Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 4–5 (2005).

<sup>121</sup> For general discussions, see DONNELLY, *supra* note 120, at 204–24; FELICE, *supra* note 120, at 1–3; GRIFFIN, *supra* note 120, at 256–76; Michael Hartney, *Some Confusions Concerning Collective Rights*, in THE RIGHTS OF MINORITY CULTURES 202, 202–23 (Will Kymlicka ed., 1995); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, in THE RIGHTS OF MINORITY CULTURES, *supra*, at 179; and KYMLICKA, *supra* note 112, at 1, 35.

<sup>122</sup> U.N. Charter arts. 13, 55, 57, 73; ICCPR, *supra* note 50, art. 27; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

retical justifications and pragmatic prescriptions.<sup>123</sup> But the contours of the rights that the U.N. has articulated remain decidedly unclear, while other scholars argue that political rights attach only to individuals and that group rights are an incoherent or inadvisable idea.<sup>124</sup>

There appears to be a close link between group rights and federalism, much closer than between individual rights and federalism. Federalism, after all, refers to groups, not individuals. Just as no individual can assert a

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<sup>123</sup> See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989) (arguing that liberalism, despite claims by critics such as Sandel and Taylor, recognizes the individual's membership in communities and only rejects more extreme communitarian claims that should in fact be rejected); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995) (arguing that group rights that protect the group from political and economic domination by the larger society should be recognized, but that group rights that restrict the freedom of individuals should be rejected); VERNON VAN DYKE, *HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION* (1985) (arguing that groups should be recognized as having collective rights, and that liberal democracy fails to recognize these rights because it is grounded on individualism); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (arguing that anti-discrimination is merely a mediating principle for the Equal Protection Clause, and that a different mediating principle, focused on group-disadvantaging, provides a preferable interpretation of the Clause); Ronald R. Garet, *Communitarianism and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983) (claiming that groups have rights that are intrinsic, and not derived from the rights of the individual group members); Frances Svensson, *Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes*, 27 POL. STUD. 421 (1979) (discussing the challenge that group rights claims pose for liberal democratic theory, as exemplified by the conflict between American democracy and the communalism of Native American tribes); Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, 29 WORLD POL. 343 (1977) (asserting that groups have rights that should be recognized, including a moral right to self-determination); Vernon Van Dyke, *Justice as Fairness: For Groups?*, 69 AM. POL. SCI. REV. 607 (1975) (arguing that Rawls' liberalism is based on the factually incorrect assumption that society is an ethnically homogenous state); Vernon Van Dyke, *Human Rights and the Rights of Groups*, 18 AM. J. POL. SCI. 725 (1974) (observing that, although the U.N. Charter recognizes only individual rights, many collective rights of groups are recognized by domestic policies and international agreements).

<sup>124</sup> See, e.g., John R. Danley, *Liberalism, Aboriginal Rights and Cultural Minorities*, 20 PHIL. & PUB. AFF. 168 (1991) (critiquing Kymlicka for failing to account for the ability of liberalism to recognize culture, and for defining group rights for vulnerable aboriginal minorities in a manner that cannot be adequately generalized); Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985) (rejecting Sandel's and MacIntyre's critique of liberalism and arguing that theories of communitarian rights are basically flawed); H. N. Hirsch, *The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community*, 14 POL. THEORY 423 (1986) (critiquing communitarian scholars for failing to recognize the conditions needed to create and maintain communities, the negative consequences of these conditions, and the inconsistency of these conditions with American constitutionalism); Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105 (1992) (arguing that the liberal theory of individual rights, in protecting minorities against the majority, provides all the protection for groups that is required, so that there is no need to resort to a separate theory of group rights); Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751 (1992) (arguing for the moral and pragmatic value of universal rights, economic interdependence, and cultural malleability). Gutmann, *supra*, at 319, says: "The communitarian critics want us to live in Salem, but not to believe in witches."



right to speak his or her own language,<sup>125</sup> no individual can assert a right to exercise governmental authority. In both cases, it is only a group or community of people who can coherently advance these claims. The result is that the substance of the federal solution that potentially justifies the intervention can be derived from the nature of the violation, which is not necessarily true where individual rights, either negative or positive, are concerned.

To clarify, if a nation intervenes to protect individual rights and imposes a federal solution, that solution is likely to be structured as partial autonomy for the region whose people were being oppressed by the central government. The theory is that the new, partially autonomous regional government would treat its people better on those issues where it had decision-making authority, and advocate for their interests more effectively on those issues where decision-making authority remained with the central government. But the difference between the national and regional regimes would not involve human rights, *per se*. It seems unlikely that modern nations would intervene on the ground that a particular group was being denied free exercise of its religion, or a basic right to sustenance, and then endorse a solution where those rights were granted to the previously oppressed group and denied to the remainder of the nation's people. But if a nation imposes federalism as a means of protecting group rights, it has a clearer basis for crafting a federal regime that grants autonomy with respect to the content of those particular rights, whether it is language, religion, culture, or some other attribute of the oppressed minority. It would make perfect sense, for example, to insist that a linguistic minority be granted specific rights to protect the use of its language, such as the provision of public education and legal services in that language, without adding any specifications regarding the remainder of the nation.

This appealing symmetry between group rights and the intervention justified by a federalist solution is subject to some important caveats, however, beyond the limits of geographic concentration and subsidiary minorities described above. Even if one is willing to accept the validity of group rights, it seems difficult to argue that they are of equal importance to individual rights, of either the negative or positive variety. Considered by them-

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<sup>125</sup> See Dénise Réaume, *The Constitutional Protection of Language: Survival or Security*, in LANGUAGE AND THE STATE 37, 48 (David Schneiderman ed., 1991); Ruth Rubio Marin, *Exploring the Boundaries of Language Rights: Insiders, Newcomers and Natives*, in SECESSION AND SELF-DETERMINATION, *supra* note 77, at 136, 144–61. Wittgenstein makes the more general point that there is no such thing as a private language; language is necessarily a means by which people agree upon the meaning of sounds and symbols so that they can communicate with each other. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 241–294 (G. E. M. Anscombe trans., 3d ed. 1958).

selves rather than as a supplement to individual rights, they relate mainly to induced rather than compelled assimilation. If a group has its own language and its own religion, compelled assimilation of that group, by forbidding its members to speak their language or practice their religion, would inevitably violate much better-established rights of free speech and free exercise, so that group rights would need not be considered. A violation of group rights, by itself, would generally consist of non-coercive inducements to the group to abandon its culture, such as providing education only in the majority language, failing to provide funding for the group's cultural activities, or encouraging young people to leave the group by offering them opportunities in the larger society. While members of the group may perceive such actions as threats and even respond to them with violence,<sup>126</sup> it is difficult to argue that adoption of such policies by a nation provides another nation with a justification for intervening.

Moreover, as Will Kymlicka has pointed out,<sup>127</sup> group rights may not only seem somewhat flimsy when standing by themselves, but they may conflict with individual rights that are generally seen as more substantial. A group's culture will only persist if its young people subscribe to it, but if the group is a small or remote minority within the nation, its young people may yearn for the bright lights and broader opportunities that the majority cul-

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<sup>126</sup> It is precisely such a perceived threat that has fueled Islamic fundamentalism, which has been notoriously violent. While the fundamentalists have demonized Western culture in general and Western nations in particular, the driving force of their antagonism has not been that people in Tennessee or Shropshire are behaving in ways that they dislike, but that the governments of the nations where they themselves live have adopted Western culture and are inducing them, and their children, to behave this way. See YOUSSEF M. CHOUËIRI, *ISLAMIC FUNDAMENTALISM: THE STORY OF ISLAMIST MOVEMENTS* 157–96 (3d ed. 2010); MICHAEL FIELD, *INSIDE THE ARAB WORLD* 228–71 (1995); BEVERLEY MILTON-EDWARDS, *ISLAMIC FUNDAMENTALISM SINCE 1945*, at 73–113 (2005); RAPHAEL PATAI, *THE ARAB MIND* 294–325 (rev. ed. 2002). For a vivid discussion of this phenomenon in a particular country, see MARTIN STONE, *THE AGONY OF ALGERIA* (1997). Because Algeria was so intensely colonized, and its elites so strongly influenced by French culture, the fundamentalists have been particularly hostile to modernization efforts by the national (and entirely Islamic) post-colonial regime. “In the political and social crises of the 1990s satellite dishes became a frequent target for Islamic extremists in heavily Islamic-influenced areas . . . .” *Id.* at 22–23.

<sup>127</sup> KYMLICKA, *supra* note 112, at 152–72. He says:

[A] liberal conception of minority rights cannot accommodate all the demands of all minority groups. For example, some cultural minorities do not want a system of minority rights that is tied to the promotion of individual freedom or personal autonomy . . . . These measures do not protect the group from the decisions of the larger society. Rather, they limit the freedom of individual members within the group to revise traditional practices. As such, they are inconsistent with any system of minority rights that appeals to individual freedom or personal autonomy.

*Id.* at 153. For a related view, see JOHN RAWLS, *POLITICAL LIBERALISM* (1996) (arguing that a well-ordered liberal society consists of an overlapping consensus among different groups that do not necessarily share a common conception of the good or a commitment to liberalism).

ture offers. The group's efforts to survive, and to resist assimilation, may thus involve restrictions on these young people's freedom. Central government policies that support those efforts may thus appear as a violation of these people's rights.

Such considerations emphasize the role of federalism as a solution rather than a ground for intervention. It is difficult to regard group rights as a basis for external intervention, even if an already federalized subunit appeals to the international community for support and protection. On the other hand, if external nations intervene in response to more severe humanitarian or human rights concerns, additional considerations based on group rights can aid in crafting the federalist remedy. Federalism's grant of partial autonomy to the oppressed region might specifically protect its collective or group rights. At the same time, the fact that the region remained part of the nation would provide countervailing forces in the region that might well protect the individual rights of those who, for reasons of political identity or personal preference, wanted to associate themselves with the national culture. It is precisely the ability to fine-tune the relationship between the central and regional governments that makes federalism an attractive solution for nations whose peoples have disparate political identities.

Federalism seems still more appealing as a solution for claims to self-determination. While the principle of self-determination played an important role in the decolonization process<sup>128</sup> and is generally uncontroversial in that context, it presents more complexities as a general principle for determining national boundaries. One of the major criticisms is that it seems to imply a right to secede, and thus threatens the dismemberment of any nation containing populations with disparate political identities.<sup>129</sup> This is in fact the way the principle was implemented by one of its strongest proponents, Woodrow Wilson.<sup>130</sup> The settlement he urged in the aftermath of World War I involved the dissolution of the Austro-Hungarian Empire into a collection of small, ethnically defined new nations. Unfortunately, each of these nations possessed ethnic minorities of their own that led to a reitera-

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<sup>128</sup> See CASSESE, *supra* note 1, at 71–98; JOHN CHARLES HATCH, A HISTORY OF POSTWAR AFRICA 25–41 (1965); MEREDITH, *supra* note 34, at 162–78. For an insightful argument that the principle of self-determination, when implemented in accordance with European concepts of the nation state, represented a disastrous strategy for African society, see BASIL DAVIDSON, *supra* note 34, at 10–13.

<sup>129</sup> See BUCHANAN, *supra* note 55 at 331–400; BUCHHEIT, *supra* note 84; CASSESE, *supra* note 86, at 205–76; HANNUM, *supra* note 55, at 46–49; Donald Horowitz, *A Right to Secede?, in SECESSION AND SELF-DETERMINATION*, *supra* note 77, at 50; MUSGRAVE, *supra* note 55, at 22–30.

<sup>130</sup> See THOMAS J. KNOCK, TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER *passim* (1992); EREZ MANELA, THE WILSONIAN MOMENT: SELF-DETERMINATION AND THE INTERNATIONAL ORIGINS OF ANTICOLONIAL NATIONALISM 25–26 (2007); MUSGRAVE, *supra* note 55, at 22–30.

tion of the problem that the dissolution was designed to solve.<sup>131</sup> What followed, during the next century, was a lugubrious history that fully justified the comment, widely attributed to Winston Churchill, that the Balkans have produced more history than they can consume.<sup>132</sup> Self-determination seems even more problematic if the group demanding it happens to occupy a resource-rich part of the nation. That represents a potential threat to the economic viability of the remaining nation and induces the suspicion that the people, or at least the leadership, of the seceding region are motivated by greed as well as by identity politics.

Here again, federalism can provide a workable and attractive solution, and thus increase the justifiability of intervening on behalf of the group whose political identity differs from that of its nation's majority. Because it represents an intermediate step between domination and secession, federalism counteracts three of the most troublesome and least justifiable motivations for the minority group to assert its right of self-determination and for an external nation to support that right. While federal regimes grant autonomy to subunits of the nation on matters connected most closely to political identity and culture, their central governments tend to retain control over the economy, civil order, and foreign relations by maintaining a national market, a supervisory legal system, and a unified foreign policy. The national market will oppose, or counteract, efforts by the autonomous sub-region to monopolize or control resources that happen to be located in its region. The supervisory legal system will tend to provide significant protection to minority groups within the federalized subunits, particularly in the common case where one of those minority groups is the national majority, thus counteracting any instinct by the previously dominated population of the sub-region to be prejudiced or retaliatory. The unified foreign policy will deny to the intervening nation the political advantages it might gain by encouraging the breakup of a rival or hostile nation and then establishing friendly or client relations with the more tractable of the successor states. In other words, a federalist solution tends to shift the principle of self-determination away from its less attractive aspects of greed, ethnocentrism, and international *realpolitik*, and toward more normatively appealing features such as local governance and cultural diversity.

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<sup>131</sup> In fact, the dissolution involved the creation of four new nations (Austria, Hungary, Czechoslovakia, and Yugoslavia), plus regions attached to Poland (which was restored by the settlement) and Romania. See MISHA GLENNY, *THE BALKANS: NATIONALISM, WAR, AND THE GREAT POWERS 1804–1999*, at 307–544, 634–661 (2001); ROBERT A. KAHN, *A HISTORY OF THE HABSBURG EMPIRE 1526–1918*, at 497–520 (1974). It is interesting to speculate whether the federalization of the Austro-Hungarian Empire would have been a preferable solution.

<sup>132</sup> The largest of the newly created nations, Yugoslavia, broke apart into eight separate entities, in part as a result of further interventionist actions by the United States. See GIBBS, *supra* note 61, at 106–14.

## III. EXTERNAL RESPONSE TO INVITATION

The role of federalism in international law is not limited to the issue of definitive intervention into a nation's internal affairs. There are a significant number of nations where such intervention could not possibly be justifiable, regardless of whether it is practical, and others where it could not be practical, even if justifiable.<sup>133</sup> Some of these nations are already federal, however, and their subunits, possessing a certain level of autonomy, want to establish international relations of various kinds. They might do so by initiating contacts with external nations or by responding to contacts that foreign nations have initiated. Alternatively, an external nation may perceive some specific advantages in establishing direct relations with another nation's federalized subunits. Is it justifiable for an external nation to engage in contacts of this sort? That is, does federalism confer some sort of international status on the subunits of the federalized nation, and is it justifiable for external nations to enter into such contacts when there is no general justification for intervention on humanitarian, human rights, or related grounds?

The question is not whether subunits of a nation can engage in international contacts of any kind. It is well established that we live in a globalizing world and that institutions that define themselves in largely or entirely domestic terms are likely to become involved in relationships that extend beyond the borders of their nation. Corporations, non-profit institutions, universities, cultural organizations, scientific organizations, professional and amateur sports leagues, and public institutions of various kinds will all find that they need to engage with institutions of the same or different kind in other countries. Generally, they will be able to do so with the tacit or explicit authorization of the nation where they are located. Subunits of the nation that have their own governmental structures and pursue their own policies in particular areas have the same need to act in an international arena and will possess the same implicit authority to do so.<sup>134</sup> The question here is whether an external nation is justified in establishing certain contacts with the federalized subunits of a nation over the explicit objection of that nation's central government. That is the point at which contacts with a foreign nation become a form of intervention by the foreign nation and where a question of international law arises.

Consider the example of Canada, which has created a federalized regime, in large part in response to demands from the French-speaking popu-

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<sup>133</sup> This second category would consist, at a minimum, of the great powers, which, as Hedley Bull suggests, can be defined as those nations that cannot be intervened against. INTERVENTION IN WORLD POLITICS, *supra* note 12, at 2.

<sup>134</sup> For a comprehensive discussion of such contacts, see GLENNON & SLOANE, *supra* note 10, at 35-76.

lation of Quebec.<sup>135</sup> Canada is a nation that protects human rights, of all kinds, at the highest level;<sup>136</sup> consequently, interference with Canada's internal affairs is impermissible.<sup>137</sup> But the province of Quebec has now been granted a range of autonomy rights in Canada's federal system and wants to establish international relations with foreign nations or institutions in those nations.<sup>138</sup> How should other nations respond to such overtures? Should they require, and demand that their institutions require, permission from the Canadian government, or should they treat Quebec as sufficiently separate and autonomous to establish relations regardless of, or in opposition to, the policies of Canada?

It follows, from the characterization of federalism established above, that external nations would not be justified in establishing relations with a subunit such as Quebec over the explicit objection of the national government. To reiterate, federalism is not a deontological principle but a pragmatic arrangement designed to solve certain structural problems, specifically the problem of divergent political identities within the populace. Thus, the fact that the nation has adopted federalism as a solution to a sub-optimal situation does not confer any justification to intervene on external nations.<sup>139</sup> There is no coherent normative claim that the external nation can advance that would justify intervention, even of a fairly mild nature, simply because the subject nation has chosen to structure its government in a particular way.<sup>140</sup> Of course, the federal arrangement itself may allow the subunit to

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<sup>135</sup> See generally BANTING ET AL., *supra* note 86 (essays discussing various features of Quebec's demand for greater autonomy or independence); BUCHANAN, SECESSION, *supra* note 74 (discussing Quebec's right to secede from Canada in terms of a general theory of the right to secede on the basis of a separate cultural identity); CASSESE, *supra* note 55, at 248–56 (same); ERK, *supra* note 86, at 44–56 (observing that Canadian federalism did not satisfy the demands of Quebec, which differs from other provinces because of its language, and thus the federal system had to be revised and adapted to account for this difference); KYMLICKA, *supra* note 112, at 10–26, 116–20 (discussing Quebec's demands in terms of the multiethnic character of the Canadian nation and the historical origins of that nation); MCROBERTS, *supra* note 86 (recounting the history of Quebec and its relationship to the Canadian nation during the twentieth century).

<sup>136</sup> According to Freedom House, a leading international human rights organization, Canada has a general freedom ranking of 1.0, the highest possible on its 1 to 7 scale, and a ranking of 1 on both political rights and civil liberties. This has been true ever since Freedom House began its rankings in 1973, which is prior to the expansion of Canadian federalism. See *Freedom in the World 2017: Table of Scores*, *supra* note 108.

<sup>137</sup> This is not to say that no injustices occur in Canada, but simply that these injustices do not rise to the level that would justify intervention.

<sup>138</sup> At present, the province of Quebec has twenty-six international offices in fifteen separate countries, designated as general delegations, delegations, bureaus, and trade offices. See *Offices Abroad, GOV'T OF QUE.*, <http://www.mrif.gouv.qc.ca/en/ministere/representation-etranger> [<https://perma.cc/UUY5-672Q>].

<sup>139</sup> See *supra* pp. 219–22.

<sup>140</sup> In the United States, this principle leads to a strong preemption doctrine, as established by *Missouri v. Holland*, 252 U.S. 416 (1920). A recent reaffirmation is *Crosby v. Nat'l Foreign Trade*

establish certain types of relationships with other nations. In that case, however, the subunit's authority is properly regarded as a delegation by the central government, just as that government might delegate authority to a private entity for certain purposes. As noted at the outset, this is a question of domestic law, not international law.<sup>141</sup> The issue of intervention simply does not arise under these circumstances.

Federalism is not without effect in this context, however. In deciding whether to respond to a request from a federalized subunit, the external nation is entitled to assume that the subunit has been granted the authority to make such a request. If the request came from a subunit of a unitary nation, however, the external nation would not be entitled to act on such an assumption. The reason is that federalism constitutes a grant of partial autonomy and thus may explicitly or implicitly authorize the subunit to deal directly with external nations on certain issues. Both historical circumstances and the current pace of globalization suggest that the grant of autonomy would often be hobbled by a prohibition against any international relations by the federalized subunit. Quebec is surrounded, for literally thousands of miles, by English-speaking territory. If it could not engage in cultural exchanges with other Francophone areas, which inevitably consist of other nations or parts of other nations, the value of the language rights it has been granted by Canadian federalism would be diminished. Similarly, if a subunit has been granted authority over family law, the full exercise of that authority in the modern world would require it to deal with marriages between its citizens and foreign nationals, marriages of its own citizens in foreign nations, international adoptions, and a variety of other issues that require international contacts of various sorts.

The presumption that the subunits of a federal regime, but not a unitary regime, have authority to deal with external nations may seem somewhat unimportant, since, by its nature, that presumption could be counteracted by central government command. In fact, it would often make a real difference. To begin with, modern nations, and particularly democracies, have complex decision-making structures and procedures. The boundaries of a federalized subunit's authority may not be clear, and in the absence of a crisis, might not be clarified for long periods of time. In addition, subunit governments

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Council, 530 U.S. 363 (2000). *But see* GLENNON & SLOANE, *supra* note 10, at 205–20 (arguing that *Holland* was severely undermined by the Court's decision in *Bond v. U.S.*, 134 S. Ct. 2077 (2014)). Maintaining a strong preemption doctrine for treaties does not run counter to the trend observed in Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015) (documenting the decline of the doctrine of foreign relations exceptionalism). Given that preemption remains an important feature of domestic law, it cannot be concluded that a nationalist approach to the issue in question is any less normal than a federalist approach.

<sup>141</sup> See *supra* pp. 197–99.

tend to advocate for their autonomy, particularly in a federalized system, and may well be able to convince the central government to expand the scope of the uncertainty or prolong its duration. Third, as Robert Scott and Paul Stephan have observed, many international law agreements lend themselves to informal or contract-based enforcement, which would enable the subunit to establish and maintain a relationship with a foreign nation in the absence of the formal authority that the national government might provide.<sup>142</sup> The result is that an external nation, receiving some sort of request for relations with a federalized subunit, or perceiving an opportunity to establish such relations, will often not know whether the subject nation's central government has authorized, tolerated, or prohibited those contacts. If it is entitled to presume that the contacts are permitted, it may well proceed in ways that would not be justified if it were dealing with subunits of a unitary regime, and this permissive period of uncertainty might persist for long periods of time.

The presumption of authorized contact would also make a difference for the still more complex issue of the relationship between external nations and private firms or non-governmental organizations (NGOs) within the subject nation. It would mean that these actors would acquire a different status, vis-à-vis their central government, depending on their relationships with the governments of the federalized subunits.<sup>143</sup> Of course, private firms and NGOs in democratic nations are generally free to establish international contacts of various kinds, but an authorization from a federalized subunit might make a considerable difference in conflictual situations. Consider, as an example, the Landless Workers' Movement of Brazil (MST),<sup>144</sup> an important social movement that has used direct action and political mobilization to combat the plight of landless rural workers.<sup>145</sup> International human

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<sup>142</sup> ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 148–51 (2006). As the authors state: “[A] relationship that has no clear end point and substantial value to all participants can rely on retaliation to police compliance . . . . We would expect to see formal enforcement, therefore, only where the interactions of the parties are complex and lack transparency.” *Id.* at 149. Thus, an agreement for special trade relations or a cultural exchange between a national subunit and a foreign government, which is relatively simple and clear in its implications, can be enforced by retaliation (if one party defaults, the other can withdraw) and thus not require formal state action.

<sup>143</sup> This subject is discussed here because subtleties of this sort are much less likely to arise in situations where definitive intervention is either justified, as a matter of international law, or carried out as a matter of *realpolitik*.

<sup>144</sup> MST stands for the organization's name in Portuguese, the Movimento dos Trabalhadores Rurais Sem Terra.

<sup>145</sup> See PETER P. HOUTZAGER, *The Movement of the Landless (MST) and the Juridical Field in Brazil* 1–2 (Inst. of Dev. Studies, Working Paper No. 248, 2005). The MST is an organization of 1.5 million landless peasants from twenty-three of Brazil's twenty-six states, but it is heavily represented in the impoverished Northeast. See RICHARD REYNOLDS, *ON GUERRILLA GARDENING: A HANDBOOK FOR GARDENING WITHOUT BOUNDARIES* 36 (2008). In that region, the issue also



rights and environmental protection groups have expressed wide support for the MST's goals. But the external response to which the Quebeçois are entitled cannot be afforded to the MST unless the situation reached the point where intervention would be justified on the basis of humanitarian or human rights concerns. If the MST were able to obtain authority from one of Brazil's twenty-six states, however, it would be in a stronger position to establish and maintain international contacts. Of course, the central government might forbid such contacts as a matter of national policy, but since the Workers' Party has controlled that government under the da Silva and Rouseff administrations, relations between the MST and the central government have been complex and far from uniformly hostile. It might be difficult for that government to categorically forbid constructive international contacts by a social movement that had won the support of a federalized subunit of the nation.

The role of federalism regarding the international contacts of subunits can be seen as analogous to its role in the context of forcible intervention, namely, that it functions as a solution rather than an independent justification. In situations where forcible intervention is unjustified, a nation that received an invitation of some sort to establish economic or cultural relations with the subunit of another nation might not know whether it could properly respond. The basic principle is that it could do so if the national government approved the subunit's action, but not if the national government forbade it. As stated, however, the national government's position might not be clear, and might be difficult or burdensome to determine in real situations. Federalism provides a solution, namely, that the foreign nation is entitled to presume that the contact is permitted if it is dealing with a federalized subunit. The reason is that federalism, as discussed above, grants subunits of the nation autonomy to act in various capacities. A nation, by establishing itself as federal, is thus declaring that its subunits are authorized to act on their own in a variety of situations. In a globalized environment, that declaration is made throughout the world.

## CONCLUSION

Should federalism make a difference in international relations? Should it serve as a basis for nations to pierce the sovereign veil that has been drawn around independent nations by the Westphalian system? International

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has strong ecological ramifications because Northeastern peasants, rather than being given unused or lightly used land from the massive holdings of the wealthy, have been encouraged to clear uninhabited land in the adjoining Amazon rain forest. See Ken Conca, *Environmental Protection, International Norms and State Sovereignty*, in *BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION*, *supra* note 12, at 147, 157–58.

legal scholars, looking inward toward nation-states from a generalized and often normatively based perspective, have tended to ignore this question and treat nation-states as unitary sovereigns. American legal scholars, looking outward from our vast and complex nation, have devoted a considerable amount of attention to the ability of its component states to maintain international contacts but have rarely gone beyond this domestic law problem to consider the international law questions of foreign intervention in a nation-state's affairs. This article attempts to remedy the resulting scholarly lacuna by asking whether federalism should play a role in international relations, whether it should alter the general rules by which one nation's intervention in the affairs of another are judged.

The answer is based on three general principles. First, federalism is a juridical grant of autonomy that is separate from the decentralization that occurs in all nations to a greater or lesser extent. Second, it is motivated and maintained by the separate political identity of the people in the subunit that has been granted this juridical autonomy. Third, it is not an independent right but a pragmatic strategy that can respond to the demands of some but far from all of the groups within a nation that might possess a separate political identity.

On the basis of these principles, this article concludes that a nation's adoption or rejection of a federalized structure should not influence the decisions of other nations about whether to intervene in its internal affairs. Those decisions should be based on the considerations that have already been extensively canvassed in international law, most notably humanitarian emergencies, ongoing human rights violations, and justifiable demands for self-determination. But interventions, being forceful actions that are supported by some norms and are opposed by others, should only be undertaken if they will do more good than harm—that is, if the intervener has some long-term strategy for solving the problem that induced its action. Federalism, as a means of internal governance, can play an important and valuable role. As a compromise that acknowledges the separate political identity of geographically concentrated groups but enables the nation to continue functioning as a coherent entity, it may well serve as a pragmatic, flexible solution to the presenting problem. As such, its availability renders certain interventions more justifiable than they might be otherwise. In addition, it should be regarded as granting nations a presumptive right to establish contacts with a subunit of the federalized nation in the absence of a clear indication from that nation's government that such contacts are forbidden.

