

THE MANY USES OF FEDERALISM

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TABLE OF CONTENTS

I. Introduction.....	953
II. Two Varieties of Federal Innovation	956
III. The Importance of Timing.....	957
IV. The Potential of Federalism	958
V. The Costs of Federalism.....	962
VI. Shortfalls in Benefits	963
VII. Federalism and Majoritarianism	965

I. INTRODUCTION

Sanford Levinson's very interesting book *Our Undemocratic Constitution*¹ falls squarely in the field that has come to be called constitutional design. This field deserves at least as much prominence among constitutional lawyers as the case law that often does not involve the design of the United States Constitution but nevertheless occupies nearly all of the academic field of constitutional law. When constitutional lawyers discuss the United States Constitution, they take the design as given and focus instead on current controversies that merely involve applications of the design. It takes a political crisis such as Watergate to raise a question about the wisdom of the fixed-term presidency.² It requires the malapportionment of state legislatures to make citizens wonder whether a federal Senate in which Nevada and Delaware have the same number of senators as do California and New York is a sensible arrangement.³ Only a presidential election in which the popular vote and

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1. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

2. See JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 199-200* (rev. ed. 1992).

3. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down existing and proposed apportionment schemes in Alabama on the basis that they were not devised on the basis of population).

the electoral vote go in opposite directions triggers reconsideration of the Electoral College. A controversial Supreme Court decision is needed to prompt a challenge to life tenure for federal judges.⁴ Most of the time, these institutions are considered unalterable features of the landscape. *Our Undemocratic Constitution* has the virtue of bringing issues such as these prominently into the foreground.

Many of the features criticized in the book are the product of Madisonian constitutional engineering to pit “faction” against “faction,” as *The Federalist* put it,⁵ and to prevent the “passions” of a majority from prevailing unimpeded.⁶ *Our Undemocratic Constitution* could well be retitled *Our Unmajoritarian Constitution* because its principal complaint concerns impediments to undifferentiated majority rule, with the notable exceptions of the decidedly unmajoritarian Bill of Rights and judicial review, which survive the book’s scrutiny unscathed. Interestingly enough, the American public is not as impatient with restraints on majority rule as Professor Levinson is, for it venerates the structures created in 1787.⁷ Even in times of constitutional crisis, such as Watergate, the public habitually blames deficient incumbents, rather than deficient institutions, for the difficulty.⁸

To be sure, some of these institutions may seem a bit shopworn, even to the general public. With the enormous growth of interstate migration, federalism may be in this category, and this may account for the current attraction of measures to realign the Electoral College vote with the national popular vote. Yet it needs to be recalled that a wide range of institutions are compatible with democratic regimes, and unmajoritarian institutions can assuredly help democracy function.

Federalism is among those institutions. Indeed, the adoption of a federal regime in this country in 1787 was followed very closely in Europe and Latin America. In both, federal institutions were seen to provide a democratic solution to the problem of uniting diverse territories in a single regime. Switzerland, Germany, Argentina, Venezuela, Mexico, and Brazil were among the states that adopted federalism for this purpose, and their

4. See REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger Cramton & Paul D. Carrington eds., 2006).

5. THE FEDERALIST NOS. 10, 51 (James Madison).

6. THE FEDERALIST NO. 62 (James Madison).

7. See HANS KOHN, AMERICAN NATIONALISM: AN INTERPRETIVE ESSAY 8 (1957).

8. See Donald L. Horowitz, *Is the Presidency Failing?*, THE PUB. INT., Summer 1987, at 3, 23.

decisions were explicitly based on the American example.⁹

Issues of constitutional design, at long last revived in the United States by Professor Levinson's book, thrive outside the United States. Since the Third Wave of Democratization began in Portugal in 1974,¹⁰ dozens and dozens of constitutions have been written and rewritten. Some have taken their inspiration from the United States and adopted fixed-term presidencies, bicameral legislatures, and upper houses with equal numbers of representatives from each federal unit; others have been more eclectic in their design. Whatever the design, outside of the United States, the configuration of institutions is not regarded as an unchangeable feature of the landscape but an arena of purposive activity in which the aim is to engineer institutions that can cope in a democratic way with the problems particular societies present.

In the many ethnically divided countries of Asia and Africa, Madisonian methods have more potential than has so far been realized. In such countries, the task is to construct unmajoritarian institutions of the sort to which *Our Undemocratic Constitution* objects, for the aim is to prevent majorities—ethnic majorities—from forming or, if they do form, from dominating politics and thus dominating minorities. Majority rule—by ascriptive groups—is precisely the problem in such societies. Under these conditions, it is easy to see why the particular institutions criticized by Professor Levinson might be especially attractive: a president with a policy veto, a malapportioned upper house, and even electoral systems that blend plurality counts with geographic distribution requirements for victory.¹¹ And perhaps the attractiveness of such institutions overseas might lead us to rethink their pertinence or obsolescence in the United States.

In this Article, my aim is to discuss some unexplored frontiers of federalism. By opening a window on comparative federalism and ethnic conflict in severely divided societies, it is possible to show that federalism can often be an aid to the reduction of conflict or to its pursuit in democratic ways. Depending on the configuration of federal institutions,

9. See Donald L. Horowitz, *The Federalist Abroad in the World*, in *THE FEDERALIST* (Ian Shapiro ed., forthcoming 2008).

10. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 3, 21–25 (1991).

11. In Nigeria, for example, the winner in a presidential election must receive the largest number of votes nationwide plus at least twenty-five percent of the vote in no fewer than two-thirds of the states. The rationale behind this arrangement is to ensure cross-ethnic support through cross-regional support. ROTIMI T. SUBERU, *FEDERALISM AND ETHNIC CONFLICT IN NIGERIA* 112–14 (2001).

however, federalism can also foster undemocratic institutions. There are, therefore, two main points to be made: federalism has utility in deeply divided societies far beyond the utility that commended it to the attention of those who met in Philadelphia in 1787, but to realize its many benefits, it is necessary to get the federal design right.

II. TWO VARIETIES OF FEDERAL INNOVATION

When federalism was first devised in the United States more than two centuries ago, its purpose was to build a larger polity out of smaller polities. It had previously been thought, based on experience with ancient republics, that small size was an essential ingredient in republican government. As the *Federalist* papers argued, by proliferating contending factions and balancing their effect, federalism could provide a new way to extend the range of republican government beyond what had previously been thought possible.¹²

The Anti-Federalists disagreed with this assessment. They argued that the powers confided to the national government were not compatible with republican government and would make the rights of citizens insecure. This brought rights consciousness to the forefront of public consideration in debates on ratification and gave rise to the Bill of Rights as a check on national power.

Enlarging the territorial base of a polity through federalism proved to be an attractive technique. In the nineteenth century, Switzerland and Germany used the same federal technique, although other states, notably Italy, formed large polities out of disparate component units without dividing power between those units and the center. Today, however, according to the Forum of Federations, there are only twenty-four federations in the world.¹³ Several more unitary states have particular regions that are autonomous or have asymmetrical federal relations with one or more, usually distant, territories, for example, Denmark with Greenland.

Almost all large states that are governed democratically are federations. Nevertheless, twenty-four is not an impressive number, and all but four of the twenty-four listed federations antedate the Third Wave of

12. THE FEDERALIST NOS. 10, 14 (James Madison).

13. Forum of Federations, *Federalism by Country*, http://www.forumfed.org/en/federalism/by_country/index.php (last visited Aug. 15, 2007) (To this list, a few others might be added: for example, Iraq and, more doubtfully, Indonesia).

Democratization. Most new democracies have not found federalism attractive, presumably because they fear that creating locally controlled federal units may encourage separatism and secession.

The fact that large democratic states tend to be organized federally suggests that the original message emanating from Philadelphia in 1787—that federalism is a solution to the problem of scale—has been heard and acted upon. But for ethnic conflict today, this is not the most significant message. If it were possible to unite states that attained independence separately in large federations, the scaling-up federalism of 1787 would have new relevance, as it does in some sense for the European Union. But as repeated failures in international regional integration illustrate—from the failure of the East African Federation, to the British West Indies Federation, to the United Arab Republic of Egypt and Syria—scaling-up recurrently encounters fatal difficulties.

There is, however, a different form of federal innovation that is highly pertinent to ethnically divided societies—namely, devolution federalism, in which substate units are created to respond to problems of ethnic diversity. This form of federalism is not a function of population or territory size; in fact, most of the states that could utilize devolution federalism are relatively small. Few small or medium-sized states that were ethnically divided even considered federal institutions to be a serious choice at independence or redemocratization. Had they done so early on, even relatively small states, such as Sri Lanka, could have spared themselves a great deal of pain.

III. THE IMPORTANCE OF TIMING

Most states confronted with ethnic conflict resist federalism, even though it can facilitate interethnic accommodation in a variety of ways. When states finally do yield to federal solutions, it is usually when conflicts have progressed to a seriously disintegrative or violent stage. It then becomes a matter of the central government's yielding a great deal of power to the substate units, often simply to facilitate the ability of ethnic contestants to live in separate compartments while purporting to inhabit a common central state. Belgium's federalism was designed to loosen the bonds between Flanders and Wallonia, and even so it is highly fragile.¹⁴ The Dayton Accords of 1995 created a very weak central government in

14. See, e.g., JOHN FITZMAURICE, *THE POLITICS OF BELGIUM: A UNIQUE FEDERALISM* (1996).

Bosnia,¹⁵ and Iraq's new federation is perhaps even weaker. The federation proposed for Cyprus in the Annan Plan¹⁶ of 2004 that was rejected by Greek Cypriots in a referendum would have created a weak and easily-deadlocked central government. Once separatists have the upper hand, the aim of federalism is simply to keep antagonists separate.

This suggests that timing is crucial. In relation to the development of conflict, earlier is always better. Because of the limited, semi-partitionist goals of federal arrangements contrived when conflict has already progressed, the study of such arrangements may well yield rather discouraging results. There are, however, a number of federations that were established at independence, generally before intergroup conflict became severe. From these federations, which have more robust central governments, the conclusions that can be drawn about the relation of federalism to ethnic conflict are more varied and, at the same time, more balanced.

IV. THE POTENTIAL OF FEDERALISM

There are at least eight ways in which federal institutions—and here I mean specifically the existence of substate territorial units holding some governmental power that the central government does not hold—can have benign effects on ethnic conflict. Some of these effects involve providing satisfactions at one level of government that are unavailable at others. Others entail restructuring of cleavages, interests, relations, and alliances.

First, units placed below the central government, whether those are called provinces, regions, or states, can allow a group that is a minority in the country as a whole but a majority in a substate unit to exercise governmental power in ways that would be foreclosed if the whole country were one undifferentiated territory. For example, in Malaysia, where Chinese are about one-quarter of the total population and no longer exercise great power at the center, they nevertheless are a majority in the state of Penang.¹⁷ The Chief Minister of that state has always been Chinese, and despite the rough edges of ethnic relations there, there is

15. See Charles Jokay, *Local Government in Bosnia and Herzegovina*, in *STABILIZATION OF LOCAL GOVERNMENTS* 89, 96 (Emilia Kandeve ed., 2001).

16. U.N. Dep't. of Political Affairs, *The Comprehensive Settlement of the Cyprus Problem* (Mar. 31, 2004), <http://www.un.org/Depts/dpa/annanplan/annanplan.pdf>.

17. See Chew Huat Hock, *Some Observations on Coalition Politics in Penang*, 19 *MOD. ASIAN STUD.* 125, 125 (1985).

some sense of a government responsive to Chinese interests in Penang.¹⁸ Where groups are territorially differentiated, this is a very common function of federalism, and it can certainly mitigate, but not vitiate, a sense of minority exclusion at the central government level. The important point is that such provincial power, while not completely satisfying, may be sufficient to avert attempts to secede, particularly because most such attempts fail anyway.

Second, the existence of substate units can quarantine conflict within those unit boundaries. Ethnic violence in Malaysia has tended not to spread from one state to another. In the Nigerian First Republic (1960–1966), with three major territorial units (and one much smaller one), every ethnic issue threatened to engulf the whole country and ultimately did in the Biafra War.¹⁹ In the restructured Second and Third Republics, with larger numbers of states, many ethnic issues have become subnational issues limited to one state at a time. The issue of Shariah, or Islamic law—always a delicate problem in a country so evenly divided between Muslims and Christians—has become a state matter, with various solutions in the several northern states.²⁰ These solutions have not always been reached peacefully, but at least the considerable disorder attending them has tended to be quarantined. Issues of this kind in Nigeria are highly contentious, but the contention is focused on the governmental level at which the power is lodged, and political losses do not necessarily create grievances that spill across boundaries into other units.

Third, federalism can make it possible to mitigate discontent by making special, asymmetric arrangements for regions with special problems or distinctive identities. Indonesia is not formally a federal state but has a heavy measure of devolution to regions. In the case of Aceh, on the northern tip of Sumatra, it has been possible to devolve power to impose Islamic law without devolving that power to other subnational units.²¹ Quebec's special identity has been recognized in Canada, albeit with

18. See *id.* at 140–41 (discussing the considerations made by political parties at the federal level as they strive to maintain the support of Penang's Chinese population).

19. See DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 603–04 (2d ed. 2000).

20. See SUBERU, *supra* note 11, at 133–38.

21. See Geoffrey Hainsworth, *Rule of Law, Anti-Corruption, Anti-Terrorism and Militant Islam: Coping with Threats to Democratic Pluralism and National Unity in Indonesia*, 48 *ASIA PAC. VIEWPOINT* 128, 139 (2007) (discussing the role of Shariah in Indonesia, including the empowerment of Aceh to implement its principles at the provincial level).

difficulty.²² Asymmetrical federalism in general makes special dispensations possible, but more possible at the periphery than near the center of power.

Fourth, in ethnically heterogeneous states, regional government provides a site at which politicians of various groups can encounter each other, become familiar with each other, engage in bargaining, and learn about the needs and aspirations of groups other than their own before they rise to the national level, where more complex and delicate issues of national policy may need to be resolved. Training in compromise is important in divided societies. This political socialization function of federalism in multiethnic countries is underappreciated. This may be one reason federalism is more often recommended when groups are territorially separate than when they are intermixed. Yet benign effects are possible in both.

Fifth, division of a country into subunits can create incentives for political actors to see at least some issues in terms of competition among those subunits, rather than among ethnic groups. Consider a country with resource-rich and resource-poor regions. Resource-rich regions are likely to argue for policies that apportion revenue from resources according to the principle of derivation (crudely, revenue should be returned to the place in which it originated), while resource-poor regions are likely to argue for policies apportioning revenue proportionately by population. If resource-rich units and resource-poor units do not coincide with particular ethnic groups, then this argument over revenue will cross-cut ethnic divisions and create allies out of members of groups that may otherwise be antagonistic. One of the oldest hypotheses in ethnic conflict studies suggests that cross-cutting cleavages mitigate ethnic conflict. A major problem in severely divided societies is that it is very difficult to deliberately arrange for cross-cutting cleavages to present themselves. Federalism, however, may inadvertently do what ethnic conflict engineers cannot otherwise do.

Sixth, federalism may activate subethnic cleavages that drop conflict down to the subnational level from the national level or, to put it differently, from the intergroup to the intragroup level. Before India's reorganization of states along linguistic (ethnic) lines in the 1950s, the undivided state of Madras had a high level of conflict between Tamil

22. See generally Richard Simeon & Luc Turgeon, *Federalism, Nationalism and Regional Conflict in Canada*, 3 REVISTA D'ESTUDIS AUTONÒMICS I FEDERALS 11 (Oct. 2006) (discussing Quebec's delicate role in Canadian federalism).

speakers and Telugu speakers.²³ The reorganization partitioned these two groups, placing Telugus in Andhra Pradesh and Tamils in Tamilnadu, and the structure of cleavages changed dramatically.²⁴ In Andhra, for example, with Tamils absent, conflict took place among three intra-Andhra territorial groups, Telenganas, Coastals, and Ryalaseemas, and among several powerful landowning castes, especially Kammass and Reddis.²⁵

Politically relevant group identities are malleable. One stimulus to which they respond is the territorial context. All else equal, the smaller the territorial context, the lower the level of politically salient identity. To put the matter crudely, if there are multiple territorial compartments, there are likely to be multiple subethnic conflicts. Inevitably, the more of these there are, the more difficult it is for the country as a whole to be divided along a single overarching cleavage line. One function of federalism, therefore, may be to create such ethnic and subethnic complexity as to reduce the level of conflict the whole country experiences. This function is a corollary, in a sense, of the quarantine function. Countries, such as Tanzania, that have a large number of dispersed groups are generally not as conflict-prone at the national level as those, such as Sri Lanka, with a few large groups that meet at the center of politics.²⁶

Seventh, federalism can serve as a *de facto* electoral reform. Territorial boundaries serve to partition electorates, sometimes in ways that exacerbate ethnic conflict, sometimes in ways that reduce it. The best example of this in both directions comes from Nigeria. As mentioned, the First Republic had three large regions. One of these, the Northern Region, contained about half the total Nigerian population.²⁷ The Hausa-Fulani, about thirty percent of the Nigerian population but perhaps twice that percentage in the North, was able to gain control of the Northern Regional Government by securing a large majority for its party, the Northern People's Congress (NPC), in the Northern legislature and squelching most opposition activity from minority ethnic groups in the North by a combination of patronage and denial of services to dissident areas.²⁸ Using this strong position in the Northern Region as a base, the NPC was able to win a plurality of seats in the national legislature and, with a junior

23. See HOROWITZ, *supra* note 19, at 66.

24. See *id.*

25. See *id.* at 613–14, 672–76.

26. See *id.* at 37–38.

27. See SUBERU, *supra* note 11, at 14.

28. See HOROWITZ, *supra* note 19, at 603; SUBERU, *supra* note 11, at 27–30.

coalition partner from the south, to control the country as a whole.²⁹ Essentially, the large size of the Northern Region allowed its largest group, with only thirty percent of the total population, a springboard to national power.

During and after the Biafra War, Nigeria was redivided, first into twelve and then into nineteen states. During the Second Republic (1979–1983), the North was divided into ten states (out of nineteen), but the Hausa-Fulani were able to control only six of these; the remainder were controlled by non-Muslim and Muslim (but not Hausa-Fulani) political parties, as well as a dissident Hausa party. The difference was that with new state boundaries, the incentives and disincentives available to the former NPC over the whole Northern Region were limited to those states populated by genuine supporters of the successor to the NPC. In this way, the proliferation of states changed the arenas that groups and parties could dominate. After the reconfiguration of federal units, the Hausa-Fulani were confined to something approximating a proportional share of electoral power, rather than the greater-than-proportional share they had enjoyed previously.³⁰ No longer could they dominate Nigerian politics from their disproportionately large Northern base. In this sense, federalism amounted to an electoral reform.

Eighth, federalism can provide a stimulus for interethnic alignments and coalitions. Once the Hausa-Fulani could no longer govern essentially alone, their political party was driven to seek genuine coalitions with other groups.³¹ If, then, federalism helps to proliferate groups and subgroups, or if it helps to confine the power of groups to a more or less proportional share, it will, all else equal, make it impossible for one group to aspire to control the whole government through the democratic process. If that is so, and if parties remain ethnically based, as they are likely to be, then it follows that incentives to form interethnic coalitions will be enhanced. Interethnic coalitions are much more likely to attend to the interests of multiple groups, thereby reducing conflict, especially if the coalitions are formed before elections.

V. THE COSTS OF FEDERALISM

We shall consider in a moment why these multiple benefits of

29. See SUBERU, *supra* note 11, at 28–29.

30. See HOROWITZ, *supra* note 19, at 604, 606–13.

31. See *id.* at 612. Certain aspects of the electoral system also pushed in this direction.

federalism are often not realized, but first a word about costs. Federalism is not cheap. It involves duplication of facilities, functions, personnel, and infrastructure, including provincial capitals. It also risks jurisdictional disputes, including a particular subtype, disputes over jurisdiction to engage in corruption. In Indonesia, the recent extensive devolution has created multiple centers of authority to block commerce and new projects. Investors have often been stymied by multiple demands for permission fees, lawful and unlawful.³²

There is another, specifically ethnic cost. If subunits, or some of them, are ethnically homogeneous, then members of migrant groups who are not considered indigenous to a unit may become victims of discrimination in favor of indigenes. Son-of-the-soil discrimination is common in many federal systems, including Nigeria and India, and in post-devolution Indonesia.³³

All of this means that there need to be strong legal protections so the costs of federalism will not outweigh its benefits. A federal system needs an umpire. Characteristically, that umpire is the judiciary. In states with undeveloped, inept, or corrupt legal systems, federalism can go awry.

VI. SHORTFALLS IN BENEFITS

Timing is one source of benefit shortfalls. States that could benefit from federalism typically come to that realization too late, usually after conflict has intensified. Their reluctance to devolve power actually increases as conflict grows, because the fear of secession also increases. Then, when warfare becomes acute, a partitionist federalism with a weak center, comparable to the sort described earlier in Bosnia and Cyprus, is most likely.³⁴ At best, this may barely hold the state together without utilizing many of the eight mechanisms enumerated earlier.³⁵

Equally important are inaptly configured federations. The most stable federations have tended to be those that have four features: (1) equality of powers among the component units; (2) equality of size among the component units; (3) a reasonable number of units; and (4) units based on preexisting boundaries.

32. See DAMIEN KINGSBURY, *THE POLITICS OF INDONESIA*, 63–80 (2d ed. 2002).

33. See MYRON WEINER, *SONS OF THE SOIL: MIGRATION AND ETHNIC CONFLICT IN INDIA* 8–9, 75 (1978).

34. See discussion *supra* Part III.

35. See *supra* Part IV.

Asymmetric federations can certainly function well, especially if the unit treated differently is relatively small and far from the center, as Greenland and the Faroe Islands are from Copenhagen. The larger and more central the unit that receives special treatment, the more fraught the relationship may be. Negotiations over Quebec's place in Canada provide an example of the management difficulties raised by such arrangements. Asymmetric federations can be made to work, but symmetrical powers and immunities for all the units are the safer course.

The perverse consequences that can flow from great differences in the size of federal units are well illustrated by the Nigerian experience in the First Republic, in which a single group in an unusually large region could coopt the electorate of nearly the entire region in the service in an attempt to control the entire country.³⁶ The case for reducing such size discrepancies is made very clear by the experience of the Second and Third Republics, in which no single group has been able to leverage its territory in order to dominate the entire country.³⁷

Likewise, the proliferation of units in Nigeria corrected the conflict possibilities inherent in a small number of units. In contrast, as politics in Pakistan came to be seen as simple opposition between East and West, the survival of the state became more precarious. Czechoslovakia, a bipolar state, dissolved soon after the fall of the communist regime. Belgium, with its divisions between Flemings and Walloons, benefits from the existence of a third region, Brussels, which, while French-speaking, contains many people of Flemish origin. But federations with three or four units are still vulnerable to dissolution if there is polarization as alliances form across a couple of units. A number of units larger than the number of groups is preferable.

A serious problem concerns endless proliferation of units, often after violent conflict over that issue. Nigeria has moved from three major regions to thirty-six states. Following devolution, Indonesia has experienced many movements to split regions, usually due to pressure from regional ethnic minorities to carve out their own new regions, often in reaction to local discrimination. The ideal situation is to overlay federal units onto preexisting territorial boundaries that have significant historical resonance so that groups located there can think of themselves in ethnic and subethnic terms and also in territorial terms. In such cases, there is likely to be greater reluctance to demand division of the territorial unit.

36. See discussion *supra* Part IV.

37. See discussion *supra* Part IV.

A final source of difficulty in implementing federalism for conflict reduction concerns regional minorities. If federalism is demanded in order to avert secession, within the putative secessionist region that is to become a unit in the federation there may be a regional minority that fears the new arrangement. In Sri Lanka, where the Tamils demand a federal unit in the Northern and Eastern Provinces, the Eastern Province is heterogeneous. Sinhalese and Muslims (mainly Tamil-speakers but not identifying as Tamils) also reside in that region. The Tamil insurgency has involved a certain amount of ethnic cleansing, which has, of course, worsened relations among the groups in the East. A federal arrangement that carved Sinhalese and Muslims out of the unit, if that were possible, would be unacceptable to Tamil insurgents. However, an arrangement that left those groups in the unit would be unacceptable to the Sinhalese and Muslims.

For all of these reasons, federal arrangements that are adopted are often suboptimal. The constraints inherent in the relations among groups and in the relations of groups to territory all militate against realizing maximal benefit from federalism and, even more often, from adopting a federal arrangement in the first instance.

VII. FEDERALISM AND MAJORITARIANISM

A discussion of federalism has much to contribute to a discussion of Professor Levinson's concerns about majoritarianism. For one thing, federalism makes something obvious that is frequently obscured when we discuss majority rule within undifferentiated national states. That something is the arbitrary character of the territorial boundaries within which we count majorities. Once a state is federalized and contains internal boundaries, within which electorates are partitioned, it becomes clear just how arbitrarily majority standing is determined. Depending on the relation of population to territory, it is perfectly possible that a national majority will comprise only a minority tendency in most federal units. For the strictest majoritarians, this may suggest that federalism is inherently undesirable because it might well derogate from majority preferences in the state considered as an undivided whole. And yet there is a prior question obscured by undifferentiated majoritarianism—the question of political community. Just as national boundaries allow the partition of one community from another, so too, do boundaries between federal units. Majoritarianism is incoherent without a prior determination of the commonalities that accompany political community.

Moreover, some of the eight functions of federalism enumerated here involve identifiably unmajoritarian features. For example, in order to

strengthen state loyalties that cross-cut ethnic loyalties, the equal representation of states, regardless of population, in the upper house—or something close to equal representation—is likely to be indispensable. If the standard of majoritarianism is the ability of national level majorities to rule unimpeded, the equal representation of states in a senate does not meet the standard. Yet, as we have seen, it may well serve other democratic purposes.

Likewise, asymmetric federalism that permits practices in one federal unit that would be impermissible in others or in the state as a whole constitutes a concession to local majorities that comprise only minorities in the country as a whole. Which is the relevant majoritarianism? In the case of Aceh, the asymmetric powers of the province permit Islamic law practices that may trench on the rights of secular and dissenting Muslims that a majority of the state as a whole considers inviolable, except insofar as their violation may be necessary to secure the peace in Aceh. When peace is at stake, majority preferences (and even minority rights) may sometimes have to yield.

If this suggests that majoritarian democracy is not always the ultimate value, perhaps it opens a new window on Professor Levinson's arguments. Perhaps the values promoted by each of the unmajoritarian features identified in *Our Undemocratic Constitution* need to be uncovered so that a judgment can be explicitly made about the trade-off between those values and majority rule. The problem cannot be solved by declaring that unmajoritarian features should simply be purged from the Constitution. In the case of federalism, I have suggested some very important functions that can be achieved, sometimes at the expense of undifferentiated majority rule. And it confounds arguments for unfettered majoritarianism all the more to suggest that in severely divided societies some of these functions may be necessary to make it possible to have democracy on any terms at all.