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Cover Page Footnote

William T. Comfort III Professor of Law, New York University Law School. I gratefully acknowledge the advice and comments of my colleagues Don Herzog, Daniel Halberstam, and Benjamin Straumann.

SUBNATIONAL NORMS IN THE NEW CONSTITUTIONAL ORDER: FEDERALISM

FEDERALISM AS WESTPHALIAN LIBERALISM

*Roderick M. Hills, Jr.**

How should a nation's constitution deal with its citizens' intense religious and ideological disagreements? When citizens are passionately divided over an issue, then two opposite dangers threaten a republic—either gridlock or civil war. Gridlock can result from citizens' inability to set aside an issue when it is obvious that further deliberation about the issue is fruitless. Unable to agree to disagree, they waste efforts in endless, acrimonious debates that might be more profitably devoted to reaching agreement on less intractable matters. Civil war can result when one faction becomes large enough to break the deadlock and force its beliefs upon the rest of the nation. In the extreme case, the losing faction could become violent—a “hot” civil war. But, even absent violence, there is the risk of a “cold” civil war, in which a large portion of the nation feels alienated from the nation's normal politics and resentful of the winners who, the losing faction believes, dominate politics to the exclusion of their values. Either of these consequences—civil war or gridlock—is undesirable. The constitutional legitimacy of a democracy rests on the fiction that each citizen consents to the overall decisions of his elected representatives, at least in the thin sense that each citizen believes that his losses on some issues are roughly balanced by his victories on other issues. When one faction believes that its fundamental values have been rejected by the majority, then this fiction is more difficult to sustain.

I will call this problem of religious or ideological divisiveness the dilemma of deep disagreement. There are familiar solutions to this dilemma that can all loosely be described as “liberal” solutions.¹ Their

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1. In invoking the freighted term “liberalism,” I am aware that I invoke a controversy rather than a clear concept. As Raymond Geuss has nicely summarized, “liberalism” has no stable definition, tends to rewrite its own past, and is open to significant modification in the future. Raymond Geuss, *History and Illusion in Politics* 69 (2001). My modest claim is only that the version I offer above is not only consistent with the four general characteristics suggested by Geuss, *id.* at 73, but consistent with the modern liberal's self-conscious genealogy of liberalism as a device for fostering social peace in the face of the great

liberalism stems from their effort to maintain some sort of neutrality about how the deep disagreements should be resolved by relying on a decision-making framework that appears to be impartial between these different conceptions of the good. Such solutions do not attempt the impossible task of devising a procedure that will never have the effect of advancing one side of a deep disagreement over the other: No such procedure could exist, because all procedures will necessarily yield results offensive to one side or the other, if the procedure yields any results at all.² Rather, plausible liberal solutions are theories of excluded reasons: They bar reliance on such effects as the justification for the lawmaking procedure.³

In what follows, I will describe three sorts of liberalism, each of which attempts to side-step deep disagreements by appealing to our shared intuitions about the right process or institution for resolving disputes. I will call two of these theories “Millian” and “Madisonian” liberalism after their most famous proponents, John Stuart Mill and James Madison. These two versions of liberalism dominate constitutional doctrine and scholarship, although constitutional theorists do not always recognize them as theories about neutral decision-making processes.

But the third theory, which I will dub “Westphalian” liberalism, after the Peace of Westphalia that is its most famous and, perhaps, earliest example, has a much more muted presence in constitutional law. The essence of this form of liberalism is that, recognizing that citizens have passionate and irreconcilable religious or ideological differences, the U.S. Constitution devolves decisions about these differences to an intermediate level of government—states, provinces, cantons, etc. The burden of this essay will be to suggest that this strategy is a genuinely liberal strategy for defusing deep disagreements, by substituting conflicts over proper jurisdiction for conflicts over ultimate decisions that the relevant jurisdictions should make. Recognizing the liberal aspirations of such a doctrine helps one understand its strengths and weaknesses as a rival to the Millian and Madisonian versions of liberalism that so dominate constitutional debate today.

European religious wars. See, e.g., John Rawls, *The Basic Liberties and Their Priority*, in *Equal Freedom: Selected Tanner Lectures on Human Values* 105, 119 (Stephen Darwall ed., 1995) (asserting that liberalism has its origins in “the wars of religion in the sixteenth and seventeenth centuries” which saw “the development of the various arguments for religious toleration”).

2. For an explanation of this impossibility, see, e.g., Stephen G. Salkever, “*Lopp’d and Bound*”: *How Liberal Theory Obscures the Goods of Liberal Practices*, in *Liberalism and the Good* 167 (R. Bruce Douglass, Gerald R. Mara & Henry S. Richardson eds., 1990).

3. The point has been made many times. For a representative argument, see John Rawls, *A Theory of Justice* 332 (1971); Jeremy Waldron, *Autonomy and Perfectionism in Raz’s Morality of Freedom*, 62 *S. Cal. L. Rev.* 1097, 1135 (1989) (contrasting “neutrality of effect,” which “would be an extraordinarily demanding ideal, because almost every governmental action is going to have *some* impact on the prospects for various lifestyles” with “[n]eutrality of reasons,” which merely “places limits on what may count as a good reason in politics”).

I. MADISONIAN AND MILLIAN LIBERALISM AS JURISDICTIONAL SOLUTIONS TO DEEP DISAGREEMENT

Consider two opposite ways of allocating power over matters of deep disagreement. First, one might allocate such power in a highly centralized manner, to the national legislature of a large republic. Second, one might devolve power over such decisions to private individuals and organizations. I shall dub the first method of allocating power “Madisonian liberalism” because it is most famously defended in Madison’s *Federalist No. 10*. I shall dub the second allocation of power “Millian liberalism,” after J.S. Mill’s defense of individual autonomy in *On Liberty*. Although these jurisdictional solutions seem diametrically opposed to each other, they have similar liberal justifications: Both jurisdictional limits share the goal of constraining the justifications for collective decisions to prevent one faction from resolving an issue of deep disagreement by sheer force of numbers.

A. Madisonian Liberalism and Congressional Constitutionalism

Consider, first, Madison’s theory of majority factions in a large republic. At the outset, it is important to reject the notion that *Federalist No. 10* is somehow a defense of interest-group liberalism in which self-interested legislators cut deals to cobble together inclusive coalitions. Madison expressly rejects such a notion, defending instead a Federalist and eighteenth-century consensus that parties of less than the entire people were a form of political corruption.⁴ Rather than suggest that large republics facilitate coalitions of self-interested factions, Madison argues that the process of legislating in a large republic refines away such selfish interests or passionate ideologies, replacing both with “patriotism and love of justice.”⁵ Three mechanisms ensure that legislators in a large republic will perform this refining function. First, such legislators are chosen from a nationwide pool of talent; second, they are elected from large electoral districts that make it “more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried” (e.g., buying enough pots of ale for the unwashed electors of Eatandswill to purchase their votes); and, third, the larger legislature governs “a greater variety of parties and interests” which cancel each other out, because no single majority can find “a common motive to invade the rights of other citizens.”⁶ The result is that voters will elect only “men who possess the most attractive merit and the most diffusive and established characters,” and

4. I piggy-back, therefore, Jack Rakove’s reading of *Federalist No. 10* as a statement of faith in “traditional ideals of legislative responsibility” in which disinterested elites voted on the basis of “some larger notion of public good” over the view that Madison somehow represents a modern turn to interest-group liberalism. See Jack N. Rakove, *The Madisonian Moment*, 55 U. Chi. L. Rev. 473, 481-83 (1988). For an account of Madison as a progenitor of interest group pluralism, see Paul F. Bourke, *The Pluralist Reading of James Madison’s Tenth Federalist*, 9 Persp. in Am. Hist. 271 (1975).

5. *The Federalist No. 10*, at 77, 82 (James Madison) (Clinton Rossiter ed., 1961).

6. *Id.* at 82-83.

the legislators themselves will avoid “unjust and dishonorable purposes” that are embarrassing to communicate to a large number of fellow lawmakers.⁷ All three mechanisms refine away passion and selfishness much as nitric acid refines silver, by burning away the partial impurities and leaving only the gleaming ore—those views that constitute the “permanent and aggregate interests of the community.”⁸

The legislature of the large republic, in short, prevents any political effort to force a resolution of deep disagreements—in Madison’s lexicon, legislation rooted in “passion”⁹—unless there is a general consensus concerning the proper resolution of the dispute. Madisonian legislation is liberal in the sense that one need not have any substantive view of what the “permanent and aggregate interests of the community” are to endorse the refining process by which such interests are separated from “partial” considerations.¹⁰ Instead, one need only accept the view that, whatever those general interests are, they cannot survive the large republic’s election and lawmaking process. In particular, these processes refine away partial resolutions of issues of deep disagreement—in Madison’s words, “a zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice” that divide the citizenry.

For the purposes of this essay, one can set aside the question of whether this reading of *Federalist No. 10* represents the “core of the Madisonian system”¹¹ or not. The critical point is that this vision of the national legislature as transcending parochial local prejudice or greed has a powerful pull on the judicial imagination. It surely explains some scholars’ and judges’ inclination to defer heavily to Congress’s judgment concerning how best to implement the Fourteenth Amendment. Thus, Edward Rubin urges that one cannot determine matters of fundamental national principle except by consulting national legislation.¹² Likewise, calls for “active liberty” or “popular constitutionalism,” by both Supreme Court Justices¹³ and constitutional scholars,¹⁴ typically assume rather than argue that Congress must be the vehicle for such popular interpretation of the Constitution, ignoring the possible role of state governments, city councils, juries, or private nonprofit organizations as rival vehicles. The unspoken assumption underlying this literature is that somehow a single legislature containing

7. *Id.* at 83.

8. *Id.* at 78.

9. *Id.* (describing “passion” and “interest” as the two motivations defining factitious legislation). The two motives should not be conflated. On the role of the interests in softening and correcting the passions in eighteenth-century political thought, see Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph* (1997).

10. *The Federalist No. 10* (James Madison), *supra* note 5, at 78, 82.

11. Rakove says that it does not. Rakove, *supra* note 4, at 484.

12. Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 Ga. St. U. L. Rev. 1009 (1997).

13. See, e.g., Stephen Breyer, *Active Liberty* (2005).

14. See, e.g., Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1 (2003).

only 535 members can better represent the preferences and values of three-hundred million people than fifty legislatures containing over 7000 legislators. Whatever the validity of this assumption, if it has any basis at all, that basis must lie in some view that Congress's enactments present a truer portrait of the nation's values than any subnational body.

Yet it should be obvious that Madison's use of the large republic to protect an essentially premodern vision of national politics was rendered obsolete by the rise of national political parties. The very process of organizing politics on a national scale actually may require rather than discourage precisely the sloganeering and demagoguery that Madison feared: One cannot mobilize millions of voters without millions of dollars, typically raised through hyperventilated, mass-mail campaigns conducted by staff-run, Washington-based advocacy groups that provide few outlets for the rank and file to engage in careful deliberation. Likewise, Madison never provided any serious explanation for how the mutual vetoes of interest groups would cancel each other out rather than simply lead to gridlock or extortion. It is likely that the pivotal congressperson who can provide the vote necessary to override a presidential veto or stop a filibuster in the Senate will tend to hold views not too far from the views of the median national legislator.¹⁵ Yet mutual vetoes of each faction hardly ensures that the legislative dross will be siphoned off, leaving only pure ore. Rather, the national legislature may simply grind to a halt as the national agenda is consumed with simple culture war salvos—Terri Schiavo, flag burning, same-sex marriage, abortion, etc.—shrill enough to be heard by an inattentive citizenry above the din of its favorite soap opera or sporting event.

If the status quo represented some sort of national consensus, then gridlock would not be illiberal, although it would be impractical. However, the justice of the status quo might itself be a matter of deep disagreement. The system of mutual vetoes created by the U.S. Constitution of 1789-91, for instance, firmly protected Southern interests and, thus, insulated slavery from national prohibition. But this protection of the status quo simply constitutionalized one side of a deep disagreement among the citizenry. Indeed, it may have been intended to do so,¹⁶ stripping the arrangement of justificatory neutrality. Thus, Madison's *Federalist No. 10* bears a disturbing resemblance to John C. Calhoun's *Disquisition on Government*, in which every economic interest—in particular, the slave-owning interest—can veto any law that threatens its current advantage.¹⁷

15. See Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (1998).

16. On the relationship of the Great Compromise on representation of states in the Senate to the preservation of slavery, see Jack N. Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 *Wm. & Mary Q.* 424, 448-50 (1987).

17. John C. Calhoun, *A Disquisition on Government*, in *A Disquisition on Government and Selections from the Discourse* 3, 20 (C. Gordon Post ed., Liberal Arts Press 1953) (1851), available at http://www.constitution.org/jcc/disq_gov.htm. According to Calhoun, the only solution to the problem of one interest's oppressing another is "by taking the sense of each interest or portion of the community, which may be unequally and injuriously

In short, Madisonian liberalism may not be the ideal neutral process by which to resolve or side-step deep disagreements. But what about Millian liberalism?

B. *Millian Liberalism and the Public-Private Distinction*

One might solve the problem of deep disagreement by delegating issues inspiring such disagreement to individual persons, limiting the state to the role of defining the jurisdiction of each individual independent of his idea of the good. David Hume's metaphor of two travelers passing each other on the road captures both the notion and the problem:

Two men travelling on a highway, the one east, the other west, can easily pass each other, if the way be broad enough: But two men, reasoning upon opposite principles of religion, cannot so easily pass, without shocking; though one should think, that the way were also, in that case, sufficiently broad, and that each might proceed, without interruption, in his own course. But such is the nature of the human mind, that it always lays hold on every mind that approaches it; and as it is wonderfully fortified by an unanimity of sentiments, so is it shocked and disturbed by any contrariety.¹⁸

On Hume's account, "one should think" that the state acts as a traffic cop, enforcing rules of justice that are independent of each individual's conception of the good but that nevertheless help everyone reach their destination. But "such is the nature of the human mind" that this conventional liberal theory is not easy to achieve, because the human mind "always lays hold of every mind that approaches it," spoiling for a fight.¹⁹ How, then, should the state manage these loquacious sojourners who feel compelled to proselytize and protest over what constitutes the good life?

Mill's *On Liberty* provides an answer to this question more consistent with the human need to communicate than Hume's. For the purposes of this essay, the essential characteristic of Mill's liberalism is that private decision making and private speech together constitute a mechanism of collective decision making not dissimilar from Madison's legislature in a large republic. Chapter II of *On Liberty*, in particular, sets forth a series of famous arguments about the benefits of individual liberty to collective decision making—for instance, that individual power to resist social convention will increase the tendency of society to make correct judgments about controversial issues of morality and will ensure that a larger number

affected by the action of the government, separately, through its own majority, or in some other way by which its voice may be fairly expressed; and to require the consent of each interest, either to put or to keep the government in action." *Id.* For an account of how Calhoun invoked this theory of minority veto to protect Southern interests in the tariff controversy of 1832, see Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876*, at 104-08 (2000).

18. David Hume, *Of Parties in General*, in *Essays: Moral, Political, and Literary* 54, 60-61 (Eugene F. Miller ed., Liberty Classics 1987) (1777).

19. *Id.*

of people understand the grounds for their conventions.²⁰ The advantage of free expression is a collective advantage resembling Madison's defense of elections in large districts: Just as the large districts prevent "vicious arts" from carrying elections with parochial tactics such as feeding rather than informing the electorate, so too unconventional opinions ensure that "the mind of a people [is] stirred up from its foundations," preventing lay persons' "mental development" from being "cramped, and their reason cowed, by the fear of heresy."²¹ Like Madison's legislature of disinterested representatives elected from large districts, Mill's society of talkative individuals ensures that any truth about the good life will win acceptance only if it has been accepted through a process of disinterested debate, ensuring that it has the genuine and informed acquiescence of society. In this way, a single faction's partial view of the good cannot be foisted on any individual except to the extent that it wins the general acquiescence of society.

It is easy to overlook the aspect of collective decision making that justifies Mill's liberalism, simply because of the apparently individualistic nature of its jurisdictional rules. The foundation of Mill's theory is ostensibly "one very simple principle"—that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection."²² On this view, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."²³

But Mill's "harm" principle does not assume that private actors will not interact with each other to influence each other's opinions: For Mill, it is "neither possible nor desirable" that "the feelings with which a person is regarded by others, ought not to be in any way affected by his self-regarding qualities or deficiencies."²⁴ To the contrary, "[w]e have a right, also, in various ways, to act upon our unfavourable opinion of any one, not to the oppression of his individuality, but in the exercise of ours."²⁵ This power to act on one's unfavorable opinion of one's neighbors includes not only the power to express one's opinions of one's neighbor's self-regarding behavior,²⁶ but also the power to boycott or ostracize those people that one

20. John Stuart Mill, *On Liberty* 75-118 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

21. *Id.* at 95-96.

22. *Id.* at 68.

23. *Id.*

24. *Id.* at 143.

25. *Id.* at 144.

26. As Mill wrote,

Considerations to aid his judgment, exhortations to strengthen his will, may be offered to him, even obtruded on him, by others; but he himself is the final judge. All errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his

believes to be immoral²⁷ and to “give others a preference over [the immoral person] in optional good offices, except those which tend to his improvement.”²⁸

Thus, Mill’s system of liberty is actually a system of collective governance, in which each individual “may suffer very severe penalties at the hands of others, for faults which directly concern only himself.”²⁹ The limit on “these penalties” is that they must be “the natural, and, as it were, the spontaneous consequences of the faults themselves, not because they are purposely inflicted on him for the sake of punishment.”³⁰ That is, the Christian shopper could boycott the atheist’s store not to convert the atheist through economic pressure, but rather to express the shopper’s own religious beliefs, such as a religious desire to subsidize her fellow believers with her patronage. In this way, each member of society can visit “inconveniences” on other members for their self-regarding preferences and values, just so long as those burdens “are strictly inseparable from the unfavourable judgement of others.”³¹ The combined effect of each individual’s freedom is a system of collective decision making in which each individual must bear the legitimate consequences of his choices—consequences defined in terms of the good or bad opinions of his neighbors, expressed not only in words but also in the burdens of social ostracism, so long as the level of ostracism results only from the proper self-regarding preferences of those neighbors to express their own beliefs rather than to “punish” the target.

Mill’s theory of liberalism, in short, is a theory of collective governance essentially similar to Madison’s but extended to the social sphere. Like Madison, Mill is concerned that the homogeneity of groups will render their members incapable of critical deliberation. But Mill is concerned not with legislative homogeneity, but rather the homogeneity of social groups, resulting from the fact that “the world, for each individual, means the part

good Though doing no wrong to any one, a person may so act as to compel us to judge him, and feel to him, as a fool, or as a being of an inferior order; and since this judgment and feeling are a fact which he would prefer to avoid, it is doing him a service to warn him of it beforehand, as of any other disagreeable consequence to which he exposes himself. It would be well, indeed, if this good office were much more freely rendered than the common notions of politeness at present permit, and if one person could honestly point out to another that he thinks him in fault, without being considered unmannerly or presuming.

Id. at 143-44.

27. According to Mill,

[w]e are not bound, for example, to seek his society; we have a right to avoid it (though not to parade the avoidance), for we have a right to choose the society most acceptable to us. We have a right, and it may be our duty, to caution others against him if we think his example or conversation likely to have a pernicious effect on those with whom he associates.

Id. at 144.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

of it with which he comes in contact: his party, his sect, his church, his class of society.”³² To disrupt such group bias, Mill promotes heterogeneity of opinion in a diverse nation just as Madison promotes heterogeneity of legislators through a large republic.

The notorious difficulty with this version of liberalism is that it requires a definition of legitimately protected entitlements with which each individual is entitled to express his or her opinions and values through boycotts and disassociation. Absent such a definition of entitlements, the notion of “harm” is empty.³³ I may express my approval of your religion by refusing to open my wallet to donate to your faith; I may not express my disapproval by stealing your own wallet and using your money for what I regard as superior ends. Thus, we need a definition of baseline property rights to distinguish coercion from legitimate disassociation. Mill’s abstract constraint on justification is obviously unequal to this task: In theory, even slavery would not violate Mill’s “harm” principle, because the slave owner could have merely self-regarding reasons to exploit the slave’s labor. Mill, of course, rejects contracts to enslave oneself on the ground that slavery so obviously destroys individual liberty that such contracts undermine “the very purpose which is the justification of [contractual freedom].”³⁴ But such intuitive notions of liberty hardly help much in defining baseline property rights in closer cases.

Take, for instance, the notion of freedom of association. Should the owner of a company town enjoy the right to evict members of a rival church for the self-regarding purpose of providing a larger subsidy (in the form of wages to his employees) for his own church? Would an employee’s contract with an employer requiring the former to adhere to the religion of the latter enhance the liberty of both by enlarging the range of voluntary organizations available to them? Or would it resemble a contract of enslavement that “defeats . . . the very purpose which is the justification of allowing [the employee] to dispose of himself?”³⁵ Mill’s “harm” principle, barring “other-regarding” purposes, sheds no light on this question.

32. *Id.* at 77.

33. The point that the “harm principle” is devoid of content as a theory of entitlement is a familiar one. *See, e.g.*, Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* 12 (1984); Simon Lee, *Law and Morals: Warnock, Gillick and Beyond* 25 (1986) (“Merely incanting ‘harm-to-others’ is not sufficient to provide a recipe for when the law should enforce morality. At best, it provides a starting-point. At worst, it begs all the important questions.”).

34. Mill, *supra* note 20, at 173. Mill explained,

The reason for not interfering, unless for the sake of others, with a person’s voluntary acts is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at the least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself.

Id.

35. *Id.*

The problem of coercion resulting from private persons' powers of disassociation does not arise only when the person in question owns an entire town. Consider, for instance, the power of physicians and pharmacists to abstain from providing assistance in obtaining an abortion. Roughly eighty-seven percent of counties in the United States have no abortion provider, and thirty-four percent of women between the ages of fifteen and forty-four live in these counties.³⁶ Thus, despite *Roe v. Wade*,³⁷ the medical profession has the power to withdraw abortion services from a vast swath of the United States, forcing women to migrate across jurisdiction borders to obtain an abortion. The problem is present at the international level as well, as indicated by the report of the United Nation's Committee on the Elimination of Discrimination Against Women (CEDAW), which condemned doctors' rights of conscientious objection under national law on the ground that they curtailed women's rights to obtain an abortion.³⁸ But any law that denied doctors such a power over their own labor would invite the accusation that the law illegitimately coerced the doctors into foregoing their autonomy. Thus, abstract slogans about self-ownership justify the doctors' rights to withhold their services just as easily as they justify women's rights to avail themselves of such services. This is not to say that it is in principle impossible to distinguish between the self-ownership rights of various claimants—doctors, pharmacists, their clerical staff, etc.³⁹ Instead, one need note only that abstract slogans of self-ownership will resolve no difficult case.

The problem of dividing jurisdiction between private parties can be endlessly repeated whenever one private person seeks access to the services or property of another. People seeking to work for a firm, obtain an abortion, march in a parade, attend a private school, or patronize a restaurant will inevitably confront the self-regarding claims of rivals to control these opportunities for rival ends. Mill's "harm" principle provides no guidance on such questions: As a theory of constrained justification, it would permit all such assertions of self-regarding preferences, and, as a theory of entitlement, it is simply devoid of content.

36. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 *Persps. on Sexual and Reprod. Health* 6, 6 (2003).

37. 410 U.S. 113 (1973).

38. U.N. Comm. on the Elimination of Discrimination against Women [CEDAW], *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, ¶¶ 353-60, U.N. Doc. A/52/38/Rev.1 (Aug. 12, 1997). For an example of such rights of conscientious objection, see Section 4(1) of the British Abortion Act 1967, which states that "no person shall be under any duty . . . to participate in any treatment authorised by this Act to which he has a conscientious objection." Abortion Act, 1967, c. 87, § 4(1) (Eng.).

39. For a description of these fine-grained problems, see, e.g., *Janaway v. Salford Health Auth.*, [1988] 3 All E.R. 1079 (H.L.) (U.K.) (affirming a lower court's ruling that a secretary did not enjoy under British law a right of conscientious objection to refuse to type a letter discussing the option of abortion); James F. Sweeney, *May a Pharmacist Refuse to Fill a Prescription?*, *Plain Dealer* (Cleveland), May 5, 2004, at E1.

In sum, Mill's system of liberalism creates a system of private governance but no rules for defining the jurisdictions that do the governing. Mill intended that private persons be able to use their entitlements in ways that exerted pressure on their neighbors: His liberalism is justified as a system of collective decision making to ferret out groundless and partial opinions, much as Madison's legislature is a system for refining away factitious legislation. But Mill offers little guidance on the extent of each person's legitimate interests, beyond the patently inadequate injunction against other-regarding purposes.

This is not to say that Mill was unaware of the need for some definition of entitlements. Chapter V of *On Liberty* largely consists of a series of examples illustrating such a definition, analogous to a sort of common-law exposition of a concept.⁴⁰ But such illustrations are hardly self-justifying, even if they were sufficient to define the contours of Mill's theory of harm (which they are not). It is not obvious, for instance, why the selling of goods "affects the interest of other persons, and of society in general" and, therefore, does not come within "the principle of individual liberty asserted in this essay."⁴¹ Aside from this sketchy set of illustrations, Mill sometimes seems to fall back on positive law and custom to define legitimate interests, urging that every person is bound not to "injur[e] the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights."⁴² But aside from such pure positivism and simple utilitarianism, Mill offers nothing more specific by which legitimate private interests can be defined. And yet on this definition does the entire theory of liberty depend.

The fault is not with Mill's theory in particular. The problem afflicts any theory that purports to divide jurisdiction between private persons on the basis of abstract and a priori pronouncements. The difficulty is that disagreement about the details of property and personhood are just as intensely felt as disagreements about the underlying ends to which individuals seek to use their property and persons. One does not avoid such deep disagreements by pronouncing that each person should use his own property as he pleases, or by declaring that "basic rights" should be protected, or that certain "fundamental liberties" have lexical priority over utilitarian considerations. All of these slogans are merely promissory notes for an argument that has not been delivered. As Brian Barry has noted, even John Rawls's more structured system for deriving rights from decisions made behind the veil of ignorance does not yield minimally specific notions of basic liberties.⁴³

40. Mill, *supra* note 20, at 163-87.

41. *Id.* at 164.

42. *Id.* at 163-64.

43. Brian Barry, *John Rawls and the Priority of Liberty*, 2 *Phil. & Pub. Affairs* 274 (1973). Barry notes that Rawls's justification amounts to little more than a specific application of the general principle of diminishing returns, but that this principle, as expressed by indifference curves that trade liberty off against material wealth, cannot justify

Therefore, if one's goal is to prevent the state from taking sides on issues of deep disagreement, then one needs some method of resolving disputes about private jurisdiction that respects the legitimacy of both sides of such disputes about private power. Every liberal theory, in short, requires some political theory about how disputes about private power should be resolved. Mill himself was curiously blind about this need. He famously urged plural voting for the educated on the theory that equality in voting rights was not essential, given that political rights, unlike civil rights, could be used to coerce the dissenting minority.⁴⁴ This distinction between political and civil rights has been urged by modern political theorists with the same indifference to its tautological quality:⁴⁵ What counts as "coercion" is itself a question that voting rights are supposed to resolve. Power over "one's own" land or labor is "coercive" if, in light of all the relevant considerations, such power gives one "too much" power. But there is no clear answer to what constitutes "one's own" or "too much power," absent at least the particular laws and customs that define private power in a particular society.

It is this failure of Mill and his *epigoni* to define private entitlements in a way that can overcome deep disagreement that creates the necessity for some process that respects each person's view on the intractable questions of entitlement. As Jeremy Waldron aptly puts the matter, "right-bearers have the right to resolve disagreements about what rights they have among themselves and on roughly equal terms."⁴⁶ This meta-right, the "right of rights," in Waldron's phrase,⁴⁷ is itself an individual right, albeit one entitling the individual to a share of the collective power to define individual rights.

the absolute priority of liberty. *Id.* at 177-81. Barry suggests a different justification based on the possibility that liberty promotes material well-being and, therefore, need not be traded off against such well-being. *Id.* at 281-86. But all such relationships are highly contingent on debatable empirical considerations.

44. John Stuart Mill, *Considerations on Representative Government* 180 (1861) (arguing that political and civil rights were incommensurable, because, with political rights, "if the more ignorant does not yield his share of the matter to the guidance of the wiser man, the wiser man must resign his to that of the more ignorant," whereas each can exercise civil rights without affecting the other).

45. See, e.g., Ronald Dworkin, *Taking Rights Seriously* 194 (1977) (arguing that individual rights take precedence over majority rights of self-government because the latter involves policy making rather than principle); Richard J. Arneson, *Democratic Rights at National and Workplace Levels*, in *The Idea of Democracy* 118, 120 (David Copp, Jean Hampton & John E. Roemer eds., 1993) (criticizing the idea that the right to vote has noninstrumental value on the ground that "[t]he exercise of the vote is an exercise of power by the voter over the lives of other citizens," and "[n]o one has rights to placement in social roles that allow one to exercise power over other human beings without first obtaining their consent unless such exercise of power best promotes fulfillment of the fundamental rights of the people over whom power is exercised together [with] one's own fundamental rights").

46. Jeremy Waldron, *Law and Disagreement* 254 (1999).

47. *Id.*

But what sort of share of what sort of power? This question leads one from Millian liberalism to what I call Westphalian liberalism—the liberal power of collective but decentralized self-government.

II. WESTPHALIAN LIBERALISM AS A SOLUTION TO DEEP DISAGREEMENT

I borrow the term “Westphalian liberalism” from the Peace of Westphalia of 1648, which is the name conventionally given to the two treaties (of Münster and Osnabruck) that ended the Thirty Years’ War. This war was not a single war at all, but rather a complex series of interrelated century-long struggles fought between numerous and varying participants but dominated, on the “Catholic side,” by the Habsburg dynasty of Austria, aided primarily by Habsburg Spain and Bavaria, and, on the “Protestant side,” by Sweden, aided primarily by the Dutch United Provinces, some small German Protestant states such as Hesse-Kassel, and (most importantly) Catholic France.⁴⁸ That last entry indicates that the war was as much a struggle over dynastic and nationalist ambitions as it was a fight over religious and constitutional principles, with the consequence that, especially after 1630, when Sweden entered the war financed by France, each side was aided by both Catholic and Protestant powers.⁴⁹

The term “Westphalian liberalism” may seem paradoxical. The treaties that comprise the Peace of Westphalia do not remotely outline any overarching liberal theory. Moreover, the protections extended to religious nonconformists seem illiberal by modern standards, given the degree to which the various sovereigns of the Holy Roman Empire were permitted to invade what modern liberal states would regard as private matters of conscience. But the Peace of Westphalia is liberal in two different senses. First, by using territorial jurisdictions to define power over religious disputes, the Peace substituted geography for theology, side-stepping deep disagreements that otherwise would tear apart the German people. Second, the Peace provided a solution to the difficulty of drawing a distinction between the public and the private. Precisely because this distinction is itself the source of intense controversy, it cannot be the sole foundation of a system of rules for avoiding strife over matters of deep disagreement.

The essence of the Westphalian geographic solution was the combination of devolution of power over religion constrained by the concept of the

48. For a convenient single-page table summarizing the variability and complexity of the alliances, see Geoffrey Parker, *The Thirty Years’ War* 155 (1st ed. 1984).

49. For instance, Habsburg, Austria, was occasionally allied with the Lutheran Duchy of Saxony and the Kingdom of Denmark, both being hostile to the Lutheran kingdom of Sweden. Saxony, however, played both sides, beginning the war as a loyal member of the Holy Roman Empire joining the Emperor to suppress the Protestant Bohemian revolution, but allying itself with Sweden after the Edict of Restitution in 1629, only to abandon Sweden and join the Habsburgs once more after 1635. There is a voluminous literature on the course of the alliances during the war. For general accounts, see Ronald Asch, *The Thirty Years War: the Holy Roman Empire and Europe, 1618-48* (1997); Parker, *supra* note 48, at 20-21; Cicely Veronica Wedgwood, *The Thirty Years War* (Methuen 1981) (1938).

“normal year.” The constituent imperial estates, consisting of seven electors, two-hundred-odd princes, lords, and prelates, and fifty-one free cities, were given the power to determine the religion of their subjects, so long as they provided certain minimal protections to all members of three recognized sects (the Calvinist, Lutheran, and Roman Catholic Christians), and so long as they provided enhanced protections for any of these sects that was tolerated by the relevant territory as of the “normal” or baseline year of 1624.⁵⁰ These sovereigns were also obliged to return property to each religious community to the extent that such property was held by the community as of 1624.⁵¹ The normal year was, therefore, a modification of the Peace of Augsburg’s old principle that the sovereign prince or prelate should determine the religion of his people (*cuius regio, eius religio*):⁵² The sovereign was obliged to recognize as a protected religion of the ruling regime whatever sect was tolerated as of 1624. In effect, the normal year pegged the sovereignty of a particular piece of imperial territory by a specific year—one that was less disadvantageous to the Habsburgs than 1618 (when the Protestants controlled Bohemia) but less advantageous than 1629 (prior to Sweden’s entry into the war)—thus avoiding the difficulty of determining who really ruled territories that had been occupied, abandoned, and reoccupied in the shifting fortunes of war. One could analogize such a device to a state constitution that freezes a particular constitutional regime into place at a particular moment. The year 1624 became the compromise constitutional moment for the Holy Roman Empire’s territorial estates.

The normal year fits the minimal model of a liberal solution to the problem of deep religious disagreement. There were no deep disagreements about the geographic boundaries of the subparts of the Holy Roman Empire, nor about the laws that governed these subparts in 1624. This is not to say that disputes could not arise about exactly what religions were tolerated to what extent in 1624. However, the different confessions were not divided over such legalistic and historical matters. Therefore, the formula successfully terminated the longest and most savage of the religious wars that plagued the sixteenth and seventeenth centuries in a liberal fashion, by giving “the right” (that is, jurisdictional rules) priority over “the good” (that is, principles for religious salvation). Each of the contending factions—Calvinist, Lutheran, and Catholic—received control over sufficient territory as to assuage them of the loss of control over the balance, and an end to religious strife was thereby guaranteed.

50. See Treaty of Osnabruck art. V, § 35, Oct. 24, 1648, 1 Consol. T.S. 198 [hereinafter Treaty of Osnabruck]; Michael Hughes, *Early Modern Germany 1477-1806*, at 95-96 (1992); Joachim Whaley, *Religious Toleration and Social Change in Hamburg, 1529-1819*, at 5 (1985).

51. Treaty of Osnabruck, *supra* note 50, art. V, § 35.

52. “Whoever rules, his the religion.” Under the 1555 Peace of Augsburg, each prince of the Holy Roman Empire was given the power to determine religious orthodoxy within his own territory.

Yet one might argue that Westphalian liberalism is a thin sort of protection for liberty, hardly worthy of emulation today. Some religions—for instance, Judaism and various Protestant sects such as Mennonites and Anabaptists—were given no protection whatsoever. There was no guarantee of full religious equality even for members of the three recognized confessions (Calvinists, Lutherans, and Roman Catholics). If the sect had been tolerated in the normal year, then its members enjoyed only a right of “private” religious worship, in chapel buildings that were not equipped with bells or spires. For sects that were not tolerated by the relevant sovereign in the normal year, the Peace provided only the right to worship in the privacy of their homes (*devotio domesticum*).⁵³ If members of a subordinate religion found these limits unacceptable, then the Peace of Westphalia guaranteed to dissenters the right of migration (*ius emigrandi*) to a jurisdiction in which their sect enjoyed the protections of the normal year. The migrants were entitled to three years in which to sell their real property (the so-called “Triennium”), and they were entitled to take their minor children and personalty with them.⁵⁴

By modern lights, these privacy and mobility rights are hardly a robust protection for religious liberty. In particular, the right of emigration was a costly alternative to oppression. When the Archbishop of Salzburg, for instance, harassed Lutherans in the alpine regions of his domain in 1731, 19,000 Lutherans sought to exercise their emigration rights. After overcoming the Archbishop’s initial refusal—he had claimed that they were members of a non-Lutheran heresy and, therefore, not covered by the Westphalian treaties—they migrated from Salzburg to the welcoming arms of Frederick William, the King of Prussia, who set aside land in East Prussia for his new citizens. But nearly a quarter of the migrants died soon after the arduous trek.⁵⁵

Therefore, one might regard Westphalian liberalism as little more than the liberalism of fear—fear of religious strife so great that even crude and oppressive divisions of authority over religion are seen as more desirable than continued misery of war. The Thirty Years’ War had led to the death of roughly fifteen to twenty percent of the Holy Roman Empire’s population, not to mention the gruesome atrocities perpetrated by rival bands of soldiers who supported themselves by pillaging Germany’s villages.⁵⁶ The tortures, famines, and plagues have been the stuff of literary *grand guignol* from Jakob Grimmelshausen’s *Simplicissimus* (1669)⁵⁷ to Bertolt Brecht’s *Mother Courage*.⁵⁸ One is tempted to say that the fear of

53. Whaley, *supra* note 50.

54. Mack Walker, *The Salzburg Transaction: Expulsion and Redemption in Eighteenth-Century Germany 121-23* (1992).

55. *Id.* at 171.

56. On the costs of pillage during the Thirty Years’ War, see Henry Kamen, *The Economic and Social Consequences of the Thirty Years’ War*, 39 *Past & Present* 44 (1968).

57. H.J.C von Grimmelshausen, *The Adventurous Simplicissimus* (A.T.S. Goodrick trans., Univ. of Nebraska Press 1962) (1669).

58. Bertolt Brecht, *Mother Courage and Her Children* (Eric Bentley trans., 1955).

religious civil war so exceeded the love of liberty that the disputants were prepared to adopt crude jurisdictional rules that sacrificed the latter for the former.

Yet this evaluation misses both the most salient shortcomings and advantages of Westphalian liberalism. In particular, Westphalian liberalism enjoys one advantage over the Millian variety: It does not presuppose any noncontroversial answer to the question of whether some activity is properly controlled by private or public authorities. As noted above, this question of whether one person's activity "harms" another person depends on some definition of entitlements that is itself often a matter of deep disagreement. It is question begging, therefore, to settle deep disagreements by stipulating that some activity is harmless in that it affects only the private actors themselves and not the public sphere. By substituting geographic boundaries (i.e., the boundaries of the various imperial estates' territories) and temporal boundaries (i.e., the normal year of 1624) for the conceptual boundary of the public/private distinction, the Peace of Westphalia made a liberal settlement of the Thirty Years' War possible.

This advantage of Westphalian liberalism is obscure to us twenty-first-century observers: We are so familiar with the concept of a state with full-time employees and distinct status that we tend to assume that private rights can easily be separated from state institutions.⁵⁹ Likewise, we are so familiar with the coexistence of social stability and vigorous public disagreements over fundamental values that we tend to take for granted the notion that the former is not threatened by the latter. Outside of a handful of political theorists, therefore, it is common for us to believe that it is a

59. For an example of such confidence, see Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. Rev. 857, 864-69 (2001). Professor Cross offers a "simple test for distinguishing between positive and negative rights—if there was no government in existence, would the right be automatically fulfilled?" *Id.* at 866. Since Professor Cross assumes that all true rights are merely rights against the government, he infers that the abolition of the state would eliminate all violations of rights. *Id.* Of course, this "simple test" is a tautology if one builds into the concept of "rights" the requirement of state action. On this account, private rights of property, contract, and tort against private invasion are, properly speaking, not rights at all, and everyone's rights are perfectly secure in a state of anarchy. Such a view of rights might seem to be unhelpful—indeed, even trivial—if one takes the view that rights insure some minimal level of security of persons against attack by other persons, whether public or private. See, e.g., Ian Shapiro, *Democratic Justice* 31 (1999) (describing "the characteristic liberal mistake" of "focus[ing] on the forms of tyranny performed by and through government as the only—certainly the principal—kind of tyranny that should worry political theorists"). The eighteenth-century concept of rights certainly does not reflect Professor Cross's understanding, given the prominence of the right to remedies in key 18th century texts. See, e.g., Mass. Const. art. X, XI ("X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. . . . XI. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character."); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524 (2005).

simple matter to define some class of purely private speech and conduct—that is, activities that do not threaten the public sphere or other private persons with coercive harm.

Sixteenth- and seventeenth-century elites were more self-conscious than we are about the ways in which private liberty could be a source of public coercion or even anarchy.⁶⁰ Thus, even skeptics about religious truth like Michel de Montaigne and Justus Lipsius would typically insist that private citizens conform their outward conduct to the dominant religious beliefs and rituals.⁶¹ This is not to say that they had no concept of purely private matters. However, advocates of a sphere of protected privacy tended to define the *private* in terms of the *invisible*—in the narrowest sense, private thoughts or conscience. Thus, it was natural for the drafters of the Treaty of Osnabruck to protect only household prayers, which were invisible to the larger public, as purely private, excluding church bells and spires from the sphere of private religious autonomy. Religious processions in particular were a touchy matter, requiring the most delicate mapping of routes to avoid riots by members of the rival confession.⁶² One of the sparks that helped ignite the Thirty Years' War itself was a Catholic religious procession, replete with a saint's relics, through the predominantly Protestant city of Donauwörth, a procession that led to a full-fledged riot by Protestant burghers and the retaliation by Catholic Elector Maximilian of Bavaria, who occupied the city with his troops.⁶³ But even something as mundane as the phrase with which one greeted one's neighbors⁶⁴ or attending the opera⁶⁵ was a public act that could spark religious conflict.

In sum, far more than we do today, seventeenth-century policy makers struggled self-consciously to determine how to regulate private persons' publicly visible actions. Such persons were private in that they held no office and exercised no legal authority to regulate others. But their acts or opinions were public in that they were deliberately displayed before a wide audience in widely circulated journals, concert halls, opera theaters, the

60. On the general belief in sixteenth-century France that civil order depended on "one faith, one law, one king," see Joseph Lecler, *2 Toleration and the Reformation* 5-39 (T.L. Westow trans., 1960). Even supporters of religious toleration did so largely because of the fear that, given the size of the Protestant sect in France, religious unity could not be enforced without a civil war: They urged the suppression of smaller sects. *Id.* at 50.

61. See, e.g., Michel de Montaigne, *Of Custom, and Not Easily Changing an Accepted Law*, in *The Complete Works of Montaigne* 77, 86 (Donald M. Frame ed. & trans., Stanford Univ. Press 1958) (1572-74) ("[A]s for externals, [the wise man] should wholly follow the accepted fashions and forms."); Richard Tuck, *Philosophy and Government 1572-1651*, at 58 (1993) (discussing Justus Lipsius).

62. Marc R. Forster, *The Counter-Reformation in the Villages: Religion and Reform in the Bishopric of Speyer, 1560-1720*, at 228-29 (1992); Michael Hughes, *Early Modern Germany, 1477-1806*, at 96 (1992).

63. Parker, *supra* note 48, at 22-24.

64. Walker, *supra* note 54, at 41 (discussing Pope Benedict XIII's effort to require subjects to greet each other with the phrase "Jesus Christ be praised," a practice offensive to Lutherans who regarded the phrase as taking the lord's name in vain).

65. Whaley, *supra* note 50, at 30 (describing the political controversy over Orthodox Lutheran pastors' efforts to suppress operas in 1680s Hamburg).

streets, or buildings visibly dedicated to the activity. It was widely and not implausibly suspected that such actions could instigate riots, sedition, and even civil war. At the very least, such acts constituted a challenge to the dominant elites in the territory. How, then, could such acts be placed beyond the power of the state to control? But, if the state exercised such control, then how could it avoid provoking a civil war?

Westphalian liberalism solves this dilemma by allowing state control of activity in public spaces but limiting the geographic scope of “the state’s” power. “The state” may, in principle, regulate public activities, which one might roughly define as (at least) any act visible outside the home. But only the imperial estates—the duchies, counties, cities, and ecclesiastical states of the Empire—and not the Emperor himself, have sovereignty (“Landeshoheit”) over such topics. Assuming that each of the three major religious factions could capture some significant share of the Imperial Estates under the rule of the normal year, there was a rough sense in which this jurisdictional arrangement could be neutral between the factions.

One might concede that Westphalian liberalism makes sense in the seventeenth-century context, when there were deep disputes about the compatibility of a private sphere that would address public matters and yet be outside state control. In such a world, every public demonstration amounted to a threatened coup d’etat. But such a world was eroding even during the seventeenth century, as private consumers of literature, drama, religious and political tracts, art, and music slowly constituted themselves as a critical audience—a public, entitled to a collective opinion about what they viewed—in salons, coffee houses, theaters, and other public spaces.⁶⁶ In our world—meaning, the world of secular, industrialized democracies—private persons routinely exercise this sort of public power without sparking civil wars.⁶⁷ Why, then, should we rely on Westphalian liberalism to define the proper scope of such publicly visible private action? Why not, instead, assume that the private sphere is capable of self-government according to some uniform system of individual rights—that is, according to some version of Millian liberalism—that would be enforced against subnational and national governments alike?

The difficulty with the Millian solution is that we remain deeply divided on the proper scope of the private sphere, and these disagreements are

66. The obligatory citation for the creation of such a public sphere is Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger trans., MIT Press 1996) (1961).

67. Venture outside this narrow sphere, and the possibility that private liberties such as freedom of speech might have such effects becomes more plausible. Consider, for instance, the role of radio broadcasts of Radio Television Libres des Mille Collines (RTLM) in inspiring thousands of ordinary Hutu citizens of Rwanda to murder thousands of their Tutsi fellow citizens. See, e.g., Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed With Our Families: Stories from Rwanda* 99-100 (1998). The Rwanda genocide has been the occasion for some rare sociological realism about abstract constitutional rights. See, e.g., Jean Marie Kamatali, *Freedom of Expression and Its Limitations: The Case of the Rwandan Genocide*, 38 *Stan. J. Int’l L.* 57 (2002).

frequently impossible to resolve on the basis of any shared consensus about private liberty. Indeed, one person's version of fundamental private liberties can often be a violation of another person's version of different liberties. These sorts of conflicts between rights can arise whenever one person claims that government is obliged to consider some fact that another person claims government is obliged to ignore. For instance, one person's claim to be exempt from military service on grounds of religious belief can constitute a denial of another person's claim to equal treatment regardless of religion or lack thereof. Such conflicts are typical of conflicts between the Free Exercise and Establishment Clause doctrines of the First Amendment. But it is a mistake to assume that such conflicts between rival rights are limited to this context. For instance, virtually every claim to enjoin the regulation of land on the ground that the regulation deprives the owner of property without due process of law burdens a rival right of the neighbors not to have their property values reduced by the injunction of the regulation. State constitutional doctrine, indeed, recognizes the latter as a challenge to "spot-zoning" or a deregulatory taking.⁶⁸ Likewise, if one relaxes the "state action" requirement, then every First Amendment claim for freedom of expressive association raises an equal and opposite claim against nondiscrimination on the basis of viewpoint.⁶⁹

One could, of course, attempt to resolve such conflicts between rights simply by devising a theory of rights that makes one person's claim more persuasive than another's. But it is extraordinarily unlikely that any such theory will conclusively resolve reasonable disagreement about the proper scope of private liberty.⁷⁰ The question then becomes whether one can define some liberal principle by which such disagreements can be resolved. The capacious definition of "liberalism" offered by this essay is merely that liberal procedures for resolving deep disagreement cannot be justified by their tendency to suppress one side of the disagreement. A corollary of this principle is that procedures that minimize the suppression of reasonable views should *ceteris paribus* be preferred over rival procedures.

68. For an overview of spot-zoning doctrine, see Daniel R. Mandelker, *Land Use Law* §§ 6.27-6.36 (4th ed. 1997). A deregulatory taking occurs whenever the elimination of remedies against private landowners deprives other persons of their own property rights. For an example of a deregulatory taking, see *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998) (striking down Iowa's right to a farm law barring neighbors from bringing a nuisance lawsuit against a feedlot operation because the loss of the former's common-law nuisance rights constitutes a taking).

69. See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995) (refusing to address whether the organizers of the St. Patrick's Day parade were state actors on the ground that respondent's counsel waived the issue at oral argument). If the parade organizers were state actors, then their exclusion of gay and lesbian marchers likely constituted viewpoint discrimination in violation of the First Amendment's Free Speech Clause.

70. For arguments about the persistence of disagreement about rights, see Amy Guttman & Dennis Thompson, *Democracy and Disagreement* 35-36 (1996); Shapiro, *supra* note 59, at 19-20; Waldron, *supra* note 46, at 243-49.

On this minimalist account of “liberalism,” Westphalian liberalism has this virtue over Madisonian liberalism: It better avoids the gratuitous suppression of reasonable views through the preservation of jurisdictional diversity. By devolving the question of controversial rights to subnational governments, Westphalian liberalism ensures that different conceptions of the right can prevail in different jurisdictions. There are, of course, many reasons consistent with liberalism to reject a decentralized approach to the definition of controversial rights: The relevant subnational jurisdictions might, for instance, lack the practical bureaucratic expertise to govern the issues in question, or a uniform definition of rights might facilitate commerce across jurisdictional lines. But, absent such an argument, the liberal ought to prefer the Westphalian over the Madisonian solution to disagreement. At the very least, the liberal should indulge the following weak presumption in favor of the former: The burden should be on the supporter of the Madisonian solution to specify some reason—other than the suppression of one side to a reasonable disagreement about rights—for the centralization of rights’ definition.

In this general sense, jurisdictional diversity is a liberal virtue, expressing tolerance for reasonable differences of opinion. In a more practical sense, one can make two more specific arguments that the regime of the Holy Roman Empire preserved the values of liberalism through the conventional mechanisms of voice and exit.⁷¹

First, the diversity of regimes within the Holy Roman Empire preserved a liberalism of voice by protecting a diverse range of jurisdictions with different methods of government, cultural loyalties, and policy-making track records. This array of jurisdictions provided practical alternatives to dominant ideologies that otherwise would dominate the culture and politics of the seventeenth and eighteenth centuries. These jurisdictions were not, of course, Louis Brandeis’s laboratories of democracy, as none of the regimes of the Holy Roman Empire could be termed democratic.⁷² But they were laboratories nonetheless, capable of producing what one might call “benchmark competition”: News of one regime’s cultural and political successes provided a sort of benchmark—a crude social science experiment and propaganda—with which policy makers and dissenters in other regimes could challenge the predominant culture and politics. For instance, Prince Leopold III Friedrich Franz of the tiny state of Anhalt-Dessau challenged the dominant French ideology of bureaucratic and militaristic absolutism of Brandenburg’s Frederick the Great by cultivating an English style in

71. The obligatory citation is, of course, Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970).

72. Some of the Empire’s cities, however, had relatively broad suffrage. Between the 1690s and the constitutional revisions of 1721, the imperial city of Hamburg, for instance, allowed all Lutherans to vote in the *Bürgerschaft* (the “lower house” of the city legislature). Eventually, the imperial army invaded the city to suppress the ensuing “anarchy,” and an imperially chaired constitutional revision commission installed a stiff property qualification for participation in the *Bürgerschaft* that drastically reduced the rights of political participation in the city. Whaley, *supra* note 50, at 17-19.

aesthetics, educational policy, agricultural policy, and politics.⁷³ Saxe-Weimar's patronage of Goethe and cultivation of the *Sturm und Drang* pre-Romantic sensibility emphasized subjective experience over the rationalist and empiricist style of the French *philosophes* favored by Frederick the Great.⁷⁴ The multitude of tiny "toy kingdoms" of the Holy Roman Empire in effect constituted a decentralized system of endowments of the humanities, preventing the dominance of any single school of thought in art, literature, music, or science.

The benchmark competition produced by the Holy Roman Empire's preservation of jurisdictional diversity was supplemented by the power of exit. The Treaty of Osnabruck specifically provided for a formal legal right of the members of recognized confessions to migrate to more hospitable jurisdictions, free from the customary taxes on emigrants, a right that imperial courts upheld even when asserted by wives against their husbands.⁷⁵ But the preservation of numerous small and underpopulated jurisdictions within the Holy Roman Empire led to an informal power of migration that protected groups such as Jews and Mennonites that fell outside the treaty's formal protection.⁷⁶ Likewise, interjurisdictional competition for bureaucratic expertise gave considerable freedom to lawyers, scholars, and journalists to steer their own course in their writings, risking the disapproval of one princely employer because they could generally find another patron to back their position. Illustrative of this tendency for intellectuals to preserve their intellectual freedom by shopping for patronage was the career of the eminent but rigidly dogmatic imperial lawyer, Johann Jakob Moser, who annoyed several princely employers in quick succession with his uncompromising pedantry.⁷⁷

By the late eighteenth century, the Holy Roman Empire's defenders relied primarily on this jurisdictional diversity as the basis for their claims that the Empire preserved liberty. Contrasting the Empire with the French absolutist state, German writers praised the Empire's political fragmentation as a protection for civic freedom, noting that its unwieldy processes for collective decision making allowed lesser jurisdictions to experiment with more effective governance, while the individual's capacity to exit ensured that one could always escape experiments gone awry. The

73. Maiken Umbach, *Federalism and Enlightenment in Germany, 1740-1806*, at 45-49, 94-96 (2000).

74. Walter H. Bruford, *Culture and Society in Classical Weimar, 1775-1806* (1962).

75. Peter H. Wilson, *From Reich to Revolution: German History, 1558-1806*, at 153 (2004).

76. Despite the opposition of ultra-Orthodox Lutheran pastors in the more populist Hamburg Bürgerschaft, for instance, the Senate of Hamburg entered into contracts granting protection to Jewish migrants for fear that these migrants would otherwise take their wealth and skills to neighboring cities of Emden, Altona, or Stade. Similar incentives pressured the Hamburg Senate to grant protections to Calvinists. Whaley, *supra* note 50, at 71-74, 82-83.

77. Mack Walker, *Johann Jakob Moser and the Holy Roman Empire of the German Nation 82-97, 172-75, 192-96* (1981). Eventually, Moser was imprisoned by the Prince of Württemberg, illustrating the limits of exit as a strategy for preserving intellectual liberty. *See id.* at 235.

porousness of the jurisdictions' boundaries also ensured that books published in one jurisdiction would soon find their way into others regardless of the latter's efforts at censorship.⁷⁸

In theory, of course, an absolutist monarch could devolve power on subsections of its jurisdiction to experiment with religious liberty, permitting pilot programs tolerating religious diversity in some parts of the nation while suppressing it in others. The implicit assumption, therefore, of the pro-Empire argument based on jurisdictional diversity was that no unitary absolutist state would tolerate such disuniformity for long: The absolute monarch's itch to install the one best system (from the ruler's perspective) would soon douse any experimental initiative. France's experience with religious toleration provided some partial confirmation of this suspicion. Something roughly akin to a Westphalian system of partial tolerance existed in France in the sixteenth century under Charles IX, under the 1563 Edict of Amboise, which gave certain Huguenots freedom of worship outside of towns and within a single town in each bailiwick. But this French system of "religious zoning" was extremely unstable, changing with each successive monarch and court faction.⁷⁹ No centralized regime ever sustained such geographic decentralization during the Reformation, and Louis XIV repealed the Edict of Nantes and expelled his Huguenot population in an effort to obtain religious uniformity in his population. Apparently the shifting factions produced by court intrigue in an absolutist monarchy were incapable of adhering consistently to a policy of jurisdictional diversity. By contrast, the unwieldy constitutional machinery of the Holy Roman Empire froze the imperial estates' capacity to experiment into place, free from the interference of meddling emperors or Imperial Diet.

In short, the Westphalian Peace had the liberal virtue of preserving at least some space for some reasonable differences of opinion on public issues while avoiding civil war. One could rephrase this liberal virtue as a virtue of avoiding the *gratuitous* suppression of disagreement over values. Suppression of disagreement is gratuitous when it is unnecessary to ensure adequate provision of some collective good. Some level of suppression of different viewpoints is unavoidable when the goods being supplied are "collective goods" that cannot adequately be provided through the private market—for instance, because those goods are non-excludable or non-

78. John G. Gagliardo, *Reich and Nation: The Holy Roman Empire as Idea and Reality, 1763-1806*, at 121-126 (1980).

79. The 1563 Edict of Amboise was succeeded by the Massacre of St. Bartholomew of 1572, in which the French Regent, Catherine de Medici, authorized the surprise slaughter of several thousand Huguenots after she failed to assassinate the Huguenot leader Admiral Coligny. The massacre turned out to be a political blunder and was followed by the Edict of Beaulieu of 1574, permitting freedom of worship outside of Paris, a liberal policy that was overturned only three years later by the Edict of Poitiers, which confined the zones of toleration once more to the suburbs of a single town per bailiwick. See Mack P. Holt, *The French Wars of Religion, 1562-1629*, at 50-75, 99-122 (2d ed. 2005).

rival.⁸⁰ If you and I disagree about the proper level of policing in a community, one of us must lose, assuming that (as is likely) police protection is not a good that we can adequately provide through private contracts. But Westphalian democracy minimizes such losses by ensuring that decisions about public goods are made at the lowest level of government consistent with the adequate provision of the good.

As Wallace E. Oates has shown, when the effects of some policy are confined within the territory of subnational jurisdictions, then the uniform provision of the good at the national level will leave more people dissatisfied with the level of the good than subnational provision would.⁸¹ Oates's "decentralization theorem" is a generalization about economic welfare, but the principle has relevance to the principle of liberal respect. Suppose that there is a disagreement between two factions about the proper regulation of prostitution. One side believes that the presence of prostitutes results in a seedy and threatening atmosphere on neighborhood streets, lowering nearby property values and promoting criminal behavior by sending a signal that antisocial behavior will be tolerated.⁸² The other side believes that the evidence of such effects is shaky and that any reasonably tough-minded urban resident should be able to avert his or her eyes and tolerate the presence of prostitutes.⁸³ Because the disagreement concerns the effects of prostitution on public spaces, one cannot assign the activity of prostitution to either the public or private sphere without taking sides on the disagreement. In this sense, the "harm principle" is useless, as the factions have a reasonable disagreement on the question of prostitution's harmfulness.⁸⁴ Suppose, however, that everyone agrees that any effects of prostitution on property or crime rates, whatever those effects might be, are confined to the city in which prostitution occurs. According to Oates's theorem, cities can respond to citizens' views concerning prostitution at least as accurately as higher levels of government.

What justification, then, can exist for allowing higher levels of government to preempt cities' decisions on the topic? If each citizen's

80. For a simple account of non-excludable and non-rival goods, see Richard A. Musgrave & Peggy A. Musgrave, *Public Finance in Theory and Practice* 8-9, 43-44, 49 (5th ed. 1989).

81. This intuitive conclusion result has been formally proven by Wallace E. Oates. For an intuitive description of the argument, see Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 *J. Econ. Lit.* 1120, 1124 (1999). The formal proof is contained in Wallace E. Oates, *Fiscal Federalism* (1972).

82. For the classic statement of such effects from prostitution, littering, graffiti, and vandalism, see James Q. Wilson & George L. Kelling, *Broken Windows*, *Atlantic Monthly*, Mar. 1982, at 29.

83. For disagreement with Wilson and Kelling's view of the evidence on the effects of small-scale disorderly conduct, see Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 *Mich. L. Rev.* 291 (1998).

84. For an insightful argument that empirical disputes about the effects of small-scale disorderly conduct tends to undermine the rhetoric of the "harm principle," see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 *J. Crim. L. & Criminology* 109 (1999).

views are entitled to equal respect, then their votes should get equal weight. *Ceteris paribus* that means that majorities should prevail over minorities when a majority decision is required. But it also follows that *ceteris paribus* the system of voting should be designed to minimize the number of persons who end up as members of a frustrated minority. Otherwise, one cannot assure the losing faction that its views received the maximum possible consideration, consistent with the requirements of collective decision making. In effect, one would be giving far more weight to the votes of one side of the dispute.⁸⁵

The requirement that one minimize the size of the losing coalition by making decisions by the largest possible majority or set of majorities implies some form of Westphalian democracy. Such a principle could take the weak form of a prohibition on certain sorts of reasons for elevating a decision to a higher level of government: One could not, for instance, use a national decision simply to ensure that a position would prevail that otherwise would be defeated at the subnational level.⁸⁶ Or one could insist on a stronger principle of subsidiarity under which all policies would be devolved to the smallest unit of government capable of providing the good to the largest possible majority of all persons affected by the good.⁸⁷ These two versions of the Westphalian principle will tend to converge, in any case, depending on the rigor with which the principle is enforced. If the nationalization of an issue serves no purpose other than to assure victory for a coalition that would lose at the subnational level, then it is likely unnecessary to elevate the issue to the national level for its provision to affected persons.

Either version of Westphalian democracy, however, assures the losing faction that their loss was not *gratuitous*, meaning that their loss was the minimal sacrifice required by any system of collective self-government, because any collective decision would result in at least the same number of equally disappointed persons. This assurance that their votes were not

85. For a simple illustration, imagine that there are five equipopulous subnational jurisdictions, each with twenty people who are divided on the issue of school vouchers. If four of these subnational jurisdictions are divided nineteen to one against vouchers, but one outlying subnational jurisdiction favors such vouchers nineteen to one, then a subnational decision would allow ninety-five out of one hundred voters to govern themselves according to their preferred viewpoint. By contrast, a national decision against vouchers would result in only seventy-seven out of one hundred voters being so governed. In effect, the nationalization of the issue would preempt nineteen pro-voucher voters' decision to increase the power of one disappointed anti-voucher voter.

86. This principle is akin to Jonathan Still's principle of constituency-neutral process equality. See Jonathan W. Still, *Political Equality and Election Systems*, 91 *Ethics* 375 (1981).

87. Thus, it would be an argument against devolution of policy making that subnational units are incapable of pursuing some policy favored by a majority of their residents because a minority of those residents could flee the jurisdiction and thereby defeat the policy. See, e.g., Shapiro, *supra* note 59, at 35-37 (arguing against requiring school integration through local decision making because exit of middle-class households to neighboring jurisdictions defeats integration policies).

gratuitously wasted is the extra comfort provided by a system of Westphalian democracy, over and above a system of national democracy. In this sense, the system of Westphalian democracy protects self-rule, even of those persons whose values do not prevail at the subnational level.

The Millian liberal might yet complain that this thin sort of self-rule is not comparable to the self-rule guaranteed by a robust system of private rights. If all individuals are given some private entitlement to do with what they please, then they are assured of some specific level of control, not merely some assurance that their loss of control was essential for the greater good. But the difficulty with such a retort is that, when there is deep disagreement about the proper scope of private liberty, then the protection of one person's private liberty can constitute the denial of another person's rival liberty. The latter person is in precisely the same position as the losing party in subnational government: He comes under the power of those with whom he disagrees. Suppose, for instance, that I believe that my children cannot obtain an adequate education unless they attend socially integrated schools in which all racial, religious, and economic groups are represented in rough proportion to their share of the general population. Suppose that I also believe that public subsidies for private education—"vouchers"—at suitably certified schools will not produce such an integrated educational experience. In such a case, Mill's proposal for protecting private liberty by guaranteeing each household an equal entitlement to publicly financed education at a school of the parents' choice⁸⁸ effectively defeats my view of private liberty—that is, my view about what is necessary to give my child an adequate education.

It is no comfort to me that such a scheme ensures that I will have the same level of private autonomy as my neighbor: That autonomy is precisely what is preventing me from securing what I regard as my own rightful entitlements. His autonomy is the tyranny of separate and unequal schools, by my lights. By contrast, if each state is given discretion to require integrated public schools or use vouchers as their residents see fit, then the subnational decision-making procedure gives each side some share of power to adopt their view of autonomy in education. Even those residing in states where views other than their own prevail have the comfort of knowing that their views were accommodated to the maximum extent possible. In other words, Westphalian liberalism makes some accommodation for the coexistence of different views about private entitlements. But Millian liberalism can make no such accommodation, because Mill presupposes consensus about how to divide authority between public and private spheres.

88. On J.S. Mill's proposal for publicly financed private schooling, see Mill, *supra* note 20, at 176-77.

III. THE LIMITS AND PROMISE OF WESTPHALIAN LIBERALISM TODAY

In sum, when (1) the scope of private liberty is contested and (2) there is consensus that subnational processes suffice to represent the relevant viewpoints, then Westphalian democracy is a more liberal way of accommodating deep disagreement than either Mill's libertarianism or Madison's large republic. But these two qualifications to the Westphalian solution suggest a role for both Mill's and Madison's rival efforts.

First, consider how Madison's liberalism offers a corrective to the Westphalian system. If Madison is correct that subnational politics are less likely than national politics to give equal consideration to each side of a deep disagreement, then there is a case for preferring Madisonian democracy over Westphalian democracy on liberal grounds. Perhaps such a situation could arise because of the reasons offered by Madison—the allegedly low quality of subnational legislators or the prevalence of a single overzealous faction in subnational sovereign authorities. It is doubtful that national legislators enjoy this advantage over subnational politicians on every sort of issue. But one can easily imagine issues in particular social contexts in which the liberal advantages of ideological diversity among subnational decision makers would be outweighed by the absence of any meaningful diversity of thought or discussion within a single subnational jurisdiction. In part for this reason, the Congress has special powers to legislate to preempt state laws rooted in racial prejudice under Section 5 of the Fourteenth Amendment. The Peace of Westphalia also included a Madisonian element in section V:52 of the Treaty of Osnabruck, which provided for imperial oversight of confessional matters through the Imperial Diet and the principle of *itio in partes*, under which the Imperial Diet divided by religion into Catholic and Protestant *corpora* and reached decisions on religious issues by consensus.⁸⁹ Mindful of the risk of anachronism in so egregiously ripping institutions out of their intellectual milieu,⁹⁰ one could say that the Diet served a proto-Madisonian function of muting intense intra-territorial religious fanaticism by reminding each prince and prelate within the Empire of the dangers of imperiling the imperial peace with religious persecution.⁹¹

Likewise, if there can be no reasonable disagreement about the proper scope of private liberty, then Mill's theory of liberty ceases to be illiberal.

89. Derek Croxton & Anuschka Tischer, *The Peace of Westphalia: A Historical Dictionary* 140 (2002); Gagliardo, *supra* note 78, at 24-25; Wilson, *supra* note 75, at 138-40.

90. See Quentin Skinner, *Interpretation, Rationality, and Truth*, in 1 *Visions of Politics: Regarding Method* 27-56 (2002). In defense of such an anachronistic use of terms, one might consider the deployment of Madison to describe a seventeenth-century arrangement quite different from anything that Madison had in mind as an effort to place both Westphalia and Madison within a larger historical pattern of functionally similar strategies for addressing deep disagreement, a practice that even Skinner might accept as legitimate. *Id.* at 49.

91. For an example of the intervention by the Imperial Diet's Protestant corpus in the internal religious affairs of a Catholic bishopric, see Walker, *supra* note 54, at 27-29, 43-45.

In such a case, the distinction between private and public matters actually is the best principle by which to allocate authority over deep disagreements. Suppose, for instance, that, in a particular society, it so happens that there is no belief that “domestic devotions”—the prayers and religious services occurring within a family’s house—have any effect on the salvation of other souls or the security of the state. In a world in which the vast majority of people agree that God will not punish a nation that refuses to stamp out heretical domestic devotions, only the members of the household are affected by their own domestic religious observances, according to the lights of the society itself. Therefore, the proper territorial principle is to give the household, not the subnational government, control over those observances. Indeed, interference by the subnational government in the household’s self-governance would be more illiberal—that is, as gratuitously provocative—than interference of the national government in the self-governance of the subnational government. If the residents of Minnesota can exclude the nation as a whole from governing matters that affect Minnesota alone, then surely a private household can exclude Minnesota from governing matters that affect only the private household. The principle of *Landeshoheit* and the principle of privacy, in short, stand and fall together on the same ground—that those who are most affected by the decision should have the chief say in its decision.⁹² In this sense, a commitment to the protection of federalism implies a commitment to protection for private liberty.

Westphalian liberalism, in sum, is bracketed by the liberalism of Madison and Mill. The critical point to keep in mind is that private, subnational, or national decision making constitutes a “liberal” principle only if there is a social consensus that the decision maker in question is appropriate for the decision. The function of the liberal solution, after all, is to direct attention away from divisive disagreements to decision-making procedures about which there is social consensus.⁹³ The question, therefore, is necessarily a sociological rather than deductive one, dependent on the structure of belief in a particular society. This is not to say that the competence of an institution—family, church, *land*, Empire, etc.—is simply a brute fact unalterable by argument. The various beliefs, assumptions, habits, and values of any society never perfectly cohere, such that one can draw on internal tensions within them to suggest reform.⁹⁴ But the notion

92. For a similar argument linking subsidiarity and privacy, see Shapiro, *supra* note 59, at 37.

93. For an analogous argument, see Guttman & Thompson, *supra* note 70, at 52-53 (“[A] citizen offers reasons that can be accepted by others who are similarly motivated to find reasons that can be accepted by others.”). For an extended argument that immunity from generally applicable laws can be extended to religious believers only if such protection could be extended in principle to analogous secular beliefs, see Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* (2007).

94. As Don Herzog has argued, John Locke’s *First Letter Concerning Toleration* provides an illustration of this process of using some trends within a social meaning to re-shape that meaning. Although written as a description of plain facts—the separate functions

of deducing from bland sociological truisms a category of “harmless” activity that, therefore, can be safely relegated to the private sphere, is an academic fiction worthy only of a philosophy department operating behind the veil of ignorance.

Those who forget the liberal credentials of the Westphalian system do so largely because of their overconfidence in their ability to distinguish noncontroversially between public and private spheres. Such overconfidence leads one to believe that deep disagreements can be easily resolved by allowing different private actors to make their own private decisions about those disagreements. But when there is a deep disagreement about the proper distribution of private entitlements, then any such “solution” is simply question begging. As a popular example of such overconfidence, consider the popular pro-choice bumper sticker, “Against Abortion? Don’t Have One!”⁹⁵ which obviously ignores a central issue in the dispute between supporters and opponents of the decriminalization of abortion—whether the inhabitant of the womb—fetus? baby?—bears rights. As a more academic example, consider Professor Erwin Chemerinsky’s confident assertion that federalism undermines liberty. Erwin Chemerinsky charges that the U.S. Supreme Court’s major federalism decisions limiting Congress’s power have been “rights-regressive” because they have diminished rather than increased individual liberty. As an example, Chemerinsky confidently asserts that “there is no doubt that [*City of Boerne v. Flores*] is rights regressive” because it struck down the Religious Freedom Restoration Act (RFRA),⁹⁶ which allegedly “enlarged” rights.⁹⁷ According to Chemerinsky, “[p]ut most simply, *Flores* means that many claims of free exercise of religion that would have prevailed, now certainly will lose. People in the United States have less protection of their rights after *Flores* than they did before it.”⁹⁸

Put most simply, Professor Chemerinsky’s assertion about people enjoying “less protection of their rights after *Flores*” is not merely controversial but controverted and, indeed, probably wrong. As Professors Christopher Eisgruber and Larry Sager have argued at length, the “free exercise” liberties protected by RFRA might themselves be violations of persons’ entitlement to a secular state, protected by the First Amendment’s

of church and state—the *Letter* defies much of the reality of seventeenth-century ecclesiastical powers and many seventeenth-century beliefs about the ecclesiastical function. But Locke also invokes a sufficient number of real changes in English law to make his account of church-state separation plausible. In Herzog’s phrase, Locke’s *Letter* “is best thought of as urging the merits of social differentiation, of opportunistically extending a happy trend.” Don Herzog, *Happy Slaves: A Critique of Consent Theory* 168 (1989).

95. For example, see Pro Choice Resource Project Stickers and Bumper Stickers for Choice, <http://www.prochoiceproject.com/Prosticker.htm> (last visited Oct. 19, 2006).

96. 42 U.S.C. § 2000b(b) (2000).

97. Erwin Chemerinsky, *Does Federalism Advance Individual Liberty?*, 47 Wayne L. Rev. 911, 920 (2001) (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

98. *Id.*

Establishment Clause.⁹⁹ But the important point is not that Professor Chemerinsky erred in his view of rights: The important point is that he somehow reified assertions about private entitlements into uncontroversially existing objects—“their rights”—ignoring the ferocious debate that RFRA triggered. If one has this vision of private liberty, then the advantages of federalism for protecting it will seem illusory.

Because Professor Chemerinsky’s vision is an illusion, there is a stronger case for the Westphalian system. As even Professor Chemerinsky himself occasionally seems to recognize, a noncontroversial theory of rights is often lacking.¹⁰⁰ One person’s right to a living wage is a violation of another person’s freedom to make contracts; one person’s religious immunity from facially neutral laws is a violation of another person’s right to be subject to the same regulation regardless of religious belief. In such cases of reasonable disagreement over the scope of private liberty, insisting that private actors pursue their own beliefs within the confines of their own private entitlements is not to offer a liberal solution at all, if “liberalism” is taken to be a theory extending equal respect to both sides of a reasonable disagreement. Such a Millian solution simply imposes one side’s view of “liberty” on the other, usually with much handwaving and little persuasive argument.

By contrast, Westphalian democracy protects liberty not by privileging one person’s view of private entitlements at the expense of another’s, but rather by giving all persons a fair shot at prevailing in the subnational political process, writing their preferred vision of liberty into the subnational laws. The “liberty” being protected is not the laws that such jurisdictions enact, but rather the liberty of collective self-government in the definition of rights, free from the gratuitous suppression of one side of the disagreement that is required by uniform national legislation. The political processes of federalism, in other words, do not protect liberty as some object distinct from those processes themselves: Those subnational processes are themselves constitutive of liberty, where “liberty” stands for the equal right of all affected by a definition of “rights” to have a say in rights’ definition.

99. Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994).

100. Thus, Chemerinsky acknowledges the deep divisions among academics and laypersons concerning whether the right to bear arms ought to be protected as a constitutional right. Chemerinsky, *supra* note 97, at 924. One might legitimately ask whether Chemerinsky finds it easy to determine whether law is rights-progressive or rights-regressive only because his particular socioeconomic status places him in a milieu (highly educated, upper-middle class professional and academic people) where everyone happens to agree that certain rights are important (say, the right to an abortion) whereas other rights are dangerous to human life (say, the right to bear arms). Were Chemerinsky a Southern Baptist farmer rather than a Duke law professor, his views on these rights might be more muted.

One can argue (as I have elsewhere argued¹⁰¹) that the Rehnquist Court's protection of exclusive state power over the "noneconomic" sphere was a clumsy and inarticulate attempt to advance such a vision of federalism. Moreover, other constitutional regimes such as Germany's *Grundgesetz*¹⁰² and Canada's British North America Act of 1867¹⁰³ also devolve controversial matters that inspire special religious or ideological divisiveness, such as the education of children, to subnational governments, perhaps for the Westphalian reason of promoting civil peace. One might argue that the Rehnquist Court's efforts to de-federalize education in cases like *United States v. Lopez*¹⁰⁴ are an American analogue to these Canadian and German examples.

But one cannot begin to place all such federal regimes into a common context unless one considers the ways in which the federal regimes of Canada, Germany, and the United States all advance—whether by coincidence, historic evolution, or intention—a similar vision of Westphalian liberalism. To consider such a possibility, one must open one's mind to the possibility that the public-private distinction or democracy writ large are only two roads to the liberal compromise of deep disagreement. Long before Mill and Madison, there was Westphalia. That historical compromise can stand as a reminder that federalism might serve a similar liberal function today that it served in 1648.

101. Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 *Geo. Wash. L. Rev.* (forthcoming 2006).

102. See, e.g., *Grundgesetz* [GG] [Constitution] art. 7(4) (F.R.G.) (placing the regulation of private schools under the regulation laws of the *Länder* ["unterstehen den Landesgesetzen"]); *id.* art. 91a (defining the provision of higher education as a "joint task" under which the federal legislature enacts through "framework legislation" or *Rahmengesetze* over which the *Länder* have control through the *Bundesrat*'s veto); *id.* art. 91b (defining the Federation-*Land* agreements for "educational planning and in the promotion of research institutions and research projects of supraregional importance").

103. See *British North America Act, 1867*, 30 & 31 *Vict.*, c. 3, § 93 (U.K.) (providing that "[i]n and for each Province the Legislature may exclusively make Laws in relation to Education").

104. 514 U.S. 549 (1995).