

## Federalism as Fairness\*

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UNTIL recently, contemporary political philosophy had not devoted much attention to federalism. Theories of federalism were mainly developed from the perspectives of political science and law, and remained largely empirical in nature.<sup>1</sup> Yet, in the past decade, some first normative political approaches have started to appear.<sup>2</sup> Interestingly, this recent interest in federalism has by and large<sup>3</sup> coincided with—and can perhaps be seen as the result of—the emergence of a politico-theoretical interest in multinational states and in the issue of minority rights for national groups who live in such states. Many of the theorists in this recent field of normative federalism for multinational states—perhaps with Will Kymlicka as their main representative—have focused on federalism’s ability to provide self-government to sub-state national groups, such as the Catalans, the Flemish and the Québécois. National identities are believed by them to have a profound significance in people’s lives and federal systems offer the possibility of protecting these national identities and of giving them abilities for self-government.

I believe that there is much to say in favor of such a conception of multinational federalism. National cultures matter to people and federalism enables people to maintain their own national culture. Yet it seems to me that there is a tendency in many of these new theories of multinational federalism to assume the view that federalism is *essentially* and *merely* a mechanism to provide sub-state nations with self-government.

I wish to argue that, although it is partially valid, as a full-fledged theory of federalism this view has several shortcomings. Firstly, theorizing federalism

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<sup>1</sup>See especially Riker 1964 and Elazar 1987.

<sup>2</sup>See, apart from the important 1994 article by Norman: Bauböck 2000; Føllesdal 2000; Gagnon and Tully 2001; Patten 2000; Karmis and Maclure 2001; Kymlicka 2001a, pp. 91–119; Weinstock 2001; King 2005; Levy 2006; Norman 2006; Kymlicka 2007.

<sup>3</sup>Important exceptions are Føllesdal 2000 and Levy 2006.

essentially as a tool for providing sub-state nations with self-government can explain the non-unitary nature of the federal state but not, in itself, the state's 'togetherness', its still being one (multinational) state rather than several mononational states. In short, the theory does not ground the absence of secession.

Secondly, this view is based on the assumption that people's cultural and national identities are mononational, in the sense that people refer uniquely to the sub-state nations that make up the multinational federation as the context of their identity. It thereby neglects state-wide identities, dual identities and intra-national plurality over national identity.

Thirdly, this view of multinational federalism takes federalism not only away from what it can be, but also from what it very often is. In important respects, this view, which is gaining dominance in this new literature, casts a federal state on an 'international' or a 'confederal' model. On this model, different nations are understood to come together and to engage in some jointly agreed and mutually beneficial courses of action. But federalism very often is not (and, for reasons articulated below, should not be) simply an international meeting-ground for sub-state nations. Federalism is typically something in between a unitary domestic nation-state and an international institutional structure. Citizens in federal states are simultaneously citizens of two peoples who each exercise sovereignty: a federal people and a sub-state people. My goal in what follows is to begin to articulate a normative theory of this 'in between' for multinational federal states.

These objections are related: it is because of the mononational understanding of identity that the move to cast a federal multinational state on a model prevalent in international relations is possible, whereby two or more nations are understood to engage in a 'partnership' (or 'marriage'), which in turn makes secession—or divorce—a natural mental option.

In this article I explore an alternative rationale for federalism which attempts to overcome the perceived shortcomings in the 'emerging view'. This alternative understands federalism as embodying principles of fairness in a society marked by a pluralism of national identities. In such a society, federalism, more than unitarism or secession, is the best way of implementing fair terms of recognition for individuals' national identities. This alternative justification consists of two central moves: (i) federalism is often better able to accommodate identities than mononational (seceded) states because individuals may be members of both the federal and the sub-state nation simultaneously; and (ii) federalism is a fair way to adjudicate between conflicting identities among the citizens that make up the component nations. Whereas the first point emphasizes the fact that many Québécois refer to both Canada and Quebec as the context for their national-cultural identity, the second argues that implementing federalism is a fair way to adjudicate between those Québécois who claim that Quebec is their primary national-cultural identity source and those Québécois who refer to

Canada as their primary source. As a result of this second fact, both the Quebec secession option and the option of installing a unitary (non-federal) Canadian state would be tantamount to compelling some to live according to the cultural context of others, and this is unjust. Federalism, instead, offers a fair solution in such cases, by refusing to give all the ‘recognition’ to any particular group and by instead distributing recognition equally. My thesis is that these two facts provide, on cultural identity grounds, a normative grounding of why federalism in multinational states may often be preferable on grounds of fairness both to secession and to a unitary non-federal state.

In what follows, I first define multinational federalism. Sections II and III analyze the understanding of federalism of the two most important theorists in this new tradition, who I take to be spokesmen of the ‘emerging view’ of multinational federalism: Will Kymlicka (Section II) and Wayne Norman (Section III). I argue that Kymlicka and Norman can be understood to theorize federalism as a contract between distinct nations. In this respect, their proposals share some important similarities with Rawls’s *The Law of Peoples*, and may be understood as federal extensions of it.

In Sections IV, V and VI, I outline a theory of multinational federal justice grounded in a second way of envisioning the federal contract. This road starts the extension from Rawls’s *Political Liberalism*. The result is not to focus on a contract between internally homogeneous partners, but to start from individual citizens of the federation. Section IV outlines the two Rawlsian extension options. Section V elaborates a justification for multinational federalism on the basis of the second option. Section VI outlines what the content of the federal contract would look like. Section VII considers two objections to the developed line of argument.

## I. TYPES OF FEDERALISM

In line with some common understandings of federalism in political theory, I will understand federalism to refer to a political system that divides powers between a central government and sub-state units, such that each level has genuine sovereign authority over certain issues.<sup>4</sup> There are two ways of categorizing forms of federalism which are useful for what follows. First, federalism can result from the decentralizing restructuring of a previously (more) unitary state (like in the United Kingdom or Belgium) as well as out of the integration of previously independent states (as in the European Union’s “federalization” process).<sup>5</sup> Second, some forms of federalism explicitly seek to accommodate the self-government claims of national-cultural groups, whereas in other cases, federalism is not related to the recognition of national identities. Resnick and

<sup>4</sup>See Kymlicka 2001a, p. 94.

<sup>5</sup>Weinstock 2001, p. 76. Stepan 1999.

Kymlicka call the first recognition-related type ‘multination federalisms’ and the second ‘territorial federalisms’.<sup>6</sup> The United States and Germany are examples of territorial federalism whereas Belgium and Canada are multinational federal states.

In this essay I take *multinational decentralizing* federalisms as the basic case. I thereby have states like Spain, Canada and Belgium in mind.<sup>7</sup> These are currently all considering decentralization claims that are advocated as a means of accommodating self-government claims of their national groups.<sup>8</sup> Although I am inclined to be optimistic with regard to what the view I will develop might entail for territorial and especially for integrating cases of federalism, here I will largely leave this question open (I will briefly return to integrating cases in Section IV).

Various sorts of normative arguments may be given to justify federalism, such as: federalism increases political participation and influence; it diminishes the threat to liberty from a too powerful central government; it allows for Tiebout sorting; it allows for competition between the sub-state units.<sup>9</sup> In this article, however, I will focus on a distinct set of arguments that are of particular importance to *multinational* federalism. These claim that the decentralization should restructure along national or cultural lines, such that national-cultural units get powers of self-government. In particular, I will focus on the ‘identity’ argument for federalism, which stipulates that the importance of people’s national identities is a reason for federal restructuring. I do not consider other arguments for or against federalism here, although these are of course crucial. As a result, the justification for federalism reached will remain *pro tanto* in an important respect.<sup>10</sup> Indeed, for a full justification, non-identity related reasons would have to enter the picture at some point. But I do think the strategy employed here is justified, because multinational federal states like Belgium or Canada have implemented federalism precisely for identity reasons, and it is often thought that the success of the federation will depend on whether it satisfies the identity recognition claims of sub-state nations. In addition, the alternative rationale for federalism I articulate is able to solve problems using the identity argument which would have to be tackled in non-identity related ways by the emerging view. The emerging view understands identity purely in sub-state national terms, and is then obliged to depend on other arguments to show why the proposal is one for federalism and not for secession. The federalism as

<sup>6</sup>Resnick 1994, p. 71. Kymlicka 2001a, pp. 91–119.

<sup>7</sup>What is said here may also be relevant for states like the United Kingdom, Switzerland, the US as far as its relationship with Puerto Rico is concerned, Finland, Iraq or Afghanistan.

<sup>8</sup>Although Canada historically belongs to the integrating type, it can be included in the list of states that are *currently* considering claims for federal decentralization or increasing autonomy.

<sup>9</sup>See Weinstock (2001, p. 76) for the first two arguments, and Levy (2006) for the second argument. The last two arguments are criticized in Levy (2006). See Norman (2006, pp. 141–157) for an overview of normative arguments for and against federalism.

<sup>10</sup>I thank an anonymous reviewer for pressing me on this point.

fairness approach, however, argues that identity reasons in themselves suffice to block the secessionist challenge to federalism.

## II. KYMLICKA'S PROBLEM

A successful theory of multinational federalism must include two fundamental parts: (i) an argument which shows why a federal state should devolve power to sub-state national groups (why it should not be a unitary state); and (ii) an argument which shows why a federal state is still preferable to secession (why it should still be one state). My thesis is that Kymlicka offers a solid normative grounding of (i), but in the process undermines a successful identity argument in favor of (ii).

Kymlicka's theory starts with the observation that the idea of remaining politically neutral towards cultures is impossible:

Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups.<sup>11</sup>

The just alternative to this idea of ethnocultural neutrality or 'benign neglect', Kymlicka argues, is a policy of granting minority rights. The specific sort of minority rights to which national groups are entitled are called 'self-government rights'. The justification for this proposal is based on an account of the role played by cultural membership in promoting individual freedom or autonomy. If liberals are concerned with safeguarding and enabling individual freedom, Kymlicka claims, they should be aware of its preconditions. Kymlicka argues that membership in a cultural community is a crucial precondition of individual freedom. To be autonomous beings, individuals need a cultural background that makes available various options. "Put simply, freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us."<sup>12</sup> Our culture thus offers us a 'context of choice'.

Kymlicka understands the relevant cultural context of choice to be the nation, to which he refers as the *societal culture*.<sup>13</sup> It is the *national* or societal culture (these terms are interchangeable) that provides the cultural spectacles that make our life choices and options meaningful to us. Societal cultures "[provide their] members with meaningful ways of life."<sup>14</sup> Societal cultures tend to be territorially concentrated and based on a shared language. Examples of such societal cultures include the cultures of the Danes, Dutch, Québécois, Catalans or Flemish.

<sup>11</sup>Kymlicka 1995, p. 108.

<sup>12</sup>Ibid., p. 83.

<sup>13</sup>See for instance Kymlicka 2001, p. 215.

<sup>14</sup>Kymlicka 1995, p. 76.

Kymlicka concludes that, in the absence of a culturally neutral policy option, liberalism stipulates granting self-government rights to national groups, so as to enable them to maintain their own societal culture. The result is a proposal for a multinational federal state, which offers its sub-state nations political autonomy.

While I acknowledge Kymlicka's huge and highly valuable contribution to the case for national minority rights, it seems to me that as a theory of multinational federalism his view faces an important objection. To see this, it is important to be aware of the somewhat unexpected nationalist logic underpinning Kymlicka's theory. While he defends *multi*-national states and criticizes liberals like Rawls and Dworkin for working with the unrealistic assumption that nations and states coincide,<sup>15</sup> for Kymlicka, it is still nationality that is the relevant unit of freedom and democratic self-government. That is, the freedom-enabling context of choice in multinational states is offered by the sub-state nations: the relevant contexts of choice are for instance the culture of the Catalans (not the Spanish), the Flemish (not the Belgians), or the Québécois (not the Canadians). Kymlicka argues that the sort of freedom and equality that matters most to people is freedom and equality within their own societal culture (i.e., their nation).<sup>16</sup> This is what makes him a liberal nationalist.<sup>17</sup> As a result, in his theory national groups get territorial and political autonomy. In the end, "territorially bounded national communities will, and indeed should, continue to serve as the primary locus for the exercise of collective autonomy and self-government."<sup>18</sup>

The problem with Kymlicka's nationalism is that it rests on a monolithic and homogeneous picture of nationhood. The unit within which Kymlicka thinks people are constitutively embedded—the societal culture—refers in fact to the 'cultural structure' (a term he later rejects without however rejecting the idea it denotes<sup>19</sup>), which might be contrasted with the values or beliefs of a culture.<sup>20</sup>

I call it a *societal* culture in order to emphasize that it involves a common language and social institutions, rather than common religious beliefs, family customs, or personal lifestyles. Societal cultures within a modern liberal democracy are inevitably pluralistic. . . . This diversity, however, is balanced and constrained by linguistic and institutional cohesion.<sup>21</sup>

So, far from postulating the homogeneity of the *values*, the *character* or the *content* of culture, Kymlicka provides ample room for cultural pluralism and content-based cultural variety. He draws a distinction between the pluralistic *content* and the *form* of culture, the *vehicle* which contains the content. That is

<sup>15</sup>Kymlicka 1989, p. 177.

<sup>16</sup>Kymlicka 2001a, p. 216.

<sup>17</sup>Kymlicka 1995, p. 93; 2001a, pp. 221–41.

<sup>18</sup>Kymlicka 2001b, p. 270.

<sup>19</sup>Cf. Kymlicka 1989, p. 165 and Kymlicka 1995, p. 83.

<sup>20</sup>Kymlicka 1989, pp. 165–7.

<sup>21</sup>Kymlicka 2001a, p. 25.

why Kymlicka can say that societal cultures are ‘inevitably pluralistic’ while still attributing substance and cohesion to their form, which is manifested in the culture’s language and in its institutions.

But this presumption of cohesion in the form of culture is problematic. We should cast doubt not only on the homogeneity of the character of culture, but also on the homogeneity of culture as form or vehicle. The idea of a ‘societal culture’ reveals the idea that the culture in question is institutionally complete, clearly distinct from others, and territorially concentrated.<sup>22</sup> There is an assumption here to take as a starting-point a picture of the world as a transparent mosaic of cultural and linguistic wholes, where clear and stable boundaries mark off monolingual and mononational societal cultures.

This assumption is inappropriate. There are many things that do not fit within it and it is, more often than not, untrue. Indeed, the cultural landscape we inhabit is imbued with cultural hybridity and opacity. It is always characterised by multiple identities, minorities within minorities, and bi-and multilingualism.<sup>23</sup> Our world is not a patchwork of clearly distinct cultural units.

As a result, in choosing the concept of a societal culture as the empirical starting-point for a theory of multinational federalism, Kymlicka unduly restricts the cultural unit in which people can be embedded. Kymlicka takes for granted that we are embedded in monolingual, mononational and territorially concentrated contexts of choice. But why should this be the case? Some citizens of multinational states may for instance derive their relevant cultural embeddedness from the state-wide culture rather than from the sub-state unit.

This seems for instance the case in Switzerland, where there is a strong sense of Swiss-wide national identity despite its extensive cultural and linguistic diversity. In recent articles, for instance, Francois Grin<sup>24</sup> and Nenad Stojanovic<sup>25</sup> have argued that Kymlicka’s understanding of Switzerland as a multinational country, comprised of different nations,<sup>26</sup> is largely incorrect. They explain that language and nationality are not coterminous in Switzerland. Swiss citizens refer instead to Switzerland as the nation, be it a nation with a great amount of sub-national linguistic diversity. The Swiss thus appear to maintain a multinational and multilingual societal culture, which doesn’t fit into Kymlicka’s categories, since he believes societal cultures to be based on a shared language, history and institutions.

So there is no reason to a priori restrict the form of a cultural context of choice to sub-state nations. People may identify with larger constellations such as the state-wide nation.

<sup>22</sup>Kymlicka 1995, pp. 76–7, 25; 2001a, pp. 25, 269.

<sup>23</sup>See also: Benhabib 2002, pp. 59–67; Carens 2000, pp. 65–6; and Hollinger 2001, p. 243.

<sup>24</sup>Grin 2002.

<sup>25</sup>Stojanovic 2003.

<sup>26</sup>Kymlicka 1995, p. 13.

Nor is there any reason to believe that people can only be embedded in one cultural context of choice at once.<sup>27</sup> Kymlicka also has difficulties with recognizing issues of biculturalism or binationalism where individuals derive their relevant cultural context of choice not from one such context but from two different ones. There is no mention in Kymlicka of the mere possibility that people might experience membership in two societal cultures. In important respects, the dual identities (with both the state-wide and the sub-state cultures as identity contexts) that exist in many multinational states can be understood as instances of such binationalism. Kymlicka cannot recognize this fact since he believes that people are essentially embedded in one distinct societal culture.

But that is an oversimplification. Several studies of the unit of national identity people refer to in multinational states point to the fact that many people identify with both the state as well as the sub-state as the context of their identity. Take for instance the Belgian state (but very similar remarks can be made in the case of Spain<sup>28</sup> and Canada<sup>29</sup>). Kymlicka argues that in multinational states like Belgium, Spain and Canada, citizens share citizenship but not a national identity. For instance, he understands people in Flanders to have Belgian citizenship but only a Flemish national identity.<sup>30</sup> In other words, their constitutive context of choice is not Belgium but Flanders, which then explains why Flanders is entitled to receive self-government rights in order to provide its members with their own context of choice. However, when probed for their national identity feelings, 42.2% of Flemish respondents in a 1999 survey answered that they self-identify as much with Flanders as with Belgium, and only 7% answered to be 'only Flemish' and 22.4% 'more Flemish than Belgian'.<sup>31</sup> And in a study of the national identities of Belgian citizens, the researchers conclude that, throughout the whole of Belgium, citizens experience a 'dual national identity' (Flemish/Wallonian *and* Belgian), and that in Flanders, the strength of both national identities (Belgian *and* Flemish) are in balance.<sup>32</sup> It is certainly highly questionable to understand people in Flanders to collectively refer to Flanders instead of Belgium as their national identity context.

This shows that people may have more than one national or cultural context of choice (such as a Catalan alongside a Spanish cultural context). But it also shows that the members that make up a societal culture may not be identical in the way they adhere to their culture. Kymlicka attributes a shared cultural identity (membership of a distinct societal culture) to all the members of a certain group, and then bases his normative political conclusion on the existence of this identity. But, if the analyses of the just-mentioned surveys are correct, then peoples may consist of members with divergent identities.

<sup>27</sup>Karmis and Maclure 2001, p. 370.

<sup>28</sup>Moreno 2001, pp. 112–26.

<sup>29</sup>Mendelsohn 2002.

<sup>30</sup>Kymlicka 2001b, p. 256.

<sup>31</sup>Meersseman, Billiet and Depickere 2002, pp. 20–1.

<sup>32</sup>Maddens, Billiet and Beerten 1999.

In short, contrary to what Kymlicka assumes, 1) contexts of choice may be larger than the sub-state nation, 2) people may be members of more than one national identity context at once, and 3) groups are often internally divided with regard to which context is the most relevant one.

So I don't think Kymlicka's theory succeeds as a successful normative theory of multinational federalism. Kymlicka has taken the first necessary step towards a successful theory of multinational federalism: he has given an argument for devolving powers to national subunits for reasons of identity. But the way in which he argues in favour of national self-government makes a successful argument in favour of the second step, the grounding of the federal level, difficult. To respect the value of people's cultural membership, Kymlicka relegates the heart of politics to the national level, of which Kymlicka says that it is the only unit within which genuine democracy can occur.<sup>33</sup> As a result, there is no identity-related reason in Kymlicka's argument why, after all, to maintain any powers at the federal level. There may of course be other reasons (although Kymlicka does not stipulate them). But relegating all the identity dimensions to sub-state nations has two drawbacks: it weakens federal stability and, essentially, it ignores larger state-wide national identities, dual identities, and disagreement among citizens over which national identity is the most prevalent one.

In fact, the multinational level gets reduced here to a level of cooperation between internally homogeneous entities that come together for their mutual benefit. As far as identity is concerned, federalism can on this view at best be a second-best solution for national groups, which would in general be better able to satisfy the choice context of their members if they were independent. The impasse of federal instability Kymlicka admits to end up with<sup>34</sup> thus seems a direct corollary of his very thin and instrumental understanding of federalism as a mere mechanism for self-government.

If the just-mentioned objections to the unit of cultural membership in Kymlicka's theory are correct, then we might be led to a different conception of federalism, one that focuses more on a nation's internal dividedness and on federalism's ability to offer a fair way of adjudicating between divergent identities of the members that make up the nations. I will formulate a rudimentary articulation of this below. But first, we need to look at the impressive formulation of the 'emerging view' in normative federal theory by Wayne Norman.

### III. NORMAN'S THEORY OF FEDERALISM

In 'Towards a Theory of Federalism', the founding article on federalism in contemporary political theory, Norman develops an outline for a possible normative theory of federalism. He recommends taking a Rawlsian,

<sup>33</sup>See Kymlicka 2001a, p. 325.

<sup>34</sup>Kymlicka 1995, pp. 189, 192.

contractarian approach, by adapting Rawls's idea of an overlapping consensus to federalism.

Norman's idea is to recommend federal principles and institutions if they would have been selected by enlightened federal partners interested in developing a stable and mutually beneficial federation. The parties that are negotiating the contract are the national groups that together form the federation. Norman states that he treats as the basic case the situation of independent nations negotiating to form a just and stable federation.<sup>35</sup>

In applying Rawls's idea of an overlapping consensus to the issue of federative justice, Norman focuses on two key elements of Rawls's theory. The first is the fact of reasonable pluralism. For Rawls, this refers to a plurality of reasonable but incompatible religious, philosophical and moral doctrines.<sup>36</sup> Norman extends this fact of pluralism, for multinational federal contexts, to include "divergent conceptions of citizenship and cultural membership based, for example, on national, linguistic, ethnic, or regional identities, affiliations or concerns."<sup>37</sup>

Secondly, he identifies three types of federal commitments, which are modifications of Rawls's three possible bases of social union. The first is a *modus vivendi* agreement founded on self- or group interests. For reasons parallel to those of Rawls,<sup>38</sup> Norman argues that federal relations must be based on more than a *modus vivendi*. Although in Norman's theory nations have initially decided to federate for reasons of mutual self-interest, they must be willing to develop a *moral* commitment to the new federal state, as a *modus vivendi* union will be inherently unstable.

Secondly, federal partners will also avoid accepting deep, monolithic conceptions of citizenship and identity as the basis of their union, which would be the equivalent of a shared understanding on one comprehensive doctrine in Rawls's sense.<sup>39</sup>

The third and most suitable basis for a just and stable federal union, Norman continues, will be "some form of overlapping consensus that demands more of federal partners and their citizens than a *modus vivendi*, but less than a comprehensive, monolithic conception of shared identity and citizenship."<sup>40</sup> Norman cites the official rationale of the most committed supporters of the Meech Lake Accord of 1987 in Canada as an example here. These supporters claimed that the accord would allow Quebecers to embrace Canada and its institutions, while recognizing their divergent conception of citizenship and national identification.

<sup>35</sup>Norman 1994, p. 85. This move is less pronounced in Norman's recent 'Negotiating nationalism' (2006, see e.g. p. 154).

<sup>36</sup>Rawls 1996, p. xix.

<sup>37</sup>Norman 1994, p. 87.

<sup>38</sup>Rawls 1996, p. 147.

<sup>39</sup>Norman 1994, p. 88.

<sup>40</sup>Ibid., p. 88.

Although Norman remains somewhat vague with regard to the concrete outlook of this third form of federal commitment, the general idea behind the proposal is clear. A federal principle can be regarded as just if it would be chosen in a hypothetical social contract between enlightened federal partners. Federal partners will not restrict their endorsement of the union to their direct self-interest since they must acknowledge that the resulting *modus vivendi* unity is inherently unstable. Nor will they want to base federal unity on a shared understanding of one specific cultural identity: that would be oppressive towards those who have a different cultural identity. Instead they will allow for a pluralism of identities.

I believe, however, that Norman's Rawlsian extension is subject to the same critique leveled above at Kymlicka's understanding of federalism. Norman suggests understanding the fact of pluralism in a way that includes a diversity of conceptions of citizenship and cultural membership. The idea here is no longer to search for a stable basis for a social union of *individuals* with differing conceptions of the *good* in Rawls's sense but rather for *groups* with differing *national identities*. The underlying assumption, however, is that individuals *within* a group do not differ with regard to conceptions of cultural-national identity. A comprehensive commitment to federal unity is rejected since not all the peoples or nations in the federation adhere to the same monolithic understanding of cultural membership and identity. But the individuals that make up each nation *are* assumed to share such monolithic understanding. Peoples are understood here as internally homogeneous in terms of identity and cultural membership. That is why the contracting federal parties represent peoples instead of individuals: they represent the shared view of cultural membership of their members. It thus seems that we are very close here to Kymlicka's understanding of groups. For both Kymlicka and Norman, cultural diversity and pluralism refer to a diversity of groups, which are believed to be internally cohesive in terms of culture and identity.

But, for the reasons I mentioned above, it is not clear to me why assuming a shared identity would be oppressive and unjust at the federal level but not so at the sub-state level. Groups tend to be internally divided with regard to the importance of identity and with regard to the question whether or not secession is desirable. As we saw earlier, a substantial minority of the Flemish, Catalans and Québécois do not refer to the sub-state nation for their identity context but uniquely to the federal nation. And the majority of people in these three examples tend to refer to both. Indeed this may be one of the fundamental characteristics of federal states: not that there are two peoples who join for their mutual benefit, but that we may speak about the existence of a 'people' at two levels; there is the federal people, composed of the individuals that make up the federation, and there are the peoples of the sub-state national groups. So the same rationale Norman uses at the federal level to reject a joint commitment to a shared cultural conception may be invoked to counter the idea that sub-state nations themselves are homogeneous in terms of cultural membership.

#### IV. FEDERAL EXTENSION OPTIONS

Norman assumes that the parties who design the political conception of justice are peoples which are already culturally unified. He explicitly takes independent peoples who decide to join for their mutual benefit as the standard case for building a theory of multinational justice. So, although Norman does not explicitly state this, we can understand the conception of justice for the federation as a whole as designed by peoples (or their representatives) in a second sort of original position at the federal level, subsequent to a previous one in which a conception of justice was constructed for each of the peoples that are making up the federation.

Interestingly, Norman thereby comes very close to the strategy employed in Rawls's later theory of international justice, as laid down in *The Law of Peoples*. There Rawls extends the social contract idea to the society of liberal peoples (and, in a second step, to the society of decent peoples). This society of liberal peoples consists of peoples that have already made up their own political conception of justice for the domestic case. The idea of the original position is now used again, to extend a liberal conception to the Law of Peoples.<sup>41</sup> But, this time, the parties in the original position are not the representatives of individuals, like in the domestic case, but of peoples as collectivities. Since Norman analogously assumes that the federal contract is made by the (representatives of) peoples, we may conceive of the logic of this project as sharing important similarities with the set-up of Rawls's theory of international justice.

But that is not the only conceivable route. In fact, designing a theory of multinational federalism along Rawlsian lines seems to be possible in two ways. The first is indeed to cast a multinational federal state on the model of Rawls's *The Law of Peoples*, thus giving rise to a Law of two or more Peoples. This line of reasoning envisages a federal contract with peoples who each contain a shared conception of national-cultural membership. The representatives in the original position making up the multinational federal contract represent peoples instead of individuals. The second way is to cast it on Rawls's *Political Liberalism*, by extending Rawls's fact of reasonable pluralism to include differences of and disagreements over nationality. Here there is only one original position, and the parties in it represent individuals whose conceptions of national-cultural membership are put behind the veil of ignorance.<sup>42</sup>

I believe it is essential to acknowledge the appropriateness of the federal extension that starts from two independent states negotiating the terms of a federative union. In many cases this will provide federal unions with an adequate normative grounding. This approach may be particularly helpful for 'integrating

<sup>41</sup>Rawls 1999, p. 32.

<sup>42</sup>Both routes are extension issues: Rawls himself has never explicitly tackled the issue of federalism or multinational states, and when he talks about 'peoples', he means 'states'. For a brief comment on federalism, see Rawls (1999, p. 70). With regard to the multinational dimension, see Rawls (1999, pp. 24–5; see also 1996, p. lx, n. 37).

forms of federalism' in an earlier stage of their development, when identities are still relatively mononational and when institutions and the political process haven't instilled state-wide identities in citizens. The European project is a case in mind: today it seems fruitful to picture it normatively as a process whereby peoples interested in building a form of federation select federal principles of justice that can form the object of an overlapping consensus.

However, while taking the route of a federal law of two or more peoples may be fruitful to many forms of federation, I believe that this line of reasoning is over-represented in normative debates over federalism, and that this accounts for the difficulties to normatively ground many existing practices and characteristics of federal states—in particular dual, divergent and state-wide identities.

## V. FEDERALISM AS FAIR IDENTITY ADJUDICATION

The problem associated with the approach that casts a federal state on the model of international relations may be clear by now. Peoples are often internally divided with regard to the issue of cultural membership and by modeling the contracting parties as the representatives of peoples instead of individuals, this approach neglects cultural minorities within minorities, and misrepresents federalism as we know it today in many multinational states. In fact, this view bases its theory of federalism on a confederal pattern. As Norman later suggests, a confederal arrangement is typically a union of “constituent units and not of common citizens”.<sup>43</sup> In contrast, I think that states marked by pluralism of the kind described would benefit from a real *federal* ordering. That is why I propose that starting from a domestic-like argument with an original position in which representatives represent individuals is more just; this is a move similar to the argument of some of those who have criticized Rawls's use of the original position in the context of global justice.<sup>44</sup>

Taking this road, which is more akin to the rationale behind domestic political liberalism, implies taking three significant extension steps compared to political liberalism. The first is to extend Rawls's understanding of the fact of reasonable pluralism. For Rawls, this fact refers to a plurality of reasonable but incompatible religious, philosophical and moral doctrines. If we want to extend this to include multinational plurality, the fact of pluralism is to be additionally understood to refer to a plurality among individuals of conceptions of cultural membership based on national identities. This way of proceeding is very similar to Norman's extension, with the only difference that it intends to drop Norman's assumption that the pluralism in the multinational state is one between peoples that each

<sup>43</sup>Norman 2006, p. 126.

<sup>44</sup>Theorists like Caney (2002) and Tan (1998) claim that setting up the Law of Peoples as a contract between peoples denies the inherent dividedness and pluralism of peoples. Here it is argued that certain individuals with identities are culturally silenced if we work with a federal contract between peoples.

share a separate conception of cultural membership. It thereby tries to carry the idea of pluralism further to refer to an intra-national pluralism regarding national identities, and avoids assuming that pluralism is only international instead of intra-national in nature.

The second step is to show why parties behind a veil of ignorance would choose to recognize national-cultural identities politically through national self-government. Several normative theorists of multinational federalism have argued that national and cultural identities have such a profound significance in people's lives that this makes political recognition of them as well as a certain level of self-government desirable.<sup>45</sup> I will not explore this argument in depth here, and will to a large extent simply assume that people typically value their national identities (be these sub-state, state-wide or both) and have a reasonable interest in seeing them reflected in their political institutions. Why should we honor such interests? In short, because, as Alan Patten has argued, if a good (in this case self-government) is valued by many groups and if states have to distribute this good (because there is no neutral option), then, in principle, the only fair way to distribute this good is to distribute it equally.<sup>46</sup>

There are, however, exceptions: in some cases there may be good reasons why less crucial goods should not be equally distributed, if thereby other, more significant, interests can be safeguarded. So we might need an argument to show why self-government is an important good. I think two arguments can be developed here. The first is based on dignity and self-respect. Most people would feel humiliated if the political institutions through which they collectively shape their world are officially grounded in certain one-sided identities which they don't share. The other argument is based on Kymlicka's argument that national-cultural contexts enable freedom, coupled with the argument that self-government is the best way for national groups to enable their members to continue to enjoy their national-cultural context.

This is only a synoptic indication of how such an argument might work. Other accounts of the importance of self-determination can be given here. One might just go with Kymlicka's own argument, for instance, stripped from its mononational assumptions. But some account must be given for a theory of multinational federalism to be complete: without a convincing account of why national self-government is valuable, the parties might well be thought to simply ignore sub-state national identities altogether, and opt for one self-government context, the one dominated by the nationality of the majority as long as it meets traditional human rights constraints, for instance.

The third step consists in showing why a federal state is preferable to secession into several national (seceded) states in which the national identities at stake might receive maximum recognition. Kymlicka argues that, when people are

<sup>45</sup>See, among many others: Kymlicka 1995, 2001a, pp. 91–119; Miller 2001; Norman 1994; Patten 2000, 2001; Tamir 1995.

<sup>46</sup>Patten 2000; 2001.

asked to choose a principle for the drawing of boundaries in a Rawlsian-like original position—not knowing their race, ethnicity, or language—they will choose to draw, wherever possible, territorial and political boundaries around their nations.<sup>47</sup> This results in the normative guideline to draw and redraw boundaries in such a way that they mark off self-governing ‘national linguistic/territorial political communities’.<sup>48</sup>

However, if the objections I mentioned above are valid, then it is not so certain that the parties will choose such extensive forms of mononational self-government. If they are informed of the extent of cultural hybridity, linguistic intermingling, mixed or multiple identity structures such as binational identities, and the absence of identical identity structures among the members of one territorial unit, there are good reasons to believe that they would opt for federal forms of protecting cultural choice contexts. They would then know that the individuals they represent may have cultural attachments larger than the monocultural nation, that they may be part of more than one national-cultural context and that not every individual derives his or her cultural identity from the same such context. As a result, parties in the original position would be concerned to protect the interest not to have institutions grounded in national identities they don’t share. Since they don’t know whether they would be members of the institutionally recognized identities, they will instead favor a conception of federalism that treats different national identity groups equally.

Equal treatment does not mean that asymmetric solutions in the division of power between the federal and the sub-state units or between sub-state units themselves cannot be pursued. Such asymmetric solutions can be seen as expressions of *equal* treatment, if we realize that what we want to treat equally is not the recognition of nations (say, by granting half of the available powers to the Catalan nation and half to the Spanish nation) but of national identity groups (say, the predominantly Catalan and only partly Spanish group, or a 50/50 dual group, etc.). Treating identity groups equally may well imply differential recognition or asymmetry, so as to take into account the strength of identities.<sup>49</sup> I will return to this in the next section.

Why, then, does federalism express the equality of treatment ideal better than secession does? Since peoples are internally divided in terms of cultural identity, it is unreasonable to expect others to endorse your particular conception of cultural membership. Doing so, and building an overlapping consensus around one such particular conception would amount to a comprehensive and therefore unreasonable type of federal commitment. This is very similar to what Norman argues and only differs with regard to the fact that Norman assumes the pluralism to be merely international whereas this approach carries the idea of pluralism further, to include intra-national pluralism.

<sup>47</sup>Kymlicka 2001b, pp. 267–9.

<sup>48</sup>Ibid., p. 269.

<sup>49</sup>I thank David Miller and an anonymous reviewer for pressing me on this point.

The fairness idea behind this ‘federalism as fairness’ view comes down to the combined conviction that: 1) political recognition of national-cultural identities is an important good and that, given the impossibility of remaining politically neutral towards such identities, the only fair way to distribute this good is to distribute it equally; and 2) federal systems are better equipped to realize equality of treatment than both unitary non-federal states and seceded national states. In short, identity fairness requires equal treatment and federalism is the best way to realize equal treatment.

Why are federal systems better equipped to realize equal treatment? If it is true that, say, in Flanders, the strength of both national identities—Belgian and Flemish—are in balance, such that there are some who uniquely refer to Belgium, others who uniquely refer to Flanders and still others who refer to both as the context(s) of their identity, then multinational federalism cannot be simply understood as a contract between two nations or as a mechanism for the self-government of the two nations. Taking this into account will result in a different federal contract than that envisioned by those theorists who understand peoples to be internally undivided in terms of nationality. For them, federalism can at best be a second-best solution because, for instance, secession may lead to conflicts and instability. More specifically, arguing along the lines defended here may clarify why national self-government should not be total, but only partial. If some Flemings refer to Flanders and others to Belgium for their cultural frame of reference, total self-government for Flanders would deny the cultural membership of the second group. Thus, the same type of reason that should induce to decentralize instead of remaining unitary—namely, that doing so would deny the cultural membership of those who refer, partly or totally, to Flanders for their cultural membership—justifies why a federal state is preferable to two new unitary states, namely because the latter solution would neglect the identities of those Flemings who derive their cultural identity, partly or totally, from Belgium.

The fact that nations are internally pluralistic with regard to the issue of culture and identity is therefore a justification for the existence of federal levels of self-government besides national ones: federalism allows for the institutional expression of both sub-state and state-wide identities. The federal level finds its normative grounding in the cultural membership interest of those who refer to it for their dual or uniquely state-wide identities, whereas sub-state self-government is required by the fact that some people refer to the national group, uniquely or partly, as their relevant cultural context of choice. This argument can be invoked both for multinational states where citizens are overwhelmingly inclined to have dual identities<sup>50</sup> as well as for states where citizens are intra-nationally divided in terms of cultural identity.

<sup>50</sup>The argument is analogous to David Miller’s account of nested identities. Miller (2001, p. 314) argues that the main reason for creating a devolved parliament in Edinburgh is that it gives expression to one-half of the Scots’ national identity.

So, in states marked by diversity of the type described above, multinational federalism is preferable to unitarism as well as to secession, on cultural identity grounds. It gives expression, first, to dual and state-wide identities alongside sub-state national ones, but, crucially, it is a fair resolution of conflicting identity interests within sub-state units.

## VI. THE CONTENT OF THE FEDERAL CONTRACT

So far I have sketched the contours of a justification for multinational federalism. Apart from answering the ‘why federalism’ question, can normative theory also say something relevant on the content of the federal contract? Which arrangements will be settled on, and is it possible to articulate principles of federative justice?

It is impossible to fully answer these questions in the abstract. Indeed, the development and presentation of the content of the federal contract cannot be a freestanding affair. The content will depend on the specific case at hand: on the number, strength and character of the national identities present, on the extent of dual identities, on the nature of the relationship between the national groups, on the history of recognition in the country, and so on.

Nevertheless, we can say something about the structural shape of federal contracts, and the line of argument defended in the particular normative defense of federalism articulated here may also begin to tell us something on how to put flesh to that shape.

The federal contract will crucially contain answers to three content issues.<sup>51</sup> 1) What form of institutional expression should be given to national self-government? 2) Which powers should be devolved and which should remain federal? 3) What sort of policies should a multinational federal state pursue?

The answer to the first question consists of two parts: (i) identifying the two loci of political authority—the federal and sub-state units; and (ii) determining the representation of the self-governing units at the federal level.

(i) While accommodation of the federal nation is expressed through a state-wide political apparatus, accommodating sub-state nationality is typically pursued through identifying sub-state political communities which delineate national-cultural units. The simplest way to instantiate this is to locate territorially based national groups and grant them substantial political autonomy on that territory exercised through a parliament and government with sovereign powers. So for instance, Quebec, Catalonia and Flanders each are territorially defined partially self-governing units.

While granting territorial self-government to each national group is typically seen as the standard case of accommodating sub-state nations, there are also alternatives for cases not characterized by the territorial concentration of groups,

<sup>51</sup>See Norman (2006, p. 97) for a more elaborate list of basic questions for a federal state.

which would face the ‘minority within minorities’ problem in a clear territorial division. (Note however, that the territorial model already provides an important partial solution to this problem: members of the majority nation who live in a territorial unit dominated by a self-governing minority nation, for instance, still have their identity recognized through the existence of a federal level of self-government.) One alternative is ‘territorial binationalism’: two or more nations live intermingled in a territorial unit, the unit is declared to belong to both nations, and balancing mechanisms are in place like quota and veto powers. A second alternative is ‘non-territorial self-government’: political authority is partially exercised in a non-territorial way. In practice, however, non-territorial self-government will always be pursued in combination with territorial binationalism or territorial self-government because of unavoidably territorial dimensions such as roads and public safety.

(ii) Apart from identifying sub-state nations and devolving political authority to them, another way of expressing institutional recognition to the ideal of sub-state national self-government is by representing them at the federal level—for example by representing the nations in the second chamber of the federal parliament.

More generally, a wide range of legitimate ways of institutionally expressing self-government can be pursued here, as long as they give expression to the ideal of equal treatment of national identities. Note, however, that the federalism-as-fairness approach does give rise to some different recommendations compared with the rival view. The rival view sees the sub-state nations as the core loci for identity and political decision-making. This is compatible with understanding federal democracy as only ‘indirectly’ participative: sub-state nations delegate representatives to a federal negotiation table.<sup>52</sup> The federalism-as-fairness view, in contrast, provides an argument for giving institutional expression to the existence of a federal people alongside institutional expression for sub-state peoples. This view is compatible with direct participation of citizens in both federal and in sub-state politics. So the exercise of federal collective autonomy occurs primarily through federal self-government, not indirectly through sub-state delegates.

Let us now move on to the second issue: which powers should be devolved to the sub-state nations and which should remain federal? Here again much will depend on the case at hand. As a general rule of thumb, we can say that the self-governing units—sub-state or federal—need a large enough number of powers to be able to exercise meaningful autonomy. Typically, these powers will enable authority over traditional nation-building competences, such as language policy, education and public media. However, there is no reason to assume self-government should be limited to these. Indeed, a national culture is typically

<sup>52</sup>For example, indirect (nationally mediated) representation is Kymlicka’s (2001a, pp. 324–5) preferred model for democracy within the EU.

expressed not just in its language or history, but also in the choices it makes in more traditional policy areas, such as environmental planning, health care and even international affairs.

Much will depend on the strength and the perceived character of the national identity. Nations which are weakly adhered to require a less substantial transfer of powers than more strongly embraced nations (as for instance exemplified in the differential institutional recognition of the Welsh versus the Scottish nation). This may sometimes justify asymmetry in the division of powers. The national 'character' will also influence the division of competences: nations for which some value or policy field or national habit is important (say, fishing or language) will typically strive to become sovereign on those issues, which may lead to another form of asymmetry.

Finally, it is relevant to repeat that in the federalism-as-fairness model the state-wide nation is accommodated through federal institutions. Nation-building competences will therefore also need to be exercised at the federal level, so as to enable for, for instance, a celebration of the multilingual nature of the federal nation or of the historical achievements of the country-wide nation.

The third issue is the sort of policies pursued. This may at first sight appear a weird topic for discussion among federal contractors. Federalism is concerned with the division of authority, which is the power to *make* policy, rather than with which particular policies ought to be pursued. But there are good reasons to think that the federal contract would also entail some policy stipulations. In particular, federal contractors would be concerned about the individual dispositions of citizens as far as life in a federal state is concerned. Political theorists now tend to agree that the well-functioning of liberal-democratic institutions depends on the dispositions and qualities of citizens.<sup>53</sup> Encouraging appropriate dispositions is one of the reasons to pursue nation-building: the idea is that when a web of national solidarity is woven around a community, citizens will be more likely to trust each other, to support social justice schemes and to contribute to the overall stability of the regime. The parties to the original position therefore have reason to ensure an 'ethos of federalism' in the public sphere and in the day-to-day business of public institutions, and to inculcate it in the civic education of the citizens of the federal state. Fostering this ethos is not part of the state-wide nation-building intended to give expression to the state-wide nation. It is rather *meta-nation-building*, the nation-building required for the sort of stability and trust creating measures needed in federal multinational states. As a meta-nation-building device, it should not just be pursued at the federal level but equally at sub-state levels.

What is needed is a commitment in the public sphere and in public institutions to respect and acknowledge the multinational and federal character of the regime,

<sup>53</sup>See: Macedo 1990; Kymlicka 1995, pp. 174–6; Kymlicka and Norman 1994; Patten 2000, pp. 202–8.

by, for instance, respecting national flags, anthems and holidays, ensuring that royal inauguration events occur in the official languages of the federation, and so on. With regard to the civic education and the inculcation of this ethos in citizens, we can think of knowledge about the language and history of other national identities in the federation, as well as of intercultural education and of the importance of acknowledging and affirming difference.<sup>54</sup>

## VII. TWO OBJECTIONS

I end by responding to two incompatible objections. Both rely on the observation that, if identities are truly diverse and pluralistic, then it is not clear why national affiliations receive special recognition. The first objection states that there is no reason to limit the argument to *national* identities. While Catalan citizens may have Spanish and/or Catalan identities, they may also have a city-based identity, a catholic identity and a chess-player identity. Why should only the two former identities be given political recognition? Instead, self-government should be given to all identities. The second objection states that it should be given to none of them: if identities are truly diverse, then it is not clear why ethnonational identities should be picked out and receive special recognition. Why, instead, not ensure a unitary state operating within typical liberal-democratic parameters?

These objections are powerful. Whether national identities deserve self-government whereas other identities don't or do so differently will depend on the nature of the argument given for national self-government (for instance, an argument implying that only nations provide members with freedom). But there is also a more general strategy to show that national identities differ from other identities in a way which makes them better candidates for receiving political recognition through self-government rights. "National" forms of diversity involve national groups which often question political authority as opposed to political content or policy. They differ from groups who mainly question actual policies, such as caste-based, racial, religious, ethnic, dialect-based or indeed hobby-related identity groups. Take the claims coming from racial minority groups that their job opportunities are significantly harmed by forms of racism. The solution that is most straightforward here and also desired by such groups is to be found in implementing or improving (antiracial or group-differentiated) policies aimed at advancing their situation. Such groups do not normally demand significant redrawing of political boundaries or secession.

But national groups *do* demand a change in political authority, as for instance the Scots, the Flemish, the Québécois, and the Catalans have done. These groups do not just demand policy changes: what they want is authority changes; they claim forms of self-government.

<sup>54</sup>On the expectation on the part of citizens to acknowledge and affirm difference, see Patten (2000, p. 206). See also Karmis and Maclure (2001).

Having said that, it could well be that certain—typically regionally based—identities transform into national identities. Flanders is internally divided into five provinces. Some of these, in particular West-Flanders and Limburg, exhibit weak forms of more standard national identities: they are territorially concentrated, they have a dialect with which many inhabitants strongly identify, and people often talk of the West-Flemish or Limburg ‘character’. It is conceivable that, in due time, identification with these regional identities significantly increases, such that it becomes sensible to see them as national identities. Conversely, it might also happen (although it is unlikely, especially when nations control institutions, which foster identities) that sub-state nations are no longer seen as identity-providing. At that point the identity reasons for federalism disappear, and, from an identity point of view, a unitary state would suffice. It is also imaginable that, in due time, state-wide and dual identities disappear, so that citizens uniquely identify with their sub-state nation. In that case, the identity reasons for federalism also disappear. Finally it is imaginable that both sub-state and state-wide identities disappear and that citizens develop strong supranational identities in which case there is an identity argument for institutionally recognizing that identity. In short, the theory defended here is dynamic, and tracks the identities at stake and their strength.<sup>55</sup>

So the short answer to the first objection (“give recognition to all”) is that there is a relevant difference between national and other identities, though we should not rule out the possibility that some of these other identities, in due time, do become national ones, and thereby candidates for self-government.

The short answer to the second objection (“give recognition to none”) builds on the first answer and adds that, given the importance of national identities, it would be unfair not to grant recognition to those with solely (or partially) sub-state identities, because in this scenario all the recognition is given to the state-wide identity. This solution is comparable, in terms of the amount of identity unfairness, to full secession of the sub-state units into new unitary states, which would be unfair to those with solely or partially state-wide identities. It would be tantamount to giving all the national recognition to one of the national identities.

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<sup>55</sup>The dynamic nature of identity recognition also pertains to the formative effects of institutions on identities. My argument says that state institutions should recognize existing identities. But the institutions themselves have an impact on the identities, and shape them, and once implemented for identity reasons, the institutions may strengthen or modify the identities in certain ways. This is interesting but does not affect the general argument which simply says that the institutions should track the identities. If (just) institutions modify identities, then this will modify the recognitional claim.

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