

## CHAPTER ONE

# WHAT IS FEDERALISM?

In order to discuss federalism (at a theoretical level at least), it is necessary to define it. This immediately raises a number of the complexities that beset this subject and that mechanistic discussions of it tend to ignore or obscure. In fact, the problem is sufficiently complex that no mere definition will suffice. However clear one tries to be about such an emotionally charged political term, its varied usages will tend to seep through the verbal boundaries one has established. Any effort to provide real clarity must therefore distinguish the term *federalism* from related terms and attempt to map the conceptual topography of the entire underlying issue. That issue is the relationship between the center of a political regime and its constituent parts, however those parts are conceived—a relationship that implicates the foundational matter of political identity. The first section of this chapter offers definitions of the two central concepts that motivate our theory, political identity and federalism. The second section distinguishes the concept from related but different concepts of consociation, decentralization, and democracy, both local and general.

### TWO BASIC CONCEPTS: POLITICAL IDENTITY AND FEDERALISM

#### *Political Identity*

Identity is one of modernity's most contested concepts, not only on its own terms, but because it implicates our theories of the self. In fact, one definition of modernity is that it begins with Descartes' declaration that the isolated self is the starting point of knowledge.<sup>1</sup> His notion of cogito is a declaration of the self's independence from both God and tradition, its

ontological priority over any pre-given structure, whether transcendent or empirical.<sup>2</sup> This notion is central to Kantian philosophy, where the self not only possesses ontological priority but projects its inherent understandings on the perceived structure of the universe.<sup>3</sup> It has been carried forward by both political liberalism and analytic philosophy and is probably the dominant view of educated people in the Western world. In Continental philosophy, the issue of the self's independence serves as the battleground between Husserl's phenomenology and Heidegger's existentialism, with Husserl a self-declared Cartesian and Heidegger granting priority to *Dasein*, or being.<sup>4</sup> But there are actually large areas of agreement between the two—most relevantly, for present purposes, the idea that the self is socially constructed. For Husserl, the self is an irreducible internal consciousness that integrates experience, but all its content, all a person's ideas and ways of interpreting the world, are the product of social, or intersubjective, processes. For Heidegger, those social processes create the self and define its boundaries, with *Dasein* present only as a primordial substrate. Most modern social scientists premise their work on this notion of a socially constructed self.

Identity can be understood as the self's interpretation of itself.<sup>5</sup> This would be true for the Cartesian, Kantian, Husserlian, and Heideggerian self, although it would have different ontological significance in each case. Descartes and, more particularly, Locke and Kant urge that the self develop an identity as an independent, morally responsible agent.<sup>6</sup> In contrast, modern Continental philosophers, such as Husserl and Heidegger, following Hegel, argue that this is impossible in the ordinary course of life, where socially constructed conceptions of identity prevail, conceptions that can only be escaped if the self sheds its identity through either a transcendental *epoché* or a reconnection with the essence of *Dasein*. This is why the insights of Continental philosophy have seemed so useful—and so convincing—to English-speaking as well as Continental social scientists, although Continental philosophy itself has remained far less popular than analytic philosophy among English-speaking scholars.<sup>7</sup> From a social science perspective, identity is best regarded as an empirically observable production of social systems that vary in their complexity and interrelationships.<sup>8</sup> Thus social scientists, without necessarily becoming involved in philosophical debates about the ontology of the self, can explore the ways that people decide who they are, where they belong, and what their lives are all about.

Once identity is treated in social science terms, it becomes clear that

people's identities are powerfully affected and perhaps determined by their community or social group. Descartes, Locke, and Kant may urge us, from a philosophical perspective, to view ourselves as isolated individuals, but the social science based on phenomenological or existential concepts recognizes that identity is constructed by the groupings that claim individuals from birth, inculcate them, and serve as the dominant context of their adult lives.<sup>9</sup> In fact, this social context generally determines whether people view themselves as individuals at all, rather than as members of a tribe or clan.<sup>10</sup> Modern individualism can thus be regarded as a specific cultural production, the distinctive way in which contemporary Western society constructs people's identities, so that our sense of ourselves as separate entities is merely a special case of the more general process of cultural construction. As Anthony Cohen points out, this approach can be taken too far, so that it denies the phenomenological reality of individual consciousness that is posited by most philosophers.<sup>11</sup> But there can be no doubt that community or social group—a collective sense of self—is a crucial factor in the formation of the individual's identity.<sup>12</sup>

Political identity is that aspect of identity that connects the individual with politics, that is, with some group that exercises governance in a given area or competes for the ability to exercise governance. Sometimes, political authority is defined as the process of obtaining monopoly of authorized force,<sup>13</sup> but in a settled modern society, it implicates the whole range of activities by which civil order is maintained within a given area and by which the collective goals of the people in that area can be achieved.<sup>14</sup> Even when politics is thus broadly defined, no theoretical or empirical approach demands that every individual possess a political identity at all. In a situation such as that of the Roman Empire, for example, where political control was well-established, comprehensive, largely nonparticipatory, and completely tolerant of nonpolitical affiliations (e.g., religion), the social groups that defined people's identities often had no political involvement, and it is at least possible that political commitments were entirely absent from many people's constructed identities.<sup>15</sup> That was certainly St. Augustine's recommendation,<sup>16</sup> and one gets the impression that it was the actual experience of many early Christians.<sup>17</sup> The notion of identity as a socially constructed conceptual framework suggests that it is a variable one, that even if people possess an instinctive need to belong to a group or an instinctive sense of such belonging, such instincts can assume many different forms.

In the modern world, however, people's political identity—their sense

of themselves as being part of a group that exercises or demands to exercise a monopoly of authorized force, to maintain civil order, and to implement collective goals—seems enormously important and very often dominant. Indeed, it could be argued that the rise of the nation-state, another hallmark of modernity, caused (or perhaps was caused by) the increasing dominance of political identity over other modes of self-definition.<sup>18</sup> Benedict Anderson's well-known characterization of nationalism as an "imagined community" captures both the subjective character of nationalism and its connection to the concept of identity.<sup>19</sup> Certainly, modern nations have demanded and obtained levels of loyalty and commitment that render them a major force in people's process of identity formation and that displace prior social groupings based on caste, consanguinity, or religion.<sup>20</sup> As late as the early nineteenth century, Eugen Weber argues, citizens of France still identified with their provinces or localities; by the end of that century, the military conscription and the advances in communications, transportation, urbanization, and industrialization had made them all think of themselves as French.<sup>21</sup> Of course, such prior modes of self-definition as religion, language, collective mythology, and ethnicity continue to shape people's identities as well, but the tremendous impact of the nation-state has tended to draw these alternative constructs into the political orbit. The religious wars of the sixteenth and seventeenth centuries made all religion political, and religious groups have responded by becoming political participants, as recent events in our own nation readily attest. Similarly, with nationalism's increasing impact, the collective myths or memories of various groups either have become identified with national identity or have been consciously constructed as a means of opposing that identity and establishing another in its place.

The relationship of ethnicity to nationalism is particularly complex and particularly significant for purposes of this discussion.<sup>22</sup> As David Miller, T. K. Oommen, and Anthony Smith have noted, the two are far from identical, since nationalism embodies a political claim that ethnicity, as an independent concept, does not.<sup>23</sup> But these two instincts, these two ways of constructing identity, have been intimately intertwined as a matter of historical experience, and nationalism has tended to politicize ethnicity in a way that did not occur in prior eras. Smith observes that some nations are formed when a governing elite is "gradually able to incorporate middle strata and outlying regions into the dominant ethnic culture," while others are formed when an ethnic intelligentsia mobilizes "a formerly passive community into

forming a nation around the new vernacular historical culture that it has rediscovered.”<sup>24</sup> Clearly, however, these two nation-building processes can conflict, as will occur when a governing elite attempts to incorporate a group that is being mobilized by its intelligentsia around a different identity; and both processes can conflict with ways of defining a nation that are carried out without regard to the populace’s ethnic identification, such as conquest or colonial demarcation. Given the centrality of both political and ethnic identity in the modern world, conflicts and discontinuities of this sort frequently produce incendiary results.

There are, however, countervailing tendencies. In their accounts of the contemporary conceptual landscape, many writers speak of multiple identities, of shifts from one identity to another, or of self-actualizing identities that reject any hard-and-fast affiliation.<sup>25</sup> Certainly, globalization, Internet communications, and increasing individualism could be seen as major social trends that are undermining the primacy of people’s political and ethnic affiliations, with the rise of the European Community and the desire of people to enter that community by portraying themselves as “good Europeans” serving as both emblematic and pragmatically important instances of such trends. But the question can be treated as a largely empirical one, and there is no need to resolve it for purposes of this study. Political identity need not be universal, exclusive, or even primary in order to be an important determinant of people’s attitudes. It need only be a means of self-interpretation that is readily and widely deployed in a variety of situations. That is sufficient for it to serve as an important consideration in virtually any political setting and as a determinative one in a good number of situations.

Thus there is great explanatory value in focusing on people’s political identity when examining issues of politics or governance. Even if it is one strand among many when considered at the individual level, it is likely to be dominant when individuals are aggregated (as they are in politics), because it is often the primary aspect of identity that connects the individual to larger groups. It could be compared to gravity, which is the weakest of the basic forces at the subatomic level but determines the structure of the universe because it combines unidirectionally and acts at unlimited distances. To the extent that other aspects of an individual’s identity (e.g., language, religion, or ethnicity) connect to larger groups, these aspects are likely to overlap with political identity in the modern world of nation-states; that is, modern people expect that their nonpolitical identities and their political identities will correspond. Moreover, as Amin Maloof suggests, “[p]eople

often see themselves in terms of whichever one of their allegiances is most under attack.”<sup>26</sup> Political crises would thus generate a heightened sense of political identity, even among people who might otherwise define themselves in religious, personal, or cosmopolitan terms. In short, we can expect that the conditions of modernity have given political issues an essential role in defining people’s sense of self.

### *Federalism*

*Federalism*, as the term is used in political science and legal scholarship, refers to a means of governing a polity that grants partial autonomy to geographically defined subdivisions of the polity.<sup>27</sup> Clearly, such a regime lies somewhere between a fully unitary state and an alliance of separate ones. A political entity that is governed by a single central government making all significant decisions cannot be described as federal without abandoning the ordinary meaning of the term. The same is true for a group of separate political entities that have entered into an alliance that precludes conflict among them but leaves all other decisions under the control of the separate entities.

While the concept of federalism, as an ideal type, is clear enough, the rationale behind its formulation requires further exploration. Divisions of authority within a government are obviously of interest, but what is the significance of geographical divisions, as opposed to functional ones? Why must the division involve a partial grant of autonomy to these geographical entities, as opposed to a functional grant of more extensive powers? A regime where some public officials exercise comprehensive authority over a range of governance areas (e.g., police, education, and social welfare) but are divided between those who are part of a central government and those who are part of regional governments is generally understood to implicate the issue of federalism. In contrast, a regime where some officials’ authority extends over the entire polity but is divided into single functions (e.g., police, education, or social welfare) implicates such issues as separation of powers or delegation but is not regarded as involving any question of federalism, except for the question of whether the absence of federalism produces beneficial or deleterious effects. Why do we associate one division of authority with federalism and not the other?

The distinction cannot be based on the extent of decision-making authority that is being exercised by a subordinate unit, because an expansively defined functional agency can exercise more authority than a narrowly

defined geographic one. Nor can it be based on the amount of independence that the subordinate exercises. The functional authorities could be independent agencies largely free of central control (e.g., the Federal Reserve Board or the U.S. Supreme Court), but such arrangements are still not described in terms of federalism. It would appear that at least one key to our conception of federalism lies in the question of geography itself and the significance of geographical divisions of authority, in contrast to other sorts of divisions.

There are at least two ways in which geography appears to create a distinctive division of authority and thus explain the restriction of federalism to that situation. First, geographical divisions are mutually exclusive while functional divisions are not. The reason is simply that geography is an external factor whose features are dictated to us by nature, whereas functions are socially constructed in their entirety. To be sure, we choose, as a matter of social construction, what significance we attribute to geography, just as we choose what significance we attribute to function. But once we have chosen geography as an organizing principle, once we have said that we want to divide authority by geographic regions, we are compelled by the nature of physical space to define those regions as separate from each other. In contrast, functional divisions can overlap depending on the way they are defined. Thus, if we assign the maintenance of public order to one agency and the provision of social services to another, we still have the option of having the first agency monitor the second agency's distribution of social services, having the second agency monitor the first agency's treatment of individuals, or creating a third agency that takes a public order approach to providing social services or a social services approach to maintaining public order. But once we have decided that the western third of a country is one administrative region, we cannot include parts of it in another administrative region unless we abandon geography as the principle of organization.

Second, geographically defined entities tend to reiterate the structure of the polity as a whole in a way that functional entities do not. New institutional theorists refer to this phenomenon as institutional isomorphism.<sup>28</sup> In the United States, for example, the central government, confusingly known as the federal government, is divided into an elected chief executive, an elected legislature, an appointed judiciary, and a large group of administrative agencies headed by appointed officials and assigned to such functions as agriculture, commerce, health, education, environmental protection, national defense, and foreign relations. The subsidiary governments,

confusingly known as states, are also divided into an elected chief executive, an elected legislature, a judiciary, and a large group of administrative agencies headed by appointed officials and assigned to such functions as agriculture, commerce, health, education, and environmental protection. There are differences, of course: state judges are often elected, not appointed; and state governments generally do not deal with certain issues, such as national defense and foreign relations. Despite these differences, the state governments appear as smaller versions of the national governments. In other words, the structure of the national government in its entirety and the structure of its geographically defined subsidiaries reiterate each other, whereas the structure of the national government and its functionally defined subsidiaries do not.

Why are these features of geographically divided authority so distinctive or important that they merit a separate designation and implicate all the claims and issues that are featured in the federalism controversy? Why are mutually exclusive regions that reiterate the structure of the central government so important and so controversial? The answer lies in the connection between these regions and the issue of political identity. Nations, described earlier as the focus of the modern person's political identity, are territorial in nature. As Miller notes, national identity "connects a group of people to a particular geographic place, . . . a clear contrast with most other group identities that people affirm."<sup>29</sup> Ethnic groups can serve as either a basis or a challenge to the formation of a nation, but only if they have a similar link to physical territory, so that they can aspire to national status. Thus the geographical organization of government, the physical pattern into which governmental authorities are arranged, powerfully implicates people's sense of self, in a way that cannot be duplicated by other issues of government organization, at least in the modern world.

But the boundaries of the nation do not always correspond to people's sense of political identity. A vast range of causal factors, including history, culture, ethnicity, economics, and international relations, determines political boundaries. Moreover, different people with different political identities are often mixed together in a single political entity. Thus there will often be disjunctions between the structure of governance that corresponds to people's sense of self and the structure of governance that actually obtains in a given region. Given the territorial nature of the nation-state, the mutual exclusivity of territorial boundaries, and the centrality of political identity to people in the modern world, these disjunctions are likely to create serious

conflict, as noted earlier in connection with ethnicity. Although observers vary in the extent to which they attribute political conflict to leaders' choices, economic forces, or popular attitudes, it seems apparent that disjunctions between political identity and geographic governance have been among the most important sources of such conflict in the modern world.

Federalism, as a concept, serves as a means of modulating, or varying, political identity. It thus expands the range of psychopolitical resources available for the creation of a political regime. Without federalism, the citizen or subject confronts the dichotomous choices between identification with the central regime and alienation from it in the realm of thought and between loyalty to the regime and rebellion against it in the realm of action. Federalism creates a wider range of possibilities for thought and action; it provides the individual with opportunities to divide loyalty and rechannel action. Thus, if people's political identity is associated with some region that has been subsumed into a larger polity, federalism provides a means by which the disjunction between their political identity and their territorial mode of governance can be reduced. It grants some reality to the region with which they identify, some objective correlative for their politically defined sense of self.

There are, of course, a variety of ways that loyalty can be divided or action rechanneled. The individual could become attached to a religion, a clan, a cultural movement, or a vocation. Confronted with a central regime that one dislikes, one can take refuge in any number of affinities and actions that provide an alternative identity. In an increasingly politicized environment, however, many of these alternatives are themselves politicized, and the nonpolitical refuges that are adequate for certain individuals may not be sufficient for large groups. Federalism has the value of being a political response. It provides alternative sources of identity and grounds for action in a purely political arena, so that the individual can feel motivated to remain involved in that arena. This is why federalism typically involves reiterated governmental units that reproduce the structure of the central unit. In using federalism to modulate political identity, the individual is giving loyalty not to something that is different in kind from the central government (e.g., a religion or a clan) but, rather, to something that is similar in kind and differs largely in extent. None of this implies that a political redirection of one's commitments is better or worse than any other type of redirection. But it is a response distinctive enough to merit a separate designation, which, by established usage, is federalism.

A defining feature of federalism is that it grants partial autonomy to geographical subdivisions, or subunits. As both political scientists<sup>30</sup> and political economists<sup>31</sup> have established, the subunits must exercise exclusive jurisdiction over some set of issues; that is, there must be some types of decisions that are reserved to the subsidiary governmental units and that the central government may not displace or countermand.<sup>32</sup> This structure is often, although somewhat controversially, described by saying that the subsidiary units possess rights against the central government. Like an individual in a regime that recognizes human rights, such as the right to speak or to practice one's religion, the subunits may assert certain claims of rights against the central government, claims that preclude the central government from taking action. The result is to allow the subunit to reach any result regarding the decisions that have been allotted to it, whether or not this decision comports with the desires of the central government.<sup>33</sup>

The significance of this feature is related to the question of political identity and will constitute a principal theme of this book. If people identify exclusively with the nation as a whole, they have no consistent reason to desire or demand that geographic subdivisions of the polity possess autonomy rights. Rather, their political desires will involve the nation as a whole, and they will want the entire nation to be governed according to their views. Only when their identity is divided between the nation and a geographic region or exclusively linked to such a region will they want the region to possess some level of autonomy, so that it can make choices that the center cannot countermand. In other words, regional autonomy will only be appealing to people if the region itself is meaningful to people, that is, if it relates to their sense of political identity. The emotive content of political identity leads to the equally emotive stance that a region's partial autonomy should be recognized as a matter of right.

From this perspective, regional autonomy can be contrasted with functional autonomy, such as the autonomy of the central bank or the judicial system. Many people regard functional autonomy as extremely important, but they do so on the basis of their political attitudes, not their sense of identity. Their commitment to central bank autonomy will be based on the way they think the nation should be governed, the advantages of having trained economists control the money supply or the dangers of having elected politicians controlling it. But this will not address the problem of divided loyalty, it will not provide a means by which a disjunction between their political identity and their territorial mode of governance can be re-

duced. Thus governance issues regarding functional autonomy implicate a variety of issues, but issues regarding geographical autonomy are best understood by exploring people's sense of political identity.

A subsidiary issue with some definitional impact involves the extent to which a particular nation is federalized. No effort will be made in this study to categorize the enormous variety of political arrangements that make use of the federalist principle.<sup>34</sup> Some nations are entirely divided into regions that possess autonomy rights, generally the same set of such rights. Thus there is no area over which the central government possesses exclusive jurisdiction, except perhaps the capital city or some sparsely populated territories. Other nations grant autonomy rights to particular areas, while the remainder of the nation is governed in a unitary manner.<sup>35</sup> In the United Kingdom, for example, Wales, Scotland, and Northern Ireland have been granted various autonomy rights, while England, with the majority of the population, remains a unitary state, with the counties into which England is divided possessing no such rights.<sup>36</sup> Because the present discussion addresses the theory of federalism as a governance mechanism, both types of regimes will here be considered federal, and the two types will be distinguished only when that distinction is relevant to the analysis.

## FEDERALISM DISTINGUISHED

Obviously, federalism is not the only means of organizing a nation's government, nor is it the only means of dividing control among different components of a polity. Further clarity about the nature of federalism can be achieved by comparing it to some of these other means of dividing control and by explaining the operative reasons for making verbal distinctions among them. The means that will be considered here are consociation, decentralization, local democracy, and, in a slightly different sense, democracy in general. Like federalism, these are principles for organizing a political regime and respond to the problem of divergent attitudes and circumstances among the citizens of the regime. Each principle shares at least one additional feature with federalism: consociation grants authority and autonomy to subsidiary groups within the polity, decentralization grants authority to geographically defined subunits, local democracy establishes political structures in geographically defined subunits, and democracy in general grants members of the polity definitive rights against the central government. Nonetheless, each of these principles is distinctly dif-

ferent from federalism. They are sometimes conflated with it to bolster contested claims of one sort or another, but this mode of argumentation breeds conceptual confusion. Different modes of governance should be described by different terms, and arguments in favor of each one should be based on its own distinctive features, not merged with other arguments through verbal obfuscation.

### *From Consociation*

Consociation, a concept most fully developed by Arend Lijphart, is an effort to achieve stable democratic government in a polity with a heterogeneous and potentially fractious population by means of power sharing and group autonomy.<sup>37</sup> Lijphart 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.”<sup>38</sup> While federalism in a democratic regime can be regarded as a form of consociation, the concept of consociation itself is much broader, in terms of both the groups that it covers and the mechanisms that it employs. Most obviously, as Daniel Elazar observes, the groups whose participation is invited and whose loyalty is secured in a consociative regime need not be geographically distinct and frequently will not be.<sup>39</sup> Religious, racial, or ethnic groups that are dispersed throughout the population are prime candidates for the consociative approaches that Lijphart discusses. Indeed, many of his examples—such as the conflicts between blacks and whites in South Africa, between Catholics and Protestants in the Netherlands, and between Muslims and Maronite Christians in Lebanon—involve intermixed populations and could not be viably addressed by federalist solutions.

Moreover, the mechanisms that Lijphart regards as implementing a consociational approach to governance are often unrelated to federalism. His concept of power sharing consists of four elements. Proportional representation enables all significant segments of the population to elect at least some members of the legislature, government by “grand coalition” allows leaders from these segments to participate in executive decisions, the requirement of a “concurrent majority” grants all segments veto power over legislative or executive decisions, and judicial review protects these arrangements from being undermined by a powerful majority. The unifying theme among these mechanisms is that they allow minority groups to par-

ticipate in the decision making by the central government. They are designed to ensure that minority voices will be heard in the national legislature and executive and that those bodies will not take action inimical to minority interests. In some sense, they are the polar opposite of federalism, in that they protect minorities by granting them a role in the central government, not by granting them a separate government apart from the center, with semiautonomous authority.

Lijphart's idea of group autonomy might seem more closely allied to federalism, but even here there is a clear distinction. The educational and cultural autonomy that he envisions is precisely the sort that can be granted to dispersed groups with no particular geographic base. For example, imagine a nation whose population is divided between two religions, such as Protestantism and Catholicism. In its educational policy, the government might adopt a unitary approach by compelling all children to attend public schools with either a secular curriculum or a curriculum based on either of the two religions. Alternatively, it might adopt a consociational approach by allowing parents to choose between schools run by each religious group and by providing public funding for these schools. This strategy, which authorizes each group to perform a specific function for its own members, is quite distinct from federalism, which allows a general government in a particular region of the nation to make a range of decisions for all citizens within that region. Federalism may fulfill some of the same functions as consociation and might even count as a consociational approach, but many consociative strategies do not count as federalism, because they do not possess federalism's defining characteristics; that is, they do not establish geographically defined subunits with definitive autonomy rights against the central government.

Because the overlap between federalism and consociation is only partial, some of the advantages claimed for consociation apply to federalism only adventitiously, if at all. To begin with, Lijphart argues that consociation provides protection for minority groups in democratic regimes controlled by a unified majority and provides stability in democratic regimes that are comprised of contesting minorities. These same advantages cannot be claimed for federalism unless the minority or contesting minorities happen—at a minimum—to be geographically based. If they are not—if the minorities are intermixed with the majority or with each other—federalism will not necessarily benefit minority groups or contribute to stability. Its effect will depend on a complex series of factors, such as whether the geo-

graphic subdivisions are themselves governed in a consociative manner, whether a dispersed minority in a majority-dominated regime represents a local majority in one of the subunits, whether the subunits contain minorities within them, and how the subunits are represented in the central government. Certainly, federalism offers dispersed minorities no consistent advantage of the sort claimed for consociation.

Moreover, the arguments for consociation may not even apply to regimes where minorities are geographically based. At its core, consociation is based on an ethos of compromise and mutual accommodation. Because they must work together in the proportionally elected legislature and the coalition government, the majority and the minority or the competing minorities are likely to become more tolerant of one another, to minimize their differences, to seek creative non-zero-sum solutions, and to avoid symbolic confrontations. Federalism, in contrast, protects minorities by giving them a political base with some degree of autonomy from the central government. Very often, the minority can maximize this protection by emphasizing its differences with the remainder of the nation and engaging in symbolic confrontations in order to increase the political identification of its members with their autonomous subunit. Using the principle of institutional isomorphism, the geographic minority may want to secure regional political control that mirrors and thereby counteracts the advantages that the majority possesses at the central level, rather than compromising with that majority in a coalition government.

### *From Decentralization*

A crucial distinction must be made between federalism and decentralization.<sup>40</sup> As stated earlier, federalism grants subunits of government a final say in certain areas of governance; that is, it grants these governments definitive rights against the center. Decentralization, in contrast, is a managerial strategy by which a centralized regime can achieve the results it desires in a more effective manner.<sup>41</sup> The effectiveness of any decision-making unit depends on a variety of factors, including the information available to it, the quality of its personnel, its level of control over its subordinates, and its prestige among those who must follow its commands.<sup>42</sup> These factors suggest sometimes that the most effective decisions will be made by the central government and sometimes that they will be made by a geographical subdivision. A central government can achieve uniformity and may be able to command greater resources and prestige. A subsidiary government may

be able to gather information more effectively, to control street-level employees, and to respond to circumstances that are specific to its locality. The choice between these two alternative strategies—that is, the particular allocation of responsibility within the overall structure—is determined by the effectiveness of each strategy in achieving the desired result.<sup>43</sup> But in decentralization, in contrast to federalism, the central government identifies this result and thus defines the criteria for success or failure, and the central government decides how decision-making authority will be divided between itself and the geographical subunits.<sup>44</sup>

The distinction between federalism and decentralization can be clarified by an analogy to business firms, which arouse less intense emotions and are therefore easier to think about. Many large firms decide, as a business strategy, to decentralize a large proportion of their operations. A firm that sells clothing through retail outlets may decide to divide the country into regions and appoint a separate manager for each region. These managers might then be given control over such functions as purchasing, advertising, store design, hiring, bookkeeping, and inventory. The basis for this strategy might be a belief that sartorial tastes differ from one region of the country to another and that the regional managers will be more attuned to these variations than the central office executives, who are necessarily located in a single region of the country. It is clear that this means of organizing the firm is an alternative to dividing the firm into functionally defined units with nationwide authority—that is, one unit that does that purchasing for every outlet in the country, another that hires employees for every outlet, and so forth. It is equally clear that the purpose of both methods of organization is exactly the same—namely, to maximize profits—and that the choice between them is based on empirical assessments about which method would be most efficient. Under no circumstances, however, would the geographically designed subunits be allowed to define their own purposes, such as altering the sartorial tastes of their region, raising money for local charities, or increasing the number of people who come into their stores to visit with each other. In other words, decentralization is a managerial strategy that is readily and frequently deployed within a unified structure.

While federalism generally results in a fairly high level of decentralization, decentralization does not necessarily lead to federalism. This point is worth emphasizing because many of the arguments about the virtues of federalism advanced by both courts and commentators refer to decentral-

ization, not to federalism.<sup>45</sup> In fact, true federalism, where geographical subunits are allowed to establish their own goals and maintain their own values, would tend to undermine many of the advantages that are often claimed for federalism but in fact pertain to decentralization. This is not to say that federalism lacks virtue; rather, its virtues lie in an entirely different area than many American courts and commentators tend to assume.<sup>46</sup>

An extensive catalog of pseudofederalist arguments can be found in what is perhaps the U.S. Supreme Court's leading statement on the virtues of federalism, *Gregory v. Ashcroft*.<sup>47</sup> Writing for the majority, Justice O'Connor declared that federalism increases public participation, achieves economic efficiency by allowing for competition among jurisdictions and increases citizen utility by enabling them to choose among these competing jurisdictions, and encourages the development of new governmental techniques through experimentation. Scholarly works that champion federalism generally refer to these same supposed virtues.<sup>48</sup> All these advantages, however, flow from decentralization, and none have much to do with the federalist principle that geographically defined governmental subunits must be granted partial autonomy in particular areas of governance.

To begin with the first argument—that federalism increases public participation—Justice O'Connor states that federalism “increases opportunity for citizen involvement in democratic processes.”<sup>49</sup> If one wants to implement a program of ensuring and increasing participation in the democratic process, increasing the number of decentralized decisions may well be a valid way to proceed, but this would be a national policy, not a result of federalism. The goal would be to encourage political participation in every region or locality. Federalism does not necessarily increase participation; it simply authorizes a set of specified political subunits to decide for themselves how much participation is desirable. Some might choose to encourage participation, but others might choose to suppress it.

There are a variety of other, more direct methods that national policymakers could adopt for achieving the same goal, such as hiring community organizers, funding local organizations, and requiring approvals for government decisions from different sectors of the population.<sup>50</sup> None of these have anything to do with federalism or even decentralization, but if participation is a real goal (rather than a post hoc rationalization for federalism), they should be given equal consideration. More generally, participation is a complex process that must be fostered by specific, carefully constructed mechanisms. It will not be secured by large-scale structural

arrangements whose relevance to that process is based on vague and unproven assumptions.

One might argue that political subunits that possess autonomy rights in a federal regime are “closer to the people” than the central government and are thus more likely to foster local participation. In assessing this argument, however, it is important to note that federalism necessarily vests authority at a given level of political organization, usually the regional level of provinces, prefectures, or American states. Localities, which are truly closer to the people and are where the envisioned participation will occur, are typically subordinated to the larger, regional subunits. Moreover, a common—if not essential—feature of federalism is that there are significant constraints on the national government’s ability to interfere with subunit policies for managing and controlling the local governments within their borders.<sup>51</sup> As Richard Briffault points out, however, there is simply no reason why an intermediate political unit would be more favorable to local units than the nation’s central authority.<sup>52</sup> In fact, the autonomy granted to a political subunit might favor a narrow elite that can control that subunit, while the national government, which is more difficult for such elites to control, might seek to encourage broader-based participation,<sup>53</sup> particularly if it incorporates consociative features. Actual alignments are likely to depend on the political positions of central and local authorities. In the United States, for example, the white-dominated governments of the pre-modern Southern states undoubtedly fostered the autonomy of white-dominated towns against federal intervention, while the federal government was the champion of participation by African-Americans, at least during the Reconstruction and civil rights eras.

One might also argue that federalism fosters local participation by enabling citizens of political subdivisions to choose their own rulers. But this merely combines decentralization and the independent norm of electoral politics, without involving federalism at all. In a truly federal regime, some states might opt for elections, while others might not. Moreover, to the extent that these subunits possess political autonomy in a federal regime, they will control the decision about whether or not their own subunits—cities, towns, villages, and rural districts—choose their leaders by election. If a nation, as a matter of policy, wants to use elections to increase political participation, its best strategy would be to require elections in all localities within its borders (as a matter of national policy), rather than allowing subunits to control this determination.

The second pseudoargument articulated by Justice O'Connor is that federalism achieves economic efficiency by allowing subunits of the polity to compete for valuable resources. The idea is that quasi-autonomous jurisdictions will compete for productive assets, such as factories, and desirable people, such as corporate executives, by creating a favorable economic climate. Asset managers and individuals will then choose among jurisdictions, voting with their well-heeled feet in favor of the most efficient states and thus ensuring the efficiency of the nation as a whole. This argument is associated with the theory of fiscal federalism and will be discussed in greater detail in chapter 3. Here, it is sufficient to note that it suffers from the same defect as the argument for public participation. Federalism allows a multiplicity of norms, not simply a multiplicity of rules. In a truly federal system, some subunits might not be interested in economic efficiency or social welfare at all; they might be primarily motivated by the desire to preserve an agrarian lifestyle, to protect the environment, or to encourage individual spirituality. These particular subunits might lose out in the competition for factories and corporate executives, as the economic analysis predicts. But rather than perceiving their losses as a chastening lesson that induces them to change their laws, they might perceive them as a necessary cost or as a positive advantage. Clearly, this would not achieve the single goal that the proponents of efficiency desire. What they really want is a unitary system, devoted to efficiency, which delegates instrumental decisions to decentralized subunits but retains normative control to make sure that every subunit is committed to the general goal.<sup>54</sup> In other words, they might decentralize decision-making authority to subsidiary units, but they would not grant that authority as a matter of right.

Closely related to the argument that federalism fosters competition is Justice O'Connor's third argument—that federalism increases the citizens' utility by enabling them to choose among competing jurisdictions, each offering different packages of services and obligations.<sup>55</sup> This is the second branch of fiscal federalism and will also be discussed in chapter 3. It would appear to be an unquestionable benefit—surely it is better to give people the opportunity to choose the governmental conditions under which they live than to confront them with a monolithic system that may comport with their preferences but may just as easily conflict with them. But the argument, as stated, is also an attribute of decentralization, not federalism. The idea that people can choose among jurisdictions on the basis of the services that they provide suggests that they could live a reasonably comfortable life

in any—or at least a significant number—of those jurisdictions, so that the choice among government service packages will be a real option, that is, one that people can actually exercise. This will be true under two circumstances: first, if the national government imposes certain uniform standards on each jurisdiction to ensure that citizens can live as comfortably in one as in another; or second, if the national is so culturally homogenous that most of its citizens are comfortable in any of its regions. Both of these circumstances are characteristic of decentralized regimes, not federal ones. In the first case, federalism does not exist; in the second, it is unnecessary and thus likely to be vestigial.

A truly federal regime is one whose subunits differ from one another on normative grounds, which, as will be discussed in chapter 2, are usually cultural and almost always linked to questions of political identity. In such a regime, citizens cannot realistically choose on the basis of government service packages, because their choices will be largely dictated by more compelling issues. To take the example of the United States, most Americans can comfortably live in any state because the people of every state regard themselves as Americans, are culturally similar, speak the same language, and display roughly the same mix of races and religions, although in different proportions. Choosing among states on the basis of government service packages is thus at least a possibility, although, as a practical matter, it is constrained by factors that will be discussed in chapter 3. But suppose that each state varied in language, religion, and culture the way the constituent republics of the Soviet Union did; how comfortable would people be about moving to another state to obtain more preferable government service packages?<sup>56</sup> For that matter, would European, African, or Asian Americans move to Puerto Rico, Guam, or a Native American reservation to obtain different services? These regions are true examples of federalism because their inhabitants possess divergent political identities from the nation as a whole; for that very reason, they are simply too different from the rest of the country for such factors as Justice O'Connor mentions to predominate. In other words, citizen choice—the choice among different subunits on the basis of political identity—is a genuine feature of federalism. But the choice among government service packages that Justice O'Connor mentions and that fiscal federalism has championed is much more likely to be found in decentralized regimes than in federal ones.

To put the analysis of all three arguments more generally, true federalism cannot be regarded as a means of favoring any specific, first-order

norm, because its essence is to permit a multiplicity of norms. It favors only the second-order norm that no first-order norm should dominate the polity. In practice, of course, a federal regime may achieve a specific, first-order norm, such as local participation, citizen choice, or economic efficiency. This will occur when that norm is so widely shared that every subunit will adopt it, even if left to its own normative devices. But in this case, federalism is essentially vestigial, and the uniform norm is being achieved despite the continued existence of federalism, not because of it.

The disjunction between federalism and any first-order norm is further emphasized by a fourth and somewhat different argument for federalism: that federalism gives the states an opportunity to experiment with different policies.<sup>57</sup> The reason this is desirable, presumably, is not because of an abiding national commitment to pure research but because the variations may ultimately provide information about a range of alternative governmental policies and enable the nation to choose the most desirable one. James Madison advanced this idea in *Federalist No. 56*,<sup>58</sup> and Lord Bryce elaborated on it a century later in his classic commentary on American government.<sup>59</sup> Still later, the Progressive Movement picked it up to defend state regulatory policies that were being struck down by a conservative Supreme Court. It appeared in a 1918 dissent by Justice Holmes<sup>60</sup> and found its most eloquent exponent in Justice Louis Brandeis, who, in a famous dissent in a 1932, observed, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."<sup>61</sup>

This argument has a certain ring to it, but on further examination, experimentation turns out to be a happy incident of managerial decentralization, not of federalism. In a unitary system, the central authority will generally have a single goal, but it may be uncertain about which of several policies will best achieve that goal. To resolve this uncertainty, it could invite or order its subunits to experiment with different strategies until the best way to achieve the goal emerges. Experimentation of this sort is an instrumentality, useful only when the subunits share a single goal. It is not particularly relevant to subunits whose goals are different from each other. But true federalism allows governmental subunits to choose divergent goals, not merely to experiment with different mechanisms for achieving a single one. Divergent goals will typically render instrumental experimentation irrelevant; for example, precisely what experiment would one design to

tell the antebellum Southerners whether they should retain slavery or to tell contemporary Quebecois whether they should maintain their language and culture? The experimentation argument, like the arguments touting competition and citizen choice, seems applicable to federalism only when there is no normative disagreement among subunits, so that federalism produces the same results as administrative decentralization. It is an effort to justify a normative regime by invoking the appeal of an instrumental one. The instinct to do so is understandable in this instrumental age, but it is not conducive to coherent analysis

In fact, even decentralization creates problems for the kind of experimentation that is needed to select policies in a modern administrative state. To experiment with different approaches for achieving a single, agreed-on goal, one subunit must be assigned an option that initially seems less desirable, either because that option requires changes in existing practices or because it offers lower, although significant, chances of success. Allowed to choose their own strategies, as they are in a decentralized system, subunits would be unlikely to choose these unappealing options;<sup>62</sup> they must be forced or encouraged to do so by the central authority. Economic theory underscores this conclusion. Experiments are likely to be public goods, because the information they generate will be available to the entire nation, regardless of each state's individual investment. As a result, as James Gardner and Susan Rose-Ackerman have pointed out,<sup>63</sup> individual subunits will have no incentive to invest in experiments that involve any substantive or political risk; they will instead prefer to be free riders and wait for other subunits to generate them. This will, of course, produce relatively few experiments.

The standard solution to this dilemma is either coercion or coordination through the central government. If the decentralized subunits are rational actors who desire to experiment—a heroic assumption, but certainly one that is required for the entire states-as-laboratories argument—they might agree among themselves to share the costs of such experiments. More typically, they might agree to subject themselves to coercive discipline to overcome the problem of free riders, just as a patriotic citizenry that supports strong national defense might opt for a military draft and a system of taxation, rather than a voluntary army supported by individual contributions. In either case, the natural consequence of their agreement would be centralization.

Finally, even if decentralized subunits establish a mechanism by which

they can coerce themselves to experiment, they will need to collect massive amounts of data if proper choices are to be made; in technical areas particularly, the virtues of a specific policy are unlikely to be self-evident. Decentralized subunits, acting on their own, will have little incentive to generate this information. They may be motivated to articulate politically palatable justifications for their chosen policy, but they are unlikely to gather data directed to its replication or modification. If the information is gathered and assimilated, it is not likely to be useful unless the original policy choices are coordinated by a centralized authority. Even in the absence of normative, truly federalist variations, experiments initiated by one subunit are unlikely to be particularly useful to another because they will tend to vary along an unruly variety of dimensions. Of course, data and experience developed for one set of conditions can be applied to another, but such applications require information and analysis that no subunit is likely to undertake on behalf of others. Thus centralization is necessary not only to initiate the experimental process but also to implement the results of that process in any reasonably effective fashion.

All of this is implicit in the imagery of scientific experimentation, once that imagery is taken seriously. Experiments generally involve variations among subsets of a total population, but those variations are carefully and minutely prescribed by the researcher—a centralized authority if ever there was one. In medical research, for example, it would be unusual for the researcher to authorize the subjects to follow whatever course of treatment they desire, even if all the subjects agree on the general goal of finding a medical cure. The more common practice is for the researcher to prescribe the treatment for each group, which allows the use of therapies that would not otherwise be chosen and provides comparable data regarding their effects.

Experimentation is neither a first-order norm (like local participation, citizen choice, or economic efficiency) nor a second-order norm (like federalism) that allows for a multiplicity of norms. Rather, it is a technique for implementing a first-order norm in a more effective manner. It is not even related to decentralization in any necessary way, since a highly centralized decision maker can command experimentation by varying the commands it issues to different subordinates. If we assume, however, that the experiments are being generated by the subunits, rather than the center, experimentation joins the other arguments in favoring decentralization of deci-

sion-making authority. This may feel like federalism, which also involves such a shift, but federalism allows for normative variation that would undermine, at least potentially, the norm that is being advanced and that would vitiate whatever experiment is being used to advance it.

Eliding the distinction between federalism and decentralization breeds conceptual confusion, because the distinction makes a real difference in the world. In a decentralized regime, the central authority can always override the decisions of the subdivisions if they fail to achieve the purpose that the centralized authority intended when it authorized the subdivisions to decide. In a federal regime, there are some decisions that the center cannot override, although, depending on specific circumstances, it may be able to influence the decision by threat or by inducement. In a decentralized regime, a constitutional court could never strike down an intrusion on a subdivision's authority by the supreme policymaker, typically the legislature. In a federal regime, the court is obligated to strike down some intrusions on subunit decision making, on the basis that these intrusions violate the autonomy rights that are a necessary component of a federal regime.

Confusing these two different modes of governance, as the U.S. Supreme Court has done, insinuates irrelevant issues into the managerial concept of decentralization and leaves the concept of federalism without a generally recognized name. For example, some writers distinguish between dual federalism, which involves a clear division of governmental responsibilities, and cooperative federalism, where there is a division of labor between the central and subsidiary governments in the implementation of particular programs.<sup>64</sup> Similarly, other writers draw a distinction between federalism that grants subsidiary units the authority to decide and federalism that only grants these units the authority to act.<sup>65</sup> The problem is that cooperative implementation and grants of the authority to act are actually decentralization, rather than federalism. Both approaches display the most characteristic feature of decentralization, where basic policy decisions are made at the center and implemented in the subdivisions; and both approaches lack the most characteristic feature of federalism, where the subdivisions possess an area of independent decision making in which they can establish their own policies. Attaching the term *federalism* to both approaches confuses two very different modes of governance and thus impedes the enterprise of choosing between them in a responsible and beneficial manner.

### *From Local Democracy*

An aspect of government that is frequently conflated with federalism is local democracy. For linguistic convenience, the term *local* will here be used to refer to any governmental unit below the national level, whether designated as city, commune, county, prefecture, province, or state. The term *democracy* is not so easily contained, as it is subject to extensive debate about its meaning and implications.<sup>66</sup> The term *local democracy* is a bit more manageable; for present purposes, it can be defined as the practice of selecting the executive or legislative authorities of governmental subunits by means of free and fair elections. While there may be other features of local government that some commentators would demand before describing it as democratic, few people would be willing to say that local government was organized on a democratic model if neither the executive or legislative bodies that comprise that government were elected.

Local democracy is distinct from democracy in general. A fully democratic regime, comporting with the most extensive demands of democratic theorists, need not use elections to select the ruling officials of its geographic subunits. Having elected its national leaders through a fully deliberative process (with high levels of participation, rational debate, and political participation) and having resolved internal tensions through consociative means, a regime might choose to use regionally and locally appointed leaders to implement the policies that resulted from this electoral, deliberative, consociative process. Conversely, a dictatorial regime might allow the election of local authorities who were then commanded to implement policies developed by authoritarian means and allowed to determine policies of no particular concern to the center. To be sure, neither arrangement is particularly common. A democratic regime, embodying a vigorous process of public debate and popular election at the national level, is likely to draw on political resources for choosing local leaders, while authoritarian regimes will generally be reluctant to allow open debate and free choice at the local level. Beyond these conscious or pragmatic considerations, the principle of institutional isomorphism suggests that the structure of local government will mirror the national government's structure within a given polity and certainly within a given political culture.<sup>67</sup> Nonetheless, local democracy is conceptually distinct from democracy in general and needs to be considered as a separate mechanism of governance.

The difference between federalism and local democracy is that federalism reserves particular issues to subnational governmental units, regardless of the political process that exists within these units, whereas local democracy establishes a particular political process in the subnational units without granting these units any particular area of authority. A national regime may limit the responsibilities of the local, democratically organized units to the implementation of centrally established policy or may grant a certain range of policy-making authority but subject it to review and revision by central authorities. In either case or in the virtually infinite variety of intermediate cases, the subunits would have no claim on the right to make a definitive decision on any subject. Since federal regimes are defined by such a right, those regimes that do not incorporate this right should not be regarded as federal, even if their subunits choose executive or legislative authorities by free and fair elections.

Just as some of the arguments in favor of federalism in fact refer to decentralization, some of the arguments for federalism in fact refer to local democracy. In one case—public participation—these two sets of arguments overlap. While federalism, as discussed earlier, does not necessarily increase public participation, local democracy does, because elections, the defining feature of local democracy, are a form of participation. A closely related argument involves the virtue of making government officials accountable to the people whom they govern, by empowering the electorate to demand certain behaviors from public officials and dismissing these officials if they fail to comply.<sup>68</sup> But the participation that is generated by elections and whatever accountability results from these elections is a feature of local democracy, not federalism. Local democracy requires elections, whereas federalism involves an assignment of definitive authority to government subunits, whether democratic or not.

Political terminology is malleable, of course, and it might be argued that local democracy, which, after all, involves the empowerment of electorates in political subunits, should be included within the concept of federalism. To capture the categories discussed earlier, one might distinguish between substantive federalism, where certain issues are definitively reserved to governmental subunits, and process federalism, where the subunits lack such a definitive assignment of authority but possess a guaranteed political structure that involves the election of their executive and legislative officials. Stipulative categorizations of this sort cannot be proven right or

wrong, of course. The difficulty with this one, however, is that it fails to distinguish between democratic nations that are generally regarded as federal, such as Switzerland, Germany, Canada, Australia, and the United States, and democratic nations that are regarded as centralized, such as France, Sweden, Finland, Denmark, the Netherlands, and Japan.<sup>69</sup> All the centralized nations feature local democracy; all are divided into political subunits, of one sort or another, that are controlled by elected executives or legislatures.<sup>70</sup> To describe local democracy as federalism—even as a separate category of process federalism—simply reiterates the distinction between democratic and nondemocratic regimes and fails to distinguish those regimes in either group that reserve all authority to the national government from those regimes that grant political subunits definitive control of certain issues. In other words, without a substantive component, federalism ceases to be a distinguishable mode of governmental organization.

One might argue that process federalism, as a separate and meaningful categorization, could be retrieved by restricting it to those nations that establish local democracy as a matter of right, that is, those that preclude the central government from canceling local elections or overturning their results. Such regimes, after all, grant definitive rights to governmental subunits, even though these rights involve the political process and not a substantive area of authority. The difficulty is that this argument also fails to distinguish among democratic regimes. Virtually all democracies, including those regarded as highly centralized states, grant constitutional protection to local democracy.<sup>71</sup> The constitution of diminutive and highly centralized Luxemburg, for example, provides that the nation's even more diminutive communes "form autonomous authorities, on a territorial basis, possessing legal personality" and that "in each commune there is a communal council directly elected by the inhabitants."<sup>72</sup> The reason these provisions appear in the constitutions of centralized states is that local democracy is conceived as a human right, like freedom of speech or religion, and not as a means of dividing central governmental authority. In these nations, the central government maintains plenary control, but people are granted the right to elect the local officials who will carry out central commands. The constitutional protection of local democracy, therefore, does not distinguish national from federal regimes but only distinguishes constitutional regimes from those regimes, such as the United Kingdom, that do not provide constitutional guarantees.<sup>73</sup>

### *From Democracy in General*

A distinction must also be made between federalism and democracy in general. The two are obviously distinct, but the familiar argument that federalism serves to preserve or protect political liberty<sup>74</sup> often rests on the assumption that federalism can only exist in a democratic polity. This assumption is simply untrue. In contrast to the conflation of consociation and federalism or of decentralization and federalism, which expand the concept of federalism to areas where it does not apply, the conflation of democracy and federalism removes the concept of federalism from areas where it does apply, namely, to federally organized monarchical or dictatorial regimes. Doing so makes federalism seem more desirable and greatly advances its connection to political liberty, but this is achieved by verbal legislation, not by argumentation or analysis. Clearly, there are many non-democratic regimes where political subdivisions possess decision-making authority as a matter of right. To exclude them leaves an important political phenomenon without a generally recognized name and obscures the relationships among structurally similar regimes.

One reason federalism is sometimes regarded as being limited to democratic polities is that it depends on claims of rights that political subdivisions can assert against the center. Such claims, it might be argued, are nonexistent or illusory in a nondemocratic regime. But this argument elides the distinction that Hannah Arendt points out between authoritarian and tyrannical or totalitarian governments.<sup>75</sup> In tyranny or totalitarianism, the leader, either a single person or a small collegium, wields absolute control, at least juridically, and no entity can interpose any justified claim to resist its commands. An authoritarian regime, in contrast, is simply one where the leadership is neither chosen by popular election nor answerable to the populace or any significant section of the populace for its actions. This is not the same as absolute control and does not preclude the assertion of rights against the central government by subordinate entities of various kinds. The inclination to equate the two, Arendt points out, is a product of liberal thought that so categorically condemns nondemocratic regimes that it agglomerates them all into an unacceptable, undifferentiated mass.

In fact, Arendt defines an authoritarian regime as one based on law: "Its acts are tested by a code which was made either not by man at all, as in the case of the law of nature or God's Commandments or the Platonic ideas, or

at least not by those actually in power.”<sup>76</sup> That code establishes the leadership’s authority but simultaneously limits that authority, and among the limits can be restrictions on the central government’s authority to control its subdivisions. The result is that the subunits possess rights against the center, rights that are grounded on the very same justification that supports the center’s initial right to rule. It is possible, of course, that the center might use its monopoly of force, its control of the armed forces, to override the rights of political subdivisions, but that would represent a shift from authoritarian to tyrannical or totalitarian rule. A democracy can undergo a similar collapse, but the mere possibility that such a collapse is possible does not negate the rights that exist during the time when the collapse has not occurred.

Whether or not one accepts Arendt’s categorical assertion that all authoritarian regimes are based on law, many such regimes clearly fit this description as a matter of historical fact. Virtually all premodern European monarchies, going back to the early Middle Ages, were law-based and law-constrained authoritarianisms.<sup>77</sup> Their kings, being Christian monarchs, were not only forbidden, by generally recognized morality, from engaging in the exotic atrocities of the Roman emperors (e.g., publicly ravishing a sister or castrating and then marrying a boy)<sup>78</sup> but faced a mechanism—the Papacy—that could enforce these prohibitions by verbal condemnation, excommunication, anathema, or general interdict.<sup>79</sup> The same types of constraints applied with respect to the political structure of the regime. Most European monarchies were truly federal regimes, divided into counties, baronies, and castellanies, with only a small area that was directly under royal control.<sup>80</sup> The rulers of these subdivisions, not the king, exercised most of the governmental functions within their area of jurisdiction, such as creating vassals, appointing abbots, collecting taxes, dispensing justice, and maintaining order. The king could not impose new taxes on the people of these subdivisions without obtaining the approval of its ruler or, more typically, of an assembly composed of these rulers or their representatives. The Spanish monarchy often found itself virtually bankrupt because the Cortes would not vote for new taxes,<sup>81</sup> while the English kings saw their authority regularly challenged by Parliament’s fiscal control.<sup>82</sup> This rather high level of local or regional autonomy was secured by well-established and widely recognized rights against the central government, rights that bore the imprimatur of tradition, of law, and sometimes of the church. European kings

were not appealing to the assemblies or protolegislatures solely because these bodies or the entities they represented held the balance of force, any more than democratically elected chief executives appeal to modern legislatures solely for this reason. Rather, they were doing so because their regimes were bound by legal rules, and the political subdivisions possessed definitive and well-recognized rights against the center.

It is not even a certainty that a tyrannical or totalitarian regime cannot be described as federal. To be sure, no one in such regimes possesses rights against the tyrant or totalitarian dictator, but they may well possess rights against everyone else, and these contingent rights may be sufficient to give the regime a predominantly federal character. For example, the Soviet Union was probably a totalitarian regime throughout its history and certainly was so under Stalin, but it possessed a clearly delineated federal structure that determined the locus of decision making and service delivery in many areas of governance. Until the mid-1930s, Stalin followed Lenin's policy of encouraging the autonomy of the national republics and the development of indigenous languages. Concerted efforts were made to staff the Communist Party apparatus in the various republics with members of that republic's ethnic majority.<sup>83</sup> By the late 1930s, however, Stalin shifted toward centralization and Russification, a process that was intensified during World War II.<sup>84</sup> Nonetheless, many basic functions continued to be carried out at the regional level, with both the official bureaucracy and the Communist Party being subdivided among the various republics. While Stalin could override these geographic distinctions, no one else could, and because Stalin left them in place, the Soviet Union had a governance structure that differed in significant ways from that of such centralized totalitarian regimes as Communist Hungary or North Korea. Perhaps it might be better to describe the Soviet Union as a qualified federal regime, but it is certainly useful to recognize that despite its totalitarian character, it possessed a different internal structure from a fully centralized or unitary one.

The tendency to conflate democracy and federalism appears most prominently in arguments that federalism secures liberty. Liberty is widely recognized as an advantage that is uniquely provided by democratic government: only democratic government, by definition, allows for unencumbered political participation, and only democratic government, by experience, protects human rights. But federalism is not necessarily democratic and thus cannot be given credit for the freedom that democracy provides.

Of course, a federal regime can be a democratic one, but it is the democratic features of the regime, not the federal ones, that are securing the advantages of liberty. This point is perhaps obvious, but scholars regularly champion federalism as a means of protecting liberty,<sup>85</sup> and Justice O'Connor, writing for the Supreme Court in *Gregory v. Ashcroft*, asserted that federalism serves as "a check on abuses of government" by diffusing power among separate sovereigns.<sup>86</sup> To sustain this argument, it is necessary to explain how federalism provides independent protection for liberty, that is, how a federal regime protects liberty in a manner that a unitary democratic one does not. As Jesse Choper points out, this is not easy to do.<sup>87</sup> It seems difficult to imagine that any American, even a Supreme Court justice, is so parochial as to be unaware that such unitary regimes as England, Sweden, Denmark, and the Netherlands have met the highest standards of political participation and human rights protection. In fact, it is not clear that the United States, despite its federal character, compares favorably with these regimes in the human rights arena.

Perhaps proponents of this argument are claiming that federalism is necessary for a large nation or a world power to protect its people's liberties, even if it is not necessary for smaller polities. But such a claim would need to be made explicitly, not carried along with a rhetorical current that conflates federalism with democracy. Once federalism is distinguished from democracy, moreover, the argument that it is needed to secure liberty does not seem particularly compelling.<sup>88</sup> France, Italy, the United Kingdom, and Japan are all rather large nations, and they have managed to maintain democratic regimes without federalism. As a matter of theory, federalism, unlike democracy, is a mechanism that grants power to regional governments, not to individuals. The regional government might be undemocratic or, at any rate, less democratic than the central government. Unless there is some reason to assume that central governments are systematically more oppressive than regional ones, the diffusion of power possesses only an adventitious relationship to liberty.

Finally, it might be argued that federalism, by diffusing power, renders government in general less effective and thus less of a threat to human rights. But this argument depends on a rather traditionalist and highly controversial claim that human rights consist exclusively of negative rights against the government and do not include positive rights that only affirmative governmental action can secure. Apart from this, the method of protecting liberty through federalism seems peculiarly indirect and vulnerable

to violation by joint action of the central and regional governments. If liberty requires controls on governmental power, there are numerous more direct ways of implementing such control, such as election of the chief executive, a bicameral legislature, and judicial review of executive and legislative action. These, however, are the mechanisms of constitutional democracy, not of federalism.