PhD DISSERTATIONS OF
NORTHWESTERN ITALIAN PHILOSOPHY CONSORTIUM – FINO

Nations Without Nationalism

In Defense of National Cultural Autonomy

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(2017)

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Table of Contents

Preface

We live in nationalist times. Three great waves of nation state formation took place in the twentieth century: one after the First World War, another after the Second World War, and yet another after the collapse of the Soviet Union. The nation state is now firmly in place as one of the major institutions that structure our world. One important problem with the nation state model is that, at least *de facto,* it always implies that there is a titular nation, usually the majority nation, that "owns" the state. The problem that is the topic of this dissertation is that minority nations in such nation states may come under pressure to assimilate or are not treated equally to the majority nation in some relevant sense.

Many proposals for minority nation accommodation that aim to solve this minority problem are themselves nationalist proposals. As we will see in the introductory chapter of this dissertation, nationalism can be defined as the political principle which holds that the political and the national unit should be congruent (Gellner 1983: 1). Given that many proposals for minority nation accommodation consist in supplying the minority with a political unit of its own, they are nationalist proposals. Furthermore, many of these proposals have few built-in guarantees against abuse by nationalist minority members aiming to establish their own nation state. Therefore, in the long term, many of these proposals are likely to lead to secession. When that happens, the national minority gets a nation state. The nation state model is then further entrenched and the minority problem is duplicated.

An interesting proposal for national minority accommodation that provides more guarantees against minority nationalism spiraling out of control is "national cultural autonomy", which I abbreviate as NCA. NCA is a non-territorial model of accommodating minority nations that guarantees the cultural maintenance of the minority nation. It does not, however, satisfy claims for demanding forms of equality between majority and minority nation. The main advantage of NCA is that it is not a nationalist proposal of minority nation accommodation. It does not give the minority a political unit nor any institutions that can be used for a minority nationalist project. The argument I will make in this dissertation is that NCA is the model that can maintain minority nations without fostering nationalism.

The model of NCA has been around for more than a century now. Consequently, NCA has a long pedigree of defenders. Although, I will mostly respond to contemporary debates, I did draw on them for inspiration. Some notable proponents of NCA were Simon Dubnow, Paul Schiemann and Vladimir Medem. The most elaborate account was, however, developed by Karl Renner and Otto Bauer. Let me briefly present them here. They were both important politicians as well as intellectuals in turn-of-the-century Vienna. They conceived of a model that could save their Social-Democratic party and the Austro-Hungarian Empire from the nationalities conflict that was tearing up both entities. One can say without hesitation that they were very important politicians. Renner twice became chancellor of Austria. Bauer became minister of foreign affairs and was one of the founding members of what has come to be known as the Second-and-a-Half International. Furthermore, they are both also recognized as the co-creators of the Modern Austrian political system.

As well as being politicians, Renner and Bauer were also intellectuals. They were part of the Austro-Marxist school, a non-orthodox Marxist school that combined Marxism with Neo-Kantianism. Renner's *The Institutions of Private Law and their Social Functions* is still being read in the field of sociology of law. Bauer was an intellectual heavyweight. Leszek Kolakowski, the critical chronicler of Marxist thought calls Bauer's *Die Nationalitätenfrage* (2000, written in 1907) the “most important Marxist study in this field [of nationalism studies]” and “based on a shrewd historical analysis”. (Kolakowski 1978: 285) Miroslav Hroch (2009: 43), the great sociologist of minority nationalism, mentions Bauer as the first author to have had a positive impact on him. He also credits Bauer with being the first to “understand the relation of the nation-building process to the general capitalist transformation of the society”. (Hroch 1993: 11) Those were certainly not the only ones that were impressed by Bauer's book. I can warmly recommend the reading of this book, but regrettably it will only play a marginal role in this dissertation.

The writings of Renner and Bauer are compatible and both authors refer to each-other at crucial points. Put their writings together and one gets a coherent model with implications for diverse areas of political thinking. Bauer gave a rich philosophical and sociological background to the model. He defined the nation and supplied the philosophical underpinnings

of NCA. When it came to policy prescriptions (as we would now call them), Bauer limits himself to stipulating how his Social-Democratic party should ideally function and clarifying the extent to which it should accommodate minority nations. Renner, who studied law, made more detailed prescriptions for the operation of the state. His writings (see mainly Renner 1902; 2005) thus flesh out the political details of the model.

This dissertation is heavily inspired by the writings of Renner and Bauer. However, my aim is to provide an up to date defense of NCA and this has involved adapting certain elements. For example, the theory of group language rights that I develop in chapter three represents a novel element in my account of NCA, although I took from Renner and Bauer the idea of basing the scope of such a right on a national register. The aim of this dissertation is not to defend the views of Renner and Bauer; it is to defend the principles behind NCA, many of which I share with Renner and Bauer.

Elements of NCA, and in one case even something that comes close to the full model, have been implemented at different places throughout the twentieth century. NCA was implemented in the interwar Estonian Republic. Today NCA is partially implemented in Brussels and especially in South Tyrol. In Brussels, French-speaking and Dutch-speaking institutions like schools and administrations exist side by side. In South Tyrol this is similarly the case, but the region has also implemented a national register that is used most notably to allocate public sector jobs proportionally. Finally, the national register was also implemented in some provinces of the Austro-Hungarian Empire, in some cases years, and in others even only months, before the First World War (see Kuzmany 2016). After this war little remained of the Austro-Hungarian Empire. It succumbed to the power of minority nationalism. Wilson's Fourteen Points Program led to the first large wave of nation state formation. Two more waves followed, and the nation state model as well as the problem of national minorities became more and more entrenched.

Methodology

Two methodological points should be mentioned at the outset.

First, the question this dissertation sets out to answer is: What is owed, as a matter of justice, to national minorities? Thus formulated, however, this question is ambiguous as to the level of ideality assumed. What do I mean by "level of ideality"? As I will explain in chapter two, I conceive of different levels of normative theory that change according to how many feasibility constraints they take into account. On the lowest level, which is usually called non-ideal theory and which I call prescriptive theory, all feasibility constraints are taken into account. On the highest level we take no removable feasibility constraints into account. There are also intermediate levels. High-level ideal theory takes few constraints into account; low-level ideal theory many. Thus, a normative theory can be qualified as to the level of ideality on which it operates. The question, What is owed to national minorities as a matter of justice?, is ambiguous because it does not say anything about the level of ideality either of the question or therefore of the appropriate answer. Are we asking which institutions to prescribe implementing here and now? Or are we asking which institutions there should be on some higher level of ideality? I will be asking which institutions to prescribe. Most normative theories operate at some relatively high level of ideality. They seek to connect their prescriptions to ideal principles. I think this can indeed be done when it comes to constitutional essentials: a bill of rights, core constitutional principles like the separation of powers, etc. When it comes to the institutions that are prescribed in the fields of multiculturalism, but also those of democratic theory, global justice, etc.—i.e. fields that go beyond the constitutional essentials—I have my doubts about these attempts to connect prescriptions to ideal principles. Hence I limit myself to prescribing NCA. I am agnostic about the validity of alternative models on a relatively high level of ideality.

Second, this dissertation can best be described as somewhat eclectic in terms of content. Its five chapters deal with five different topics which are: multiculturalism, ideal and non-ideal theory, group rights, democratic theory and federalism studies. This eclecticism was unavoidable. I do not see how one can do prescriptive political philosophy, certainly on the topic of multiculturalism, without entering into several fields of political thought at once. As I have already said, when one prescribes one should take all feasibility constraints into account. Feasibility constraints are, however, discussed in diverse fields of political philosophy, theory and science. Part of the concept of "minority", for example, is often defined in relation to the

democratic system in use. Thus, one needs to know how the democratic system functions; what can and what cannot feasibly be changed; what are the highly desirable parts of this system; etc. Often, to give another example, some form of federalism is proposed in order to accommodate national minorities. Thus, one needs to know how federations function; what can be changed; etc. Too often I have found that political philosophers deductively construct interesting theories only to arrive at prescriptions that turn out to be wholly infeasible or so minimal that there is hardly any connection with the interesting theory. Consequently I felt the need to form an opinion about the topics discussed in the fields mentioned above. This inevitably comes at the expense of specialization. Yet, when we do prescriptive theory, such a cost is unavoidable.

Acknowledgments

Are national boundaries morally relevant boundaries?—that, or at least something close to it, was the question that lured me into the study of nationalism. The question was one of a long list of possible topics on which one could write one's master thesis. I initially thought the answer was easy: obviously not! Nine years later with a rather large file called "doctoraat" on my laptop I no longer think the answer is obvious. I also no longer think it is easily given. Writing a dissertation is hard. With every new idea that comes to one's mind one has another idea of which the exact meaning needs spelling out. Having the ideas is relatively easy, working them out costs a surprising amount of time and effort. In no other line of work the creative moment and laborious duty so closely follow each-other. One often just wants to shut the brain down—and I often have done so. But then the guilt kicks in and the whole enterprise becomes emotionally burdensome as well. In short, writing a dissertation is hard. I was, however, very lucky to be surrounded academically with good teachers and personally with good friends and family.

My debt to two institutions is high. I would like to thank all the people who made the *Consorzio di Dottorato in Filosofia Nord-Ovest* possible. I especially thank the professors for their high-quality teaching. I also thank the students for the amicable environment and bearing my at times arrogant and at other times undoubtedly boring seminar questions. I also owe

much gratitude to the *Hoger Instituut voor Wijsbegeerte*, where I first learned about philosophy and spent the first years working on this dissertation. I have especially good memories of all the discussions with the students in the justice seminar and thank them for that. Furthermore, I also thank the *Archiv der Arbeiterbewegung* in Vienna, for giving me access to the Renner archives; the organizers and participants of the Helsinki Summer School (section: introduction to conceptual history), the Keele summer school 2015, the intensive paper-writing workshop in Rome 2016, the EURAC summer school 2016, and all the conferences that I attended.

Certain persons I want to thank in particular: Ephraim Nimni, for accepting my application to two conferences when I did not have much to show for it yet; Denise Réaume, for very helpful comments on chapter three; Alan Patten, for making a very educational stay in Princeton possible. Two persons deserve special mention. I owe a lot to Helder De Schutter. In more than one way Helder contributed to this end-result. It was Helder who put me on the course of studying nationalism with the question mentioned at the beginning of this subsection. It was also Helder who sent a letter encouraging me to apply for a PhD. position when I had said goodbye to academia. Finally, Helder also taught me something of great value: the normative perspective—for lack of a better way of putting it. I remember Helder asking me, some years into the war in Syria, whether I would have backed up a military intervention earlier on. I hesitated. It is easy to be an absolute pacifist. It is much harder to think about the criteria of a just war. Helder certainly contributed to my commitment to the cause of normative thinking. Helder, thank you for all your help, enthusiasm and encouragement. Finally, I was very lucky to be assigned to Ian Carter as a doctoral student. One of the many things I lacked when I continued work on my dissertation in Italy was analytical and conceptual rigor. Confronted with a student that lacks such rigor one can do two things, I suppose. The first is to let the student get away with unclarity. The second is to read closely what the student has written; try to understand what he or she means; think about where it conflicts with one's own views; and ask the student to clarify. Ian unfailingly did the latter and this dissertation benefited greatly from him doing so. I remember one of our first conversations about the word "appeasement", which was an early candidate for opening the subtitle of this disssertation. Ian feigned a lack of knowledge about the exact meaning of "appeasement". Given that I could not express clearly what I meant, no mention of

appeasement—except for this one—is left in the whole dissertation. Simply put, it is a luxury to have a supervisor that is so committed to what often were no more than vague intuitions of mine. Another thing that I am very grateful for is all the time and effort that Ian has put into this dissertation. Many of his comments set me onto the path of clarifying something that was much in need of clarity. Finally, if this work is written in a somewhat decent English then that too is thanks to him. Ian, thank you for all the discussions, the comments and the proofreading. I deeply regret that you are no longer obliged to be my supervisor.

At last—and I am undoubtedly forgetting people here—there is long list of friends and family that made this dissertation practically and emotionally possible to complete. Jef, Marijke, Kathleen, Miet, Jelle and Roel thank you for still being there for me and hosting me every now and then when I visit. I always feel welcome and I know that that is something I should not take for granted. Johan and Mathijs, thank you for providing me with the perfect environment to start work on a dissertation. I truly miss the dinners, the many drinks, the discussions and the discussions on drinks. Ulrike, thank you for the, what from now on should again be, monthly distractions. Lou, Cristiana, Iacopo and also Dario, thank you for teaching me what *la dolce vita* means. I do not know how you did it, but you turned Italy for me from "one of those southern countries" into something special. Voi italiani! Also, I am obliged to say, Lou and Cristiana, thank you for all the delicious food. To Annie I owe the comfort of knowing that there is a safe place to which I can always return and the rare pleasure of a mother who has an educated opinion about politics herself. To Francis I owe a love for discussion and a lively tradition of conversing which I hope we can take up again soon. To Claire, I owe a window onto the world. To Thijs, Sofie, Pieter, Annelies and many more I owe a warm family of understanding people. Last but in no way least, thank you, Mareike. Many people are kind. But you are unfailingly kind. Just one way—and it is not even the most important one—in which your kindness shows is the amount of attention you give me whenever there is a new idea that I need to put in some words. Not only do you unfailingly listen, you also more than once made me see something I did not see before. At several points in this dissertation I should have mentioned and thanked you for the point I made. I hope I can still show you these words in the distant future. And I hope, by then, that you have finally stopped to unfailingly listen and to say so when I am boring you. When you finally do so, I will of course tease you for days, weeks, months by saying that you are so incredibly unkind.

But here I admit that I actually mean the opposite. Mareike, this work is dedicated to you.

For Mareike

Nations Without Nationalism

Introductory Chapter: National Cultural Autonomy or National Self-Government

Introduction

The title of this dissertation conveys its core idea. The idea is that we should maintain minority nations without promoting nationalism of any sort, whether it is liberal, illiberal, minority or majority nationalism. Even though this is an appealing idea, surprisingly few scholars advocate it. Those critical of nationalism, like Russel Hardin and Brian Barry, are also critical of the tools needed to maintain minority nations. Those in favor of accommodating minority nations, like Yael Tamir and Will Kymlicka, not only favor maintaining minority nations but also favor nationalism. The latter defend a specific form of accommodating minority nations: national-self-government (which I will abbreviate as NSG). NSG grants minorities their own subunit in a federation. Furthermore, this subunit should have substantial collective decision-making powers over more than just educational and cultural affairs. As such NSG strives for congruence between the political and the cultural unit. As I will explain extensively below, this makes it by definition a form of nationalism. Since defenders of minority nation accommodation generally argue in favor of nationalist forms of accommodation, the choice seems to be between, on the one hand, not seriously accommodating minority nations and, on the other, promoting nationalism. The aim of this dissertation is to defend and stake out a midway position: nations without nationalism.

The model that best incorporates this idea of nations without nationalism is NCA. NCA is a model of minority nation accommodation that does not grant minorities either their own politically autonomous subunit in a federation or substantial collective decision-making powers. Instead it grants them a non-territorial body that only has collective decision-making powers over cultural and educational affairs. As I will explain in the next section, NCA does not strive for the congruence between the political and the cultural unit and it is thus not a nationalist model. As Bauböck (2005) and Kymlicka (2005) note, that NCA does not grant more collective decision-making powers, as does NSG, is also the main point on which NCA is open to criticism, at least from the perspective of those convinced that minority nations are entitled to accommodations. Consequently, this dissertation takes up the task of arguing that national minorities do not have a right to collective decision-making powers over more than cultural and educational affairs or to NSG. In the first section below I will define nations and nationalism, spell out my account of NCA and indicate how it differs from NSG.

Then I will focus on the relevant normative arguments. In the second section, I shall state the positive case for NCA. The argument that most clearly points in the direction of NCA is what I shall call the maintenance argument. This argument says that there is something valuable about cultures and that cultures therefore need to be maintained. Kymlicka's famous argument—that cultures provide individuals with a context of choice that is important for making autonomous choices—can be seen as a variant of the maintenance argument. My maintenance argument differs from Kymlicka's argument in the sense that it explicitly states that a certain dynamic, the dynamic of market failure, needs to be rectified; it emphasizes that the national cultures of small, dispersed, non-modernized, and internal national minorities—what I abbreviate as small minorities—also have to be maintained; and it emphasizes that people need access to their cultures. I will argue that Kymlicka and Alan Patten should accept this maintenance argument on the basis of their own normative premises. Finally I will argue that the maintenance argument points in the direction of NCA because it implies that the cultures of small national minorities ought to be maintained and that people have access to their culture. Both things demand non-territorial forms of accommodation, like NCA.

In the third section I turn to criticizing NSG. Three defenses of NSG will be discussed here: Yael Tamir's (1993), Kymlicka's (mainly 1995) and Patten's (2014)[1]. These defenses combine two arguments to reach NSG. One is the instrumental argument for NSG, according to which NSG is needed as an instrument in order to maintain national minority cultures. The other is the equality-based argument for NSG, which says that minorities should have certain political arrangements since majorities have them too. I argue that each of the three authors makes both types of argument and that the instrumental argument is predominant at least in the cases of Tamir and Kymlicka. The problem with the instrumental argument is that, exactly because it is instrumental, it has a commitment to the end to which it is supposed to be an instrument—i.e. cultural maintenance. NSG is, however, a territorial model and as such it cannot maintain the cultures of small minorities nor can it grant all people access to their cultures[2]. Since NCA better satisfies cultural maintenance, advocates of NSG need to reassess the role that the instrumental argument plays in their overall arguments for NSG. I see two possible ways of saving the case for NSG. First, the equality-based

1 Other arguments have been made but these are the best book-length defenses of NSG for minority nations. This excludes arguments like that of Miller (1995), which focuses on majority or state nationalism. Margalit and Raz's (1990) argument is too short to know what it would imply compared to NCA. Note that Tamir uses the term national self-determination instead of NSG. They can, however, be equated with each-other.

2 Tamir and Kymlicka also propose a non-territorial variant of NSG, i.e. consociationalism. Consociationalism is a model of democracy for deeply divided societies that gives high levels of autonomy to minorities and aims to stabilize the democratic process through elite cooperation. Consociationalism could in principles accommodate small national minorities and give all people access to their culture. There are, however, other problems with consociationalism, to which I will return below.

argument can be made to stand on its own. Second, the equality-based argument can be combined with the instrumental argument and qualify it. In the latter case the equality-based argument must explain why cultural maintenance does not apply to small minorities and does not always demand access. In both cases the equality-based arguments need to be strong arguments. In the last subsection of the third section I argue, however, that these arguments have problems of their own and therefore cannot qualify or take over from the instrumental argument.

1. Definitions

1.1. Nations

Much has been written on how to define nations and no agreement has been found. 'Nation' has all the features of what Gallie (1956) called an essentially contested concept. Although I will not argue at length to back up this claim, much of the disagreement in the descriptive debate on defining the nation stems from disagreements about the normative question what to do about nations and especially the phenomenon that always seems to come with nations, namely nationalism[3]. If it is indeed the case that normative disagreements distort the descriptive debate, then the idea behind this dissertation—nations without nationalism—could lend support to more nuanced views in the descriptive debate. Luckily I do not have to delve into the descriptive debate for I am largely in agreement with the concept of nation that Tamir, Kymlicka and Patten use. Let me briefly recall their definitions of the nation.

Tamir (1993: 58-63) rightly points out that a nation is not a state. She then argues that "nation" is a cluster concept, which means that, in order to count as a nation, a group must have a sufficient number of certain characteristics (Tamir 1993: 65). She mentions language, history and territory as

3 The fact that primordialism is used as a scapegoat and a straw-man position by modernists—which has been noted by two eminent scholars (Horowitz 2004: 72; Brubaker 1996: 15)—points in this direction. Modernists, like Gellner (1983) and Anderson (1983), claim that nations only really emerge in modernity and hat they are functional or instrumental to modernity or some aspects of modernity. According to primordialists—whose foundational writings are Shils (1957) and Geertz (1963)—the nation has ancient roots and individuals have national attachments that are prior to rational calculation. Few, if any, scholars that take up central positions in the debate on defining nations still defend this position. Nevertheless Smith (1995: 30-33) and Özkirimli (2010: ch. 3 and 4) still present this debate as being split between modernists and primordialists. Primoridialism thus functions as a scapegoat in the descriptive debate. The consequence is that moderate positions, that go somewhat in the direction of acknowledging the ancient roots of nations, are thrown out as well. For such a moderate position, with which I largely agree, see the work of Miroslav Hroch. Hroch (2004: 96) goes in the direction of recognizing the ancient roots of nations when he says that nations have a pre-existing linguistic and cultural community. This, which seems to me plausible position, is unacceptable to die-hard modernists. Part of the reason why primordialism provokes such antagonistic responses is that, by seeing nations as having an ancient lineage, it seems to make the case for nationalism stronger. I argue here that this is not the case. One can say that nations have ancient roots and—although it does not even imply that—a right to exist, without promoting nationalism. In short, one can defend the position of nations without nationalism compatibly with a moderate form of primordialism.

objective characteristics, but names self-awareness of its distinctiveness or national consciousness as being the one factor that is a necessary characteristic (Tamir 1993: 65-66). Notice that territory is thus not a necessary characteristic.

Kymlicka (1989: 179-180) notes how vexed the problem of defining nations is. Similar to Tamir, he also says that any definition of the nation will contain a subjective component, i.e. the self-identification with the group, and an objective component, i.e. a common heritage and language (Kymlicka 1989: 179). Kymlicka's theory is build on the, so he argues, normatively relevant concept of a societal culture, which consists mainly of a cultural structure and institutions. It is clear that by societal culture, he means national cultures (Kymlicka 1995: 75-76). Kymlicka (1989: 166-167) makes an interesting distinction between cultural character and cultural community or structure. The cultural character is the set of "norms, values, and their attendant institutions". (Kymlicka 1989: 166). The cultural community or structure is the "viable community of individuals with a shared heritage (language, history, etc.)". (Kymlicka 1989: 168) Liberals should maintain the cultural structure and not the cultural character or specific values and norms[4]. It is our cultural structure that provides us with the range of options that is important for making autonomous choices. The implication is that normative theories of minority accommodation should primarily maintain the cultural structure and thus give minorities the tools to maintain their language and their own cultural and especially educational institutions.

Patten's concept of nations, or distinct cultures, is the most profound. Scholars who use the concept of "nation" to refer to a distinct culture have come under attack for essentializing cultures. In response to this criticism, Patten (2014: 50-57) presents his social lineage account of cultures. What distinguishes members of the same culture from others and what ensures continuity in the same culture is that these members share "a lineage of cultural continuity", which he describes as "a common experience of socialization that is distinct from, because historically isolated from, the experiences of socialization undergone by others". (Patten 2014: 51) He defines socialization as "a broad range of different formative processes that work, in one way or another, to shape the beliefs and values of the persons who are subject to them". (Patten 2014: 48) According to this social lineage account a culture is the precipitate of a common social lineage (Patten 2014: 39). Thus it is defined only with reference to relational properties and as such it is not essentialist, at least if by essentialist one means defined with reference to nonrelational properties (Patten 2014: 39)[5].

4 This is still compatible with Bauer's definition of the nation, explained in the next footnote, which is based on a national character. The national character, for Bauer, is the precipitate of history. It has no explanatory force of its own. Saying that it has no intrinsic value of its own, and thus should not be maintained, goes only one small step further.

5 Patten's concept of nations is similar to Bauer's. Bauer (2000: 117) defines the nation as "the totality of human

I take it that there is something like a nation, that it is the result of common processes of socialization, that it has objective and subjective characteristics and that it has a cultural structure that is a normatively relevant thing.

1.2. Nationalism

Nationalism, according to the celebrated definition of Gellner (1983: 1) is the political principle or, I would say, ideology, "which holds that the political and the national unit should be congruent". Note that "congruence" here has a neutral technical meaning which does not imply the positive connotation that this word sometimes has. I will use "congruence" in this technical sense. Let me explain how I interpret this definition.

What I mean by national unit should be clear from the previous subsection. What I mean by political unit requires more explanation. On the one hand, I interpret *unit* in "political unit" broadly: it can be a state, a subunit in a federation or a powerful political body. NSG grants minority nations their own territorial federated subunits or a powerful consociational body and is thus a nationalist model. On the other hand I interpret *political* in "political unit" narrowly. The reason why I do so is the slipperiness of the nationalist political dynamic. What do I mean by this slippery dynamic? A subunit in a federation can secede and thus become a state of its own, at which point nobody would contest that the principle of nationalism has been implemented. There is a regress here. A strong nationalist minority party can successfully demand a subunit of its own and eventually a small band of nationalists can form a potentially strong nationalist party. What to do with this regress? Is one a nationalist when one gives some member of a national minority a megaphone? That would of course be odd. We can, however, analyze the circumstances that provide minority nationalists with favorable conditions. Hence a federated subunit and electoral institutions that foster the emergence

beings bound together by a community of fate into a community of character". The community of fate is "the common experience of the same fate in the context of constant relations, of continual interactions". (Bauer 2000: 100) This is, at least if one does not interpret 'fate' too strongly, as I think is consistent with Bauer's intentions, very similar to Patten's description of a social lineage as a common experience of the same socialization processes. Notice that Bauer uses the outdated concept of national character. Yet, interestingly, he argues that it has no historical explanatory force (Bauer 2000: 20-25). He argues against Fichte's national spiritualism (Bauer 2000: 23-24) and the national materialism of social Darwinism (Bauer 2000: 26-28) which turn the national character respectively into a "spiritual" and "material substance" with explanatory value. Against these nationalist interpretations of the national character Bauer says that the national character itself needs to be explained and that this is the task of a Marxist historiography (2000: 12, 17, 31). It would be very interesting to see whether Bauer's concept of the nation, based on the outdated concept of national character, is consistent and answers the worries of those arguing against cultural essentialism. This, however, would be a topic for another dissertation. If Bauer's concept of the nation is consistent and plausible, then Bauer's national character, like Hroch's pre-existing linguistic and cultural community, is another concept that has fallen victim to the antagonism in the debate on defining the nation.

of strong minority parties give the minority, what I call, helpful tools of nationalism. By tools of nationalism I mean all institutions that provide that minority nationalist with favorable circumstances in the sense that they help in implementing his or her nationalist ideology. We can rank the tools of nationalism from being very to not helpful at all. A homogeneous federated subunit with many powers is a very helpful tool. An electoral institution that gives strong incentives for the emergence of minority parties is a somewhat less but still quite helpful tool of nationalism. Freedom of organization is not a very helpful tool of nationalism, although it still—rightly of course—enables the band of nationalists to form a party. If we do not want to be nationalists and thus do not want to give a political unit to a minority nation than we should take political unit here to mean helpful tools of nationalism. We should thus avoid understanding political unit narrowly, for example only as a territorial unit, and at the same time be blind for what are helpful tools of nationalism. If one does not give a minority a territorial unit but one does give it a very helpful tool of nationalism then, given that nationalism is such a slippery dynamic, one has practically given the minority nation a state of its own.

Notice that the lower limit to this ranking of the tools of nationalism is determined by how helpful assimilation of the minority is as a rhetorical tool for minority nationalists. The image of a majority using the state's power to assimilate people with another native culture that is a mother tongue that most of us hold dear, is a potent one. Hence, in the hands of a minority nationalist, this image on its own is a quite helpful tool of nationalism, certainly in a democracy. Therefore the lower limit of our ranking of tools of nationalism does not consist in tools that eradicate or assimilate the minority nation. If the history of minority nationalism has shown one thing then it is that this will simply be counterproductive. The lower limit consists of those institutions that prevent assimilation. However, if a state does nothing to maintain a minority nation, this nation will, as I argue below, assimilate. Moreover, if the state does nothing in the sense that it ignores the minority nation, it is easy for the minority nationalist to wait for the one mistaken policy that the state is likely to implement and that gives the impression that the state malignantly awaits it chance to assimilate the minority. The lower limit of the tools of nationalism thus consists of giving a minority nation the institutions necessary for it to maintain itself.

The version of NCA that I defend here can be defined as the model that gives institutions that are as effective as possible in maintaining minority nations but as unhelpful as possible as tools of nationalism. Of course there is a degree of exactness and certainty that cannot be reached here. After all, nationalism is a slippery dynamic. No institutional design can guarantee that minority nationalism will not become a strong force. However, the institutions NCA gives to minority

nations are far less likely to lead to minority nationalism than the institutions NSG gives or not giving any institutions at all and thus assimilating the minority. Hence NCA is far less likely than NSG or a unitary assimilating state to kick-start the slippery dynamic of minority nationalism. This, in the end, is my reason for saying that NSG gives minority nations a political unit, while NCA gives them only a cultural unit. Therefore I see the non-territorial body that NCA grants nations not a as a political unit, whereas I do see the non-territorial body of consociationalism as a political unit. Consociationalism gives quite helpful tools of nationalism. In short, NCA is a non-nationalist model.

Notice that there is currently some degree of congruence between the most important political units, i.e. states, and certain national units. In many states there is a predominant titular nation. Which stance should we take on majority nationalism that is present nowadays? I do not think that someone is a (majority) nationalist when he or says that this degree of congruence need not be abolished today. Nobody, except for the most unwise of cosmopolitans, would say so. A cosmopolitan, what I take to be the opposite of a nationalist, says that it is preferable not to have political units be congruent with cultural ones. This means that when the opportunity presents itself, the cosmopolitan says, we should move in the direction of zero congruence. As I will argue at the end of chapter two, a wise cosmopolitan also does not force this process. We do not fully understand the processes of identity formation and their effect on the levels of solidarity and trust amongst a citizenry. Liberal nationalists argue that national identity is necessary for these levels of solidarity and trust. I am not convinced that this is always necessary, but it might well be that the liberal nationalist is right in a significant number of cases or with regard to a significant number of nation-building policies, like for example adopting a single language of communication. If that is so, then it would be foolish to force a supranational polity upon a population and see it fail. In the next chapter I will say more about the normative status of this liberal nationalist argument.

This, then, is also my position on majority nationalism. I think it often overreaches but I do not know whether at its core it indeed has some value. For those who agree with this assessment, as I will argue extensively in chapter two, the way to respond to majority nationalism is as the wise cosmopolitan responds. We should scrutinize the arguments of liberal nationalists, monitor their applicability and denounce them when they have been proven not to apply. Gradually, then, majority nationalism will be restricted to its rightful core. This process might take a long time and in the meantime we have no alternative to saying that it is legitimate to implement those majority nation-building policies for which a strong case can currently be made. I do not think we should multiply this evil though, and hand over the tools to implement nationalist policies to minorities as

well.

1.3. National cultural autonomy

The main features of NCA, as I defend it, are:

-A national register based on the voluntary declaration of national belonging on the part of citizens.

-The organization of all nations as non-territorial bodies that include all members of the nation which are listed in a national register.

-The devolution of most cultural and educational powers as well as most public administration tasks to the national bodies.

-A group language right that maintains minority languages[6].

-The language that is most widely spoken (usually the majority language) is adopted as the language of the political sphere throughout the country and is thought as a secondary language to all children.

-Cantonal federalism (see directly below).

Let me explain some terminology that will be used throughout the dissertation. NCA is a federal model. A federation shares power between the 'federal' or overarching government and the governments of 'federated' subunits. The problem that minority nationalism highlights is that the national majority forms the majority at the federal level, where it can therefore dominate minorities. There are several types of federation. One can distinguish between ‘administrative federations’ and ‘multinational federations’. Multinational federations recognize and are intended to accommodate national minorities. Examples are Canada, Belgium and Switzerland. Administrative federations do not recognize national minorities and are generally more ethno-culturally homogeneous. Examples are the United States, Australia and Germany. There are two types of multinational federations: ‘cantonal federations’ and ‘homeland federations’. In homeland federations, as opposed to cantonal federations, internal boundaries between the federated subunits are drawn such that there is a relatively high degree of congruence between at least one federated (political) subunit and one minority nation—indeed, this is therefore a nationalist form of federalism. Examples are Canada and Belgium. Cantonal federations do not aim for this congruence between the boundaries of a federated subunit and a national minority’s area of settlement. They create several subunits per national minority and aim for heterogeneous subunits. Of course due to geographical constraints it

6 Apart from the proportional allocation of positions in the public administration, the content of this right should be democratically decided by the nation or language group itself.

will not always be possible to have all heterogeneous federated subunits. Nevertheless the degree of congruence will be significantly lower in cantonal federalism which is thus not a nationalist form of federalism. Of course, the prime example of cantonal federalism is Switzerland. Notice that NCA thus has a territorial component, i.e. the cantons, and a non-territorial component, i.e. the non-territorial minority nation body.

Some other terms need to be clarified at the outset. In a multinational federation a national minority can form a 'local majority' in a federated subunit, which can be a canton or a homeland, and dominate this subunit. A political party that represents people from all federated subunits, competes in elections in all those subunits, and occasionally shares in power at the federal and the federated level is an 'integrated' or 'statewide' party. A party that only represents people from, or competes in elections in, the federated subunit of a national minority, or only attracts votes from a national minority, is a 'minority party'. A party system in which there are no significant minority parties, either at the federal, or at any of the federated levels, is an 'integrated party system'.

1.4. National self-government

Let us briefly compare the features of NCA with those of NSG. The major difference is that NSG proposes homeland federalism whereas NCA proposes cantonal federalism. Kymlicka prefers, and Patten requires, minority nations to have their own territorial federated subunit. The boundaries of these subunits need to be drawn such that the minority nation is relatively congruent with the unit (Kymlicka 2001: 94-100; Patten 2014: 240-241). This means that the minority has to be the majority in one federated subunit (Kymlicka 2001: 95; Patten 2014: 243). As I will argue more extensively in chapter five, Kymlicka's and Patten's account of NSG thus requires homeland federalism. Tamir (1993: 153-163), and Kymlicka as a second-best option, allow for a non-territorial form of NSG. But, as said, unlike NCA, which is a non-nationalist non-territorial model, they proposes a version of Lijphart's consociational or power sharing model[7], which is a nationalist non-territorial model. It is a nationalist model because it gives very helpful tools of nationalism to the minority nation. Tamir (1993: 156) grants minority nations mutual vetoes, a say in matters of common interest and high levels of autonomy. NCA only grants cultural autonomy[8]. As will be

7 Lijphart (2007: 6), the father of consociationalism, calls power sharing a rough synonym of consociationalism.

8 Renner and Bauer's version of NCA has been seen as a precursor to consociationalism, most notably by Lijphart (1977: 43; 2008: 4) himself and by McGarry and Moore (2005). This is simply wrong. What most obviously distinguishes NCA from consociationalism is that the former aims to keep parties integrated whereas the latter does not. This should not come as a surprise. After all Renner and Bauer were Marxists who, although they revised Marxist doctrine in order to give minority nations their due place, still thought in terms of class-conflict. That they gave minority nations their due place did not mean that they applauded the advance of minority parties, as consociationalism would do. They called their Social-Democratic party the *Gesamtpartei*—which comes close to

discussed below, where I explain the equality-based arguments for NSG, all three authors grant the federated subunit substantial powers, whether it is a territorial or non-territorial unit. This sets them apart from NCA, which only grants educational and cultural powers to the minority nations.

When it comes to the language of the political sphere it should be noted that some arguments for NSG also allow for the adoption—and presumably also teaching—of a single language of government (Tamir 1993: 152), as does NCA. Kymlicka seems to be vehemently opposed to this. He argues, however, that minority rights can justify majority nation-building policies like adopting a single language (Kymlicka 2002: 50). Perhaps, provided that one adopts strong language rights, as does NCA, Kymlicka would also allow for the adoption of a single language of government. Patten (2001: 292) says adopting a single language conflicts with his theory of equal recognition. However, he defends the right to equal recognition as a pro tanto right that can be outweighed by other considerations (Patten 2014: 24-27). Patten (2014: 171- 177) discusses liberal nationalist arguments, one of which is in favour of adopting a single language, as such a consideration that can outweigh the right to equal recognition. When it comes to the language rights, note that neither Tamir nor Kymlicka propose the strong kind of group language rights that I will propose in chapter three. On this point, NCA is closest to the position of Patten, who also proposes a non-territorial regime of language rights (Patten 2014: ch. 6). The non-territorial language group rights that I will defend in chapter three are, however, stronger than Patten's non-territorial language rights.

Notice that NCA and NSG use different ways of delineating the groups of people that their accommodations target. NCA uses a national register. The territorial variant of NSG draws territorial boundaries. Drawing boundaries has the advantage of not needing a national register that may be abused—the worry, in some countries not completely unjustified, seems to be that a malignant government will one day round up recalcitrant minorities. The disadvantage of drawing boundaries is that it always leaves internal minorities. Accordingly, the big advantage of NCA is that it does not leave substantial internal minorities. NCA will leave relatively small pockets of people or lonely individuals unaccommodated, but that is inevitable because it is infeasible to accommodate them. As we will see, this gives NCA a big advantage in meeting the maintenance

the contemporary use of "aggregative party". It was mockingly called the "k.k. Sozialdemokratie"—after the abbreviation of "kaiserlich-königlich", which denoted the Habsburg State—by their opponents. This indicates Renner's and Bauer's commitment to the goal of keeping the empire and their Social-Democratic party together. They appealed to their Czech comrades, which were most courted by minority nationalist parties, and tried to keep them in the statewide Social-Democratic party by promoting a non-nationalist principle of minority nation accommodation: the principle of NCA. Bauer (2000: 426-430), as an early precursor to the literature on state-wide parties that we will explore in the last chapter, detailed how a state-wide party should function and how high up—not very high—members of minority nations should have guaranteed positions in this party. Renner (1902: 157) even went as far as calling the fact that all parties except his Social-Democratic party were local and regional parties the "worst of all evil [Uebel aller Uebel]". It is not because consociationalism and NCA happen to be non-territorial that both can be equated with each-other.

argument's requirement that people have access to their culture.

2. The positive argument for NCA: the maintenance argument

Let us turn to the normative arguments. The positive case for NCA rests on the value of what I call "cultural maintenance", which is a close cousin of cultural preservation. The maintenance argument starts from something that is valuable about a national culture and concludes in favor of policies that maintain cultures. Kymlicka argues, for example, that, because cultures provide their members with a context of choice and range of options that are important for their autonomy, cultures need to be maintained. As we will see, what is valuable about national cultures is less important than a specific goal of maintaining cultures, or better languages, which, as we saw above, form the normatively relevant cultural structure[9]. This specific goal is the goal of rectifying a certain dynamic encountered by minority language speakers that live intermingled with majority language speakers. This dynamic is a variant of the problem of market failure. In the first subsection I explain this dynamic and I argue that liberals should rectify it, notwithstanding the arguments against cultural preservation that have been given in the literature. In the second, I will give Kymlicka's and Patten's different interpretations of what is valuable about cultures. These differences between the normative underpinnings do not matter once we have taken the full extent of the market failure problem into account. I will argue that both Kymlicka and Patten ought to converge on offsetting this dynamic. In the third subsection I argue that the value of cultural maintenance implies that one should have access to one's culture, as is recognized by Kymlicka and Patten, and that this implies non-territorial forms of accommodation, like NCA.

2.1. The dynamic of market failure

Several liberal authors have criticized cultural preservationism, which is a close cousin of cultural maintenance (Barry 2001: 65-68; Blake 2003: 218-220; Patten 2008: 101-105). I am not convinced by these arguments. I think a form of cultural preservation, i.e. cultural maintenance, can be defended even on liberal grounds.

9 There was another part to the cultural structure: the common heritage. Common heritage will be maintained by devolving educational and cultural powers to the national minority.

Patten argues against cultural (or language) preservation as follows.

> [S]uppose all citizens of some community enjoy a full set of liberal rights and that income and wealth are fairly distributed. Suppose, also, that the disestablishment principle is guiding the State's linguistic policies, and that there are no historical injustices that have not been remedied in an appropriate way. Under these idealized circumstances, it is still possible that a minority language may fare poorly and that it may even face a threat to its future survival. There may be some more economically and culturally dominant language spoken in the same environs that exerts a strong gravitational pull on the speakers of the minority language. The cultural preservation principle would direct the state to intervene in this situation to enhance the status of the vulnerable language and lower the status of the more dominant one. For many liberals, however, it is hard to justify this intervention. Given the strong assumptions made about the background circumstances it seems plausible to say that the anticipated decline of the vulnerable language reflects the choices and preferences of its speakers and prospective speakers. (Patten 2008: 103)

Note that the cultural preservation or maintenance argument need not be couched in terms of enhancing the status of a minority language. It can be merely about maintaining the language. But, more importantly, I simply do not think it is plausible to say that the decline of the vulnerable language reflects the choices of its speakers.

Indeed, Patten himself supplies the reason why it is not plausible to say so: the problem of market failure. Patten discusses this problem as an objection to his own theory of equal recognition (Patten 2014: 213, 215-216). The problem of market failure is the following.

> Even when the distribution of economic assets is fair and there is no legacy of historical injustice, a language regime based on equal recognition may show a bias against languages that are valued by their speakers but require a high level of coordination to be successful. The success of a language is the product of thousands, even millions, of discrete decisions about language use and language acquisition made by speakers and potential speakers every day. No single one of these decisions will make a tangible difference to the overall success of the language, but particular decisions may make a difference to individuals seeking to complete a successful act of communication or to endow themselves or their children with a useful skill. Faced with these incentives, even people who care a great deal about the success of their own vulnerable language may find themselves using the dominant language on a regular basis. The more that speakers of the vulnerable language reason in this way, however, the more it is likely that the success of that language will be seriously impaired.

(Patten 2014: 213)

What Patten describes here is a collective action problem. But not one that occurs as a single important decision that the parties involved face but rather one that occurs through millions of small not so important decisions. Put these millions of decisions together and we have, however, an important consequence: the maintenance or non-maintenance of one's language. Note that Patten says that even those who care a great deal about the success of their language may find themselves speaking the majority language. It is simply rather obnoxious for a minority language speaker to refuse to speak the majority language with a majority language speaker unable to speak the minority language. One has an individual incentive to switch to the majority language. However, if all minority speakers switch to the majority language, it becomes easy for majority language speakers to spread throughout what was formerly the minority society without speaking the minority language. In the end this process can and has often pushed the minority language out of use in parts and eventually the whole of a society. Van Parijs (2011: 142-146) describes this dynamic as kindness-driven agony. As Patten says, minority language speakers might collectively care a great deal for their language to be maintained but the result might still be that they often speak the majority language. Hence we have a collective action problem in the provision of a public good that the market, left to itself, cannot provide. In other words, we have market failure. The implication of a collective action problem is that a group of individuals might want to maintain its language, but is unable to get that result because it is unable to organize or coordinate its efforts. In chapter three I will propose strong language group rights that can solve this collective action problem.

In order to see the extent of the market failure problem let us have a closer look. Suppose we have a group of minority language speakers that all want to maintain their language. Instead of talking of decisions, as Patten did, let us talk about one possible result of decisions: actions. Next to the, suppose, two million actions that are needed to make a language successful there are, suppose, three million actions that are not needed to make it successful but that only contribute to its vibrancy[10]. People who want to maintain their language want the two million actions to be performed. Notice how the number and variety of actions, not to speak of the underlying decisions, incentives, etc., makes it impossible for us to assess which actions have to performed for the language to survive. There is thus an information feasibility constraint on any theory that wants to distinguish between the two million necessary actions and the three million unnecessary ones[11]. Given the problem of

10 In chapter three I will call this threshold and surplus actions respectively.

11 See Herzog (2012) for a discussion of the problem of knowledge, what I call the information feasibility constraint, in the context of the debate on ideal and non-ideal theory. The information constraint also does a lot of work in Russel Hardin's overall theory. Sometimes he calls it the problem of indeterminacy (see Hardin 1988, 2003).

market failure, this is, however, an important distinction. The two million decisions are needed to maintain the language and the group of language speakers is, so we assumed, willing to perform them.

The problem, however, goes even deeper: the state is necessarily involved. As we will see below, this is problematic for Patten's account of language rights. It can kick-start the dynamic of market failure or it can counter it. It can kick-start it by implementing an institution that has an impact on the decline of a minority language. This institution is then not the only one to blame, but it nevertheless kick-starts the market failure dynamic. Suppose a certain set of institutions, minority language schooling, minority language public administration, and enforced minority language use in some large companies is needed to maintain the language in a certain geographical area. If the state were to decide to implement majority language schooling then the other two institutions would not give the needed number of incentives to maintain the minority language in this area. What the state thus has done is to kick-start the dynamic of market failure. What is more, here too the information constraint blocks us from assessing what exactly the state can or cannot do in order for a minority language to be maintained. The role of the state is irretrievably lost in the millions of actions and interactions. It is impossible to say when and where exactly the state has performed the wrong action. We may be able to say in an inexact manner that this or that institution, schooling in the majority language for example, certainly did not promote the maintenance of the minority language. But apart from such inexact assessments there is little more we can say.

The implication is that for those liberals who think that benign neglect or disestablishment cannot work in the case of languages this objection of market failure presents a challenge. We have to rectify the dynamic in some way, but we are blocked by an information feasibility constraint from making more precise judgments about which institutions, exactly, need to be implemented. The maintenance argument I am making here says that we should be guided by the inexact ideas about which institutions have a big impact. The finer distinctions between which individuals want, and which do not want, to perform which exact action in order to maintain their language, are lost because of our lack of knowledge. These distinctions are undoubtedly normatively relevant. But so is maintaining minority languages and thus countering the problem of market failure.

One finer distinction that seems to have inspired the liberal criticisms of cultural preservationism is the distinction between a culture that the adherents want to preserve and a culture that adherents do not want to preserve it. I cannot help but think that this is where abstract philosophy goes astray. I have not met many people who do not want to preserve their native culture. If a minority culture is

in decline, it is not because not a large enough group of willing minority members that can preserve the culture can be found. It is because it is not immediately obvious which actions are necessary to preserve the culture; because, although many minority members might be willing, their preference in preserving their culture is a peculiar long-term preference that is very often overtaken by short-term preferences; and because there is a collective action problem in the production of a minority language. It is an empirical claim that a culture that is in decline is in decline because its members do not want to preserve the culture. So let me counter this claim with another one. A culture in decline for no apparent reason, like mistreatment by the overarching state or repulsive cultural practices, is most likely suffering from the market failure dynamic. This is not to say that precautions need not be taken against minority cultural elites trying to tie their members to their own projects and draconian cultural preservation policies. But, as we will see in the third chapter, there are other ways of finding out whether members wish to maintain their culture and ensuring that members are not too heavily burdened by the language maintenance policies or that they can opt out.

To conclude, the maintenance argument says that languages need to be maintained. That is so because people's cultures decline, not because they freely choose to adopt another culture, but because a collective action problem is at play in the production of the minority language. Because of the nature of this collective action problem, i.e. the large number of actions that it involves, there is an information feasibility constraint that prevents us from knowing certain finer normatively relevant distinctions. Let me now argue that both Kymlicka and Patten, on the basis of their own premises, should rectify the problem of market failure.

2.2. The value of national cultures

Many explanations of what is valuable about cultures can be given and many of those explanations will converge on the need to maintain cultures by offsetting the market failure dynamic. Let me argue that this is the case for Kymlicka's and Patten's account.

Kymlicka argues that national cultures are valuable because they provide us with a range of options from which we make meaningful choices and thus cultures are essential to individual autonomy. Kymlicka (1989: 164) argues that the range of options from which we chose cannot be chosen itself. We select the options that we think valuable from the range of options made available

provided by our culture. For Kymlicka the kind of culture that provides us with such a range of options is a societal culture, which he defines as “a culture which provides its members with meaningful ways of life across the full range of human activities [...]”. (Kymlicka 1995: 76) Kymlicka (1995: 83) then argues that “freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us”. In other words, our societal culture provides us with a context of choice (Kymlicka 1995: 83) and this context of choice needs to be protected or maintained. Notice how Kymlicka's context of choice argument is based on the value of individual autonomy. Autonomy thus explains what is valuable about language and why it should be maintained. This implies that the value of maintaining a culture can never outweigh the value of individual autonomy. This I also take to be the main conceptual difference between language preservation and language maintenance[12]. The maintenance argument I have been defending here fits very well with Kymlicka's argument[13]. According to his argument, Kymlicka is also obliged to endorse my maintenance argument. The market failure dynamic implies that a culture, especially that of what I called a small minority, that is not accommodated appropriately will disappear. If a culture has disappeared, then obviously it cannot provide the context of choice and range of options necessary for individuals' freedom. Thus, Kymlicka’s argument supports countering the dynamic of market failure.

Patten should also endorse my maintenance argument. As we saw, Patten is skeptical about cultural preservationism and the objection from market failure, which is one of the reasons that may lead one to endorse cultural preservationism. Patten (2014: 215) argues that “full evaluation of the objection [from market failure] is hampered by the absence of a satisfying general theory of market failure and fairness”. As Patten says, market failure, or Pareto suboptimality, is merely a lack of efficiency, but as such says nothing about fairness. Patten then discusses a way to bridge concerns of efficiency and fairness—Rawls’s adaptation of Wicksell’s unanimity principle[14]—but claims that

12 How we ensure that the value of individual autonomy is not unduly compromised by the value of language maintenance is another matter. In chapter three I will develop an account of group rights that aims to give individual autonomy its rightful place. This account entails a number of institutions. First, a national register, compiled on the basis of personally declared affiliation to the language group or nation, can ensure that the maintenance policies are only implemented in name of the individuals that actually agree with the goal of maintaining their language. Second, a relatively easy exit-option, which is perfectly possible in the case of non-territorial accommodations, ensures that the maintenance policy does not become draconian. One can think of this as playing the function that a bill of rights plays in a normal, territorial, democratic polity. Third, the decision about which language policies are enacted is taken in a democratic way by all, and only, the members of the nation.

13 I do, however, agree with Carens's criticism of Kymlicka's concept of societal culture. I will explain this criticism in the next section. Basically Carens argues that this concept is partly morally arbitrary.

14 Wicksell's unanimity principle says that “the costs of any scheme designed to correct the market failure must be allocated in such a way that nobody is a net burden-bearer”. (Patten 2014: 215) Rawls connects this with fairness via the benefit criterion of just taxation which says that “[i]f resources are justly distributed, then schemes of public good provision that leave some as net burden-bearers can be seen as unfair to those persons”. (Patten 2014: 215) Wicksell’s unanimity principle would thus imply that accommodations that aim to offset the problem of market failure should not leave anyone as a net burden-bearer.

it "would not leave much scope for adjustments to equal recognition [Patten's own theory]".[15] (Patten 2014: 215) He says that Wicksell's unanimity principle might allow minority language speakers to restrict their own language-related decisions—as in the Quebec's language legislation which requires Francophone parents to send their children to French schools—but that it would not license an imposition of inequalities onto speakers of the stronger language.

As argued above, however, the market failure in question here is of a specific type in two ways. First, the public good in question is a specific type of public good: a minority language that lives intermingled with majority languages. Languages are a specific type of public good—what I will call, following Denise Réaume, a participatory good—because they necessarily need many to participate if they are to be produced. But on top of that, the participatory good under consideration is a minority language that faces competition from a majority language. We thus have a collective action problem in countering this competition from the majority language. In chapter three I will argue that this implies that one is indeed justified in restricting the language-related choices of the minority members. At least, one is justified in doing so when three conditions hold: one is specific about the actions that need to be performed in order to offset the market failure dynamic; one implements certain institutions that can ensure the minority language policy is not draconian; and there is a relatively easy exit option[16]. In fact, the interest that the minority members have in maintaining their language *is* an interest in having one's language-related choices being restricted. That is, an interest in maintaining a language that lives intermingled with a majority language is an interest in having coordination rules established that can maintain the minority language. Second, the market failure is of a specific type because, as was argued in the previous subsection, the state kick-starts it. It may be impossible to tell exactly through which action the state kick-started the dynamic of market failure. But that does not matter. What matters is that the state is implicated. This entails that we are also licensed to impose inequalities onto speakers of the majority language. The point of view from which one should ask the question whether such inequalities can be imposed is not one in which the basic structure of society and the allegiance of the minority to the mixed society and state are assumed as a given on top of which the provision of some non-essential public good is at stake. One should reason from the original position. The parties in the original position know that minority languages face competition from the majority language; that there is a collective action problem in producing minority languages; that economic gain is to be made if

15 I will come back to this at the end of this subsection.

16 The same three institutions that can ensure that individual autonomy is not unduly compromised can also ensure the needed kind of unanimity. These three thing were a national register, an exit option and a democratically chosen language policy. By being 'specific about the actions that need to be performed' I mean, what I call in chapter three, 'actions falling under general types of action, the performance of which is a coordination rule in the minority's language policy'.

minority and majority join together in one society with a basic structure and under the authority of a state. But they also know that this state will kick-start the competition that minority languages face. The question is then how to divide the aforementioned economic gain fairly. It is extremely difficult to tell how much the majority owes the minority because of the pressure it puts on the minority language. But it is surely enough to pay for the language rights regime explained in the third chapter.

Next to kick-starting the dynamic of market failure, the state can also rectify its role in this dynamic. It can opt for two sorts of cultural or language maintenance policies. A state opting for NSG, ensures that the minority language can counter the dynamic on its own territory. As I will argue in chapter three, a state opting for NCA ensures that the minority can counter this dynamic without having its own territory. Patten does not discuss the possibility that the state has a hand in the market failure he describes. However, if the state indeed is implicated then his theory of equal recognition implies that he ought to rectify the role of the state. Equal recognition, as we will see more extensively below, implies that the state's policies should be equally accommodating of different conceptions of the good. Given the impact of the market failure dynamic, the state should thus rectify this dynamic. This is demanded by Patten's own basic premises. Thus, I believe, against Patten (2014: 216), that the objection from market failure does "entail a major qualification of equal recognition". It implies that he ought to adopt a cultural maintenance policy.

The normative premises of both Kymlicka's and Patten's theory thus imply that they ought to maintain cultures or languages. It is easier to show that other arguments converge on the need to maintain languages or cultures and I will not analyze these arguments here. Réaume's (2000) argument, for example, which is based on the presumed intrinsic value of languages, requires language maintenance. Also Van Parijs's (2011) argument, which is based on the idea that some kind of parity of esteem is owed to language groups, requires language maintenance. I conclude that many theories that value languages converge or ought to converge on the need to maintain languages as the main element of the cultural structure.

2.3. The maintenance argument and non-territorial accommodations

In this last subsection I shall conclude the maintenance argument. I argue that cultural maintenance demands non-territorial accommodations. It does so for two reasons. First, cultural maintenance demands that the cultures of small, dispersed, non-modernized, and internal national minorities are

maintained as well. Second, cultural maintenance demands that people have access to their culture. I first argue that for both Patten and Kymlicka access to one's culture is important. Then I turn to Kymlicka's treatment of these small national minorities.

Kymlicka and Patten both value access. We saw above that for Kymlicka the disappearance of a culture is, obviously, normatively relevant. The culture, however, does not have to disappear from the face of the earth: merely disappearing in a certain area is sufficient to trigger the conditions of Kymlicka's argument. For he argues that, "[f]or meaningful individual choice to be possible, individuals need not only access to information, the capacity to reflectively evaluate it, and freedom of expression and association. They also need access to a societal culture". (Kymlicka 1995: 84) In a footnote he adds that this kind of access to a societal culture can be seen as a Rawlsian primary good (Kymlicka 1995: 214). For Kymlicka it is not sufficient that one's societal culture exist in some distant part of the world. One also needs to have access to it. Notwithstanding Kymlicka's advocacy of NSG, this implies non-territorial forms of accommodation that can bring the cultural accommodations to where the people needing them live.

In his chapter on language rights Patten points out that he, contrary to language preservationists and nation-builders, defends non-territorial language rights in line with what has come to be known as the personality principle, and is opposed to the territoriality principle (Patten 2014: 227-231). The reason why he equates language preservationists with those who defend the territoriality principle is that most preservationists believe that the territorial imperative cannot be offset. The territorial imperative says that the only way to preserve a language is by granting it a territory of its own. The account of language group rights that I will develop in chapter three can, I claim, prove the territorial imperative to be ill-founded[17]. The point is, however, that the reason why Patten endorses the non-territorial personality principle is the same kind of access of which I am here arguing that it is normatively salient. Patten (2014: 230) says that "[e]qual recognition means that majority and minority alike are able to access, and participate in, public institutions in their own language". He adds that his right to equal recognition—or more specifically the value of self-determination that underlies this right—"is not secured by pointing to some other part of the country where the local minority's language is in ascendance. To secure fairness for local language minorities, public institutions operating in the area where those minorities live must recognize minority rights".

17 Let me briefly already explain this strong claim. In chapter three I propose a form of group rights that also gives standing to sue not only to the individuals who have a special interest in a matter of public nuisance—which is the traditional criterion for giving someone standing to sue—but also to the group or a representative of the group. This entails that the group can take judicial action to, for example, impose a duty on a private company to accommodate a minority language. The group will be much more effective than individuals in suing to impose language accommodation duties. As such a sphere can be carved out in society by judicial means in which the minority language can be maintained.

(Patten 2014: 230) It may be clear that Patten too values access.

The reason why Kymlicka advocates a territorial model has to do with his concept of societal culture. It is the concept of societal culture that singles out certain cultures as having a normatively relevant structure. We saw above that Kymlicka defines societal cultures as cultures that provide their members with ways of life across the full range of human activities. He also adds that "[t]hese cultures tend to be territorially concentrated" and that they are "institutionally embodied". (Kymlicka 1995: 76) Kymlicka thus effectively excludes what I called small national minorities which consisted of small, dispersed, non-modernized, and internal minorities and which often are not institutionally embodied or territorially concentrated. However, this exclusion can and has been criticized. Carens (2000: 56) says the following of Kymlicka's concept of societal cultures: "Kymlicka intends the concept of societal culture to provide a theoretical foundation for his analysis. In my view, however, this concept is an abstraction that distorts his argument and appears persuasive only because he fails to think concretely about its implications for particular cases, including many that he himself mentions". Indeed, it is suspiciously handy for Kymlicka's theory that the concept that he believes is normatively salient, i.e. a territorial, institutionally embodied societal culture, happens to eliminate many groups that cannot be given NSG. Having a societal culture is, however, in many ways irrelevant for Kymlicka's maintenance argument. The culture of individuals whose group does not have a territorial societal culture also provides them with a range of options and a context of choice that enables their individual autonomy. Why are 'having a legitimate claim to a territory', 'not having immigrated to a territory', 'having a modern culture', etc. relevant normative criteria? As we will see in detail in the next section, what is going on here in Kymlicka's theory is the conflict between his reliance on the equality-based and the instrumental argument. In sum, Kymlicka's dismissal of the claims of small minorities is dubious.

That I defend cultural maintenance does not mean that think the right to cultural maintenance is absolute. Contrary to Kymlicka, however, I believe the only considerations that can outweigh the value of cultural maintenance are strong feasibility constraints or highly desirable states of affairs—and I do not think implementing NSG is highly desirable. One such constraint, consisting in economic feasibility, leads to a "where numbers warrant criterion". This criterion simply says that there is a limit on the extent of accommodations that small numbers of minority members living in a geographical area can demand. Given that it is economically infeasible to organize high school courses in a minority language for three students, we will have to come up with such a lower limit. For example, five hundred minority members living in a community have a right to a primary school and translations in dealing with the community's administration, one thousand have a right

to a secondary school and public administration, etc. NCA thus accommodates small minorities but only where their numbers warrant.

There are thus two reasons why cultural maintenance demands non-territorial forms of accommodation like NCA. First, also the cultures of small minorities need to be maintained. Second, people need access to their cultures. Both Kymlicka and Patten value access. The normative premises of Kymlicka's maintenance argument also imply that he should value cultural maintenance for small national minorities. The reason why he does not has to do with his concept of societal culture. The reason why this concept has the form it does, has to do with the interplay between what I will call his instrumental argument for NSG, based on the value of cultural maintenance, and what I will call his equality-based argument for NSG. Let us now turn to how these two arguments interact.

3. The negative argument against NSG

In this section I will argue against NSG. My argument depends on a distinction between two types of argument for NSG: instrumental and equality-based arguments. Instrumental arguments argue that NSG is needed as a means to achieve something. Usually, and also in the case of the three authors under discussion, that something is cultural maintenance. Instrumental arguments thus argue that NSG is instrumental to maintaining cultures. Equality-based arguments say that all nations are entitled to an equal amount of something. This something can be some measure of expression of a culture through political arrangements (Tamir), nation-building tools (Kymlicka) or recognition (Patten). In the first subsection I will elaborate on this distinction.

The three authors combine instrumental and equality-based arguments because doing so appears to allow them to make a strong case for a substantial form of minority nation accommodation, like NSG. In order to see what I mean by substantial forms of accommodation, imagine a scale of minority nation accommodations going from more to less substantial forms. At the top there is a fully sovereign nation state. In the middle there are, in descending order of substantiveness, forms of accommodation that give national minorities a largely autonomous state in a confederal arrangement, a federated subunit and consociational non-territorial body. Next we find NCA. Close to the bottom we have all sorts of accommodations that are not able to maintain languages or cultures like weak language rights, symbolic recognition, etc. NSG is more substantial than NCA: it either gives the minority a federated subunit or a consociational body. The advantage of the

instrumental argument is that it is a strong argument for some kind of minority accommodation but not necessarily a substantial form like NSG. It is a strong argument because many scholars agree that cultural maintenance is important. Thus, if NSG can be shown to be a good instrument for maintaining cultures, then proponents of NSG have a strong argument for it. The advantage of the equality-based argument, from the perspective of advocates of NSG, is that it is an argument for substantial forms of minority accommodation, like NSG. The majority already has expression, nation-building tools or recognition. The equality-based argument then suggests that the minority should also have these things, which are substantial. Thus, by combining both arguments, defenders of NSG can give a strong argument for substantial accommodations. If one does not combine both arguments it is either more difficult to make a strong case or more difficult to make a case for NSG.

The problem is that the instrumental and the equality-based arguments conflict. We saw in the previous section that cultural maintenance, and thus the instrumental argument, demands non-territorial forms of accommodations. NSG is, however, a territorial form of accommodation[18]. I see two ways of salvaging the case for NSG. First, one can make the equality-based arguments stand on their own. Second, one can let the equality based-argument qualify the instrumental argument so that it no longer demands cultural maintenance for small minorities nor that people have access to their culture. The problem with these two strategies is that both strategies require that the equality-based arguments are strong ones that can either stand on their own or qualify the instrumental argument.

In the first subsection below I argue that at least Kymlicka, makes use of the instrumental and the equality-based arguments and that both arguments are in conflict. In the second subsection I show that both arguments are also prominent in the theories of Tamir and Patten. Furthermore, I point out that when and to the extent that the case for NSG is based on the instrumental argument, NCA can do the job equally well. In the last subsection I argue against the equality-based arguments of these three authors.

3.1. Kymlicka's instrumental and equality-based argument for NSG and the conflict

The instrumental and the equality-based arguments are nicely illustrated respectively by chapters five and six of Kymlicka's *Multicultural Citizenship*. In chapter five, Kymlicka gives his argument on societal culture, range of options and individual autonomy that I discussed above as one of the

18 Again I leave out of consideration the consociational form proposed by Tamir and Kymlicka. I will return to this.

ways of explaining what is valuable about culture. Kymlicka's main argument from chapter six is an equality-based argument. It goes as follows. After dismissing the traditional liberal strategy of benign neglect, which aims to treat cultures equally by ignoring them, he argues that our aim should be "that the good of cultural membership is *equally* protected for the members of all national groups". (Kymlicka 1995: 113; italics mine) In his later writings Kymlicka is more explicit about what he means by equally protecting this good. He says that, in order to protect their cultures, minorities ought to have a right to the same tools of nation-building as the majority (Kymlicka 2002: 27). Kymlicka (2002: 53) lists these tools: language, education, migration and naturalization policies, drawing internal boundaries and dividing powers in a federation such that the minority is empowered. Kymlicka's equality-based argument thus says that minorities should have the same nation-building tools as the majority.

It may be difficult to keep the two arguments separate. As Patten (2008: 108) says, "[b]y running together these distinct ways of thinking about state responses to cultural diversity, Kymlicka makes it hard for his readers to tell when minority rights are called for, what kinds of policies they would find expression in, and what criteria to apply in judging whether or not they are a success". Nevertheless, the arguments are indeed different. Patten (2008: 108) says that "[w]hile Kymlicka tends to write as if these two points are separate steps of a single argument, I think it makes sense to see them as two separate arguments, each with their own logic, policy implications, and domains of applicability. Neither of the considerations adduced by Kymlicka depend in any way on the other to generate its conclusions about normative desirability or urgency of cultural protections, rights, and so forth". Patten thus says that two different arguments are indeed at work in Kymlicka's theory.

Furthermore Patten (2008: 108; 2014: 154-155) points out that the instrumental and equality-based arguments may conflict. On the one hand, Patten (2014: 154) says, "If culture really is essential to autonomy in some way, then why stop at a fair distribution of cultural recognition [by "fair" Patten means what I called Kymlicka's equality-based argument], which will not necessarily provide the conditions of autonomy to all persons?" We may add that Kymlicka indeed does not favor providing the conditions of autonomy or cultural maintenance to all persons when he excludes small minorities. On the other hand, Patten (2014: 154-155) says "from the standpoint of fairness, why restrict the value of culture to its autonomy-enabling character [by "autonomy" Patten here refers to what I called Kymlicka's instrumental argument]? There are other (more straightforward) reasons why people might value their cultures that seem sufficient to explain why we would care about fairness with regard to cultures". Patten will for example argue that state neutrality demands that one recognizes cultures equally.

To be fair, Kymlicka does grant these small minorities something. They too ought to be accommodated. They should not be excluded, forced to adopt a thick culture or discriminated against (Kymlicka 2002: 48). However, Kymlicka does not give these small minorities NSG. Thus, on his account, for the language of a national minority with societal culture to survive it may be necessary to give it a territory on which it is the only official language (Kymlicka 2001: 79). Yet, for small national minorities it is all of a sudden no problem that their language cannot be given a territory. They may disappear. In a similar way, although Kymlicka claims that national minorities need the tools of nation-building—like an empowering drawing of boundaries and division of powers—to ensure that their culture survives, these small minorities have no right to such tools.

Finally, Kymlicka is aware of this conflict. In a piece written together with Christine Straehle, he even goes to some pains to argue that there is no escaping the conflict (Kymlicka and Straehle 2001: 229-234). In response they propose to reformulate the goal. Instead of separate nation states we should aim for multinational, or as they call it multination, federations of self-governing peoples (Kymlicka and Straehle 2001: 234). This new goal does little to resolve the conflict, though. It still holds that, although national minorities ought to have nation-building tools and a territory to survive, smaller internal minorities have no right to these things.

One may object at this point that, given that the strong language right that I will propose can maintain small national minorities without giving them a territory, we can grant small national minorities such language rights. However, I believe that to be impossible. It is problematic to combine the proposed language rights with NSG. The proposed language rights give some, although not very helpful still quite helpful, tools of nationalism to minority nationalist politicians: a national register that makes it easier to track the internal migration of minority members and to see which members of the minority are treated unfairly; a minority group representative that has the standing to sue in name of minority members; a long list of language rights that can function as potential claims in the democratic sphere; etc. Although these tools of nationalism may not be very helpful they should still not be implemented when a strong minority nationalist party is present. The problem with NSG, as I will argue in chapter five, is that it either implements homeland federalism or consociationalism. Both cause the disintegration of the party system and thus create the conditions for strong minority nationalist parties.

NSG should thus not be implemented together with the strong language rights proposed in chapter three. Thus, this implies that the instrumental and the equality-based arguments really are in

conflict. As argued above, if we follow the instrumental argument and thus the value of cultural maintenance, then we should implement the language rights in order to maintain small minorities' cultures and grant people access to their culture. If we follow the equality based-argument then we should implement NSG. NSG, however, gives larger national minorities a territory of their own. It may be that other minorities internal to that territory will get some accommodations of the national minority that holds the territory. But these accommodations should not amount to the strong language rights that I propose for the reason explained in the previous paragraph. The proposed language rights should not be implemented together with a political system that is likely to cause strong minority nationalist parties to emerge. Thus the instrumental and the equality-based arguments conflict.

As already indicated, it may still be possible to save the case for NSG. I see two possible strategies. The first is to let the equality-based argument stand on its own. This is the strategy Patten followed. The second is to let the equality-based argument qualify the instrumental argument. In this case one does not go all the way in following what cultural maintenance demands and one gives arguments, i.e. equality-based arguments, for stopping short of guaranteeing cultural maintenance for small national minorities and access to one's culture. No matter which strategy one follows, the equality-based arguments now have to be strong arguments. They either have to be able to stand on their own or they have to be strong enough to justify not maintaining the cultures of small national minorities and not granting access. I will argue below that these equality-based arguments are not strong enough.

3.2. Instrumental and equality-based arguments for NSG

Let me now argue that also Tamir and to some extent even Patten combine instrumental and equality-based arguments as well. Furthermore, I will compare the institutions that all authors argue for with what NCA gives to national minorities. It will become apparent that the difference between NCA and NSG is not so large. Let me show this for all authors separately.

TAMIR

Tamir clearly combines instrumental and equality-based arguments in her overall arguments for NSG. She argues for a right to culture (Tamir 1993: ch. 2) that aims to "preserve the national culture

one chooses to adopt". (Tamir 1993: 34) Recall, as I have said above, that cultural preservationist arguments are close cousins of the maintenance argument. We can consider them to be similar here. In chapter three she defends what she calls a cultural interpretation of NSG, which "views it as the right of individuals to express their national identity, to protect, preserve, and cultivate the existence of their nation as a distinct entity". (Tamir 1993: 71-72) The extent to which Tamir makes use of the instrumental argument shows itself in how she justifies the right to NSG[19]. Her justification of this right "rests on six counts:

> 1) Membership in a nation is a constitutive factor of personal identity [...];
>
> 2) Given the essential interest of individuals in *preserving* their national identity, it is justified to grant them a set of rights aimed at the protection of this interest […];
>
> 3) In order to *preserve* their *national* identity, *individuals* must be given the opportunity to express this identity, both privately and publicly […];
>
> 4) The existence of a shared public space is a necessary condition for ensuring the *preservation* of a nation as a vital and active community […];
>
> 5) National self-determination is therefore tied to the aspiration to have a communal domain […];
>
> 6) The right to national self-determination can be fully realised only if the national group is recognised by both members and non-members as an autonomous source of human action and creativity, and if this recognition is followed by political arrangements enabling members of the nation to develop their national life with as little external interference as possible [...]". (Tamir 1993: 73-74; italics mine except for 'national' and 'individuals')

Notice how points two, three and four are about preserving or maintaining the national culture. Notice also how point four derives the need for a shared public space from the need to preserve a national culture. A shared public space is thus instrumental to maintaining the national culture. Point five, the need for a communal domain, can, at least on some interpretations of 'communal domain', be seen as a point about maintaining cultures. It should be clear that Tamir's overall case for NSG makes extensive use of the instrumental argument.

Tamir's equality-based argument says that political arrangements "should reflect the unique character and draw on the history, the culture, the language, and at times the religion of the national group, thereby enabling its members to regard it as their own". (Tamir 1993:74) She argues that political arrangements cannot avoid reflecting the majority culture and that states have a cultural essence (Tamir 1993: 147-148). As an example of the majority cultures being expressed or reflected

19 Recall that Tamir speaks of national self-determination instead of NSG.

in the state, she refers to the name of the Israeli Parliament, the Knesset, which is derived from the Great Knesset, which was a central religious and political Jewish institution in the period of the Second Temple. Given that political arrangements inevitably do this sort of expressing of the majority culture, and given that minorities have a right to express their culture, Tamir argues all cultures should have their own political arrangement. 'Political arrangements', 'reflection' and 'expression' are of course vague terms and I will come back to this problem below. But this is Tamir's equality-based argument. It says that minorities should have political arrangements that can equalize some measure of expressing their culture. NSG is that arrangement.

What are the institutions that Tamir prescribes? Tamir stresses that NSG does not require a separate nation state (Tamir 1993: 74). As an alternative she advocates consociationalism in a regional organization like the EU as a possible institutional format (Tamir 1993: 155-157). Consociationalism as she understands it means that all nations have "a say in matters of common interest" and a "mutual veto power" so that they can "veto decisions they view as vital". (Tamir 1993: 156) Furthermore, there should be high levels of autonomy (Tamir 1993: 156). Finally, Tamir (1993: 149) says that it is problematic that "members of minority groups […] can be outbid or outvoted on a range of issues crucial to the survival of their communities". The collective decision-making body handed to the minority thus at least ought to have powers over issues that are crucial to the survival of the minority community. But the exact division of powers Tamir proposes is unclear. We do get a glimpse of the kinds of power that should be devolved to the minority. Tamir (1993: 156) says that non-territorial consociationalism fulfills "partial autonomy" and she goes on to say that this partial autonomy can be satisfied "by establishing schools, cultural and communal centres, publications in its own language, and the like". (Tamir 1993: 156). Here to the cultural maintenance rationale of Tamir's overall argument comes through: national minorities need schools, cultural centers, publications, etc.

These institutions are not so different from what NCA would give to national minorities. NCA also establishes schools, cultural centers, etc. Furthermore NCA also guarantees the maintenance of the cultural structure by implementing strong language rights. But NCA indeed does not grant minorities veto rights, a common say in matters of common interest.

Notice, however, that it is difficult to tell whether Tamir's reason for prescribing consociationalism —which consists of those veto rights and a say in matters of common interest—is instrumental or equality-based. For, Tamir could think that consociationalism is needed to protect policies that can ensure the survival of the culture. That would make her argument instrumental again. If that is the

case then it should be noted that, if the policy can be protected by means of some other instrument, perhaps one that does not grant veto rights[20], then the institution that brings extra unneeded protection to that policy is no longer justified by the instrumental argument, in the sense that it is no longer demanded by the value of cultural maintenance. For example, suppose we are thinking of a country with a well-established democracy which implies that it has an integrated party system whereby the minority is well represented in all the major parties—the minority thus partakes in political power. Surely this is not too unrealistic a supposition. Suppose further that this country puts something like the strong language group right that I will propose into the constitution. Finally, suppose that the right to NCA is internationally recognized and even that minorities have a right to secede if the state does not implement NCA. The latter two may not be realized yet, but they would surely not be unrealistic if multiculturalism scholars were to agree on which model is to be preferred[21]. If all this were granted then the chances of these language rights being taken out of the constitution are slim. If the reason why Tamir prescribed consociationalism is indeed instrumental then we should ask at this point whether the minority under such conditions needs extra veto rights in order to secure its language rights. The thing that needed securing has been secured and the answer must therefore be negative, especially given the problems with veto rights. The same holds for all consociational devices that are justified by cultural maintenance. Furthermore, I will criticize Tamir in the next subsection for proposing consociationalism in general, which is a model for deeply divided societies and not one that we should implement all over Europe. A similar reasoning holds for reserved seats for the minority on the highest court and to some extent the division of powers and drawing of boundaries such that the minority has its own federated subunit. As we will see below, Kymlicka proposes all these things.

Tamir's reason for prescribing consociationalism may, however, also be equality-based. If that is the

20 Veto rights should not be proposed lightly. Multiplying the number of veto rights stalls the political system. The problem is that the group given these veto rights can use it as leverage in other domains if the rest of a polity wants to make some reasonable change in the domain over which the group has a veto.

21 My last supposition is even more realistic than Patten's proposal in the context of the debate on the right to secede. This debate is split between those, like Buchanan (2004), who propose a remedial-right-only theory of secession and those, like Wellman (1995), who propose a democratic right to secede. Simplifying matters we can say that Buchanan only grants the right to secede in cases of human rights violations, unjust annexation an violation of an autonomy agreement. The latter, again simplifying, grant the right to secede when a majority of members of the minority wish to secede. Patten (2014: 232-237) places himself in between those two positions by basically defending a remedial-right-only theory but adding a 'failure of recognition' condition, where the requirement of 'recognition' means that minority nations are equally accommodated as the majority nation. Although I cannot go into detail here, I propose something similar for my right to NCA. I would thus replace Patten's 'failure of recognition' condition with my 'failure to implement NCA' condition. This moves me somewhat further in the direction of Buchanan. But it has the advantage that I am more realistic than Patten. For the international community, made up of states with their own national minorities, will be quicker to adopt and uphold NCA than equal recognition. A minority accommodation that is recognized in international law would provide minorities with a strong security. Note in this regard also that it is somewhat disingenuous of Kymlicka to lament that international law does not recognize his theory when it goes so much against the interests of the actors that make up the international community, i.e. states with their own national minorities.

case, then the veto rights, the say in matters of common interests and all similar institutions are backed by the equality-based argument. NCA would indeed not give such institutions to national minorities. However, in chapter four I will argue that national minorities have no right to such things on account of them not being permanent minorities. It could very well be the case, however, that Tamir conceives of her argument as being largely instrumental. In that case NCA comes close to being the better model to implement what this instrumental argument demands.

KYMLICKA

We have seen Kymlicka's two arguments above. The instrumental argument said that one's culture provides one with a context of choice and a range of options that is important for one's autonomy. The equality-based argument said that minorities and majorities ought to have the same nation-building tools. What are the institutions that Kymlicka prescribes? There are some recurring "usual suspects" among the institutions—or, as he calls them, nation-building tools—that Kymlicka lists as being part of NSG: "the drawing of internal boundaries; the language of schools, courts, and government services; the choice of public holidays; and the division of legislative power between central and local governments". (Kymlicka 1995: 51-52; see also Kymlicka 1995: 127) Kymlicka (2002: 53) adds "a uniform system of national education" and "migration and naturalization policies".

As in the case of Tamir, also for Kymlicka the rationale behind most of these institutions may be instrumental. Kymlicka (1995: 109) says that "[t]he viability of their [the minority's] societal cultures may be undermined by economic and political decisions made by the majority. They could be outbid or outvoted on resources and policies that are crucial to the survival of their societal cultures". This is the reason why Kymlicka thinks boundaries should be drawn and powers divided such that the minority has a collective decision-making body of its own. The powers the minority thus gets are needed to ensure that the minority is not outvoted on issues that are crucial for the survival of its culture. Next to these nation-building tools there is a further institutional format that Kymlicka believes national minorities have a right to: power sharing or consociational institutions. In order to protect, ensure, secure—words that Kymlicka often uses in this context—minority-friendly language, education, holiday, naturalization and immigration policies, power sharing institutions should be adopted. In Kymlicka's view, there are two variants of power sharing: a federal or territorial variant, and a consociational or non-territorial variant. The latter is a second-best option for Kymlicka. He proposes a multinational federation that gives national minorities not

only federated subunits but also a share of power. Examples of power sharing institutions that majority and minority should thus share are the following: holding ultimate sovereignty or having the unilateral right to reclaim powers (Kymlicka 2001: 95); an inherent, as in not delegated, authority or power to govern its citizens (Kymlicka 2001: 113); and being constitutive partners of the polity. A more concrete example that Kymlicka endorses is group representation on the supreme court (Kymlicka 1995: 143).

The same reasoning as the one given in response to Tamir's proposal of consociationalism applies here (to both territorial or federal and non-territorial power sharing). If Kymlicka's reason for prescribing power sharing institutions is instrumental then the value of these institutions stems largely from the protection they offer to minority-friendly language, education, holiday, naturalization and immigration policies. Kymlicka is even more explicit than Tamir about the instrumental value of power sharing institutions. He says, "decisions on boundaries and the division of powers are inevitably decisions about which national group will have the ability to use which state powers *to sustain its culture*". (Kymlicka 1995: 112; italics mine) Later he makes clear that having the powers specifically regarding language, education, immigration, etc. is what matters (Kymlicka 1995: 113). Kymlicka thus includes the drawing of internal boundaries and the division of powers in the list of institutions that make up NSG because decisions on these matters determine whether a national minority is a local majority in some decision-making body. The minority needs to be a local majority in order to ensure that it can implement policies that can maintain its culture. Furthermore, in a critique on Tamir that we will discuss below, Kymlicka condemns a strong, and what he calls illiberal, interpretation of Tamir because "[t]he argument here is not about the survival of the culture". (Kymlicka 2001: 251) He thus implies that liberal arguments for NSG have to be about maintaining the minority culture. Hence Kymlicka's reason for prescribing consociationalism or power sharing seems to be instrumental.

If Kymlicka's reason is indeed instrumental then what NSG according to him demands is not so different from what NCA can provide. NCA also ensures the protection of minority friendly language and education policies. NCA does not, however, give the minority a collective decision-making body. Something should, however, be noted about this collective decision-making body. Given Kymlicka's highly instrumentalist reasoning, it seems as if the power to make collective decisions on all other affairs that are devolved is almost a bonus that the national minority gets for free. If the instrumentalist interpretation of Kymlicka is correct, then there is no justification for giving a collective decision-making body to national minorities. It could, however, also be that notwithstanding Kymlicka's remarks discussed in the previous paragraph, Kymlicka believes such a

body is demanded by his equality-based argument. If that is the case then I refer again to the argument that I will make in chapter four.

PATTEN

It would not be fair to bluntly say that Patten combines the instrumental and equality-based arguments. For one thing, as we saw above, he is aware of the two types of argument in Kymlicka's work and explicitly tries to avoid the conflict that they run into. For another, his theory is clearly based on an equality-based argument. Finally, he argues against a "general right to cultural preservation" in a section called "cultural preservation versus fair treatment of cultures", the latter of which refers to his own theory. (Patten 2014: 102) Nevertheless, there are still at least maintenance elements in Patten's theory and possibly his case for NSG is partly made by an instrumental argument.

Since I will be teasing out the instrumental elements in Patten's equality-based argument I first explain that argument here. As the title of his book suggests, Patten argues for equal recognition. Patten (2014: 157) understands recognition as "a form of accommodation extended by the state to particular conceptions of the good. It consists, that is, in some rule or structure or resource that is adopted or provided by the state and that can be expected, in conjunction with other necessary inputs, to have a positive impact on the success of a particular conception of the good"[22]. Notice that the index of success of a conception of the good is the number of adherents it has. Thus, equal recognition implies that the state adopt policies that do not push people to leave one particular culture. The value of recognition in Patten's theory is derived from the value of state neutrality[23] and it is this value, as opposed to cultural maintenance, that seems to do most of the work in Patten's overall theory.

22 Let me make a few clarifications. "Conception of the good" may, for our purposes, be understood as "national culture". Patten (2014: 159) uses "culture" as a shorthand for "conceptions of the good". He justifies this by saying that "cultural loss is bad for some members of the culture […] because, predictably, some of the options they value will become unavailable to them. Even if cultures are not defined by shared conceptions of the good, their disappearance matters because of the impact on members who have particular conceptions of the good." (Patten 2014: 159) I will leave aside the instrumental elements that seems to be present here too. The "other necessary inputs" are the choices of the adherents of a conception of the good to continue to adhere to it. Patten does not want to justify preservationist policies that artificially aim to crank up the numbers of adherents when they would, without these artificial policies, chose to leave their culture. Finally, for simplicity's sake I will speak of policies instead of rules, structures and resources.

23 It is not necessary to go into detail about the account of neutrality Patten defends. Let me just note that his account, neutrality of treatment, demands that "the state's policies must be equally accommodating of rival conceptions of the good" and a policy is accommodating when it "can be expected, in conjunction with other necessary inputs, to make a particular conception of the good more successful". (Patten 2014: 115)

Not every accommodation, according to Patten (2014: 157), counts as an instance of recognition. Two further conditions need to be met for the state to be recognizing a conception of the good. First, the accommodation needs to be a customized accommodation, like a school that mainly pays attention to one culture, and not a generic accommodation, like a fire department that fights fires for all people. Second, the accommodation needs to be extended to an identity-related component or preference of a conception of the good. Identity-related components or preferences have two main characteristics (Patten 2014: 158). First, "[t]he preference is informed by, or an expression of, the fact that the preference holder identifies with a particular group or community and values that identification to at least some degree." (Patten 2014: 158) Second, the satisfaction or equal treatment of the preference has special importance for the individual in question (Patten 2014: 158). Patten (2014 133-135) gives three factors that contribute to the special importance of components, preferences or commitments of a conception of the good: the preference plays a pivotal role for the individual's ends; the preference has a non-negotiable character, like commitments to religious values are often nonnegotiable; the preference has recognitional salience. According to Patten (2014: 134-135) a preference or commitment can have recognitional salience "by virtue of being implicated in the basic relationships of respect and recognition that a person enjoys with other members of society. A decision by the state not to extend a person a fair opportunity to realize such a commitment could reasonably be regarded as denigrating by persons who affirm that commitment."

Specifically on NSG, Patten (2014: 242-246) argues that having one's national identity being recognized by implementing NSG is good for individuals. This is so for three reasons: it will result in collective decisions that more closely realize many minority members' values and preferences (Patten 2014: 243-246); it offers individuals an essential tool for preserving their culture (Patten 2014: 246-247); and it gives expression to the desire for self-government that is shared by individuals that have this national identity (Patten 2014: 247). Notice that the second reason is an instance of the instrumental argument. However, as Patten (2014: 248) states, the fact that something is good for individuals does not make it a matter of justice. The work in Patten's argument is thus being done by the following justice-based argument. Patten (2014: 247-249) argues that the recognition of national identities can be distributed equally by implementing minority NSG on the level of a federated subunit next to majority NSG on the federal level. He says that this kind of equal recognition is required by his account of neutrality because institutions should not impose more burdens on or give more benefits to one conception of the good than another (Patten 2014: 249). Patten's equality-based argument thus says that the state, for the sake of state neutrality, should recognize nations equally. It should do so by giving an equal amount of

benefits to, or placing an equal amount of burdens on, that part of the conception of the good, i.e. people's national identity, that values national self-government.

Let me now argue that there are at least four instrumental elements in Patten's theory of equal recognition.

First, many of the identity-related preferences, of which Patten's concept of neutrality of the state demands that they are equally accommodated, will be satisfied when the culture is maintained. Furthermore, it is much easier to argue that identity-related preferences in the maintenance of some aspect of a culture are of special importance. In order to explain, we can draw a distinction between different types of preferences one can hold regarding one's national culture. On the one hand, there are cultural maintenance preferences. These are related to the content of the national culture. One can, for example, prefer to participate in a book-club that reads books from one's own culture, to have a vibrant music scene in the language of one's culture, etc. Maintaining the culture satisfies these preferences. Insofar as Patten's overall argument for NSG is based on these preferences it has a large instrumental element. On the other hand, there are political autonomy preferences, which are related to NSG. One can prefer one's nation to be sovereign, to be an important player on the international scene, to have economic powers, etc. Maintaining a culture does not mean satisfying these preferences and insofar as Patten's argument is based on the need to satisfy them, it is a pure equality-based argument. Notice that it is much easier to argue that cultural maintenance preferences are of special importance and thus play a pivotal role, have a non-negotiable character and have recognitional salience. It seems odd to say that whether or not one's nation plays an important role on the international scene plays a pivotal role in someone's conception of the good; that a nation's power over economic affairs is nonnegotiable to some member of the nation; or that a nation that is maintained but not granted sovereignty or economic powers denigrates the nation's members. To the extent that the preferences of special importance are cultural maintenance and not political autonomy preferences, Patten's argument thus has an instrumental element.

Second, notice how Patten defines the recognition he aims to equalize in terms of accommodations that have a positive impact on the success of a particular conception of the good. The only liberal way of understanding the success of a conception of the good, or culture, is in terms of the maintenance of this conception. Thus, at the core of Patten's theory there is a concern with the maintaining cultures. It is difficult to tell how important this concern is, especially if the argument from the previous section is correct. There I argued that in light of his definition of equal recognition, Patten should, on the basis of his own normative premises, aim to maintain languages.

This aim is incompatible with the principle of state neutrality—which requires proceduralism. What would be the impact on Patten's theory? How would this argument, if correct, affect his argument for NSG? It is difficult to tell. At least we can say there is a maintenance element at the core of Patten's theory that, in combination with the argument on the market failure dynamic, may upset the relation between the instrumental and equality-based argument in Patten's theory.

Third, while arguing against the standard liberal approach to cultural diversity, which does not grant strong cultural rights, Patten argues that his equal recognition is "consequential" for minority cultures (Patten 2014: 166). As part of this argument Patten says that recognition "does give members of cultural minorities some of the essential resources and facilities they need if they are to enjoy their cultures and be successful at *preserving* them over time". (Patten 2014: 167; italics mine) The argument that equal recognition is consequential is one stage[24] in a larger argument in favor of the claim that "a member of a declining minority culture would have a (defeasible) complaint of justice if the state were to adopt a majoritarian approach to recognition rather than nonrecognition or equal recognition". The value of neutrality still plays the most important role, but here too we find a maintenance element playing an important role.

Fourth, Patten defends what he calls a context-dependent hybrid theory and pro tanto cultural rights that might be outweighed by other considerations (Patten 2014: 24-26; 108-111). One of the considerations for which he leaves room are language preservation considerations, which can be equated with the maintenance argument. Language preservation demands that the state undertake action to secure the outcome in which languages are preserved. Aiming for such an outcome goes against Patten's theory of equal recognition which is based on a proceduralist interpretation of neutrality of the state. Patten believes minorities have a right to equal accommodations that form the background conditions of a just procedure. If a language is still not maintained when it has these accommodations, then no injustice has been done and we should not aim for the outcome of preserving the language. However, Patten (2014: 225) argues that "[e]qual recognition is not rendered superfluous but still has an important role to play in the space that is left over once the outcome-based constraint is satisfied". Patten's theory thus leaves room for the maintenance argument but claims that this argument also leaves room for his theory of equal recognition. If my interpretation of the maintenance argument is correct, and even small groups of minorities have a right to maintain their language, then the tables might be turned and the maintenance argument might eclipse Patten's theory. The worry that there may be little work left for his theory to do is repeatedly on Patten's mind (Patten 2014: 171, 176, 207-210, 225).

24 There are two more stages to this argument: one against recognizing only the majority culture and the other against the strategy of nonrecognition.

To what extent are the institutions Patten proposes indeed beneficial to maintaining cultures? Given the prominence of the equality-based argument in his work, Patten stays surprisingly close to Kymlicka's list of institutions. Patten's list includes: language policy; the design of democratic institutions; the school curriculum; the use of public space; the designation of symbols, flags, anthems, and other conspicuous markers of identity (Patten 2014: 1-2; 159-160). Many of Patten's institutions are to a considerable extent also demanded by an instrumental argument. NCA would thus also implement these institutions. Only the markers of identity and especially the democratic institutions cannot be justified by the instrumental argument. However, claims regarding the markers of identity are simply not important enough to warrant an institutional overhaul like that of implementing NSG. By the design of democratic institutions Patten (2014: 1) means that minorities "typically want institutional and jurisdictional spaces to be carved out in which they can enjoy a measure of autonomy and self-government". I consider this to be one of the only strong examples of an equality-based argument for NSG that could possibly stand on its own.

It could, however, be that the maintenance elements pointed out above indeed explain why Patten's theory is appealing. If that is the case, then it is doubtful that Patten's theory is a pure equality-based theory. The question then is how the equality element and the maintenance element in Patten's theory relate to each-other. Does Patten's equality element explain why small national minorities have no right to maintain their culture? A further question is still whether Patten's theory is strong enough to outweigh the federal stability feasibility constraint that I will explain in chapter five.

3.3. Equality-based arguments for NSG

In this final subsection I will point out several problems with the equality-based arguments. As I explained above, the author's equality-based arguments are important because the instrumental and the equality-based arguments are in conflict. This leaves us with two possible strategies of saving the overall case for NSG. First, one can let the equality-based argument stand on its own. Second, one can let the equality-based argument qualify the instrumental argument. In both cases the equality-based arguments have to be strong arguments in themselves. Here I will show, however, that there are several problems with these arguments. The problems that I will raise are the following. Equality-based arguments may: allow for illiberal policies; rest on non-applicable feasibility constraints; be too restrictive in the sense that they do not allow for highly desirable majority nation-building policies. I will discuss the first two in relation to Tamir and Kymlicka and

the last one in relation to Patten. There is a further problem that all theories encounter: they violate the federal stability feasibility constraint.

Let me first explain what I mean by "resting on a non-applicable feasibility constraint". As will be spelled out in the next chapter, next to hard feasibility constraints, those that cannot be removed, and soft feasibility constraints, those that can be removed, there is a third category: equivocal constraints. Those are feasibility constraints of which we do not know whether they can be removed or not. These constraints typically consist of complex arguments with many empirical premises that show that there are cases in which this or that institution cannot be implemented because it endangers something that is more valuable, often political stability. These equivocal constraints can however be mitigated: their range of applicability can be reduced by reforming some of the empirical circumstances that are conditions for the empirical premises to hold. Thus equivocal constraints can gradually allow for more and more ideal principles to be implemented. We can now conceive of a scale going from contexts, like the worst-off developing countries, in which many equivocal and other feasibility constraints apply to contexts in which few constraints apply, Sweden let us say. Normative theory should be different depending on where we are on this scale, for which context we prescribe. "Resting on a non-applicable feasibility constraint" thus means that one prescribes a model for a certain context to which this model no longer applies. That is, the model is apt for a context in which some constraints apply but one prescribes it for a context in which these equivocal constraints no longer apply. I will argue below that Tamir and Kymlicka do this with regard to the consociationalism.

What is the federal stability constraint that all three authors violate? I shall flesh out this constraint in the final chapter of this dissertation. But let me already briefly explain the argument here. Federal stability is precarious because federal constitutions redistribute between the federated subunits. Some of these subunits thus have an interest in federal re-bargaining for another constitution. However, for a federal constitution to become well-established it should only evolve gradually in the sense that a higher level of the constitution needs to remain intact. Key to this aim of federal stability—defined as only a gradual evolution of the federal constitution—is the role of an integrated party system, which means the absence of regional or minority parties. Territorial NSG and consociationalism, however, stimulate the emergence of minority parties. In consociationalism this is an explicit aim because it tries to stabilize politics in deeply divided societies by fostering elite cooperation. These elites then have to be representative of their groups and thus have to get as many votes from these groups as possible. Territorial NSG also stimulates the emergence of minority parties, be it indirectly. As I will argue in chapter five, homeland federalism, which NSG

requires, provides the perfect conditions for regional minority parties to become strong parties. When there are strong regional parties the statewide party system is disintegrated. Yet, as I will argue, an integrated party system is key to federal stability. The great advantage of NCA, because it implements cantonal instead of homeland federalism, is that it avoids most of the incentives for minority parties to emerge. It thus scores much better in terms of federal stability. All equality-based arguments propose NSG and thus all of them encounter this feasibility constraint. Let me now turn to the additional problems that these author's equality-based arguments encounter.

TAMIR

As we saw above, Tamir argues that nations should have some form of equality in the political arrangements that give expression to or reflect cultures. As I noted above, 'political arrangement', 'expression' and 'reflect' are vague terms and this is problematic. It makes Tamir's theory vulnerable to two objections. First, her theory is potentially illiberal. Second, by proposing consociationalism she proposes a model that rests on a non-applicable feasibility constraint. Furthermore, it seems as if she has misunderstood consociationalism.

Tamir can be criticized for being illiberal. Kymlicka (2001: 251) points out that Tamir's argument is unclear. He asks whether, according to Tamir, it is good or bad that political units inevitably express the culture that forms the majority in the unit? Is it something that we should multiply by spreading it around and granting all nations the instruments to express their culture? Or is it something that we should try to limit? We can thus give two interpretations of Tamir. The first is a strong interpretation that sees this reflection or expression of the majority culture as something good. This position comes closest, of all three authors under discussion here, to traditional illiberal forms of nationalism. The second is a weak interpretation that sees this reflection as something bad. Kymlicka (2001: 252) condemns the strong interpretation as a mistake and questions whether liberals should promote the political expression of the national identity and endorse a view that sees states as having a cultural essence. Tamir's argument thus allows for an illiberal interpretation. She could go for the weak interpretation. But then she has to face the question of what determines the limits to the expression of culture. If she, as Kymlicka (2001: 251) suggests, says that these limits are determined by whether or not the expression is still necessary for the maintenance of the culture, then NCA is the better model. For, to mention just one advantage, NCA does not violate the federal stability constraint. It is thus questionable whether Tamir has a liberal equality-based argument that is strong enough.

Second, Tamir proposes consociationalism. As already noted, consociationalism rests on a non-applicable feasibility constraint. But let me first argue that Tamir has misunderstood this model[25]. She presents—and thus presumably conceives of—consociationalism as based on the cross-cutting cleavages idea. This idea says that "[w]hen individuals belong to a number of different organized or unorganized groups with diverse interests and outlooks, their attitudes will tend to be moderate as a result of psychological cross-pressures. Moreover, leaders of organizations with heterogeneous membership will be subject to the political cross-pressures of this situation and will also tend to assume moderate, middle of the road positions. Such moderation is essential to political stability". (Lijphart quoted by Tamir 1993: 155-156). This, however, mischaracterizes consociationalism, which was put forth in order to explain stability when cleavages do not cross-cut[26]. It proposes the opposite: keep minorities separate, give them separate political autonomy and representation, and promote elite cooperation. As such it is a model that is apt for less developed societies, like those emerging from a civil war. Tamir, however, proposes it as a future model for Europe. To be fair, Tamir (1993: 157) also quotes a famous critic of consociationalism: Brian Barry. Barry warns that "it is extremely difficult if not impossible" to turn a party system that articulates a communal cleavage into one in which it cross-cuts these cleavages (Barry quoted in Tamir 1993: 157). Tamir (1993: 157) then says: "Notwithstanding these problems, Barry claims he cannot offer 'an alternative panacea'", and she adds, "Nor can I", after which she points in a footnote to the work of Donald Horowitz—the main opponent of consociationalism. It is hard to rid oneself of the impression that Tamir has proposed a model that she herself does not fully understand. Let me just say that Barry does not have to offer an alternative panacea because he does not propose to implement consociationalism which stimulates parties to articulate communal cleavages. Party systems in culturally diverse countries are fragile things. They can easily split along cultural lines and this at best hampers the proper functioning of the democratic process and at worst ends in instability. Barry warns against implementing accommodations that cause the party system to split. Tamir proposes a type of accommodation, consociationalism, that aims to split the party system. I will explain the reason why consociationalism does so next.

25 Perhaps Tamir is not to blame for this mistake. Lijphart, the main proponent of consociationalism, is notoriously slippery in his use of concepts. See Lustick (1997), a scholar who counts himself among the followers of a stricter consociationalist theory (Lustick 1997: 99), for a critique of Lijphart's work in this regard.

26 In the Lijphart passage she quotes that I reproduced in the text, Lijphart is explaining Almond's typology of political regimes, which has a close connection with the overlapping memberships or crosscutting cleavage proposition of Bentley, Truman and Lipset. It is only later that the reason why Lijphart explains the overlapping membership proposition becomes clear. According to Lijphart (1977: 14) Almonds typology is good but it cannot explain the deviant cases of the smaller European Democracies like the Netherlands and Belgium. These countries may lack overlapping memberships but are still stable because of elite cooperation. Lijphart and his consociational model are known for putting elite cooperation on the map as a stabilizing factor. Consociationalism implies the opposite of crosscutting memberships: segmental autonomy.

What do I mean by consociationalism resting on a non-applicable feasibility constraint? I mean that consociationalism, or power sharing, is a model that applies to the context of deeply divided societies in which the levels of trust and security needed to make a developed liberal democracy work, are lacking[27]. Examples of such societies are Northern-Ireland and Bosnia-Herzegovina. Low levels of trust and security are what I called above an equivocal constraint. They constrain the ideal principles that can be implemented and the form the political system can take in such a context. Consociationalism is such a constrained political system. It aims to restore trust and security by keeping citizens to a large extent separate in highly autonomous groups and having the elites of these groups cooperate. This is not the ideal of a liberal democracy that we usually have in mind and it is the very opposite of the crosscutting cleavages idea. Moreover, we already know that this constraint does not apply in societies that are more developed: the levels of trust and security in developed societies are high enough to sustain non-consociational models. Nevertheless both Tamir and Kymlicka prescribe consociationalism for such highly developed societies. More specifically, two more ideal principles that consociationalism does not implement are identifiability (of which party is responsible for which policies) and accountability. There may be more. Lijphart (2008: 13) admits that consociationalism scores badly on these principles. It may be the case that Tamir wishes to make up for scoring worse on identifiability and accountability by scoring better on implementing the rights of minority cultures. The overall level of ideality of the resulting model may perhaps even be the same as a model that does not implement consociationalism and thus scores high on accountability and identifiability. However, then Tamir should be explicit about this. She should admit that she gives up on identifiability and accountability, and provide strong arguments that justify doing so. The more plausible interpretation is that Tamir has misunderstood consociationalism. Consociationalism should not be proposed lightly. Essentially, it implies back-room politics: shady deals, low levels of accountability, keeping the citizens out of the potentially inflammable business of politics. Lijphart (2008: 34) even goes as far as to call it, approvingly quoting David Easton, "a kind of voluntary *apartheid*".

The political arrangements that Tamir proposes to equalize are thus potentially illiberal and they incorrectly presuppose that certain feasibility constraints apply. If this is what her equality-based argument implies then this argument is not strong enough.

27 See McCulloch (2013) for an argument to this effect. McCulloch (2013: 125) identifies "the basic mistrust and insecurity that characterizes intergroup relations" as the factor that makes power-sharing models more apt for deeply divided societies. Lijphart seems to agree in general. Already back in 1977 Lijphart (1977: 1) said that the traditional consociationalist regimes like Belgium and the Netherlands were "now retreating from their high point of consociational development".

KYMLICKA

Kymlicka's equality-based argument said that the minority has a right to the same nation-building tools as the majority. These tools, i.e. language, education, migration and naturalization policies, drawing internal boundaries and dividing powers such that the minority has a federated subunit of its own are the institutions that make up NSG, for Kymlicka. Like Tamir, he proposes consociationalism, and this makes him vulnerable to the same criticism as the one given above. I will not repeat it here. I will instead discuss the critique of illiberal policies and a further dimension to the federal stability feasibility constraint.

Kymlicka can also be criticized for allowing for illiberal policies. Nation-building tools can be used for illiberal purposes. To quote Patten (2014: 5-6, 176), theories of minority rights like Kymlicka's are “too cozy” towards minority and majority nationalism. Kymlicka does say that there are liberal limits to the kinds of nation-building policies that can be allowed for. He precludes ethnic cleansing, stripping people of citizenship, violating human rights (Kymlicka 2002: 27), the coercive assimilation of immigrants, the exclusion of metics and the suppression of national minorities (Kymlicka 2002: 52). The question is, however, how to enforce these limits. Is the right to NSG conditional on not transgressing these limits? And if so, who will step in? Is a transgressing of these limits enough for the international community or perhaps the federal government to step in? Supposing Kymlicka answers all these questions positively, there is a further problem. Patten (2014: 32) rightly calls these limitations fairly minimal. Kymlicka, however, further qualifies what liberal nation-building policies are. Liberal forms of nation-building use an open definition of the national community, do not see the nation as a supreme value, have an inclusive, thin and cosmopolitan national identity, and so on (Kymlicka 2002: 54-58). However, here the enforcement question is even more pressing. The international community or federal government cannot step in when such a vague limit—as only imposing an open, thin, inclusive, etc. national identity—is not respected. As a consequence, it is impossible to ensure that nation-building policies will never become illiberal in the sense of imposing a closed, thick, exclusive national identity.

Obviously the same holds for the majority nation-building policies. But the question arises whether we should spread this evil. In the next chapter I will come back to this question. As I will explain there, I see majority nationalism as partly justified and largely unjustified. Majority nationalism or nation-building is justified when it is carried out for the right purposes, like increasing the quality of the democratic process, and the nation-building policy indeed attributes to that. These nation-building policies are justified because the goals they serve—deliberative democracy, solidarity,

equal opportunities—justify them. I will explain this argument in more detail below. Majority nationalism will often overstep what can be justified by these goals. For the reasons that were just given—the international community cannot step in whenever a vague limit has been transgressed—we cannot do otherwise but give states and thus national majorities the power to implement broad nation-building policies, for it is possible for them to have good consequences. The right way to proceed is to grant the majority the right to implement nation-building policies but to gradually make international standards of which nation-building policies are correct ever stricter so that, in the end, they only include the justified nation-building policies. We should not follow Kymlicka in spreading the evil of unjustified nation-building policies by giving the minority the same nation-building tools.

The main reason why we should not follow Kymlicka here is the following. His vagueness about the limits of minority nation-building tools gives an extra dimension to the federal stability feasibility constraint. Kymlicka underestimates the likelihood of groups pursuing a nationalist or secessionist agenda and he overestimates what can be done when that happens. The problem is that once a nation has been given nation-building tools, the more radical nationalist and secessionist factions of the minority nation are also handed very helpful tools of nationalism. As Kymlicka (2002: 28) recognizes, nationalist movements always consist of more and less radical factions. There is no guarantee that the less radical factions will win the internal power struggle. Nor is there a guarantee that the minority will listen to Kymlicka when he redefines the goal of nationalists from nation states to a multinational federation of self-governing peoples. Kymlicka seems to hope that some form of balanced end-result will evolve out of the interplay between majority and minority, each with its own nation-building tools. He repeatedly speaks of a dialectic between nation-building policies and minority rights (Kymlicka 2001: 1-2; 2002: 21-52). Presumably some sort of stable result—an *Aufhebung,* if you will—is to come out of this dialectic. But what guarantee do we have that there is such a balanced endpoint to the interplay between nation-building and minority rights? What prevents this interplay from spiraling out of control?

Kymlicka has overlooked how much federal stability depends on not augmenting the points of conflict amongst different federated subunits and between these subunits and the center. As I have said above, one of the key explanatory factors of federal instability is the fact that a federal constitution is a distributive bargain. Different federal institutions—like, most obviously, the presence or absence of regional redistributions, but also institutions like the form of the federal chamber, the power of the presidency, etc.—imply different costs and benefits and different relations of power for the different federated subunits. There is not much that can prevent

politicians from challenging a redistribution in favor of their home region or subunit (an integrated party system is one of the few things). By saying that national minorities have a right to the tools of nation-building and by not being clear about what may be done with these tools, Kymlicka has added a whole new dimension to things that are being redistributed. The new dimension consists of the nation-building policies that Kymlicka gives to the minority's federated subunit. Thus this dimension consists of all policies that have an effect on people affiliating with a culture. For Kymlicka, which nation-building policies the minority should have depends to some extent on the nation-building policies that the majority implements. Furthermore, as we saw above, Kymlicka is not clear about which majority nation-building policies are justified. Thus, instead of a stable end-result the above described dialectic may equally well end up in constitutional horse-trading with the nation-building policies being the horse. What is to stop a minority politician from saying that his region has a right to this or that change of policy, arrangement or redistribution because a majority nation-building policy has this or that negative effect on his culture? And, supposing that the minority politician did not strike the right balance, what is to prevent a majority politician, incited by the minority politician's demands, from answering in kind and demanding a change in policy, arrangement or redistribution of her own? This dynamic is detrimental to federal stability.

Kymlicka's equality-based argument thus can be criticized for demanding an infeasible institution and for handing out potentially illiberal nation-building policies. Thus, this equality-based argument is also not very strong.

PATTEN

As the title of his book suggests, Patten believes minority nations have a right to equal recognition. The problem with Patten's theory is that it does not allow for any kind of nation-building policies. These policies are, however, sometimes demanded by strong liberal nationalist arguments. I first explain the liberal nationalist nation-building arguments. Then I explain Patten's rejection of those arguments.

There are two strands in the school of liberal nationalism: one favoring minority nations (represented by Kymlicka), the other favoring majority nations (represented by David Miller). Both strands agree on the need to implement nation-building policies. The liberal nationalist arguments for nation-building say that citizens need to share national identity or a sense of nationhood and a language—in short a national culture—for the state to function well. Miller (1995: 90-99; 2000: ch.

4) has given the standard formulation of this argument. Kymlicka endorses it (Kymlicka and Straehle 2001: 224-227). According to liberal nationalists, a shared language will promote the quality of deliberation in the state's democratic sphere and give citizens adequate socio-economic opportunities. The shared national identity promotes trust amongst its citizens which encourages them to accept a democratic process that temporarily puts them out of office; ensures them that the groups in power will respect their (vital) interests; and ensures them that other citizens are genuinely willing to consider their opinions and interests. The shared national identity also increases levels of solidarity that allow for the higher levels of redistribution needed to maintain a welfare state. In short, these arguments say that in order for key institutions of a liberal democracy, like its democratic process, labor market and welfare institutions, to function well, the state needs to be a nation state. Liberal nationalists conclude that it is justified to bring about a greater congruence between the political unit and the cultural unit in order to get nation states or relatively homogeneous federated subunits, so that these institutions can function well. The government can bring about greater congruence between the political and the cultural unit by implementing all kinds of nation-building policies. Examples of such policies are imposing a single language of communication on society, requiring all students to study a certain curriculum, adopting national holidays and symbols (see Norman 2006: 43-49 for an extensive list).

Patten struggles with the liberal nationalist argument for nation-building policies. One of the most desirable nation-building policies is adopting a single language in one state. However, Patten cannot endorse such a policy because it would obviously go against equally recognizing all cultures (Patten 2001: 292). In answer to this conflict he tries to make the liberal nationalist argument on language and deliberative democracy less plausible. Patten (2014: 205) says that “for reasons having to do with scale, and with the limited amount of leisure time that citizens have for deliberation”, most deliberative democrats would not advocate a common language in which to deliberate. He points at the possibility of mediators, translators and personal bilingualism (Patten 2014: 206). This counter-argument to the strong liberal nationalist for a common language in which to deliberate, remains wanting. Compare it to Van Parijs's “grab the megaphone” strategy (Van Parijs 2011: 34). As Van Parijs argues, for democratic reasons, it is highly desirable to adopt a single language of communication. It seems to me that Patten has overlooked just how desirable this is.

Patten (2014: 206) then goes on to say that he cannot consider in detail each of the liberal nationalists’ arguments and he limits himself to the one on adequate socio-economic opportunities. This argument says that teaching all children a single standardized language is justified because it gives them access to the job market that functions in that language. Patten has an answer to this

argument: he allows minorities to organize their own labour market in their own federated subunit. Something should be noted about this argument, however. It is the only one of the liberal nationalist arguments that leaves the overarching state out of consideration. As explained above, the overarching state plausibly needs trust and a common language for the proper functioning of welfare and democratic institutions on the federal level. The labour market can indeed be organized by the minority nation on its own without much interference from the overarching state. In other words, the liberal nationalist argument on adequate opportunities is the one example of a liberal nationalist argument that can indeed be applied equally to minority and majority nations. In this, however, it is the exception among the liberal nationalist arguments. Patten's focus on the adequate opportunities argument, together with his comments on deliberative democracy, betray his struggle with giving liberal nationalist arguments their due place. There are thus also problems with Patten's equality-based argument.

Patten could object that he does leave room for the nation-building policies. Patten does acknowledge nation-building policies in a negative way. He defends a hybrid theory and a context-dependent pro tanto right to equal recognition (Patten 2014: 24-27). This allows him to sneak nation-building policies back in through the back door. There is something odd about this strategy, though. As we saw in the previous section, Patten argues that the dynamic of market failure does not entail a major qualification of his own theory of equal recognition. This seems to be the reason why Patten cannot endorse nation-building policies directly. In order for his overall theory to be consistent and based on the value of state neutrality he has to be able to plausibly say that it is no problem of justice when a small minority’s language declines. He has to be able to say that the state is not implicated. If he would positively endorse nation-building policies then that is impossible. Here his recourse to a hybrid theory and pro tanto rights seems somewhat disingenuous, though. It seems as if Patten is trying to avoid taking responsibility for the implementation of nation-building policies while at the same time he does not want to argue directly against the strong liberal nationalist arguments. Patten should state clearly whether states are justified in implementing nation-building policies or not. If they are not, then his theory implies a major change to the current organization of states. Most of them rely to a large extent on the cultural heritage of one titular majority nation and for them to stop doing so has far-reaching and perhaps wholly undesirable consequences. As it stands now, Patten can, on the one hand, conveniently allow for nation-building policies under the pretext that it is a side constraint to his right to equal recognition and, on the other, argue against language preservation policies by claiming that it is not a problem of justice when a language disappears under favorable conditions.

This, I believe, is a major problem in Patten's theory. If this argument bites then Patten's equality-based argument cannot stand on its own. If so, then none of these equality-based arguments are strong enough to either stand on their own or justify not granting small minorities cultural maintenance and not granting people a right to access to their culture. If that is correct, then NCA is the better model on account of it better satisfying the value of cultural maintenance.

4. Summary and outline of the dissertation

Although the chapters that follow range over very different topics—ideal and non-ideal theory, group rights, democratic theory and federalism studies—it should be clear from this introductory chapter that they are strongly interdependent. Let me briefly say what I will do in each chapter.

My argument largely relies on a specific conception of ideal and non-ideal theory. Three arguments that were made in this introductory chapter apply certainly on the non-ideal level and might apply on more ideal levels (we cannot know for sure): the one that argues that consociationalism rests on a non-applicable feasibility constraint; the one that argues that NSG violates the federal stability constraint; and the one that argues that the instrumental and the equality-based arguments are in conflict. I believe that we do know with the required degree of certainty that the other arguments apply on the ideal level: the cultural maintenance argument; the argument that the cultures of small minorities need to be maintained; the argument that people have a right to access to their culture. In other words with the latter arguments I respond directly to Tamir, Kymlicka and Patten, for they are also doing ideal theory. In chapter three I will explain the account of strong language right that also applies to circumstances with a high level of ideality. In chapter four and five I will be doing non-ideal theory. I will criticize Tamir and Kymlicka for proposing a model that is too ideal in chapter four. I will criticize all three authors for proposing infeasible institutions in chapter five.

In chapter two I develop the account of ideal and non-ideal theory that allows me to consistently switch between levels of ideality. Thus I will develop an account of ideal and non-ideal theory that sees the relation between both kinds of theory as complementary and dynamic. This account is based on a certain type of feasibility constraints that I call equivocal constraints. Basically I argue that we need to take seriously, and incorporate explicitly into our theories, complex feasibility constraints that are highly dependent on empirical premises. These constraints may not be normative principles but they nevertheless do a lot of work in normative arguments. The relevance for the topic at hand is that national identity is such an equivocal constraint. I will argue that, when

it comes to non-constitutional-essentials it is impossible to do ideal theory as it is usually conceived. The difficulties with the equality-based arguments that I pointed out above are a case in point. There are reasons to doubt the validity of these arguments. As there are always reasons to doubt the validity of any argument about non-constitutional-essentials on the level of ideal theory. Thus, I limit myself to prescribing NCA.

In chapter three I develop my account of language rights. I will argue that liberals should endorse a specific kind of group right in the case of a specific kind of good, namely one type of participatory good: integrated minority languages. These languages are a type of public good that encounter the problem of market failure described above. The importance of this account of language rights should have become clear from the discussion in sections two and three above. The maintenance argument explained in section two, which demands non-territorial accommodations, depends on the fact that one can maintain languages without territorializing. Furthermore, as explained in section three, this account is important for my argument against NSG in general. If I cannot make a strong case that languages and thus nations can be maintained in a non-territorial way, then my argument against NSG collapses. For I have argued that all three proponents of NSG discussed here make use of instrumental arguments. I argued that this is a weakness in the arguments for NSG because the instrumental argument conflicts with their equality-based arguments. But this only holds if I can make the claim that NCA does at least as good a job as NSG at maintaining languages. In chapter three I develop the account of language group rights that can do so.

In chapter four I argue against the idea that national minorities, because of their minority status in a democracy, have rights to accommodations. I will do so relying on what I call Schumpeter's equivocal constraint. Schumpeter held a pessimistic view on democracy partly because he thought citizens are not well-informed enough. My account of equivocal constraints allows me to endorse Schumpeter's argument to the extent that it is plausible. I argue that Schumpeter’s constraint, for now, plausibly backs up the one-person-one-vote interpretation of political equality. This implies that the social choice literature on democracy has normative implications in the sense that we should use it when we do non-ideal theory. Drawing on a social choice analysis by Barry and Nicholas Miller, I will argue that national minorities are not permanent minorities and are thus not entitled to extra forms of group representation because of their minority status in a democracy. This argument is intended to show that Tamir’s and Kymlicka’s equality-based arguments are not strong.

In chapter five I explain what I consider to be the strongest feasibility constraint against NSG. This is the federal stability equivocal constraint. This argument has already been spelled out above and I

will not repeat it here. The federal stability constraint has implications that strike at the heart of the arguments for NSG. As I argued above, an important option—combining NSG and NCA—becomes impossible because of this constraint. Strong language rights can only be implemented when one takes precautions against the emergence of minority parties. We thus have to choose: do we take the non-territorial path to maintaining nations or the territorial path? The federal stability constraint, as I will argue, says we should take the non-territorial path. Furthermore the federal stability constraint further weakens the equality-based arguments. It does so because it tells against the prescription of homeland federalism, which is implied by NSG. NCA implements cantonal federalism and thus stays clear of the federal stability constraint.

NCA is thus the model of minority nation accommodation that can maintain nations without causing federal instability. Those critical of the tools needed in order to maintain minority nations—authors like Barry and Hardin—have an important reason less to be critical in the case of NCA. As already mentioned, paradoxically, not giving minority nations the tools to maintain themselves gives the best tool of nationalism to minority nationalist politicians to pursue their nationalist agenda. It then becomes possible for them to present themselves as the much needed defenders of minority rights, to present the state as an assimilationist foreign power and to suck all minority support from statewide parties. This is the phenomenon that Renner and Bauer experienced over a century ago. It is time to give their proposals the attention they deserve.

Chapter Two: Feasibility Constraints: Hard, Soft, and Equivocal

Introduction

In this chapter I mainly develop an account of ideal and non-ideal theory. This account is based on a specific kind of feasibility constraint which I shall call “equivocal constraints”. For now it suffices to know that equivocal constraints are constraints of which we do not know whether we can ever remove them and of which the range of applicability can change. Many arguments in political philosophy, theory or science appeal to equivocal constraints. Whenever an argument is based on the notion of stability, as many arguments in political science are, an equivocal constraint, often the same one, is being referred to. As these constraints figure in the political science literature, they play a prominent role in many complex and elaborate arguments, often taking up whole books, with many empirical premises and ending in the conclusion that this or that institution will, with a certain level of probability, engender instability. Sartori's *Parties and Party Systems* (2005) is the perfect example. It details how proportional systems that allow for too many parties may end up being unstable and thus constrains the ideal principles of proportionality in the assembly and political equality. These arguments are not finished. Political scientists continue to refine them. Yet ignoring them when we prescribe institutions would be foolish, for it means that we unduly risk instability. It is better to take them into account and build an adaptable theory that can easily incorporate new findings from political science. The concept of equivocal constraints allows us to do so. Key to determining whether an equivocal constraint plausibly applies is determining the range of applicability of particular constraints and so to incorporate new findings from political science. The empirical premises determine the applicability of equivocal constraints.

We have already encountered two equivocal constraints in the previous chapter: the information constraint and the lacking trust and security constraint. In this chapter I explain one more equivocal constraints in detail: the identity constraint. In the fourth chapter we will discuss yet another: Schumpeter's constraint on democracy. The argument from the fifth chapter refers to two more equivocal constraints: the constitutional constraint and the closely related federal stability constraint.

In the next section I develop my account of equivocal constraints. In the second section I argue that identity, of which national identity is a subcategory, as it figures in the liberal nationalist arguments

for nation-building, is an equivocal constraint. This establishes the importance of equivocal constraints for multiculturalism. Many issues in the literature on multiculturalism, not least that of minority nation accommodation, start from the claim that majority nation-building is wrong. I agree, but only partially. I will argue that, for all we know, there is a just core to nation-building arguments. This implies that we need to allow majorities to implement nation-building policies. But at the same time we need to scrutinize the liberal nationalist arguments for nation-building, denounce them when they are wrong and, step by step, decrease the state's reliance on elements of the majority culture. As I will argue, this prescription is demanded if we see identity as an equivocal constraint.

In the third section I will start by pointing out, as I did in the preface, that the question, What are national minorities owed as a matter of justice?, is ambiguous as to the level of ideality assumed. Are we asking what they are owed here and now or are we asking what they are owed in a distant future and thus on a high level of ideality? In this section I will also argue that it is impossible to do high-level ideal theory about national minority accommodation. That is so because of the identity constraint and the fact that the reforms that are demanded by equivocal constraints branch out.

1. Ideal theory, non-ideal theory and feasibility constraints

In this section I explain my account of ideal theory, non-ideal theory and feasibility constraints. In the first subsection I explain equivocal feasibility constraints. In the second subsection I argue how we should normatively respond to these constraints.

But first I need to distinguish three categories of normative theory: theory of ideals, ideal theory and non-ideal theory. The reason for this threefold distinction is a division of labor. I follow Hamlin and Stemplowska (2012) in distinguishing between ideal theory and theory of ideals. It is important to think about the principles of justice in a pure way without taking any feasibility constraints into account. That is what the theory of ideals does. I conceive of different levels of ideal theory. The more highly ideal a theory is, the fewer the feasibility constraints that it takes into account. The highest level of ideal theory only takes those constraints into account that are very likely to apply forever (I will call such constraints hard constraints and equivocal constraints with a high probability of being hard ones). The less ideal, the more feasibility constraints (thus also what I call below soft and equivocal constraints that are likely to be soft) it takes into account. The work that ideal theory does—by “work” I mean here the part of labor in the division of labor of normative

theory—is to know which normative principles guide us. This is also the aim of ideal theory. This aim differentiates ideal theory from non-ideal theory. The aim of non-ideal theory is to know which institutions to prescribe. Given that it aims to prescribe institutions, the kind of prescribing it does is political prescribing. A political prescription is a claim that something, x, ought to be done, where that claim presupposes the claim that x can be done within existing institutional structures. Once one counterfactually assumes a more ideal context of institutions that cannot be brought about in the very near future, then one is doing ideal theory[28]. What non-ideal and ideal theory do is very similar. Both weigh principles and feasibility constraints against each-other. Ideal theory, however, does so without the aim of prescribing institutions within existing institutional structures. Non-ideal theory does aim to have prescriptive implications. This aim has implications for the structure of the theory. In general one can say that whereas non-ideal theory starts from the existing institutions and feasibility constraints, ideal theory starts from the principles. Even though the same rules apply to both types of theorizing, the different aim nevertheless causes them to be different. Thus I call non-ideal theory prescriptive theory. Since it prescribes institutions it should take all feasibility constraints into account. The boundary between ideal and non-ideal theory is defined by a feasibility frontier, which will be explained below.

Let me briefly situate the account of ideal and non-ideal theory that I will develop here. I will assume the complementary view of the relation between ideal and non-ideal theory. Gilabert and Lawford-Smith (2012: 819) oppose their complementary view to the substitution view. The complementary view says that ideal theory should be complemented by non-ideal theory. Both Gilabert and Lawford-Smith defend this view and so does Valentini (2009). Also Simmons (2010) endorses this view and he argues that Rawls held it too. The substitution view argues that we should substitute ideal theory with non-ideal theory. Amartya Sen is the most famous proponent of this view. David Wiens, whose work on the feasibility frontier I will use below, is another proponent. The substitution view focuses on prescribing institutions and argues that in order to do so, we should drop appeals to ideal principles. A difficulty for any complementary view is to give principles that are very ideal,[29] but that still have some role in prescribing, their rightful place. This will often be a very minimal role. My account of equivocal constraints, which I turn to next, explains why that role is minimal. Ideal principles will often be blocked by equivocal constraints.

28 By this "very near future" I mean that the duty to implement this institution falls within Wiens's feasibility frontier, which I explain below. Ideal theory can also be seen as prescriptive theory in the more general sense in which 'prescriptive theory' is the opposite of 'descriptive' theory. However, it does not only make claims about what can be done within existing institutional structures. In that sense it is not prescriptive theory.

29 Like G.A. Cohen's fact-insensitive fundamental principles of justice (Cohen 2003).

1.1. Equivocal constraints

There are three kinds of feasibility constraints: soft, equivocal and hard constraints. The distinction between soft and hard constraints (see Gilabert and Lawford-Smith 2012) has become accepted in the debate on ideal and non-ideal theory[30]. Hard constraints are logical or nomological impossibilities like jumping over the moon or taking one thousand hard decisions in a day. As Gilabert and Lawford-Smith (2012: 813) note, hard constraints are timeless and will thus always be feasibility constraints. Soft constraints are historically contingent. According to Gilabert and Lawford-Smith (2012: 813) they include economic, institutional and cultural constraints. As an example of an important soft constraint, Gilabert (2009) points at the fact that it is now impossible to guarantee the protection of socio-economic human rights for all people. This situation might and should be changed in the future by setting up an international organization that can be held responsible for the protection of these rights. When this organization exists, this feasibility constraint is removed. Because it can be removed this constraint is a soft constraint.

Gilabert and Lawford-Smith (2012: 813) note that it is not clear whether psychological and motivational constraints are hard or soft constraints. This unclarity, in my opinion, generates a new category, which I shall call that of "equivocal constraints". Equivocal constraints are those constraints of which we do not know whether they are timeless or historically contingent, we do not know whether they are hard or soft constraints. Many arguments in political theory refer to such equivocal constraints. There is, however, a relatively small number of species of them, some twenty-odd. These constraints are often reinterpreted and reformulated. As stated above, whenever political scientists speak of stability, they are giving an interpretation of one constraint: the stability constraint. In chapter five I will provide such a reformulation of the stability constraint in order to apply it to the context of multinational federalism. As I will argue in a moment, the feasibility constraint that has been discussed most in the debate on ideal and non-ideal theory, Rawls's motivational constraint, is an equivocal constraint. My argument will be that it is important to recognize these equivocal constraints as a separate category, for they imply a particular kind of normative response that is distinct from those appropriate to hard and soft constraints.

Soft and equivocal constraints are both malleable constraints[31]. Malleable constraints are feasibility constraints whose range of applicability changes. As I have said, equivocal constraints rely on elaborate arguments with many empirical premises and thus depend on many circumstances being

30 Also Wiens (2015: 449-450) uses the distinction.

31 Miller's fact-dependent political principles come close to recognizing malleable constraints (Miller 2008). But it is only in 2012 that Pablo Gilabert and Holly Lawford-Smith (2012) developed an elaborate account of malleable feasibility constraints.

present. These constraints can thus be more or less applicable depending on the presence of these circumstances. We can also alter many of the circumstances that determine the applicability of an equivocal constraint. We can implement reforms and thus create circumstances so that the constraint is pushed back or, in other words, leaves more room for the implementation of some principle. To return to Gilabert's example of the constraint on socio-economic human rights, we can set up an organization that can protect such rights and thus change the situation so that it becomes possible to implement the principle that was previously blocked. Circumstances can thus not only change from society to society but also from historical period to historical period. This implies that an equivocal constraint might now block some principle but the same constraint might not block that principle in the future. This is what it means for a feasibility constraint to be malleable. The difference between a soft and an equivocal constraint is that the former is so malleable that it can be completely removed. Equivocal constraints, on the contrary, as long as they remain equivocal rather than turning out to be soft constraints, cannot be removed. Their effects can only be mitigated.

By mitigating an equivocal constraint I mean reducing the range of applicability of the constraint without removing it. The range of applicability consists of all cases to which the constraint applies and a case here is the proposal of implementing a certain institution in response to what a normative principle demands. A constraint then applies to a case when it tells against the implementation of that institution. The range of applicability is given by the empirical premises in the complex political science arguments. These premises spell out the conditions for the dynamic that the argument describes to take place. This dynamic can be seen as the core dynamic behind an equivocal constraint. For example, as we will see in chapter five, under certain empirical circumstances, such as not being a member of an integrated party and being the politician of a federated subunits that has much to gain from changing the federal constitution, federated level politicians will too often initiate federal re-bargaining. The consequence, as we will see is federal instability. Thus in a federation where these empirical circumstances do not apply, this dynamic will not occur and the federal stability constraint does not apply. We can change many of these circumstances. We can for example design federations such that the party system remains integrated. Now it may be possible that a federated subunit may stand to gain quite a lot from federal re-bargaining without federated politicians from the integrated party being prepared to initiate federal re-bargaining. Thus there were many cases to which the federal stability constraint applied before our federal design that ensured party system integration. After ensuring party system disintegration the federal stability constraint will no longer apply to some of these cases. Now, because of the design that ensures party system integration, a normative principle, such as interregional redistribution, can be implemented. Without this design some federated subunit, a rich

one like Bavaria, stands to gain too much from federal re-bargaining so that the federal constitution would be unstable if interregional redistribution were implemented. With this federal design and thus an integrated party system Bavaria might accept without initiating re-bargaining, the interregional redistribution. In other words, the range of applicability of the federal stability constraint has been reduced. The constraint has been mitigated.

The above categorization of equivocal constraints implies that Rawls's motivational constraint is an equivocal one. This constraint says that the more talented need economic incentives to be more productive. It is an equivocal constraint because we do not know whether this motivational constraint is timeless or historically contingent. Because of the criterion that the parties in the original position need to be able to commit to the principles they chose,[32] Rawls (2005: 158) argues that "there is no objection to resting the choice of first principles upon the general facts of economics and psychology". G. A. Cohen (2003: 235-236) criticized Rawls's position, taking a more ideal point of view and denouncing Rawls's difference principle as a principle of regulation, not a fundamental principle of justice. For Cohen, fundamental principles of justice, as opposed to principles of regulation, cannot be altered by facts or feasibility constraints, such as general facts of economics and psychology. Thereby he destroyed the cozy consensus about the relationship between ideal and non-ideal theory that existed in political philosophy.

The account of equivocal constraints proposed here aims to capture part of Cohen's critique[33]. The part that I take over is the aim of avoiding to base ideal principle on adaptive preferences (see also Cohen 1991) or historical contingencies. Interpreted as such, Cohen's critique of Rawls, or at least part of it, can be put another way: Cohen criticizes Rawls for treating an equivocal constraint as a hard constraint. I believe it is important to keep equivocal constraints equivocal, not to treat them as hard constraints. Political philosophers should never just accept a feasibility constraint. We should ask whether it is a hard constraint or not and if we are not sure that it is a hard constraint, then we should seek ways to remove the constraint, if we think it is a soft one, or mitigate its effects, if we think it is an equivocal one. We should always look for ways to mitigate equivocal constraints. How far we should go in mitigating them is another question to which I will return below.

As will become clear at the end of the next section, in another way my position is also close to the

32 See Rawls (2005: 175-183) for his view on the strains of commitment.

33 Cohen (2003: 243) went so far as to say that the "question for political philosophy is not what we should do but what we should think, even when what we should think makes no practical difference". Many scholars have dismissed this position as too extreme and it does not fit with the account of equivocal constraints proposed here. Cohen's critique does not necessarily imply this extreme position though. Gilabert (2011) salvages much of Cohen's critique without implying Cohen's own radical position.

more realistic variants of political philosophy that focus on non-ideal theory. Judgments about which institutions to prescribe for the contemporary world should take into account considerations about normative ideals but also all feasibility constraints. This is what it means to endorse the complementary view of the relation between ideal and non-ideal theory. The account of equivocal constraints is designed to fit such a complementary view. Equivocal constraints are those constraints that limit our possibilities here and now and that continue to do so up to the point at which they are mitigated and allow an ideal to be realized. Equivocal constraints thus span ideal and non-ideal theory. On the level of non-ideal theory we have to take all feasibility constraints into account, including equivocal constraints. On the level of ideal theory, all hard constraints, some equivocal constraints, but no soft constraints, will constrain our principles. Equivocal constraints are thus the building blocks of a complementary and dynamic view of the relation between ideal and non-ideal theory. They are necessarily part of non-ideal theory. But we can also counterfactually assume them away and assess how likely it is that they will be mitigated when doing (low-level) ideal theory.

Normative political philosophy, or at least the branch that does this kind of dynamic and complementary ideal non-ideal theory, might seem over-stretched in keeping ideal principles ideal while also prescribing institutions, partly based on ideal principles, for a non-ideal reality. But this source of theoretical difficulty is inevitable. There are, nevertheless, areas of political philosophy that are less affected by equivocal constraints than others. The realization of constitutional essentials like a bill of rights is largely free of equivocal constraints. There are simply few feasibility constraints, soft or equivocal, on rendering constitutional essentials effective[34]. There is little that can make infeasible the adoption of a rule that says that the state should not do this or that. In short, there are few constraints on restricting[35]. The case is different with parts of our theory of justice that demand the performance of some action. Such actions may not be possible (yet), as in the case of Gilabert's recognition of human socio-economic rights. Constitutional essentials often are restrictive in nature. Other areas of political philosophy like multiculturalism, global justice and democratic theory are bordered by many equivocal constraints[36]. In these areas another kind of

34 Libertarians might disagree with this statement. I do not think that it is easy to realize constitutional essentials. But this is so mainly because installing and upholding a constitution is not easy. Once a constitution is firmly in place—and we know that this is possible and thus not blocked by feasibility constraints—there are few feasibility constraints on constitutional essentials, at least when they are negative rights. As stated in the text, in liberal democracies it is not hard to restrict the actions a state can take. At least it is much easier than implementing a somewhat demanding theory of global justice.

35 In a way I thus follow Brian Barry in limiting the realm of justice, as it is traditionally conceived, to the constitutional essentials (Barry 2002: 144-145). Barry's criterion for deciding whether something is a matter of justice is asking whether it can be reasonably rejected (Barry 2002: 67). Different ways of mitigating an equivocal constraint can be reasonably rejected so they cannot belong to the realm of justice on Barry's view.

36 Beitz would agree that the possibilities of democratic theory are limited by feasibility constraints. Beitz (1989: 125, 185) recognizes the importance of feasibility constraints for democratic theory but he argues that they leave room for variation in which ideal principles can operate. Patten too believes that multiculturalism, or at least that part that deals with national minorities, is bordered by feasibility constraints. He gives a list of circumstances in

theory is required – one that is much more inductive and sensitive to detail.

1.2. Mitigating equivocal constraints

In this section I will show that in order to acknowledge an equivocal constraint one needs a specific type of duty with which to respond to this constraint. The duty I have in mind is what I call a dynamic duty to mitigate that prescribes actions that fall within the feasibility frontier, or for short, a 'duty to mitigate'. This duty helps us steer a course between cynical realism and utopianism or unfeasible proposals. This duty has to do two things. First, it is a dynamic duty in the sense that its fulfilment involves the attempt to reform the circumstances that make the constraint apply to a certain case. Second, these reforms have to stay inside a feasibility frontier. Without such a duty to mitigate one cannot acknowledge equivocal constraints and at the same time keep the right balance between realism and utopianism. The alternative to acknowledging these constraints is neglecting them. Thus, the fact that these two aspects of the duty to mitigate are new also gives two reasons why equivocal constraints have been neglected.

The first aspect of the duty to mitigate is that it is a dynamic duty. Dynamic duties are assigned in response to malleable constraints like soft and equivocal ones. A constraint being malleable is the first reason why it is often neglected. Talking only about the category of soft constraints, Gilabert and Lawford-Smith give this reason why theorists have neglected malleable feasibility constraints: "Why include soft constraints in an account of feasibility when they are malleable? Some might say that including them risks a cynical realism capitulating to injustices that could be superseded". (Gilabert and Lawford-Smith 2012: 815) Why is malleability a reason for neglecting a constraint? Malleable constraints do not make the performance of an action impossible, as hard constraints do. They make it impossible to perform the action here and now. Yet, the performance of this action is not a trivial affair; it may lead to a very desirable state of affairs and is thus a potential duty. This explains why including malleable constraints is somewhat odd: we run the risk of cynical realism in the face of an action the performance of which might be a duty and might be possible, albeit not at present. The risk is that we let people of the hook too soon.

Neglecting malleable constraints because we run the risk of cynical realism is wrong, though. When we assign a duty to perform a certain action here and now, it does not matter whether performing an action might one day be possible. What matters, obviously, is whether performing the action now is

which states are not required to extend certain forms of recognition which includes threats to peace and security, overly consuming resources, etc. (Patten 2014: 26).

possible. As Gilabert and Lawford-Smith (2012: 815) put it, not including malleable constraints will lead to "impotent idealism" and "irresponsible risk taking". What we need to do in order to avoid cynical realism is not to ignore the malleable constraint, but to acknowledge that it is malleable (Gilabert and Lawford-Smith 2012: 815). The way to do so is by assigning dynamic duties. Gilabert (2017: 119) gives the most elaborate account of dynamic duties. Dynamic duties are duties to reform a situation, so that performing the action, which is now impossible, becomes possible. We do not let people off the hook when assigning a dynamic duty. The duty to perform an action that is impossible now because of a soft or equivocal constraint is transformed into a duty to perform another action, a reform that creates a situation in which the first action can be performed. By allowing for dynamic duties one can thus avoid both cynical realism and making unfeasible proposals.

The reasoning of Gilabert and Lawford-Smith that we should include malleable constraints in our account of feasibility, and that we should respond with dynamic duties, applies to equivocal constraints as well as to soft constraints. We do not know whether an equivocal constraint is removable, whether it is a hard constraint or not, but that does not matter. What matters is that it is a malleable constraint. Its applicability varies and the constraint can be pushed back allowing for the implementation of more ideal principles. Whereas in the case of soft constraints we can remove them and thus assign a duty to remove the constraint, in the case of equivocal constraints we can mitigate them and thus assign a duty to do so[37]. It could for example be the case that the most effective way of ensuring that a rich federated subunit shows solidarity with a poorer one is by designing federations such that the party system remains integrated. Suppose that there is a normative principle that says that solidarity between federated subunits is a good thing. Suppose further that interregional redistributions are made infeasible by the federal stability constraint. Implementing them would lead to the much less desirable collapse of the federation. Finally, suppose that federal stability can be made more robust, allowing for interregional redistributions, by designing federations such that the party system remains integrated. Thus the normative principle that demands that interregional redistribution would—in an unstable federation in which this duty is blocked by the federal stability constraint—generate the dynamic duty to design federations such that the party system remains integrated. This design of federalism results in a change in circumstances that makes the federal stability constraint not apply to interregional redistribution. Mitigating a constraint thus means implementing reforms that create circumstances that make the

37 Notice how the expected benefits of mitigating an equivocal constraint may be higher than those benefits of removing a soft constraint. It is the degree of malleability that counts for the assignment of dynamic duties. Mitigating an equivocal constraint that is very malleable, that with some mitigation might leave much more room for an ideal principle, might generate more benefits than removing a soft constraint that is not so important, that does not block a very important ideal principle.

equivocal constraint less applicable.

The second aspect of the duty to mitigate is that the reforms it implies are located inside a feasibility frontier. This moves the account offered here in the direction of realism and the substitution view of ideal and non-ideal theory. More specifically it brings us to David Wiens's (2015) account of feasibility, which is in accordance with the substitution view[38].

Wiens (2015) contrasts his account of feasibility, which he calls the restricted possibility account, with Gilabert and Lawford-Smith's account, which he calls the conditional probability account. The point of the latter account is to allow for the notion of scalar feasibility (see also Lawford-Smith 2013). Scalar feasibility contrasts with binary feasibility (Gilabert and Lawford-Smith 2012: 815). Binary feasibility is determined by hard constraints. Whenever a theory violates a hard constraint the theory can clearly be called infeasible. The only thing that binary feasibility says about theories that do not violate hard constraints is that they are feasible. Either a theory is feasible or it is not, hence the kind of feasibility here is binary. Gilabert and Lawford-Smith want to capture a notion of feasibility that binary feasibility fails to cover. The notion they want to capture is the one we use when we say of two theories that do not violate hard constraints that one is *more* feasible than the other. Hence these authors develop the account of soft constraints and the related concept of scalar feasibility. Scalar feasibility depends on malleable constraints and it can rank theories from more to less feasible in the sense of violating more or less malleable constraints.

According to Wiens (2015: 450-451) Gilabert and Lawford-Smith's account generates too few feasibility constraints, or, to put it the other way around, it sees too many actions as feasible. Wiens (2015: 450) argues that our notion of feasibility should also consider economic or political soft constraints to be hard constraints when removing them would, though possible, not be feasible because of an overload of desirable states of affairs to achieve and too few resources. One of the examples Wiens (2015: 450) gives is that of an Indian civil servant saying that it is not feasible to take certain actions against climate change because that would put severe constraints on India's economic growth. In order to grasp this notion of infeasibility that stems from limited resources, Wiens (2015: 452-453) adopts the concept of a production possibility frontier from economics and extends it to an all-purpose production possibility frontier so that it includes all purpose resources

38 I remain committed to the complementary view though. In the same way that Cohen criticized Rawls for absolving a duty to mitigate the motivational constraint, I would criticize anyone who absolves a duty to mitigate any other equivocal constraints. As soon as we have a reason to think that a constraint might be a malleable one, we have a duty to reform or mitigate. What the content of this duty is, is another question. Given that we have many other duties, or many of our resources are going to promoting more desirable states of affairs directly, or the chances of effective mitigation are very low, this duty to mitigate is not very strong. Wiens's account of feasibility helps to explain the content of the duty to mitigate.

like technological, institutional, motivational, etc. and is applicable to politics[39]. He (Wiens 2015: 456) thus constructs an all-purpose production possibility frontier or a feasibility frontier. This allows him to narrow down the actions that Gilabert and Lawford-Smith would consider to be feasible. Wiens can now say, as he wants to, that more actions are infeasible. Those infeasible actions are actions (or reforms like removals or mitigations of constraints) that are possible to perform but that are infeasible because performing them would make it impossible to perform other actions (or reforms) that are equally feasible but whose results would be more desirable. If we want normative theory to be able to prescribe institutions for our contemporary societies, then we need to acknowledge Wiens's feasibility frontier. Even though some malleable feasibility constraint may be removable in the end, we may not have the recourses now to do so. Prescribing an institution that does not take such a constraint into account is therefore utopian.

We have to accept that full justice in areas like multiculturalism, democratic theory and global justice is a work in progress and that it is far from being realized. That is so because of equivocal constraints that limit what we can achieve for the foreseeable future. Yet during that time the right balance between utopianism and realism is achieved by mitigating equivocal constraints step by step. Without this account of the duty to mitigate, the possibility that an equivocal constraint entails might be overwhelming. A highly ideal normative principle might be blocked by many equivocal constraints, leaving only faint traces in our contemporary world that can guide us. The ideal of justice might thus be far more ideal than we usually think. That is the implication of taking equivocal constraints into account. Take for example luck egalitarianism and the information constraint. Luck egalitarianism is—rightly—stubborn in thinking on a very ideal level. The effect of recognizing how demanding luck egalitarianism is, however, that the information constraint apparently blocks much more than we often think. If we apply the weight that luck egalitarian principles have on ideal level to the non-ideal level, we should put immense efforts into mitigating the information constraint. In the end, however, given that the information constraint is an equivocal one, it is perfectly possible that we are filling a bottomless pit. The necessary information is simply difficult, perhaps impossibly difficult, to acquire. Putting many efforts into acquiring this information, so many that it comes at the expense of achieving several other equally desirable goals is, I believe, unfeasible and unacceptably utopian. Yet, given that resources are available, not mitigating an equivocal constraint is cynically realist.

This gives us the full account of a duty to mitigate, which is also a pro tanto duty. We can now understand that this duty demands the implementation of reforms that create a situation in which the

39 See Hamlin Stemplowska (2012) for another account of a feasibility frontier.

constraint applies less and that the reforms we prescribe have to stay within the feasibility frontier. Notice that without such an account of a pro tanto duty to mitigate we cannot maintain the right balance between realism and utopianism. In other words, we would either be prescribing unfeasible actions or we would be leaving people of the hook too soon. Given this difficult balance to maintain it is often easier for normative theorists to neglect, ignore or bracket equivocal constraints. I believe this is impossible when it comes to multiculturalism, global justice and democratic theory. We have to take all feasibility constraints into account.

We have arrived here at a carefully balanced way of dealing with certain political facts, such as the lack of motivation, the lack of information and so on. It is important to see that I do not positively endorse these facts. They are not part of my utopian imaginations about how politics could be. But treating them as equivocal constraints allows me to be realistic and let them continue to shape political circumstances even though they generate a duty to mitigate. In the next section I will argue that identity is an equivocal constraint. Seeing identity as such allows me, for now, to endorse majority nation-building policies without endorsing them in the distant future. I hope it is clear why I think that is a consistent position.

2. Identity as an equivocal constraint

When defining nationalism in the previous chapter I took a certain stance on majority nationalism. I started from the fact that there is some degree of majority nationalism in the sense that there is some degree of congruence between political units—states—and cultural units—majority nations. Then I said that cosmopolitanism, which I see as the opposite of nationalism, does not demand the immediate abolition of this congruence. Furthermore, I said that a wise cosmopolitan patiently awaits the right moment to move in the direction of less congruence. In a way I thus give a place to majority nationalism, which seems to imply that I am a nationalist. Here I will explain what place I think majority nationalism is entitled to and why this does not commit me to nationalism. Furthermore, I argue that we should give this place to majority nations without giving a similar place to minority nations as Kymlicka has argued we should. My argument relies on seeing the liberal nationalist arguments in favor of nation-building[40] as based on an equivocal constraint: the identity constraint.

40 I summarized these arguments in the previous chapter. The arguments said that a common language, and national identity is needed for the proper functioning of liberal democratic institutions like the democratic system, welfare institutions, the labor market, etc. Notice that this argument instrumentalizes the national language and identity for the purpose of solidarity and deliberation. It is thus not an argument that starts from some intrinsic value of the national language or identity.

2.1. The identity constraint

It seems that the arguments for nation-building cannot be put in anything but vague terms. The arguments say that some kind of shared 'sense' or 'feeling' of 'nationhood', 'national identity', 'national consciousness' or whatever causes greater solidarity and trust. Are these arguments about nationhood, national identity, or national consciousness? What causes this sense or feeling of nationhood? A national culture seems to be a common answer. But are there other ways of creating such a feeling? What does the sense of nationhood cause? The answer is solidarity and trust, but then the further question is: how? In other words, we do not know what kind of group feeling is needed and how it is created.

Nevertheless, we should implement certain majority nation-building policies because the nation-building arguments might have a core of truth. We may one day understand the liberal nationalist arguments for nation-building more precisely and discover that they do not require the implementation of certain nation-building policies that they today are thought to require. It may for example turn out that the shared sense of nationhood actually does nothing to contribute to the willingness to redistribute more. We may also one day discover that some nation-building argument is unquestionably true. It may for example turn out that a shared language is indispensable for the quality of the democratic process, perhaps even to generate solidarity. I believe that nation-building arguments might have a core of truth and that is the reason why I prescribe certain nation-building policies like teaching all citizens a shared language. As I will explain below, however, we need to be vigilant against implementing policies of which we are far less certain than the teaching a common language.

Notice that I say “might” have a core of truth. In the end I am agnostic about whether well-functioning institutions indeed necessarily require a shared language. Being agnostic about this core of truth in nation-building arguments while prescribing certain nation-building policies does not make one a nationalist. This is so because the core of truth in nation-building arguments might fall short of nationalism. It may only require congruence with a certain cultural element, such as a shared language, rather than with a thick national culture. We can imagine a continuum of types of cultural units, ranging from units based on a single minimal cultural element to units based on a thick shared national culture. At the minimal end of the continuum all citizens share some cultural

element like a common language and some political principles. For example, it may be that the *only* thing citizens may have in common is a language. No thin or thick culture necessarily comes with speaking that language. The language may be an international lingua franca or the language of the former colonial power that many former colonies adopted. This is far from constituting a national culture. At the maximal end of the continuum citizens share a thick full-fledged national culture. Citizens are all conscious of their national belonging, they share a language, a history, and—depending on which definition of the nation one endorses—an ethnic or cultural character, or a connection to a homeland, an identity, etc. The core of truth in the liberal nationalist nation-building argument is that liberal democratic institutions may indeed be unable to function well without congruence between the political unit and some cultural element or elements. Admitting that there might be such a core of truth in the liberal nationalist argument does not commit one to nationalism because it remains an open question whether those cultural elements amount to a national culture. If they do, then one would be a nationalist; otherwise, one would not be a nationalist.

The problem, then, is that we do not know how far the core of truth in the arguments for nation-building reaches. This problem is deepened by the fact that much of the question of how extensive this core is turns on one's interpretation of the concept of identity, and identity is an equivocal constraint. Let me argue for this twofold claim. First, why does so much turn on one's interpretation of the concept of identity? As it is usually understood, identity implies more than merely some cultural elements. Identification has to do with at least a perceived common history, heritage and consciousness. The liberal nationalist argument qua identity argument can thus be seen as a strong version of the liberal nationalist argument. In short, if liberal nationalists succeed in making the case that a common identity is needed for well-functioning institutions, then they have clearly won the argument. Then it is clear that a national culture, and not merely some cultural element, is needed for well-functioning institutions. Second, why is identity an equivocal constraint? Let me divide this question into three sub-questions: In what sense is identity a feasibility constraint?; Why is it not a soft constraint; and, Why is it not a hard constraint?

First, why is identity a feasibility constraint? Supposing the strong version of the liberal nationalists argument currently is true and given that current identities are exclusive, the motivational force of identity makes at least demanding accounts of global distributive justice impossible. Global redistribution on the same scale as statewide redistribution cannot be organized because the people ending up paying would, arguably because they do not identify with the recipients, refuse to do so. Technically, identity is not a feasibility constraint, but our lack of knowledge of how identities are formed, and thus how we can create them, is the feasibility constraint. Is it the sharing of a national

culture that fosters identity formation, as liberal nationalists would have us believe. Or is it, as Habermas (1995: 306-307) would have it, the result of economic, social and administrative integration, some shared cultural and historical background but foremost the "legal institutionalisation of citizen's communication" through the creation of political institutions? Or—allow me a utopian conjecture—is identity formed merely by a long habit of cooperation, mutual understanding and a high degree of trust in other persons' basic decency? If one of the latter two is the case then the liberal nationalist is wrong. Then it is possible to create a postnational and perhaps also a global identity. It is our lack of knowledge in manipulating identities that have motivational force that currently blocks us from implementing global justice. In that sense identity, or more precisely the lack of knowledge about the manipulation of identities, is a feasibility constraint.

Second, why is identity not a soft constraint? Compare identity with the absence of a shared language. We know exactly what to do in order to realize a shared language: implement educational institutions and a certain curriculum. The lack of a shared language among the citizens of a given country may constrain the types of policies that are feasible. But this clearly is a soft constraint. The government simply has to set up the required educational institutions. This is not the case with identity. Suppose the citizenry is split into two groups that identify with different entities. We may have some clues as to what causes this split in identification but we cannot implement some foolproof institutional changes that will ensure identification with the state. Perhaps we will know such guidelines one day, and the equivocal constraint will then become a soft constraint, but we do not at the moment.

Third, identity is not a hard constraint because it is an open question how identities are formed. If we can one day manipulate them to the extent needed for our most ideal principles, including demanding interpretations of global justice, then they will turn out to be soft constraints. If it is ever proved that we cannot do so, then they will turn out to be hard constraints. It is important to keep this question open and not to assume or feign an answer. In other words, it is important to keep open the possibility of the identity constraint being a soft one. This is the reason why Arash Abizadeh (2005) is right to hammer home the point that the question of how identity is formed is an open empirical question. Abizadeh asks whether there are any sound conceptual or metaphysical arguments for believing what he calls the particularist thesis. If there are, then the identity constraint is a hard one. The particularist thesis comes in a strong and a weak variant. The weak variant he calls the exclusion claim and it says that "a collectivity inherently requires the existence of some external other in contrast to which it can define itself". (Abizadeh 2005: 45) The strong thesis "specifies the nature of the relation to the other that the constitution of a collectivity supposedly

requires: a relation of either antagonism or hostility". (Abizadeh 2005: 45) If sound conceptual or metaphysical arguments are found for either of these two theses then we have deductively established that identities are necessarily exclusive and perhaps even adversarial. Such an identity makes a global identity impossible, for it does not exclude any humans. Thus if the exclusion claim is right, then the identity constraint is a hard constraint. Abizadeh, however, goes on to investigate the consistency of Hegel's, Taylor's, Schmitt's and Mouffe's arguments for some version of the particularist thesis. He finds all of them lacking[41] and thus concludes that it is "always an 'open question' whether the political is particularist or adversarial, and not something that can be settled by definitional fiat". (Abizadeh 2005: 53) Identity is thus not a hard constraint because the question whether a global identity will ever be possible is an open one[42]. Identity can thus only be an equivocal constraint[43].

Abizadeh's argument that, in my words, identity is not a hard constraint, is compatible with acknowledging that exclusive and often adversarial identities do exist. As Abizadeh makes clear about his overall argument, "[n]one of this is to deny the empirical fact of actual exclusion, antagonism, and conflict in our world. It is, indeed, an empirically observable phenomenon that collective identities often do constitute themselves via the exclusion of external others from membership. Perhaps there are even empirical (psychological, sociological, economic, and political) reasons why collective identities, particularly political collective identities, are most easily formed in this way—at least in the world as we know it". (Abizadeh 2005: 58-59; footnote and reference omitted)

2.2. Prescribing majority nation-building policies

From acknowledging that identities exist it is only a small step to acknowledging that identities sometimes have positive consequences. Abizadeh may not be willing to take that step, but I think

41 Hegel's and Taylor's arguments make the fallacy of composition (Abizadeh 2005: 47-49). Schmitt's and Mouffe's arguments, which are based on difference, only consider the possibility of a spatial and ignore the possibility of an imaginative or temporal difference (Abizadeh 2005: 50-58).

42 As Abizadeh (2005: 59) notes, David Miller is not always clear about whether he conceives of this question as an open one or not. Miller's (1989a: 67–68) claim that "communities just are particularistic," seems to state it as a conceptual or metaphysical truth. Elsewhere Miller is more careful. He says that "[i]t would be too strong to say that it is necessary to the very idea of community that there must be outside communities in competition, so to speak, with the one with which I identify. Nevertheless, there seems to be a well-supported empirical connection between the strength of people's attachment to their own community and their awareness of rival collectivities" (Miller 1989b: 232–33; both Miller quotes are taken from Abizadeh 2005: 59)

43 Abizadeh agrees with the idea that identity performs the function of a feasibility constraint. He says that "[t]he falsity of the particularist thesis is crucial here because the anticosmopolitan thesis that a democratic order centered on a global human identity is impossible depends on a *feasibility* limit that only such a categorical conceptual or metaphysical claim about the inherent nature of collective identity provides". (Abizadeh 2005: 59; italics mine)

that we have to concede this to liberal nationalists. A plausible case can be made for the idea that identity has a strong motivational force and contributes to solidarity. Instead of repeating the liberal nationalist argument let me just point out that this idea has been defended for non-nationalist purposes by people from diverse positions on the political spectrum. For example, Hayek (1948), though hardly a nationalist, argued for federalism in the United States in order to mingle nations so that they could not form solidarity promoting political units that would increase taxes. Madison and Lord Acton made similar points. Someone from the other side of the political spectrum, Barry (1989b: 174-175), who surely cannot be seen as a nationalist either, also argues that "fellow-feeling" makes redistribution within the polity more acceptable. Furthermore, historically the construction of the welfare state has usually followed national unification. We may not be certain about how identity contributes to higher redistribution, but it is at least a hypothesis that we should take seriously.

That identity is an equivocal constraint implies, however, that we do not just prescribe the fostering of identities without further ado. As was argued above, equivocal constraints generate a duty to mitigate the constraint. The position I defend here is thus that of a cosmopolitan that reluctantly admits that certain nation-building policies are indeed justified. This is the reason why the wise cosmopolitan waits patiently, scrutinizes the liberal nationalist arguments, and denounces them when they have been proven wrong. The wise cosmopolitan aims to mitigate the identity constraint step by step. However, if ever a credible account of how to develop a global identity is given, then we have a duty to implement the institutions that foster this identity. This is also the reason why the position described here is not a nationalist one. Although I give a place to majority nation-building —that is, although I think that certain nation-building arguments are correct, and that we should prescribe the corresponding majority nation-building policies—these policies remain merely instrumental to the goal of fostering well-functioning institutions. Thus, when a credible account is given of how to create a supranational or a global identity, my position will entail a pro tanto duty to create that global identity. In no way do I thus intrinsically value majority nationalism. Hence, why my position is not a nationalist one.

There is, however, a further complication. For two reasons it is impossible to prescribe the implementation of minimal nation-building policies that stay close to the core of truth in nation-building arguments without giving more to the government that can implement these policies. The first reason is that we do not know the exact borders of the core of truth in nation-building arguments. How many cultural elements are required and thus justified by the need of well-functioning institutions? Is it only a shared language and some principles or also a shared cultural

heritage, character, identity? The borders of the core of truth in the nation-building argument are thus vague. Consequently if we want to make sure to prescribe the truthful core, we have to prescribe a rather extensive interpretation of this core—without, of course, being fooled by the rhetoric of majority nationalists. Second, as was discussed in relation to Kymlicka's equality-based argument in the previous chapter, the government that gets the tools to implement the core nation-building policies inevitably also gets the tools to implement policies that are further removed from the core. For, as long as international organizations are as weak as they are, this government also gets the discretion to decide which nation-building policies are needed. International standards are not refined enough to enforce heavy constraints on the part of the majority nation in implementing nation-building policies. In the previous chapter I gave this as a reason against Kymlicka's argument that minorities should also have nation-building tools. The same holds for majority nation-building policies: strict liberal standards cannot be effectively imposed on majority nations either, although we may hope that in the near future this may change through the international ratification of a right to culture. Thus, I end up with a position that acknowledges many nation-building policies: more than Patten, but still less than Kymlicka. Patten is wrong and Kymlicka is right about certain nation-building policies. That is almost certainly so in the case of a shared language and some common principles being necessary for the proper functioning of liberal democratic institutions.

The position I have been defending shows, however, similarities with Patten's position in another respect. Patten (2014: 171- 177) allows for minority nation-building policies on the federated level in response to liberal nationalist arguments that threaten to leave his theory of equal recognition without any cases to be applicable to. He notes that in certain cases there is no conflict between equal recognition and liberal nationalism (Patten 2014: 173). These are the cases in which nation-building arguments can be applied to the viable societal cultures of minority nations on the federated level. This brings Patten's whole theory more in line with that of Kymlicka[44]. As we saw in the previous chapter, Patten criticized Kymlicka for being too cozy with (minority) nationalism. In order to avoid the same coziness with minority nationalism, Patten (2014: 175) notes three points that push his theory somewhat back in the direction of pure equal recognition. “The first point takes issue [...] with the causal claim of liberal nationalists. The second allows that the liberal nationalist

44 It seems to me that this argument does quite some work in Patten's case for NSG. I have left it out of the discussion in the previous chapter because it is somewhat disingenuous (note also that Patten has left it out in his seventh chapter on NSG proper). As with Patten’s hybrid theory that allowed him not to take responsibility for nation-building arguments, it is difficult to tell whether the liberal nationalist arguments are doing positive work here or not. Whereas in the rest of his theory liberal nationalist arguments function merely as side-constraints and do not seem to do positive work. Here these arguments become positively important in selecting the cases to which equal recognition is applied. The positive work that liberal nationalist arguments do is in distinguishing between those cases (similar to Kymlicka, Patten distinguishes here between minorities with a viable or nearly viable societal culture and minorities without such a culture). The question is whether this distinction fits with Patten's overall theory of equal recognition.

concerns may be valid ones, but insists that equal recognition also has value. And the third point grants the liberal nationalist challenge in its entirety, but insists that in an important way the pro tanto reasons supporting equal recognition do not disappear". (Patten 2014: 175; compare also with Patten 2001: 297-298) The latter point means that the state "continues to have reasons to aim indirectly for a situation in which equality can eventually be established". (Patten 2014: 176) Note the similarities with my position if one replaces equal recognition with the value of a global solidarity on a very high level of ideality. Similar to Patten's first two points, I also say that we should scrutinize liberal nationalist arguments and that global solidarity has value. Patten's third point corresponds remarkably well with the idea of a duty to mitigate.

2.3. Solving two problems

Let me, finally, argue why this position—this place that I have given to majority nationalism and nation-building policies—allows me to give a consistent answer to two questions.

First, I can solve a conundrum that for some time has troubled liberals who wish not to become nationalist. The conundrum in question is that of the demarcation problem. It is next to impossible to give a justice-based answer to this problem without resorting to nationalism. Barry (1989b) describes this problem as follows. He starts by explaining an individualist principle that underlies the mainstream schools in Anglo-American political philosophy (utilitarianism, rights theories and contractarian theories). This principle says that "the only way of justifying any social practice is by reference to the interests of those people who are affected by it". (Barry 1989b: 158-159) Then Barry asks what can be said about the appropriate criteria for political boundaries that can be reconciled with this principle. He discusses two standard responses[45]: first, asserting a right to national self-determination; second, specifying universal interests that the state ought to protect and then deducing appropriate boundaries from these interests (Barry 1989b: 161-167). There are problems with both answers. The problem with the right to self-determination, according to Barry, is that collectivities should not have rights. The main problem with the second answer is that it only allows for a minimal state that does not redistribute much. Barry (1989b: 161) thus confesses that all three responses are "so weak as to be a serious embarrassment to anyone sympathetic to the general individualist enterprise". Later on in the article Barry endorses a form of majority nationalism close to David Miller's position[46]. Tamir (1993: 121) seizes upon Barry's confession and

45 I leave out a third response that Barry discusses which consists in not taking the question seriously.

46 This of course weakens his critique of multiculturalism (Barry 2001). Why do minorities not have a right to their own nation-building tools? As I will show below, the identity constraint allows us to answer this question.

says that the demarcation problem is an issue that forces liberals to resort to the national ideal of self-determination. Kymlicka (2001: 216) makes a similar point.

The account of identity as an equivocal constraint allows me to follow Barry, Tamir and Kymlicka in using national identities as a way of solving the demarcation problem while at the same time remaining cosmopolitan and true to Barry's individualist principle. I only endorse national identities insofar as they are instrumental to redistribution and I give a detailed account of why and when we should stop endorsing national identities. One can let national identity answer the boundary question without saying that national identity has intrinsic value.

Second, I can now argue, against Kymlicka, why we should not multiply the political units that can implement nation-building policies. As we saw in the previous chapter, Kymlicka argued that given that the majority will have nation-building tools and that there is no way of seeing nation-building policies as culturally neutral, national minorities also ought to have such tools. The above account implies, however, that we should not increase our reliance on identities because, as they are now, namely exclusive and often adversarial, these identities are far from ideal. To the extent that our institutions are based on existing national identities we should keep them but push them back to their rightful core. Instead of increasing our reliance on national identities, we should rather foster a postnational or global identity.

3. High and low levels of ideality and national minority accommodation

The question—What are national minorities owed as a matter of justice?—is ambiguous as to the level of ideality on which we seek to answer it. Furthermore, when it comes to minority nation accommodation it is impossible to make judgments on a high level of ideality. Let me argue for these two claims here. There are two main reasons why high level ideal theorizing about non-constitutional essentials, such as minority nations accommodations, is impossible.

First, it is impossible to argue on a high level of ideality about the proper way of accommodating national minorities because the strongest argument for nationalism is based on an equivocal constraint. The strongest, in the sense of most widely accepted, argument for nationalism is the liberal nationalist argument for implementing nation-building policies in order to increase trust and solidarity in a society. As I argued in the previous section, this argument is based on an equivocal feasibility constraint: the identity constraint. Our inability to create a global or postnational identity,

and the consequent fact that we may or may not be stuck with national identities, has a tremendous impact on normative theorizing about how to accommodate minority nations. It could be that we discover at a certain point that the only kinds of identities strong enough to generate the needed degrees of solidarity and trust are national identities. In that case, assuming a world with some two hundred states and the desirability of national solidarity and trust, we should foster national identities. Perhaps we should even return to the nineteenth century nationalist schoolbooks. If that is the case, then we certainly have to revisit the problem of national minorities. Perhaps NSG is then indeed in order, and perhaps even secession is in order. It could, however, equally well be that we discover at some point how to create a global identity. If that is the case, then, assuming that it is highly desirable, we should do so. The national minority identities that would be fostered if we implement NSG could then be standing in the way of a smooth transition to the global identity. Until one or the other of these two things is discovered, as far as prescribing and low-level ideal theory are concerned, we should stick to the status quo while gradually mitigating our reliance on the national identity of majority nations. Apart from saying this much regarding non-ideal and a low-level ideal theory, it is difficult to say much more about what justice demands regarding national minorities on a high level of ideality. Does justice on a high level of ideality require us to stick to the status quo, to foster national identities, or to foster global identities? We simply do not know.

Second, it is difficult to theorize about non-constitutional essentials on a high level of ideality because of the branching out of reforms that mitigate or remove equivocal constraints. What do I mean by this branching out of reforms? Notice that the dynamic duty to remove or mitigate a malleable constraint can have a strange, unrelated content when compared to the desirable state of affairs that generates the dynamic duty. We saw above that the desirable state of affairs of interregional solidarity in a federation might imply a duty to design the federation such that its party system is integrated. We thus progressed in our reasoning from the duty to give money to a poorer region to the duty to design the federation in some way. These two things have seemingly little in common. It is only the dynamic of federal bargaining that explains the federal stability constraint that connects them. The knowledge about such dynamics is not readily available to us. Political science studies give us a lot of information about the equivocal constraints and their underlying dynamics that constraint us today. The further we go into the future, the less political science will have to say about these dynamics. Thus, on a high level of ideality we lack the knowledge to say which dynamic duties malleable and certainly equivocal constraints will generate.

The problem goes deeper. The consequence of our lack of knowledge is that dynamic duties branch

out. Suppose in a few years we are certain enough to say that we ought to implement the institutions needed to get an integrated party system and certain enough about which institutions these are. This integrated party system may make new desirable states of affairs feasible that generate duties and dynamic duties. These dynamic duties demand other reforms, which then make further desirable states of affairs feasible, and so forth. Yet, suppose in a few years it becomes apparent that keeping party systems integrated is an utterly hopeless task. We decide that keeping party systems integrated is too costly to be demanded by interregional redistribution. We do not implement the federal design or the further reforms. Perhaps we implement a reform that strengthens local democracy and discover new desirable states of affairs that this makes possible. The result is thus a branching out of reform-paths. On the level of non-ideal and low-level ideal theory this is not so problematic. We are often only contemplating the first step in such a reform-path. Knowing which reform-path to follow becomes more difficult the higher we go up the scale of levels of ideality. From some mid-level of ideality upwards, it is altogether impossible. That is, it is impossible to know which reform-path justice demands us to follow.

What makes high-level ideal theory for non-constitutional essentials so difficult is that we not only need to justify which policies we have implemented, but also need to justify which reform-path we have chosen. It may be humanly possible now to justify this for the reform to chose now and for two or three reforms from now. But it is impossible to do so for the tenth, twentieth, etc. reform. The further into the future one reasons, and thus the higher the level of ideal theory one is theorizing at, the more the reform-paths will diverge and the more difficult it will be to oversee the possibilities. Thus, theorizing about non-constitutional essentials on a high level of ideality becomes impossible[47].

For these two reasons I think it is impossible to say much about non-constitutional essentials on a high level of ideality. Thus, I limit myself to asking which model should be prescribed for societies here and now: NCA or NSG? Furthermore, I make no claim about societies that do not possess a highly developed democratic system. As I said in the previous chapter, such societies are often better helped by a consociational regime. I do prescribe NCA for developed democracies in general.

As I said above, the question, What is owed to national minorities as a matter of justice?, is

47 For this reason I believe Rawls is consistent also when and if he makes claims about non-constitutional essentials when his account of ideal theory is seen as low-level or middle-level instead of high-level ideal theory. Rawls counters the branching out to some extent. His reflective equilibrium is a dynamic theory that can incorporate new principles that could be seen as allowing for the following of one branch, possibly the correct one. Eventually, however, I believe the branching out becomes too strong. This is not the place to ask what criteria a method like the reflective equilibrium ought to fulfill in order to keep up with the branching out of reform-paths. But it is certainly a very interesting question.

ambiguous. Tamir, Kymlicka and Patten do ideal theory at some relatively high level of ideality. I have interpreted this question as a question posed at the non-ideal, prescriptive level—that is, as a question about which institutions to prescribe. So in a way I am talking past Tamir, Kymlicka and Patten. Yet, they also prescribe institutions on the basis of their theories. Thus they have either not noticed the ambiguity, do not agree with my claim that this question is ambiguous, or do not agree with my account of ideal and non-ideal theory. However, I do not see how one can prescribe an institution—assuming my definition of 'prescription'—knowing that it violates a feasibility constraint. Yet, that is at least what Kymlicka does. He recognizes that NSG does "pose a threat to social unity" and says that "[t]he sense of being a distinct nation within a larger country is potentially destabilizing." (Kymlicka 1995: 192) I will come back to these claims in chapter five. Our three authors could accept that they cannot prescribe NSG and claim that they are working on a level of ideal theory. But then they encounter the problems of branching out and the fact that identity is an equivocal constraint.

Let me recapitulate. If I interpreted the question of what is owed to national minorities as a question posed on the non-ideal level, then what have I been doing in the previous chapter? Except for three arguments, I claim that all the arguments given there hold on a high level of ideality. These three arguments are:

1. the argument that there is a conflict between the instrumental and equality-based arguments[48];
2. the argument that NSG violates the federal stability constraint, including the version that says that Kymlicka's equality-based argument adds another dimension to the problem that is the dynamic behind this constraint;
3. the argument that consociationalism is based on non-applicable feasibility constraints.

The arguments in chapters four and five also are completely valid only on the prescriptive level—although they may also partially hold on more ideal levels. The other arguments in the introductory chapter and the argument in chapter three do hold on a relatively high level of ideality. Thus, I believe that on a relatively high level of ideality national minorities, including small ones, do have a right to cultural maintenance; that this right does imply having access to one's culture; and that this right can be implemented by means of strong group rights and devolving educational and cultural powers to the minority nation.

Why does the maintenance argument hold on a relatively high level of ideality? It does so because it

48 For this reason I have left open the possibility to combine both arguments and thus to let the equality-based argument qualify the instrumental argument.

is compatible with the vast majority of reform-paths that can be taken. Some reform-paths will mitigate certain equivocal constraints, others will not. Thus, one way in which NCA's compatibility with different reform-paths shows is in its not violating any feasibility constraints. As I will argue at length in chapter five, NCA, contrary to NSG, does not violate the federal stability constraint. Yet, this constraint too may apply on a high level of ideality. Nor does NCA add another dimension to the dynamic of federal bargaining behind this constraint, as did Kymlicka's account of NSG. Finally, contrary to Patten's theory, NCA does not violate the identity constraint in the sense that it is compatible with the majority nation implementing nation-building policies. Suppose that the identity constraint proves to be a hard one. Majority nations should impose their national identity on the minority in order to get the required degrees of solidarity. This would effectively invalidate Patten's theory. It would not, however, invalidate NCA.

Another way in which NCA's compatibility with different reform-paths shows is in the fact that it does not presuppose a certain historically contingent context. According to the maintenance argument that I gave, maintaining national minority cultures will always be desirable. The measures of equality that Tamir, Kymlicka and Patten propose presuppose, however, some contingent historical context. Kymlicka's and Tamir's emphasis on means of securing or protecting policies vital for the survival of cultures—like consociationalism and power sharing federalism—bespeaks their presupposition that the majority nation will continue to trample on the rights of national minorities. In that sense it presupposes a context in which no strong right to culture gains international recognition. If that is indeed the case, then NSG may indeed be more desirable than NCA. More specifically with regard to consociationalism, NCA does not presuppose the absence of trust and security that made consociationalism plausible. NCA is thus compatible with more reform-paths than NSG. Therefore it will hold on a higher level of ideality than NSG.

Let me, finally, explain the argumentative strategy that I will use in the following chapters. If NCA is implemented, and as I will argue more extensively at the end of chapter four, then no vital interests of national minorities qua national minorities remain unsatisfied. If that is the case, then we can counterfactually assume that the vital interests of national minorities are satisfied and see what other claims they might still have when that is the case. In chapters four and five I will use this strategy. In the chapter four I will argue that national minorities are not owed something because of their minority-status in democratic decision-making bodies. I will use a social choice model that assumes the absence of vital interests in order to demonstrate this. In chapter five, I will argue that, when investigating federal stability, we can adopt a broad definition of federal stability that includes the proper functioning of the federal system. We can do so because we may counterfactually assume

that the vital interests of national minorities are not at stake. That is so because we can then safely assume that the desirability of satisfying the remaining interests of national minorities is lower than the desirability of a proper functioning federal system. Thus my argumentative strategy consists in counterfactually assuming that the vital interests of national minorities are satisfied in order to know whether a model that plausibly satisfies these interests is overall desirable. For this strategy to work, however, we need to show first that NCA indeed satisfies the vital interests of national minorities. NCA does so by means of strong group rights that can maintain the minority's languages and by devolving educational and cultural affairs to the minority nation. Thus, we can ensure both elements of what Kymlicka called the cultural structure: language and heritage. I see no other vital interests of national minorities in general, excluding oppressed and indigenous ones, in developed democracies.

Chapter Three: A Group Right to Language Maintenance

Introduction

From the introductory chapter it should be clear that my overall argument against NSG only stands if there is a way of maintaining minority languages without granting them territorial accommodations as NSG does. In this chapter I will propose a strong group right to language maintenance for minorities that live intermingled with a majority. I shall call this kind of minority an integrated minority. Correspondingly I shall call the language of such a minority an integrated language. I will argue that this strong group right can maintain integrated languages and that it is justified.

The argument in this chapter is complex, so let me, for clarity's sake, at the outset give an idea of the function of the proposed group right by sketching the problem that integrated minorities face and the solution that this right can provide. Imagine a region in which a minority language, or several such languages are intermingled with a majority language that is used as a language of communication in the economy, public debates, by the state, etc. The problem integrated minorities face is that their situation demands the implementation of a great many language maintenance rules. This, for several reasons. First, people are mobile and language accommodations have to track the minority members, which implies many language maintenance rules. Whenever an increase in the number of minority members in a certain region warrants an increase in accommodations, new rules are required in order to implement those increased accommodations. Second, in an integrated society spheres in which the minority language can flourish have to be carved out, which also implies many language maintenance rules. If we want to maintain the minority language in an integrated society then we will have to heavily regulate many different kinds of interactions in different sectors of society. Schools, administrations, companies, hospitals, etc. all have to fully or partially operate in the minority language. Rules are needed that tell them when to do so. Third, in many cases the value of communication is more important than the value of language maintenance. There is thus an upper limit to what can be demanded from, for example, companies qua language maintenance. Here too, rules are needed to define that limit. In sum, if we want to maintain an integrated language, a great many language maintenance rules will have to be implemented. One can compare the situation of an integrated society to that of a society living in a fragile ecological environment that requires many rules to be protected. The sheer multitude of language rules that need to be upheld combined with the fact that the average individual never sets foot in a courtroom

—and rightly so—makes it very difficult to maintain integrated languages. Suing is cumbersome and often costly. Individuals avoid it when they do not stand to gain much. For most goods, this last fact, on its own, is not problematic. For integrated languages, however, it implies that they will not be maintained because integrated languages are a special type of good. As I have already argued and will do so more extensively below, there is a collective action problem in the production of integrated languages. Solving this collective action problem requires that language maintenance rules are seen as coordination rules in the effort to solve that problem. Language rights, I will argue, thus have an extra function: many of them are coordination rules. Only if we see language rights as such, can we grant an integrated minority a right to language maintenance that can actually maintain the language. The strong group right to language maintenance that I propose here aims to ensure that the right is in the vast majority of cases protected so that it can function as a coordination rule.

The group right I propose is a strong group right in the sense that it provides both the individual group members and the group, or more specifically a group representative, with legal standing to sue in order to protect the right[49]. Legal standing or the *locus standi* is the power to file suit in court. A doctrine of legal standing specifies the circumstances under which a person may plead her case before a court. Usually legal standing is granted to individuals who have a special interest in a matter of public nuisance. The individual going to court thus has to be harmed directly to be granted legal standing[50]. That is not necessarily the case with the group right proposed here. The representative of the group who goes to court does not have to be harmed directly. This representative thus has the power to go to court in name of the individual who is harmed directly. I will argue that this power of a group representative is very important to maintain integrated languages.

The argument will be that this kind of group right is needed to maintain integrated languages. That is so because integrated languages are a very specific kind of good. As was argued above, being the structure of a culture, languages are very valuable. Having to compete with majority languages of communication, integrated minority languages are also under constant pressure. But, more importantly, as Denise Réaume (1988) has argued, languages are "participatory goods" and as such there is a structural problem with protecting languages by means of individual rights. Participatory

49 Other authors have *defined* group rights in this way. Allen Buchanan (1994: 3) sees legal group standing as the defining feature of group rights. Waldron (1993: 351) also recognizes the possibility of defining group rights in this way. Notice that I do not define group rights as rights for which the group has legal standing but merely characterize one type of group rights as such. I think there are other types of group rights.

50 There are, however, numerous exceptions to this general rule. If a child is harmed, for instance, it is the guardian who has legal standing. Interestingly the doctrine of legal standing in the case of environmental law in the United States has changed recently. Environmental organizations are sometimes given the right to sue if the environment is harmed even if the people running the environmental organization suffered no direct damage. I have something similar in mind for languages.

goods are a type of public goods that can only be enjoyed jointly, in participation with others[51]. Next to languages, other examples include: cultured societies, team games, convivial parties, friendships, etc[52]. Participatory goods are public goods whose consumption is non-excludable and non-rivalrous. But what typifies these public goods is that the part that makes them valuable cannot be enjoyed by an individual on her own. This implies that the production of such a good is a collective action problem, which in turn implies that many rights to such goods should function like coordination rules. In order for them to take on this function, the vast majority of duties correlating with such a right should be imposed. If left to individual standing, that will not happen and thus, my argument is, groups should also have the standing to sue[53]. In making this argument I rely on an argument presented by Réaume (see especially Réaume 1988, 1994), and on a further argument presented by James Morauta (2002), who responds to Réaume. In order to clarify how I use these arguments I need to situate them in the literature on group rights and explain a basic assumption of this literature.

The literature on group rights is split in two camps: individualists and proponents of group rights. Individualists, like Hartney (1991) Narveson (1991) and also Morauta (2002), argue that this or that

51 Different authors have used different terms for participatory goods. Joseph Raz (1994: 35-36) and Andrei Marmor (2001) speak of 'common goods'. Leslie Green (1988: 207-209) uses the term 'shared goods'. Jeremy Waldron (1993: 355-358) uses the term 'communal goods'. Denise Réaume (1988) coined the term 'participatory goods'. I will take her elaborate account as my starting point.

52 I think only integrated minority languages should be protected by means of the proposed group right. It is possible to see a wide range of goods as participatory goods. Waldron (1993: 357-358) points at "goods like fraternity, solidarity, the close integration of G*emeinschaft*, Rousseau's general will, Marx's notion of the 'species-being' of co-operative production" as being possible communal or participatory goods. Only integrated languages should be protected by strong group right because an essential part of my argument is that the participatory good in question ought to warrant a maintenance policy. Except for integrated languages I believe that no other participatory good warrants such a policy. No right can be granted that implies a duty to develop certain friendships, to be convivial at a party, or to enjoy a team game. Communal religious worship is also excluded. My argument for a maintenance language policy is partly based on an appeal to state neutrality. Since it is easier for the state to remain neutral with regard to religions than with regard to languages, my argument should not be applied to communal religious worship. There might, however, be other kinds of group rights to these goods.

53 Next to individuals or groups imposing the duties, another option is that the state directly coerces actors, like companies or individuals, into fulfilling their language maintenance duties. In that way one could avoid giving the group standing to sue even though individual standing will not be sufficient to maintain the good. There is a problem with this option, though. As we will see below, the proposed group right presupposes that there is a democratic decision-making body that includes all and only members of the integrated minority. This body has to decide many things about the content of the right. For several reasons this body, and not the state, should also be the one sending the group representatives to court. First, when the body sends representatives to court, there is less room for manipulation by the minority body—like making impossible requests—and by the state—like not suing when the body demands it to. Second, deciding when and where to go to court can have an influence on which policies are preferable. The group representative suing in court may for example rightly believe that a for the minority restrictive landmark decision by the court would be overturned if a certain language policy teases out a contradiction in this landmark decision. This may be valuable information for the minority decision-making body. Third, the body may strategically direct the group representative to sue in a particular type of cases for the purpose of being able to implement some language rule. There are thus strategic reasons why the democratic decision-making body and the group representative should work closely together. If the state is the one suing and given that its interest is not always similar to that of the minority, then these strategies are impossible. Here, there is nothing wrong with such strategies, though. The minority should look for the most effective democratically accountable language policy. One could see the rationale here as a sort of division of power applied to the problem of national minorities.

aspect of the judicial process can perfectly well be organized by means of classic individual rights. There are also individualists who do not primarily analyze some aspect of the judicial process but point at some version of the agency problem. The problem with group rights then is that it creates an extra agent, the group or its elites, that do not have the same interests as the individual group-members for whose sake the right is implemented. This is the agency problem with regard to group rights. Individualists who make this argument thus fear that group elites might use the right to restrict group members, to dominate internal minorities, to override individual rights, etc[54]. Proponents of group rights, like Réaume (1988), McDonald (1991), Green (1991) and Jones (1999), argue that some aspect of the judicial process points in the direction of group rights[55]. They have followed two different strategies: the rights-to-collective-goods strategy (Réaume 1988, Green 1991, Jones 1999) and the rights-of-collective-agents strategy (McDonald 1991)[56]. The advantage of the former strategy is that it avoids the agency problem; the disadvantage of the latter is that it does not. The group right that I shall defend here stands in the latter camp: it depends on the right-of-collective-agent strategy. Part of the reason why Green (1991: 319, 324, 325) and Réaume opted for a right-to-a-collective-good strategy is the agency problem. Thus, although I will defend an argument that Réaume made, in the end our conceptions of the group right in question are different. Réaume defends a group right as a right to a collective good. I defend a group right as a right of a collective agent. In the last section I will show how the proposed group right responds to the agency problem.

There is an important assumption in the literature on group rights that needs to be clarified. The assumption is that, in order to justify a group right compatibly with liberalism, one has to show three things: first, that the good or benefit of the right is worth protecting; second, that there is a structural problem with granting an individual right to this good; and third, that there is no danger that the right will be abused, like the agency problem. As said I will come back to the agency problem in the last section. Let me focus here on the second point. The form of many arguments in the literature on group rights is that of analyzing some aspect of the judicial process: the nature of goods, the nature of interests in goods, the grounding or justification of rights—according to the interest theory, the grounding in interests[57]—, the exercising of rights, the nature of the right-holder,

54 Fears of group rights play an important role in the literature. Jones's (2016 section 7) entry on group rights in the *Stanford Encyclopedia of Philosophy* devotes an entire section to it.

55 There is also a long tradition of illiberal group rights, sometimes called corporatism, that is still advocated, for example by Scruton and Finnis (1989). Most proponents of group rights, like Réaume, Green and Jones, are however liberals. Note in this regard that, although Kymlicka (1995: ch. 3) tries to avoid the discussion about group rights by claiming that he speaks about group-differentiated rights, one could see him as a proposing a strong form of group rights. Jones (1999: 375) says: "Perhaps the difficulty for Kymlicka is that institutionalised group rights, particularly rights of self-determination [what I called NSG], typically take a corporate form". Jones thus effectively places Kymlicka in the camp of the defenders of a strong and illiberal corporate group right.

56 Green (1991) sets out the difference between both strategies most clearly.

57 Because it gives the group standing to sue the proposed right seems incompatible with the interest theory of

etc. For example, Réaume argues that there is a type of good, participatory goods, that cannot be seen as an individualizable good and thus cannot be protected by means of individual rights. The assumption shared by many proponents of group rights and individualists is the following: if Réaume succeeds, on the basis of conceptual analysis, in showing that an interest in a participatory good cannot be adequately protected by means of individual rights and that this good ought to be protected, then not granting a group right is unjust. The result of this assumption is that the discussion is focused on the conceptual analysis of some aspect of the whole judiciary process. The discussion between Réaume and Morauta is thus focused on the nature of goods and on what it means to hold a right. By taking up the challenge and providing conceptual arguments against Réaume, Morauta, along with many individualists, thus seems to agree that if Réaume or I succeed in showing, first, that some good cannot be protected by means of individual rights, second, that this good needs to be protected, and third, that there is no danger that the right will be abused, then we should grant this right. Although many questions remain, I take this assumption to be correct[58]. With that in mind, let us take a closer look at Réaume's and Morauta's arguments.

Réaume argues that rights to participatory goods should be seen as group rights. Her argument starts from two premises: 1) that participatory goods are enjoyed in a group, generating a sort of group enjoyment; and 2) that an individual interest in a participatory good is not of sufficient weight to ground a right to that good. As I will show, from these two premises two different conclusions can be drawn, one about the nature of participatory goods in line with the rights-to-collective-goods

rights which says that the status of the right-holder does no normative work in justifying the existence of a right (Raz 1986: 187-192). However, what I will say is compatible with a capaciously interpreted interest theory. In short, that is the case because the interest in maintaining an integrated language is a specific kind of interest. It demands the performance of certain actions that are coordination rules in the language policy of the integrated minority. As I will argue, satisfying this interest implies that there is a group agent with legal standing that can guarantee cooperation. The interest thus demands the creation of a group agent, making the proposed right compatible with a capaciously interpreted interest theory. I will spell out this argument in more detail in a footnote below.

58 One argument against this assumption says that the nature of rights does not allow for group rights. Many adherents of the will-theory, but not all, make such an argument. I do not want to lose myself in semi-metaphysical theories on the nature of rights but let me just note three points to counter this argument. First, part of the argument behind Raz's very influential theory of rights, the interest theory, is that it is more capacious than the rival will theory. Raz (1986: 166; footnote omitted) argues, for example, that "while a philosophical definition [of rights] may well be based on a particular moral or political theory [...], it should not make that theory the only one which recognizes rights. […] The definition may advance the case of one such theory, but if successful it explains and illuminates all". Capaciousness, which might also imply allowing for group rights, is indeed a virtue of theories of rights. Second, there is something odd about the phrase "nature of rights". At least legal rights are social constructs and the same has been said about moral rights. Point is, if rights do not have a nature then "the individual nature of rights" cannot be used to knock down an argument for group rights. But perhaps rights are not merely social constructs. Perhaps there is a deeper truth to the theories on the nature of rights. Then still the question is whether this deeper truth is compatible with, third, political liberalism. The oft-noted distinction between political and individualist liberalism (Larmore 1987, Rawls 1993, Galston 1995, Levy 2003, Nussbaum 2011) and the fact that most authors endorse some version of political liberalism also points into the direction of group rights. If the basic structure of society is (partially) based on a theory of rights that does not allow for group rights and a minority group stands to lose a valuable good because of this theory, then political liberalism implies that this is rather a problem for the theory of rights than for the minority and its good. In other words, political liberalism implies that the right should be granted.

strategy, the other about the nature of the right-holder in line with the rights-of-collective-agents strategy. Réaume draws a conclusion about the nature of participatory goods[59]. In this chapter I will follow Morauta in drawing and discussing the other conclusion about the nature of the right-holder from Réaume's argument. This conclusion is what Morauta (2002: 91) calls the "holding-constraint", which says that rights to participatory goods cannot be held by individuals but can be held only by the group. I will defend an adapted holding constraint which says that rights to participatory goods cannot *only* be held by individuals, they *also* have to be held by the group. Morauta only draws this conclusion and gives an interpretation of Réaume's argument, which he believes is the strongest argument for the holding constraint, in order to defeat this argument. After all he is an individualist. I will defend Morauta's interpretation of Réaume's argument against his own counterargument. I thus share Réaume's aim of showing that there is a structural problem with granting an individual right to a participatory good, but I think Morauta's argument—or the interpretation he makes of Réaume's argument—better explains what that problem is.

In the first section I will spell out Réaume's argument. In the second I will explain Morauta's argument for the holding constraint, in the third his refutation thereof. In the fourth, I reinterpret his argument in order to partially save it from his own critique. In the fifth section I finish the argument for the adapted holding constraint. My account of group rights will become clear in section four and five. At the end of section five, I present a formalized version of the whole argument. As said, in the sixth section I explain the proposed group right's response to the agency problem.

1. Réaume's argument

Réaume argues that since individuals cannot enjoy participatory goods on their own, their interests in these goods is of insufficient weight to ground a right to them. Thus rights to participatory goods should be seen as group rights rather than individual rights. Her argument has three premises.

Premise (1) states that an individual cannot enjoy a participatory good on her own. This premise follows directly from her definition of participatory goods, which states that participatory goods are goods that "involve activities that not only require many in order to produce the good but are valuable only because of the joint involvement of many. The publicity of production itself is part of

59 Réaume (1988: 10) concludes that participatory goods are such—interests in them are non-individualizable—that there can be no individual right to the core benefits of these goods. This is primarily a conclusion about the nature of the participatory good. As Réaume (1988: 2) says, her "primary concern here is with the nature of the good claimed rather than with the qualifications for the status of right-holder". Notice, however, that she goes on to give credence to my and Morauta's interpretation, which I explain next in the text, by adding: "but the former will have an impact on who, if anyone, can claim certain rights".

what is valued—the good *is* the participation". (Réaume 1988: 10) A few lines later, Réaume (1988: 11) specifies that the enjoyment of a participatory good—what is valued—cannot be separated from a communal process of recreation and reinterpretation of the good. A novel can for example be seen as a recreation or a reinterpretation of the language in which the novel is written. The point is that this recreation is a communal process that requires the involvement of many. Hence an individual cannot enjoy a participatory good on her own. The first premise is thus uncontroversial if we accept Réaume's definition of participatory goods.

Premise (2) says that 'there is a distinction between core and diffuse benefits of a participatory good'. This premise, which Morauta left out of his argument for the holding constraint but which will play a role in my argument, can be derived from an analysis of the concept of enjoyment Réaume employs. She stresses repeatedly that enjoying participatory goods, such as a cultured society, does not translate to the enjoyment of cultural trappings or artifacts (Réaume 1988: 4-5, 9-10, 23-24). One misunderstands Réaume's argument if one imagines that one might be able to satisfy an individual's interest in a cultured society by giving her a book and some paintings, or even many books and many paintings. For Réaume, enjoying a participatory good means participating in a group activity. From this particular understanding of enjoyment, we can derive different ways of benefiting from a participatory good and, accordingly, different types of interest one has in such a good. Corresponding to the participatory activity itself there is a core benefit, which is the enjoyment of that activity. Around this core there are many diffuse benefits such as, in the case of language, books, songs, jobs, etc. in that language. These are the benefits of enjoying the trappings or artifacts of the participatory good (Réaume1988: 5-6). Accordingly, one can have an interest in the core benefit which is different from an interest in the diffuse benefits.

Réaume's premise (3), which Morauta also left out of his argument for the holding constraint, says that 'an individual interest in a participatory good cannot be of sufficient weight to ground a right to the core benefit of that participatory good'. This is the crucial premise of Réaume's argument and I will discuss it extensively below. Let me quote her at length in order to avoid confusion.

> For an individual to claim a right, it must be the case that her well-being is sufficient reason to hold others under certain duties. It must be for her sake that the duty is imposed in the sense that only the good to her need be considered. And it must be the case that the opposing claims of others cannot defeat the reason for acting in her favour. Only individual interests—enjoyable by an individual in isolation from others—meet these conditions. The individual's interest in some public goods—namely, participatory ones—cannot be sufficient reason to impose duties on others, precisely because we cannot say that it is for her sake that

> the duty is imposed. Not only is it impossible to protect such goods for the enjoyment of an isolated individual, but we cannot even understand it as a good except through participation of many in its production and consumption. We can say only that it is for the sake of all, considered as a group, who enjoy it that it is provided. If this understanding is correct, there can be no individual right to a collective good but only a collective right, held jointly by all who share in the collective good. Only this collective interest is sufficient reason to impose duties. (Réaume 1994: 120-121)

In this quotation, Réaume is concerned with interests in the core benefits of a participatory good: she highlights the aspects of the good that cannot be enjoyed "by an individual in isolation from others". The third premise of her argument states that an individual interest in a participatory good cannot be sufficient reason to ground a right to the core participatory good because, when grounding a right, "only the good to her [the individual with the interest justifying the right] need be considered". Yet, as Réaume's second premise made clear: if we consider only the good or the benefit to an individual then we are missing something. If one only takes into account the aspects of a participatory good that matter to individuals, then one will only be able to account for the diffuse benefits of that good. In other words, Réaume claims grounding a right to a participatory good solely on individual interests means leaving its core benefit out of the justification for a right to it. Rights to participatory goods grounded in individual interests would, as a result, be weaker and only able to impose less burdensome duties.

Let us put Réaume's argument together. She argues that (premise 1 and 2 together) individuals cannot enjoy core benefits of participatory goods on their own; and that (3) individual interests in these goods cannot be of sufficient weight to ground a right to the core benefits of these goods. She concludes that rights to participatory goods have to be rights to collective goods.

Notice that Réaume's argument can be an argument for the rights-to-collective-goods strategy or for the rights-of-collective-agents strategy depending on how one answers the following questions. Why is it problematic that individual interests are not of sufficient weight? What could more weighty interests do? Réaume, Morauta and I give three different answers to this question. Réaume answers that it is problematic because fewer rights will be recognized when the core participatory good does not figure in the justification of the right. Morauta's answer is, in a way, more detailed than Réaume's. He says, as we will see, that it is problematic because the individual cannot control, in the sense of increase, the benefit of the right, i.e. enjoying the participatory good (Morauta then refutes his own answer). Similarly to Morauta, I answer that it is problematic because the individual

cannot control, in the sense of guaranteeing the production of, the core benefit of the right. Réaume's answer does not demand a group right as a right of a collective agent. A judge, convinced by Réaume's reasoning could add extra weight to the interest of some individual claiming a right to a participatory good. No group agent needs to be involved in the process. As I will show, my answer, and Morauta's if he were to endorse it, leads to a group right as a right of a collective agent.

Let us turn to Morauta's argument. He leaves out Réaume's premises (2) and (3) and adds two other premises, (4) and (5), which together can be seen as replacing premise (3), in order to come to the holding constraint. Eventually, however, he refutes the argument he has thus constructed. I will partially defend Morauta's own argument against his own criticism relying on Réaume's original premise (2). My conclusion will, however, be different than Morauta's holding constraint, which says that individuals cannot hold rights to participatory goods. My conclusion is the adapted holding constraint which says that individuals can hold rights to participatory good but, in the case of integrated languages, groups also need to hold this right.

2. Morauta's control-based argument for the holding constraint

Morauta leaves premises (2) and (3) of Réaume's original argument out of his own argument. He seems simply to have overlooked her distinction between core and diffuse benefits (premise 2). He does, however, justify his omission of premise (3). I will begin my discussion of Morauta by first turning to his reasons for leaving out premise (3) and then go on to explain his argument for the holding constraint as a whole.

Morauta bases his rejection of Réaume's third premise on something similar to what Peter Jones has called the collective conception of group rights (See especially Jones 1999). Instead of grounding a group right in an irreducible group interest, Jones's collective conception grounds group rights in shared individual interests. A group of individuals that shares an interest can jointly hold a right grounded in these shared interests. This arguably is a genuine group right because the individual interests taken severally would not ground the right. A good example of a group right on the collective conception is a right to a bicycle path. One individual cyclist would not have a right to a bicycle path, whereas a group of cyclists who all share an interest in a bicycle path, might be said to have such a right. Morauta is in line with Jones's collective conception although he does not explicitly refer to it. He says: "a right protects all the interests which ground it, not merely the interests of the right-holder. For all the interests that ground a right contribute to its justification;

and if an interest contributes to the justification of a right, then presumably the right protects (or promotes or otherwise serves) the interest in some way". (Morauta 2002: 94) Morauta thus defends a conception of rights that can be grounded on shared interests, which comes close to Jones's collective conception of group rights.

Réaume's Premise (3) is at odds with the collective conception of group rights. Réaume says "[f]or an individual to claim a right […] [i]t must be for her sake that the duty is imposed in the sense that only the good to her need be considered"[60]. Yet Jones claims that there are rights grounded in the shared interests of individuals in the sense that the good to all those who share the interest needs to be considered[61]. The question we need to ask here is whether viewing the interests grounding a right to a participatory good as shared interests allows for the full interest in the core benefit of the good to be taken into account in the justification of that right. In other words, does it make a difference for the weight of the interest—which is important for its justificatory force—whether we view interests as shared by a group of individuals or as a group interest? Réaume's third premise only holds if the answer to this question is yes: if seeing the interest as shared, and thus not as a group interest, prevents us from attributing sufficient weight to it so that we can grasp its core benefit. But that would be a strong claim. How weighty can shared interests be? Surely, taken together, they can be quite weighty, maybe even more weighty than group interests and certainly much more so than a single individual's interest. If we think that shared interests can be weighty enough to ground rights that can entail burdensome duties and protect the core benefit, then Réaume's third premise fails and Morauta was right to leave it out.

Let us, for the time being, follow Morauta in dismissing premise (3): an individual interest in a core participatory good, provided that it is shared with other individuals, *can* be of sufficient weight to ground a right to that core good. Below I will point to a case in which Réaume's third premise stands: when the participatory community itself is at stake[62]. After clarifying why Morauta's argument fails in this case, we will return to the question of sufficient weight. In order to see why his argument fails in that case, however, we need to explain his argument for the holding constraint.

60 See the lengthy quote above.

61 See Jones (1999: 360-361; 2014) for an explicit discussion of participatory goods by Jones. See Réaume (1994) for a discussion of the collective conception *avant la lettre*.

62 I think Réaume's premise only partially fails. We thus would have three, perhaps more, levels of liberal group rights. There are aspects of rights to mostly public goods that should be conceived of along the lines of Jones's collective conception. This is the lowest level. On top of this there are aspects of rights to participatory goods to which Réaume's group right as a right to a collective good applies. Extra weight should be attributed to the interests in the core participatory good at stake. The highest level of liberal group rights is the right I propose here. There are aspects of rights that should be conceived of as a group right as a right of a collective agent. The right in question is an integrated minority's right to language maintenance (the aspects in question are those aspects that correlate to the duty to impose what I will call RTφ's).

Morauta understands Réaume's argument to jump from premise (1), 'an individual cannot enjoy a participatory good on her own', to the holding constraint. As said, he aims to defeat this argument by constructing the strongest possible argument for the holding constraint and then proving this fortified argument wrong. According to Morauta, the strongest construction is built on what we could call, the 'control-based argument' because it is based on an account of what it means to control the benefit of a right[63]. The control-based argument adds two premises to Réaume's premise (1).

The first premise (4) says that 'an individual cannot have control over the benefit of a right which is grounded in interests in a participatory good'. (Morauta 2002: 100) Morauta presents this premise as derived from premise (1) 'An individual cannot enjoy a participatory good on her own'. The inference of (4) from (1) seems plausible. An individual always needs another individual to enjoy a participatory good. If we do not allow for the illiberal possibility, if it is a possibility at all, of forcing someone to enjoy something, then one individual cannot control another individual's enjoyment of the good. I believe Morauta is right to construct the argument for the holding constraint in this way. Premise (4) is indeed what makes the holding constraint plausible. The plausibility of the control-based argument relies on the idea that an individual cannot control the enjoyment of others whereas the group, being the community, presumably can.

The second premise (5) in Morauta's argument is what he calls the control thesis. This thesis says: "x holds a right R only if x has control over the benefit of R, and x has control over the benefit of R if and only if the following is true: If the accrual of the benefit of R depends upon the performance of some action φ, then either (a) φ is an action which x can perform, or (b) φ is an action which can be performed by some other agent y, and R gives x the power to demand that y perform φ"[64]. (Morauta 2002: 99) Note that, according to this thesis, it is sufficient for an individual to have control over an accrual or increase of the benefit for her to have control over the benefit of a right. For an individual to hold a right it is not necessary for her to have control over the benefit of the right in the sense that she has to be able to single-handedly create the good that the right aims to protect. Thus, in the case of a participatory good, it is sufficient that the benefit of enjoying the participatory activity be increased when a community, sustaining the participatory activity, is present. Notice, however, that there is a case in which the control thesis would say that the increase

63 Morauta gives another argument for the holding constraint, which he also sees as a reconstruction of Réaume's argument. This argument could be called the 'exercise-based argument' since it relies on an account of what it means to exercise a right. For simplicity's sake I only discuss the control-based argument. Morauta (2002: 98) calls it the strongest argument and the exercise-based argument is structurally similar.

64 The control thesis plays a role in my overall argument but may, together with the collective agent, seem to be incompatible with the interest theory of rights. However, Morauta would disagree. He "cannot see any reason why an interest theory could not accommodate some sort of control requirement if it wished to". (Morauta 2002: 99)

of the benefit does not give control. That is when the language is declining and despite a partial increase in some sector, the language will nevertheless disappear. My argument for the adapted holding constraint is based on this case.

The control thesis paired with premise (4) gives the control-based argument for the holding constraint. It says that individuals cannot hold rights to participatory goods because they cannot control the benefit of the right, viz. the enjoyment of others in the participation of the good. This, according to Morauta, is the strongest argument one can provide for the holding constraint. I will use this argument later on to argue for my adapted holding constraint. Yet, Morauta goes on to show that this argument is false by giving a counterexample of a right to a participatory good that does give an individual control over the benefit of the good. So Morauta argues that premise (4), which gave credibility to the control-based argument and the holding constraint, cannot be inferred from premise (1).

3. Morauta's refutation of the control-based argument: choice-rights

The counterexample Morauta (2002: 105-108) uses to defeat the control-based argument is what he calls a choice-right. Choice-rights are rights that give an individual the power to demand that the co-members of his or her participatory community are given a choice to participate in the enjoyment of the good. An example of this would be a right held by an individual community member that imposes a duty on the company that employs her to accommodate her minority language, for example, by allowing it to be spoken in the work place, providing translated manuals, not demanding fluency in the majority language for certain positions, etc. Choice-rights sidestep the problem of controlling another person's enjoyment, which made premise (4) plausible, by limiting the kind of control one individual can exercise over another. Choice-rights force others to accommodate the choices that other members of the participatory community make[65]. They do not force other community members to enjoy something; instead, their freedom to enjoy is increased by choice-rights. Choice-rights can, therefore, avoid the problem of controlling another person's enjoyment in this way. But are they really valid counterexamples against the control-based argument?

Morauta (2002: 102) spells out two criteria that need to be met for a right to be a good

65 Notice that choice-rights can be equated with Kymlicka's externally protective, as opposed to internally restrictive, rights. We will consider a case below, i.e. when the participatory community itself is at stake, in which Kymlicka's strategy of only having externally protective rights is inadequate.

counterexample against the control-based argument. First, the right has to be held by an individual and the benefit of the right has to be controllable by the individual. Second, the right has to be a right to a participatory good. Choice-rights indeed fulfill the first criterion. But Morauta's disregard for the distinction between core and diffuse benefits (premise 2 above) allows for a rebuttal based on Réaume's distinction between these two benefits by denying that the second criterion is fulfilled.

Choice-rights fulfill the first criterion. They can indeed be held by an individual. Take the individual in the example above. She has standing to sue her company which has not fulfilled its duty to accommodate her minority language. Imagine that this court action has the following consequences: the minority language is tolerated in the work place, people speaking the language are found in more positions and ambiguities in the manual can be discussed in the minority language. Assuming that a community of willing participants is present, these accommodations increase the possibilities for minority members to enjoy speaking their language. The important point is that the control over this increase lies in the hands of the individual who has the power to impose a duty to accommodate the minority language. We should thus conclude that the first criterion is met.

The second criterion, however, poses a problem in light of Réaume's distinction between core and diffuse benefits. Are benefits stemming from accommodations like translating manuals core benefits? Réaume would say that they are not, and she would have good reason to do so. Choice-rights are too limited to make a difference at least in one case: when the presence or maintenance of the language community itself is at stake. The core benefit to a participatory good such as language is a participatory activity which is produced by a community of participants. There is a structural problem with individual rights to these goods when that community itself is at stake. At least in that case an individual with an individual right cannot guarantee the maintenance of the participatory activity because a single individual's court action cannot prevent the community of willing participants itself from disappearing. In this case, therefore, choice-rights do not give an individual control over the core participatory good and they fail to be a valid counterexample to the control-based argument. Provided there are no other good counterexamples, the control-based argument for the holding constraint stands when the community of participants itself is at stake.

In most cases, however, the community of participants is not at stake and the distinction between core and diffuse benefits does not matter. When such a community is present, choice-rights are indeed valid counterexamples to the control-based argument for the holding constraint: every accommodation increases the possibilities for our individual to enjoy the core benefit with other willing participants, that are present. The holding constraint may be right when the participatory

community itself is at stake, but Morauata is right in saying that if willing participants are present there is nothing wrong with an individual right to participatory goods. The problem for Morauta, as we will see, is that one type of participatory goods, integrated minority languages, is typically pushed towards a situation in which the community of participants itself is at stake. My argument for the adapted holding constraint will be based on an analysis of what kind of rights are needed to maintain the presence of the participatory community in the case of integrated minority languages.

4. Premise (3) again: heavyweight interests in the performance of threshold actions

Let us take stock. We saw that the third premise in Réaume's argument is crucial. It claims that an individual interest in a participatory good is not of sufficient weight to ground a right to that good. In the second section, we followed Morauta in rejecting the third premise because we should not only take the interest of one single individual into account. In the third section, we followed Morauta in rejecting the seeming plausibility of the idea that individuals cannot control the benefits of a right to a participatory good: they can through choice-rights. Yet we stumbled upon a case in which individuals cannot control that benefit: when the community of participants itself is at stake. Morauta has to recognize that choice-rights are merely raindrops in the ocean in that case. Even when some individual members of a community who share an interest in a participatory good go to court to claim their right, they are unlikely to control the core benefit of the right, i.e. the presence of the participatory community. Is Réaume's third premise right when the community of participants is at stake? It would indeed seem that, in that case, an individual's interest, or even shared individual interests, cannot be of sufficient weight to ground a right, at least not a right that can give her control over the benefit of the right.

At this point Morauta could answer: so what? Admittedly, the case we are considering is a strange one. To start with: how do we know when the community of participants is at stake? Furthermore, the moment in which a community is at stake is a fleeting one, should such a moment even have an impact on our conception of rights to participatory goods? I will argue that it should. I will call the stage in which the community of participants itself is at stake the threshold stage. By the threshold I mean the point at which the number of language speakers has declined to such an extent that further decline would mean the loss of the language. This stage only manifests itself fleetingly. Yet, we can conceive of it in our imagination. Moreover, I will argue that the conditions of this threshold stage spillover into the stage before we have reached the threshold. For this reason, it should have an effect on our conception of rights to participatory goods. In the first subsection, I will argue that we

can expect this threshold stage to occur in the case of integrated languages and that a fair regime of language rights keeps this threshold at bay. In the second subsection I will show that the attempt to prevent threshold stages implies that the conditions of the threshold stage spill over into the normal stage before we have reached the threshold. I will also introduce a distinction between threshold actions, i.e. actions that are necessary for producing a participatory good, and surplus actions, i.e. actions that are not strictly speaking necessary for the production of a participatory good. This distinction allows us to conceive of this spillover, to clarify the disagreement between Réaume and Morauta and to reinterpret the former's third premise to which I will return briefly in the third subsection.

4.1. Language rights ought to keep the threshold at bay

The argument for the claim that language rights ought to keep threshold situations at bay consists of several steps. First, linguistic minorities ought to have a fair chance to maintain their language. Second, language is a participatory good and participatory goods are necessarily produced publicly. Third, integrated minority languages are pushed towards the threshold. Fourth, because minority languages are important minority goods they ought to be protected by means of rights. Let me spell out these steps.

First, a fair language policy ought to keep the threshold at bay. Why do we need a fair language policy? The argument that minorities, whether they are integrated or not, should be given the tools to maintain their language has been given in the introductory chapter[66].

Second, participatory goods are necessarily produced publicly in the sense that they involve many people for their production. Participatory goods are a type of public good. Most public goods, however, are only contingent public goods when it comes to the way in which they are produced. Most public goods, in other words, could be produced by private individuals. Take the example of street lighting. It is a public good: its consumption is non-excludable and non-rivalrous. Nonetheless street lighting could be produced by a private company that produces the lights, the electricity, etc. Maybe the company would need to be funded by taxes levied by the state in order to

66 Several arguments for a fair language policy are compatible with the kind of group right defended here: Kymlicka's (1995: 76-84) societal culture argument, Réaume's (2000) argument about the intrinsic value of languages, Van Parijs's (2011) parity of esteem argument or the interpretation of Patten's (2014) argument about equal recognition that I gave in the introductory chapter. The kind of group right proposed here is compatible with Van Parijs's and Réaume's arguments but it fits better with arguments that make fewer assumptions about identity and esteem, like those of Kymlicka and Patten. That is so because, as I will argue below, this kind of group rights demands that one can plausibly say that all minority members enlisted in a register have an interest in the language right that is being claimed in their name.

bypass the free-rider problem implied by their non-excludability but that does not matter here. Street lighting can be produced privately: it can be produced by a limited number of people or a company. This is not the case for participatory goods. These goods necessarily require a large group of people for their production. Take the example of a vibrant linguistic community. The task of keeping a community like this alive cannot be outsourced to a private individual or company. One might be able to outsource certain components of the project. One could, for example, hire a private company to set language standards, print language textbooks, employ private language teachers, etc. But, similar to Réaume's distinction between the artifacts of and the actual participatory good itself,[67] if none of the people involved goes home to write a novel or compose a song in that language, we could not call it a vibrant or living linguistic community. The task of keeping a linguistic community alive and well necessarily involves the efforts of a large group of people. If we want to maintain a good like this one, therefore, we need to keep the number of participants in the community above the threshold. In other words, we need to keep the threshold at bay.

Third, minority languages in an integrated society are the kinds of participatory goods that are pushed towards the threshold. In such a society, the minority does not have a region of its own, i.e. in which it is linguistically dominant, which is delineated by a linguistic border. Accordingly, the language rights proposed here are a non-territorial or personal form of language rights. This means that the right is attached to individuals or small groups of individuals and not to administrative or political regions[68]. In an integrated society minority languages are pushed towards the threshold because they have to compete with the majority language as a means of communication. The minority language loses out in this competition because the majority language has, as a tool for communication, the obvious advantage of being spoken by the majority of people. Thus what typically happens is that the majority language pushes the minority language into disuse in an integrated society. Brussels, for example, has moved from a predominantly Dutch-speaking city to a predominantly French-speaking one in the twentieth century. This is what Van Parijs (2011: 143), inspired by the work of the linguist Jean Laponce, has called Laponce's law: “the friendlier the relations across language groups, the more savage the competition between their languages”. Integrated languages are very friendly. Laponce and Van Parijs have concluded that, therefore, languages ought to have a territory of their own—i.e. the territorial imperative. But there is nothing that prevents us from using the same argument for strong language group rights. The point is that a

67 This, in my opinion is why Réaume's distinction between core and diffuse benefits is important. It points at the necessarily public production of participatory goods. I am making another interpretation of what is the crucial feature of participatory goods here. Usually, as in Réaume's argument, the focus is on the enjoyment side of the good (see also Waldron 1993 and Jones 2014: 58). I argue that the production side already engenders an argument for the holding constraint, whatever else may be said about the enjoyment side.

68 Réaume is known to be one of the defenders of such a personal language policy (see Réaume 2003). This sets her apart from defenders of a territorial language policy like Van Parijs (2011).

fair language policy for a linguistic minority in an integrated society counters Laponce's law. Translated to the concepts I am using here this means that a fair language policy keeps the threshold at bay.

Fourth, minority (participatory) goods have to be protected by law, namely, by making these goods the objects of rights. Minority participatory goods ought to become the objects of rights because in an integrated society no other policy-making tools designed for the majority, for example giving financial incentives, are apt to provide for minority goods. That is because the majority will always interfere. Ought the political community at large, including the majority, to decide on a scheme of financial incentives designed to keep a minority language alive? This decision will not be shielded from the usual power play of politics; the majority would intervene and outweigh the interests of the minority. The legal sphere is the only sphere that can be shielded from this kind of power play. That is the reason why a whole host of minority goods are protected by law. Languages should be protected in a similar way.

We can thus foresee that the number of minority language speakers would decline in an integrated society without strong language rights. Given that minority languages are necessarily produced by the community of speakers, giving linguistic minorities a fair chance means keeping the threshold at bay by means of strong language rights. Language rights thus ought to be able to keep the threshold at bay.

4.2. Threshold and surplus actions

We saw above that choice-rights fail as a good counterexample against the holding constraint in the threshold stage, which only really exists in a fleeting moment. The argument we just considered tells us, however, that the conditions of the threshold stage spill over into the stage that precedes it. In the remainder of this chapter I will spell out how we should conceive of this spillover. Key to it is the distinction between threshold and surplus actions.

In order to explain this distinction, let me start by describing the necessarily public character of the production of participatory goods in more detail. Imagine the set of all the actions contributing to the production of a participatory good like language. This set of actions consists of: child A, B and C being taught the language at stake; bureaucracy D, E and F partially operating in that language;

companies G, H and I accommodating it; individual J, K and L writing novels in it, etc.[69]. Some subset of this set of contributing actions is required by necessity for the production of the language group. In order to grasp that subset we can imagine the whole set of contributing actions to be divided into two subcategories according to whether they are necessary for the maintenance of the good: a) surplus actions and b) threshold actions.

Threshold actions are those actions, the performance of which would tip the balance in the right direction for the language to be maintained. Since at the surplus stage, the non-performance of one contributing action can be offset by the performance of other contributing actions we can only determine the threshold actions when we have actually reached the threshold stage. Thus, in principle, only when the language is exactly on the threshold of disappearing are all contributing actions threshold actions. Yet at the surplus stage there will also be contributing actions with a heavy impact that need to be performed for the language to be maintained: those heavy-impact actions, the non-performance of which cannot be easily offset by the performance of other contributing actions. Take for example the action of educating a child which is a future literary genius in the minority language or the action of operating in a minority language by a large administration. Note that, since we do not have foresight we cannot determine which actions these will be. Thus, in practice there will be threshold actions at the surplus stage but we cannot determine them. The category of threshold actions is also a very small one: it consists only of those actions that make a difference. Being a small and indeterminable category, threshold actions are easily overlooked. For this reason, they are a source of much confusion in the discussion on rights to participatory goods.

Surplus actions are a auxiliary to the threshold actions. If the threshold actions are performed, then the surplus actions only add to the vibrancy of the linguistic community. Surplus actions have no direct effect on the maintenance of the language, they are not required by necessity.

Rights to integrated languages entail duties to perform all threshold actions since these actions are necessary for the good to be produced. Yet, in the surplus stage, we cannot determine what these actions will be. That is why rights to maintain an integrated language are a special category and why there is a the structural problem with an individual right to maintain an integrated language. Such a right would require the performance of all threshold actions. Yet, the category of threshold actions is small and indeterminable. We cannot wait to grant rights to threshold actions until we reach the threshold stage; if we did, we would be too late to save the core benefit. The conditions of

69 Notice that imposing duties to perform many of these actions, except obviously writing a novel, is compatible with liberalism.

the threshold stage, therefore, spill over into the surplus stage. We saw above, however, that integrated minority language rights need to keep the threshold at bay. Some interests in language, therefore, need to carry the weight of threshold actions even in the surplus stage when they are, strictly speaking, surplus actions. In the next subsection we will see what this means with regard to the third premise about the weight of certain interests in core participatory goods. In the last section, we will specify which interests need to carry extra weight.

The distinction between threshold and surplus actions allows us to understand when Morauta's choice-rights are valid in more detail. Choice-rights are a valid counterexample against the holding constraint, proving that the control-based argument fails, in the case of surplus actions. But they are not valid counter-examples in the case of threshold actions. Why is this the case? Imagine the action of translating a manual into a minority language. Suppose it is a surplus action and its performance thus only adds to the vibrancy of a secure language. A right that imposes a duty to perform this action can be held by an individual because the benefits of that right, core as well as diffuse benefits, can be controlled by the individual. The manual may only be an artifact added to an already vibrant linguistic community. But, given that the participatory community itself is not at stake, a right that imposes a duty to translate the manual increases the possibilities for the participants to enjoy their language. In short Morauta's choice-rights are valid counterexamples to the control-based argument when the duties they impose are duties to perform surplus actions.

Why are choice-rights not valid counterexamples to the control-based argument in the case of threshold actions? Threshold actions are never isolated. Threshold actions point at other threshold actions, all of which have to be performed in order to maintain the participatory good. An individual right to a participatory good might give the individual the power to impose duties on her employer and the administration she uses to accommodate her language. But such an individual right does not give her a power over all the other companies, administrations, and linguistic accommodations that might be equally vital to maintaining her language. Individual choice-rights entailing duties to perform threshold actions are a drop in the ocean. Since their impact on the maintenance of the good is negligible, they cannot guarantee its maintenance. The individual thus cannot control the core benefit of the right and thus choice-rights fail as counter examples to the control-based argument in the case of threshold actions. Thus, in the case of threshold actions the holding constraint stands.

Still, Morauta could respond 'so what?' to this rebuttal. We have not advanced much with regard to our first statement that the holding constraint stands at the threshold stage. It is only at the threshold

stage that we can determine the threshold actions and as said this is a fleeting moment of which it is not clear whether it should have an impact on our conception of rights to participatory goods. But Morauta should recognize that the threshold stage does have an impact on that conception if he agrees that the conditions of the threshold stage spill over into the surplus stage. This spillover has to do with how we see the weight of the interests in participatory goods. We thus find ourselves, once again, in the territory of Réaume's third premise. I will now argue for a reinterpretation of that premise.

4.3. Reinterpreting premise (3): interests in the performance of threshold actions

Recall the discussion of premise (3) in section two. The question we posed was whether the full interest in the core benefit can play a role in justifying or grounding the right to it. We asked whether it made a difference to see this interest as an interest shared by many individuals or as a group interest. If it makes a difference—i.e. if only a group interest can carry the weight of the interest in a core benefit—then Réaume's third premise stands. If it does not make a difference, then Morauta was right in leaving out this premise. We are now in a position to clarify what is meant by the full interest in the core benefit of a participatory good. It can only mean an interest in the performance of threshold actions. As we saw in the previous subsection Morauta was right to deny premise three when the participatory community is not at stake. In the surplus stage an individual with an individual right to a participatory good can control the benefit of that right, whether it is a core or a diffuse benefit. When the participatory community is at stake, however, Réaume is right. It does not matter whether we see the interest as a group interest or as an interest shared by many individuals. What matters is the weight of the interest. The only problem for Morauta is that, again, if we agree that language rights need to keep the threshold at bay, then the conditions of the threshold stage spill over into the surplus stage and affect the language rights.

The point of the third premise is that the interests are seen as 'heavyweight interests' that can ground rights that entail burdensome duties that can maintain the language. This can be achieved in two ways: a) in line with Réaume's rights-to-collective-goods strategy, by seeing these interests as group interests (in core benefits); or b) in line with my interpretation of Morauta's control-based argument for the holding constraint and thus the rights-of-collective-agents strategy, by seeing them as interests in the performance of threshold actions. Whether the interest that grounds a right entailing burdensome duties is seen as an individual, shared or a group interest does not matter. As said above, what matters is whether we are at the threshold stage or whether the right in question is

conditioned by the threshold stage. I would thus reinterpret Réaume's third premise as saying that the weight of an individual interest seen as an interest in a surplus action is not sufficient to ground a right to the core benefit of a participatory good.

My reinterpretation, compared with Réaume's original account, has the advantage that, as we will see in the next section, we can spell out why and when we should see interests in participatory goods as interests in the performance of threshold actions. We thus replace an opaque and easily manipulable appeal to group interests and group rights by a clear and more rigid account of rights to participatory goods. As I will argue in the last section, this should go a long way in solving the agency problem. For, in order to solve this problem, it is crucial to be able to spell out in detail why and when a right to a participatory good that entails burdensome duties, is justified. That is what we will do next.

5. A new argument for the holding constraint and an account of group rights

In this section I will complete my argument for the adapted holding constraint. I will spell out how we should conceive of the spillover from the threshold stage into the surplus stage, viz. which interest should be seen as carrying the weight of maintaining the language. I will also spell out my account of group rights. Recall that the group rights I defend here are characterized by the group having legal standing to sue. This part of the argument is intended to show the defects of individual standing in the case of rights to participatory goods. In the previous section, we saw that minority languages in an integrated society are pushed towards a threshold and that they are necessarily publicly produced. Hence there is a collective action problem in keeping the threshold at bay. In order to solve it, cooperation needs to be guaranteed. That is the first premise of the argument in this section. The two additional premises are: a) guaranteeing cooperation to keep the threshold at bay can only take the form of imposing duties to perform all actions that fall under the coordination rules; and b) if only individuals have standing to sue, then there will be too many exceptions to the imposition of duties to perform actions that fall under the coordination rules. These three premises together give a new argument for an adapted holding constraint which says that the group, or a representative of the group, should *also* have standing to sue in the case of rights to participatory goods. Let me argue for the two additional premises at length.

5.1. The form of cooperation

Guaranteeing cooperation in the effort to keep the threshold at bay necessarily takes on a certain form. This form is constrained by three factors.

First, I argued above that in order to shield minority languages from majority policy-making, minority languages need to be protected by means of rights. Rights guarantee the performance of certain actions by imposing duties.

Second, given that everybody is equal before the law, only duties to perform general types of action, as opposed to particular actions, can be imposed. Let me abbreviate 'actions falling under a general type of action' as 'Tφ's'. The argument here is simple. One can only impose duties to perform all actions of a general type 'sending a child to a minority school' and not just impose a duty on child B to go to a minority school. Of course it is possible to dissect 'minority language schooling' and come up with more fine-grained general types of action. For example, one might impose a duty to 'send children to primary school' or 'send children to Sunday school'. The point is that the criteria always have to be general. We cannot justify imposing duties on one company or minority parent without doing the same for all companies and parents in the same position. However, because the types of actions cut across the division between surplus and threshold actions, there will be particular surplus actions amongst the Tφ's. Sending some children to minority schools will be threshold actions, whereas sending other children will merely be surplus actions, not actually needed to maintain the language. Yet, this is inevitable given the indeterminability of threshold actions and the fact that we have to impose duties to perform Tφ's. We have to treat all actions falling under certain general types of actions as threshold actions, knowing that there will be surplus actions amongst them. The spillover of the surplus stage into the threshold stage thus consists of seeing certain surplus actions as threshold actions because they fall under the Tφ's.

Third, which Tφ's have to be performed? Although not all Tφ's have to be performed, there can be no exception to the duty to perform the Tφ's that the minority decides have to be performed. Obviously not all general types of actions, which comprise all contributing actions, have to be performed for a language to be maintained. The minority is free to shape the language policy to its needs. The minority can, for example, decide to have a language policy focused on sending all minority children to minority schools, and not imposing any further duties of language accommodation on companies, or vice versa. However, all other things being equal,[70] there can be no exceptions to fulfilling the duties to perform those Tφ's the minority's language policy requires.

70 Here I only have in mind the fact that no right is absolute.

This is because the decision to impose duties to perform certain Tφ's is a coordination rule to which conformity has to be guaranteed since it has an impact on other spheres of public life. For example, the minority can decide to have a language policy focused on education in order not to interfere with the economic sphere. However, if we want this freedom in the economic sphere to be compatible with maintaining the language, then there can be no exception to the duty to perform the Tφ 'sending children to minority language school'. This Tφ is a coordination rule, the performance of which has to be guaranteed. The minority thus picks out certain general types of action and upholds them as coordination rules that form the basis of their language policy[71]. Let us abbreviate 'actions falling under general types of action, the performance of which is a coordination rule in the minority's language policy'[72] as 'RTφ's'.

It is important to see that this convergence on certain RTφ's is essential to guaranteeing cooperation. There is nothing wrong with seeing most Tφ's as being merely surplus actions. They need not be performed. However, if we see all Tφ's as surplus actions, the language will not be maintained. The minority members need to converge on seeing some Tφ's as coordination rules, i.e. as RTφ's. The minority democratically decides which Tφ's to see as RTφ's and by *fiat* of that minority decision those Tφ's *become* threshold actions. This is because the guaranteed performance of the RTφ's allows for the nonperformance of many other contributing actions. Given that minority languages are pushed towards the threshold, the nonperformance of certain contributing actions needs to be offset by the performance of actions that preserve their language. Otherwise the language will not be maintained. In other words, if the performance of RTφ's is not imposed, the minority language will not be maintained[73].

In sum, the form that guaranteeing cooperation in the case of the joint effort of producing a participatory good necessarily takes is that of guaranteeing conformity to the coordination rules by imposing duties to perform the vast majority of RTφ's.

71 This is the reason why, as I noted above, there has to be a democratic decision-making body that includes all and only members of the integrated minority. The minority should be free from majority interference in deciding which language policy to adopt. Furthermore, this decision should be a democratic one.

72 A shorter, but less exact, way of putting this, which I used above, is 'actions falling under coordination rules'.

73 We can now understand why, as I said in the introduction, the type of group right I am proposing here, even though it creates a group agent, still fits with the interest theory and not the will theory of rights. It is the interest in the enforcement of RTφ's and not the status, identity or capacity for control of the group that does the normative work in justifying the right. Even the capacity for control does not do normative work. The interest of integrated minority members in their language *is* an interest in the existence of a group agent that can coordinate or control the effort to maintain the minority language.

5.2. Individual or group standing

Why should groups also have legal standing in the case of rights to participatory goods? We can now rephrase this question as follows: why is individual standing inapt in the case of imposing duties to perform the vast majority of RTφ's?

The main reason why individual standing is insufficient for imposing duties of this kind is that the interest rankings of individuals in the performance of an action that contributes to maintaining her language can change from the threshold to the surplus stage. An individual interest in the performance of some contributing action is often primary in the threshold stage and secondary in the surplus stage. Only at the imaginary threshold stage would the interest in the participatory good claim its rightful weight and place. Imagine an individual committed to the maintenance of his minority language. He has a heavyweight interest in this goal. Yet, he finds himself in the surplus stage and his language is relatively safe. Drastic measures are not needed to maintain it. The individual also has an interest in sending his children to a majority language school, possibly in order to give them a competitive advantage, and so he does. Fifteen years later, however, the situation changes. The individual still has children, but his language is rapidly declining. His preference ranking now changes and he sends his children to a minority school[74]. Alas, it is too late. The language has passed the threshold and is beyond saving. This example illustrates how, at the surplus stage, the heavyweight interests of many individuals in maintaining their language will be outweighed by other interests. This does not change the fact that they have a heavyweight interest in maintaining their language, however. The problem is that priority and weight of this interest only surfaces at the threshold stage. It is this priority of many minority members' interest in language maintenance that we risk losing sight of if we do not let the conditions of the threshold stage spill over into the surplus stage. There are three things to note about the possibility of shifting priorities or preference rankings in the case of a right to language.

First, it is perfectly possible for a lightweight interest to outweigh an interest in maintaining one's language at the surplus stage. Often the interest in avoiding the burden of a legal process, i.e. hiring a lawyer and going to court, is already enough to outweigh the interest in language maintenance. It only becomes clear which contributing actions are threshold actions at the threshold stage. Since the decision about which actions these will be partly depends on the minority's coordination strategy, individuals in the surplus stage easily fail to see the importance of performing them. That is why

74 Of course it is possible that even at the threshold stage the individual thinks sending his children to a non-minority school is more important than the maintenance of his language. In that case it should be possible for him to opt out and stop being a member of the group. I will come back to this below.

even a lightweight interest might outweigh the interest in maintaining one's language.

Second, minority members will often be forced into not suing to impose a duty to perform an RTφ. Take for example a company that has a duty to accommodate a minority language. Imagine the company is not fulfilling its duty and an employee is threatened with redundancy if she takes legal action. A subtler example would be an individual who censures her interest in the maintenance of her minority language in order to get a promotion. Subtler still is the predominance of the majority language in the economic sphere which forces individuals to adapt their preferences. The parent who sends his children to a majority language school in order to give them an economic advantage, for example, is an instance of a forced or adapted preference. The same parent might prefer to send his children to a minority language school if there were a well-functioning minority language economy in his society. When it comes to languages, certainly integrated languages, individual preferences are thus bad guides because an individual preference in the maintenance of one's language will easily adapt to the predominance of the majority language. Whenever force is at play, individuals have an interest against suing which will outweigh their interest in maintaining their language.

Third, individuals will often try to free-ride on the efforts of other minority members at maintaining the participatory good. Let us return, once again, to the example of the parent who, for economic reasons, wants to send his children to a majority language school. If it is the case that the parent has an interest in the maintenance of his language and knows that sending his children to a minority language school would contribute to the maintenance of that language then he is free-riding on the efforts of other minority members if he does not do so. The problem I have been pointing at all along is that the parent can easily excuse himself by saying that it is *not clear* that he had to send his children to a minority language school because the minority has not been given the tools to implement a successful coordination strategy. That is so, because indeed that cannot be clear if the minority is not given those tools. Obviously, if this parent knowingly free-rides, then he has a strong interest against suing to impose a duty to perform an RTφ on himself.

In all these cases, individuals have an interest against suing to impose the performance of an RTφ. Nevertheless, we are warranted in assuming that the individual retains his or her interest in the performance of the RTφ, or ought to better assess his actions in the free-rider case, provided that two conditions are fulfilled. First, a minority register is in place and the individual in whose name is sued is enlisted in that register[75]. Second, the minority's language policy or set of RTφ's that is

75 I will explain the minority register in more detail below.

enforced is democratically accounted for. Provided that these two conditions are met, we should grant the group legal standing even to coerce the parent in the example above to send his children to a minority language school[76].

Finally, we can complete the argument for the adapted holding constraint. Why should groups also have legal standing to sue in the case of a right that entails the duty to perform an RTφ? Because many cases exist in which individual group members have a primary interest against suing to maintain their language at the surplus stage, but have a primary interest to sue at the surplus stage and because the performance of an RTφ is a coordination rule that cannot allow for too many exceptions. Therefore the group should also have the legal standing to impose duties to perform RTφ's. If the group does not have standing, then too often RTφ's are not performed and this compromises the minority's coordination strategy, i.e. its language rights regime. The result would be a language rights regime that cannot maintain the language group whose rights it seeks to uphold.

This argument is admittedly very complex, containing nine premises and four intermediary conclusions. So let me, by way of summary, present the whole argument formally. I start with the argument in the last two sections and then insert that argument in Morauta's argument for the holding constraint. In subsection 4.1 I argued that:

-P1: Integrated languages, i.e. participatory goods, are by necessity produced by a large number of people.

-P2: Integrated language use typically declines towards a threshold.

76 The reasoning in the text is similar with the reasoning of the Canadian Supreme Court in the Gosselin case (*Gosselin v. Québec* [2005] 1 R.C.S. 238). The appellants in this case were francophone parents in Quebec who wanted to send their children to English schools. Under section 72 of the *Charter of the French language*—which stipulates that instruction in the kindergarten classes and in the elementary and secondary schools shall be in French—they were not allowed to do so. Neither were they eligible for an exception under the criteria given in section 73—one of the criteria implies that parents who have received English education themselves can have a right to English language schooling for their children. The appellants argued that they were discriminated against on the basis of their language since they were not allowed to make use of English schools, which the English-speaking minority of Quebec had a right to under section 23 of the *Canadian Charter of Rights and Freedoms*. According to Meital Pinto (2015: 533) the motive of the appellants was to enhance the economic prosperity of their children. The Supreme Court dismissed the appellants' claim, upholding the constitutionality of the criteria in section 73. Part of the reasoning of the Court was the protection of the French language in the larger Canadian context. The Court thus saw, to use my concepts, the interest in language maintenance as a heavyweight interest in the performance of a threshold action. As such this interest should indeed be protected by rights with constitutional status and may sometimes go against the expressed interest of the group members in which language to use or to instruct one's children in. One may speculate that the Court assumed the appellants still had the interest in maintaining their French language. As I have argued, the appellants might even have had a strong interest in it but gave priority to the economic interests of their children without assessing correctly the consequences for the language maintenance policy if everyone were to take a similar action; they might have been subtly forced by the predominance of the English language; they might also have been trying to free-ride on the efforts at maintaining their language of the other French speaking citizens of Quebec. The only problem I see with the Court's ruling is that there is no escaping, other than using a private school, one's ascribed features (the criteria of section 73) on which Quebec's language policy is based—something my non-territorial group right based on a register would allow for.

-C1: There is a collective action problem in the production of integrated languages.

Next I argued, in subsection 5.1, that guaranteeing cooperation to solve the collective action problem in the production of integrated languages can only take a certain form.

-P3: Minority goods like integrated languages have to be protected through minority rights.

-P4: Rights can only impose duties to perform general types of action (Tφ's).

-P5: In order to solve the collective action problem in the production of integrated languages, cooperation with certain general types of actions (RTφ's) has to be guaranteed.

-C2: Cooperation to solve the collective action problem in the production of integrated languages can only take the form of imposing the vast majority of duties to perform RTφ's.

Then I argued, in subsection 5.2, that if only individuals have standing to sue, then there will be many exceptions to the imposition of duties to perform RTφ's.

-P6: Individuals typically do not have heavyweight interests in the performance of RTφ's.

-P7: Individuals often will not sue to impose duties to perform RTφ's.

C3: If only individuals have standing to sue then there will be many exceptions to the imposition of duties to perform RTφ's.

The three intermediary conclusions put together give the next step in the overall argument, which I explained in the last full paragraph directly above (the one starting with “Finally”).

-C1: There is a collective action problem in the production of integrated languages.

-C2: Cooperation to solve the collective action problem in the production of integrated languages can only take the form of imposing the vast majority of duties to perform RTφ's.

-C3: If only individuals have standing to sue then there will be many exceptions to the imposition of duties to perform RTφ's.

Ca: If only individuals have standing to sue to impose duties to perform RTφ's, then integrated languages will not be produced.

We can insert Ca as a premise into Morauta’s control-based argument for the holding constraint. Notice that, as I argued above, I reinterpreted Morauta’s premise (4) ‘an individual cannot have control over the benefit of a right grounded in an interest in a participatory good’ as P8 ‘an individual cannot have control over the benefit of a right grounded in an interest in an integrated language when that language is not produced’.

-Ca: If only individuals have standing to sue to impose duties to perform RTφ's, then integrated languages will not be produced.

-P8: An individual cannot have control over the benefit of a right grounded in an interest in an integrated language when that language is not produced.

-P9: x holds a right R only if x has control over the benefit of R, and x has control over the benefit of R if and only if the following is true: If the accrual of the benefit of R depends upon the performance of some action φ, then either (a) φ is an action which x can perform, or (b) φ is an action which can be performed by some other agent y, and R gives x the power to demand that y perform φ.

This gives us the adapted holding constraint: Not only individuals can hold the right, in the sense of having standing to sue, in the case of an integrated minority's right to language maintenance.

Notice that the trick is in the condition (b) of the control thesis P9. I argued that at least in the threshold stage an individual with an individual right to language maintenance does not have the standing to go to court to impose the performance of all those threshold actions that also determine whether the language is produced. Given that he or she cannot control the production of the language, he or she cannot control the benefit of the right. This is where Réaume's distinction between core benefit and artifacts comes in. The individual may be able to control the artifacts, but not the core benefit at the threshold stage. At least in the threshold stage my argument thus certainly holds. But then I also argued that the conditions of the threshold stage spill over into the surplus stage and I explained how we should conceive of this spillover, namely as heavyweight interests in the performance of RTφ's. An integrated minority's right to language maintenance implies that, already at the surplus stage, the group can guarantee cooperation with RTφ's, by having the standing to sue to impose duties to perform RTφ's.

In conclusion, the right to sue in the case of an integrated minority's right to maintain its language should be held by groups or group representatives as well as individuals. It is possible for individuals to have standing to sue in the case of such rights. Yet the important point is that the group should have standing too, for those duties that demand the performance of RTφ's. To that extent, there is a holding constraint.

6. The group right to language maintenance and feasibility constraints

As I noted in the introduction, the agency problem is a serious problem for group rights as rights of collective agents. In this section I shall show how the proposed right responds to this problem.

What exactly is the agency problem?[77] The agency problem says that it is difficult to draw the boundaries of the group and to create a group agent whose authority to represent the group is justified. Interpreted in this way, a number of worries related to group rights fall under the agency problem. There are several accounts of why a group agent's authority may not be justified: because the agent turns to internally restrictive measures (Kymlicka 1995, 34-48); because the agent does not respect the rights of internal minorities (see for example Kukathas 1992); or because the agent overrides the rights of individuals (see for example Buchanan 1994). Of course, many of these worries can be met by only giving a heavily restricted group right to the agent. Notice, however, that the agency problem is a dynamic problem: part of the reasoning behind the problem is that a group agent may be given a restricted right at the outset but may abuse its power and expand the restricted right. Claus Offe's take on group rights provides the clearest illustration of this dynamic aspect. Offe fears that recognizing one group right as a right of a collective agent will put us on a slippery slope "from cultural rights to language rights, from language rights to an autonomous educational and media regime, from there to successful mobilization for territorial self-government [...]". (Offe 1998: 139). Such a fear of group rights is widespread and does part of the work in the static accounts of why group agency is problematic, mentioned above.

Why does the proposed group right avoid the agency problem? First, the register and democratic language policy make it possible to delineate the group and to create an agent that is representative of the group's wishes. The minority deciding democratically on its language policy will give us certain principles of the language policy or broad RTφ's, such as 'primary and secondary schools operate in the minority language', 'the public administration operates in the minority language', and so on. The agent can only sue in order to enforce these principles that are democratically accounted for. The representativeness of these principles of the group's actual wishes is strengthened by the relatively easy exit option that is allowed for by the non-territoriality of the group right. Non-territorial language regimes are good at providing people with an exit option: they do not even have to move to another region in order to escape their language group. Simply de-registering will do[78].

77 As noted already, the agency problem is part of the reason why Green and Réaume opted for a right-to-a-collective-good strategy See Green (1991: 319, 324, 325) for his take on this problem.

78 In order to ensure that language maintenance rules can—rightly—be imposed on the minority members that are free-riding on other members' efforts to maintain the language, it should not be too easy to de-register. In South Tyrol one is asked every ten years which nation one belongs to. There is a procedure to change nation outside of this ten-year period, but it is somewhat cumbersome. An arrangement like this would do in order to maintain the language. This is my answer to a possible objection that says that the proposed group right, because of the register, does not differ from a voluntary association. Individualist liberalism has no trouble seeing the rights of such an association as individual rights. The rights of the association, which might be seen as group rights, are then simply created by exercises of individual powers. So, actually, they are not really group rights. This objection assumes, however, that the right of exit can literally always be invoked. If that is the case and if a duty is imposed on a free-riding group-member, then he or she can simply invoke this right in order not to be bound by the duty. That is not the case in the group right proposed here. As in South Tyrol, one can only de-register every ten years or through a somewhat cumbersome procedure. Undoubtedly some free-riding group members will opt for this de-registration

This relatively easy exit option ensures that the language policy does not become draconian. One can see it as playing the same role as a bill of rights in a normal democratic decision-making body. The minority as a group will have to decide how many resources to put into the goal of language maintenance. If it decides on some draconian language policy then it will alienate many minority members that will simply de-register.

Apart from becoming draconian, there is, however, also the danger that, although the minority has democratically decided upon a set of broad language policy principles, the group agent will overstep its function and pursue the broad principle when it does not reasonably apply. In this regard it should be noted, however, that the minority agent is not the last judge on this matter. Judges are. Judges will have to weigh the values at stake here and the importance of the actions in realizing those values. On the one hand a judge may for example find a specific sub-action of a broad principle set by the minority like teaching one extra day a week in the minority language. On the other hand the judge may find another value, like the proper functioning of the overarching state, which demands the performance of other actions, like reserving one day a week for teaching in the majority language. We can think of a similar weighing spelling out the limits of the right to language maintenance for each minority in the economic, administrative, social, etc. sphere. In this way—the minority democratically sets its own principles and judges decide when and where these principles apply—we can come to a multitude of non-draconian democratically accountable language rules that can maintain an integrated language.

Second, notice that the result would be a heavily restricted right. The group agent only has a right to sue when those aspects of the right are at stake that correlate to duties to perform RTφ's. Furthermore, the judges weigh the importance of enforcing an RTφ against other considerations like those pertaining to the well-functioning of the state or other interests at stake. Admittedly this right

procedure when sued by their group and they should be able to do so. It is however justified to give these minority members a small incentive not to de-register by for example making access to the national minority's minority language administration conditional upon being registered as a minority member. In some cases, however, even if there would be no extra incentive, the free-riding minority member will, when sued, acknowledge that they have a duty to send their children to minority schools. Moreover, suing free-riding individuals will only do a little bit of the work of establishing the coordination rules. What will do most of the work is the group's coordination rules being clearly spelled out. As I argued above, as things stand now the free-riding individual can say that it is not clear what the coordination rules are. If it were clear than many individuals that otherwise would free-ride will not do so. Furthermore, the mere possibility of being sued when free-riding will cause many potential free-riders not to do so. People like to think of themselves as law-abiding citizens and do not like to be called out on free-riding behavior. As such, it is likely that an established practice of sticking by the coordination rules will come about. This will be sufficient to turn many potential free-riders into citizens willing to do their duty. Furthermore, many coordination rules will be externally protective and thus not impose duties on the group members but on the actors, like companies, that are coercing the group members to renege on the value of language maintenance that they hold. These group members will be glad the duty is imposed on the other actor. Nevertheless, it should always be possible for an individual to switch nation or to decide that this or that action is against his or her interest. There should thus always be the possibility to de-register, be it a somewhat cumbersome one. Notice also that this somewhat cumbersome procedure is still much less cumbersome than moving to another area.

can still be an internally restrictive right and it can in a way turn on internal minorities. The example of the parent wanting to send his children to a majority language school is a case in point. As I argued, however, the integrated minority is justified in imposing a duty to perform an RTφ. Furthermore, when a minority imposes such a duty this cannot be seen as a group right overriding an individual right. When the courts decide that the RTφ outweighs an individual's interest in sending his children to publicly funded majority to schooling then individuals simply do not have a right to publicly funded schools in the language of their choice. In that sense there is no overriding of individual rights. Moreover, as already noted, we should question our usual emphasis on individual autonomy in the case of integrated languages. The individual's preference to send his children to a majority language school will in many cases be forced by the predominance of the majority language economy; it is, therefore, not autonomously formed. Given the impossibility of knowing directly what kind of coordination rules the group as a whole would prefer best, we should assume that the content of the right established as such—that is, partly democratically decided upon and partly weighed by judges—comes reasonably close to the coordination rules that the individual group members actually have an interest in.

The proposed group right also has an answer to the dynamic aspect of the agency problem. Let me note two points in this regard. First, notice that in the case of an integrated minority's right to language maintenance this dynamic is less likely to occur when one grants such a right than when one does not grant it. If, as I have argued above, the only way to maintain a minority language is to grant it a right as a collective agent, then not granting such a right may do more to initiate such a dynamic. In the introductory chapter I have argued that assimilating a minority is the best tool of nationalism that can be given to minority nationalist politicians. The discourse of a majority assimilating something people hold dearly, like a language or culture, is a powerful rhetorical tool in the hands of minority nationalists. As I have argued, there is thus a lower-limit to the kind of tools of nationalism that can be withheld from minority nations. Minimal minority rights that do not allow the minority to fend off assimilation thus have more of an agency problem than less minimal rights that allow the minority to fend off assimilation. The language right offered here gives quite minimal accommodations in terms of nationalist tools, yet these accommodations are still compatible with guaranteeing the maintenance of the minority language—that is the idea of nations without nationalism.

Second, the proposed right should not be combined with strong tools of nationalism like NSG. As I already argued in the introductory chapter and as I will argue more extensively in the last chapter, NSG or consociationalism leads to a disintegration of the party system. Thus, implementing the

group right proposed here combined with NSG or consociationalism, implies that it is implemented in the context of a disintegrated party system. We would then have in all likelihood a powerful political actor in society: a possibly nationalist minority party. This party can misuse the proposed group right. This is problematic because the proposed group right does give certain nationalist tools and moreover these tools are relatively easily corruptible. The right proposed here gives a democratic body, a sort of minimal parliament, to the minority in which only the minority is represented. It is hard to oversee the possible interactions of this democratic body with a nationalist minority party that is represented in the statewide parliament. The possibilities for strategically manipulating either the language policy or the statewide parliament are manifold. One possibility would be that the nationalist party takes a hold of the democratic body and strategically causes—or merely threatens to cause—an overload of cases to be filed in the state's courts. There are many other possibilities for shrewd strategic actions by minority nationalists. Furthermore, the national register allows minority nationalists to "claim" a group of people as being members of their nation. That is not wrong if these people are not claimed for a nationalist project. If a nationalist minority party is around, however, then this is likely to happen. In order to see this problem, compare such a scenario with that of a territorial regime without a national register. When such a regime functions well then the silent assumption is that the minority and majority each have their territory. The people living on the minority territory belong to the minority and the minority supposedly has no claim over the people living on the majority territory. This is different once a national register is in place. With such a register one can easily see which people belong to the minority. Moreover, the proposed right multiplies the rules that need to be adhered to in order to maintain the minority language. It thus also multiplies the points of conflict. There is nothing wrong with a bit of conflict that can be settled in court. The minority is justified in putting pressure on the majority to respect minority language rights. Some stable end-result—when all democratically accounted for minority language rights are respected—can be expected when the conflict is minimal. However, if the conflict gets out of hand and there is a minority nationalist party that can use it to its advantage, then the fact that the proposed group right multiplies the points of conflict is problematic. This is an important argument in favor of territorial language regimes that settle the conflict. The problem with these regimes is of course that they give up on integrated minorities. Given that assimilating the minority will put us on an even slipperier slope and provided that the proposed group right is not implemented together with NSG, we can assume that also the dynamic aspect of the agency problem can be avoided.

In conclusion, the three elements of a justification of a group right have thus been given. First, the good or benefit of the right is worth protecting. As I argued in the introductory chapter, people have

a strong interest in maintaining their language and in having access to their linguistic community. Second, there is a structural problem with granting an individual right to this good. As I argued in the previous sections, when only individuals have standing to sue, then integrated languages will not be maintained. Third, as I argued in this section, no strong argument can be constructed against this proposed right by appeal to the agency problem. Integrated minorities thus have a right to language maintenance and this implies that the group has standing to sue in order to guarantee cooperation with the coordination rules of the minority's language policy.

Let me recapitulate. The group right proposed here can prove the territorial imperative wrong and thus the argument from the introductory chapter stands. The value of language maintenance, as the core elements in cultural maintenance, can be satisfied for small, dispersed or integrated, non-modernized and internal minorities—what I have abbreviated as small minorities. Furthermore, access to one's language accommodations can be seen as a feasible part of the right to language maintenance. The implication, as we saw, was that there is a conflict between the instrumental and the equality-based arguments of Tamir, Kymlicka and Patten. These authors now have two possibilities: either make the equality-based arguments stand on their own or let them qualify the instrumental argument. In both cases the equality-based arguments have to be strong. In the next two chapters I turn to arguing directly against the equality-based arguments. In chapter four I argue that national minorities are not permanent minorities and thus have no right to some sort of equality of democratic decision-making bodies. In chapter five I spell out a feasibility constraint that NSG violates.

Chapter Four: Are National Minorities Permanent Minorities?

Introduction

In the introductory chapter we saw that the fact that national minorities are often outvoted or outweighed matters to Tamir, Kymlicka and Patten. Tamir (1993: 41-42, 70, 149) says that minorities' being outvoted is problematic. She argues that the fact that a minority is in the minority "should be a factor in deciding the extent of support they are entitled to." (Tamir 1993: 42) Kymlicka (1995: 37, 44, 109) also says that it is problematic when minorities can be outbid or outvoted by the majority. As we have seen in the introductory chapter, a large part of the reason why Tamir and Kymlicka think that there is a problem with national minorities being outvoted is because they may be outvoted on matters of cultural maintenance. However, the problem of being outvoted may also do part of the work in Tamir's and Kymlicka's equality-based arguments. For Tamir a national minority then needs a political arrangement, a democratic sphere of its own, not only to maintain its culture, but also to be able to have collective decisions that can express this culture. For Kymlicka, a national minority then needs a collective decision-making body that can implement the same sorts of nation-building policies as the majority.

Patten (2014: 244) says that it is a good for members of a group when that group is the majority in a constituency so that it has "greater power to bring about decisions and outcomes that reflect its beliefs, values, cultural priorities, traditions, and so on". On Patten's account this alone does not, however, explain why it is a matter of justice that national minorities have a democratic sphere of their own. As we saw, this is a matter of justice because equal recognition demands that the minority gets its own democratic forum.

This idea that being outvoted is unjust corresponds to the permanent minority problem[79]. Permanent minorities are minorities that are permanently, structurally or persistently on the losing side under a democratic procedure that usually operates with majority rule. These minorities are on the losing side because they are discrete and insular[80] minorities which means that they have overall distinct preferences from those of the majority. Majority rule then operates as a winner-take-all rule to the

79 Weinstock (2001: 79) explicitly argues that national minorities should be given NSG because they are permanent minorities.

80 The words 'insular and discrete' are used in the famous fourth footnote to the ruling of the United States Supreme Court in United States v. Carolene Products.

disadvantage of such a minority that overall has different preferences. The majority always gets what it wants and the minority's preferences are subsumed under those of the majority[81]. Majority rule is thus not justified to this minority and that is the permanent minority problem.

NCA cannot fix the permanent minority problem, at least not when it comes to powers over non-cultural and non-educational affairs. As such it is an interpretation of the equality-based arguments of the authors mentioned above, that can hold its ground against NCA. The question is, however, whether this problem is a problem at all in the case of national minorities. In this chapter I will argue that in general it is not. For reasons that will become clear below, only certain kinds of minorities should be seen as permanent minorities in general: oppressed and very distinct national minorities, like certain indigenous people. Correspondingly two types of national minorities might be seen as permanent ones. First, a large enough cluster of indigenous peoples in a (formerly) colonized area might form a national minority that is distinct enough from the societal majority to be seen as a permanent minority. An example that comes to mind is the Sami minority in Scandinavian countries. Second, oppressed national minorities also qualify as permanent minorities. Regrettably the Kurds provide an undisputed contemporary example. As may be clear already, I also see denying a national minority the tools to maintain its language, like language rights, as a form of oppression. Hence many more national minorities like for example the Catalans are, arguably and at least for now, permanent minorities. They are so up until the point that the state in which they live stops denying them these rights. Here I ask whether there is a case for seeing national minorities as permanent minorities over and above such cases of oppressed and distinct minorities.

The permanent minority problem sounds convincing: minorities are outvoted by majorities and that is unjust. The problem with the concept of permanent minorities, however, is that it is ill-

81 The name most associated with the permanent minority problem is that of Lani Guinier. Guinier argues that majority rule operates as a winner take all rule, that minority preferences are subsumed under those of the majority and that subsequently majority rule is not justified to this minority. She (Guinier 1995: 2) gives a simple example of the permanent minority problem. Suppose a group of six children wants to play a game but four of them want to play tag and two hide-and-seek. If majority rule is used all the time, then the group will always play tag, thus subsuming the preferences of the minority under those of the majority. This is unjust to the minority of two. Guinier goes as far as calling this majority tyranny. A just solution would consist of dividing the playtime and play tag two-thirds and hide-and-seek one-third of the time. Thereby, as we will see below, the issue is turned from a discrete issue into a continuous one.
The story of Guinier is one of the more telling ones in the history of multiculturalism. Guinier, a legal scholar who takes the problem of black vote dilution to the heart, had published a number of articles on the permanent minority problem, of which Guinier (1991) is the most important one. In 1993 she was nominated by the Clinton administration for the position of Assistant Attorney General for Civil Rights. As Guinier recalls the story in the introduction to her 1995 book, she was attacked by conservative America as the quota queen and the administration subsequently dropped her nomination. Calling Guinier a quota queen surely goes much too far. She mainly proposed cumulative voting—a system similar to the Single Transferable Vote, which John Stuart Mill also advocated—, and a theory that comes close to that of Iris Marion Young. Furthermore, as Guinier (1995, 16-20) explicitly states, her main argument is against majoritarian electoral systems and thus not against majority rule as a rule for collective decision-making, or as a seat allocation rule.

understood. Part of the reason why it is ill-understood is because majority rule is ill-understood and part of the reason why the latter is ill-understood is because the normative status of majority rule is ill-understood.

Majority rule is a divisive issue among political thinkers. On the one hand, most political scientists prescribe majority rule for well-established democracies. On the other hand, many political philosophers are skeptical about majority rule as a normative principle. The conception of equivocal constraints developed in chapter two can help to bring both camps together. The trick is to see the dispute about majority rule as being one about its normative status. If we see majority rule as being required by an equivocal constraint, i.e. Schumpeter's constraint, then we can say that we should use majority rule when prescribing institutions for our non-ideal world, but we should not see majority rule as a normative principle on higher levels of ideality. Schumpeter's account of democracy is not very popular among philosophers. However, two authors that combine scientific and philosophical approaches to democratic theory both felt the need to defend Schumpeter for a philosophical audience. Ian Shapiro (2003: 51) says that we should not reject but rather supplement Schumpeter's account of democracy. Adam Przeworski (1999) defends a minimalist account of democracy that is also based on Schumpeter's account. In the first section I will argue that Schumpeter's account of democracy still plausibly constrains our world. It demands that most of political power flows through the channel of electoral competition based on majority rule. Thus, when we do prescriptive theory, we may use social choice models that clarify the properties of majority rule. We may for example use such models to answer the question whether national minorities are permanent ones.

Majority rule itself, as opposed to its normative status, is also ill-understood. It is sometimes seen as a winner-take-all rule or, even worse, confused with majoritarian electoral institutions. I will argue in section four, based on a social choice model developed by Barry and Nicholas Miller, that majority rule is not a winner-take-all rule. They argue that majority rule maximizes average preference satisfaction. In section six I spell out what, according to this model, a permanent minority is and in section seven I argue that national minorities do not fulfill the criteria for being called permanent minorities. Barry and Miller's argument requires making a number of assumptions, like the irrelevance of vital interests and not too ideal an interpretation of political equality. I will show, in section three, that Beitz also did not make too ideal an interpretation of political equality. In section eight I will argue that, in the case of national minorities, and presuming that one implements NCA, we are warranted in making these assumptions. For, NCA satisfies all the vital interests that national minorities qua national minorities plausibly have.

1. Schumpeter's constraint

In order to explain why there is an equivocal constraint at the heart of Schumpeter's theory of democracy, I rely on Ian Shapiro's interpretation of it. First I give a short introduction in Schumpeter's general theory, then I give Shapiro's interpretation and then I argue why there is an equivocal constraint at the heart of this theory.

Schumpeter offers a pessimistic analysis of what democracy is and can be. Correspondingly he adopts a very minimal account of what a successful democracy is. Success merely means that the democratic procedures are stable and that vital interests, mainly property rights, are protected (Schumpeter 2003: 290). As I will explain at length below, the best way of ensuring success, according to Schumpeter, is by having electoral competition between candidates. Two factors make his pessimistic account and minimalistic definition of democracy somewhat plausible. First, Schumpeter holds a certain account of political leadership (Schumpeter 2003: 273-283). Politics for him is a game between powerful figures, most notably the incumbent prime minister or president and possible challengers. Electoral competition serves to reign in these powerful figures. Nevertheless, Schumpeter argues, their struggle determines many other phenomena in the democratic arena: legislation is impregnated by a struggle for power between such powerful figures (2003: 282); elections are to a large extent a popularity vote for the candidates to the office of prime minister; the functions of the cabinet and to some extent parliament flow from the office of the prime minister (Schumpeter 2003: 278-280); at his most cynical Schumpeter reduces ministers to no more than useful pawns to the prime minister and the cabinet to a sounding board. The second factor that makes Schumpeter's account somewhat plausible is his account of people's voting behavior (Schumpeter 2003: 256-264). People are extremely badly informed about politics. People know a lot about the things that concern them directly, which they personally observe, with which they are familiar, which they can influence and for which they develop a responsibility (Schumpeter 2003: 258-259). Yet, political issues are usually not among those things. The further away we move from the local level, the less people are informed about the issues at stake. The less informed people are, the more prejudices they have and the more they can be manipulated (Schumpeter 2003: 262-263). This is an all too pessimistic theory. So we should not overestimate the importance of these factors. But we should not underestimate them either. I take it that there is some truth to it and many political scientists, if not most, would agree.

The reason why we should not underestimate these factors is because electoral competition might indeed play a very important role in the larger political system. Let me explain what I mean by political system.

The research tradition, or at least what I expect to be its end-result, that comes closest to spelling out what I mean by 'political system' is that of constitutional political economy (see Hardin 1988a and Ordeshook 1992 for core ideas; see and Brennan and Hamlin 1995 for a review). This political system consists of several elements: a constitution that—as we will see in the next chapter—coordinates the interests of powerful group in society; things that we usually think of as belonging to well-functioning constitutions, like the separation of powers; a body for democratic collective decision-making that stands in a complex relation to the constitution; majority rule as a rule for collective decision-making in that body. Notice that I see many elements of the political system, i.e. the view of a constitution as a coordination device and the need for majority rule, as referring to equivocal constraints which implies that they have the normative status of these constraints. They are thus important when we make prescriptions, but we will always need to look for ways to mitigate them[82]. With such a political system in mind, we can ask questions about the internal coherence of it: what guarantees the separation of powers?; how do the actors that operate the different elements relate to each-other?; why do powerful actors respect something like the separation of powers? Furthermore, we can ask, as Filippov, Ordeshook and Shvetsova do, whether some institution is incentive-compatible. They define an incentive-compatible institution as a political institution "that takes individual motives and, eschewing any attempt to modify their basic myopic and self-centered character, redirects them to yield a socially desirable outcome". (Filippov et al. 2004: 144) Schumpeter's account of democracy should not be underestimated because in the political system it functions to redirect the myopic self-centered motives of politicians to desirable outcomes. Let me explain why next.

To understand this function of Schumpeter's account, we have to turn to Shapiro's interpretation of it. Shapiro (2003: 55-57) puts Schumpeter in the tradition of the authors of the *Federalist Papers* and Madison more specifically. Madison, according to Shapiro, had a distinctive view on power. A view that stands in between two more commonly held views: a Hobbesian monolithic view and a republican complex view. Shapiro (2003: 55-56) explains that the former sees power as indivisible. This has an important consequence for those who distrust state power: power, by its very nature,

82 I believe that constitutional political economy can be fruitfully combined with the concept of equivocal constraints. We need to take the elements of the political system serious but we also need to continuously ask how they can be reformed. It may also be that there are some core elements, a core political system, which corresponds to the potentially hard core of the equivocal constraints, that cannot be mitigated any further.

cannot be divided, it can only be limited or walled in. Amongst the followers of Hobbes one finds, according to Shapiro, Marx, Weber, Nozick and the liberal constitutionalists[83]. Shapiro (2003: 56) explains that the republican complex view of power sees power as divisible and best managed by being divided. Adherents of this view are, amongst others, Aristotle, Machiavelli, Guicciardini, Harrington and Montesquieu. Madison held a third, intermediate position. Like the republicans he takes power to be divisible. But, Madison also adds something new to the republican view: he distinguishes between incentives and constraints (Shapiro 2003: 56).

Why does the distinction between incentives and constraints allow for a new view on power that is different from just the republican view? The distinction is innovative because it allows Madison to recognize the monolithic tendencies that power has while maintaining the view that power is divisible. An example of such a tendency would be the striving for more power of Schumpeter's prime minister. These monolithic tendencies explain why mere constitutional constraints, which Madison famously called demarcations on parchment, will not do to keep politicians operating one branch of government from encroaching on the other branches and thus confirming the monolithic view on power. But if one adds incentives that bring politicians operating the second branch to guard the powers of their branch against the encroachments of the politicians operating the first branch, then the separation of the branches of government and thus the complex view can be maintained while recognizing the fact that power has monolithic tendencies. Distinguishing between incentives and constraints thus allows Madison to maintain the complex view's prescription to divide the powers of government while meeting the monolithic view's plausible description of the functioning of power.

The incentives are crucial for this Madisonian scheme, which can be equated here with what I called the political system above, to work. Ideally there should be incentives that check all possible encroachments and all possible misuses of power. But, as Shapiro (2003: 57) argues, there is a serious problem: one key incentive is still missing if the overall system is to provide checks on all possible encroachments. The executive has no incentive in the end to defer to the judiciary. What if the executive ignores an order from the courts? This is why we should take Schumpeter's pessimistic description of democracy seriously. Electoral competition might be the only way of reigning in politicians, or at least a way of doing so that avoids some serious defects that alternatives have. One alternative solution, though with defects, was that of the Federalists. Shapiro (2003: 57) notes that the Federalists tried to reign in power by making all government action

83 These liberal constitutionalists try to limit governmental power either by creating veto powers or a robust private sphere. The problem with the liberal constitutionalist view, Shapiro (2003: 56) notes, is that it preserves the domination embedded in the status quo.

difficult by distributing institutional vetoes across the different branches of government. This is, however, a rather blunt solution, and similar to that of the republicans. Both the Federalist and the republican solutions limit collective action in many ways. Schumpeter's solution, as we will see in a moment, is less blunt.

Now we have all the elements that explain, according to Shapiro, why Schumpeter's account of democracy is innovative. Thus Shapiro (2003: 57) argues:

> Schumpeter's theory was an attempt to deliver more fully on an incentives-based system while remaining agnostic on whether power is divisible or monolithic. The essential point is that power is acquired only through competition and held for a limited duration. Schumpeter's account was a radical departure in that he thought that rather than succumb to power (Hobbes) or hem it in (all these others [i.e. adherents of the republican complex view, Madison and adherents of the monolithic view that are aversive to state power like the liberal constitutionalists]), a system could control power by turning it into an object of electoral competition. Whereas constraints are geared to limiting politicians' power via rules (such as separation of powers or other constitutional limitations), incentives link what politicians find strategically beneficial to the demands of competitive politics.

Shapiro thus interprets Schumpeter's account of democracy as giving an important role to the institution of electoral competition. That is the role of what I called above, with Filippov, Ordeshook and Shvetsova, an incentive-compatible institution. The function of electoral competition is to take the myopic and self-centered motives of politicians as they are and turn them into a desirable outcome. The outcome at stake here is having powerful actors defer to the constitution and the judiciary. With electoral competition we have arrived at the market analogy that Schumpeter made famous. Parties are to be "modeled on firms trying to maximize votes as analogues of profits". (Shapiro 2003: 57) Finally, Shapiro (2003: 58) argues that regular electoral competition then disciplines leaders with the threat of losing power and gives would-be leaders an incentive to be responsive to citizen's wishes. Thus, Shapiro argues with Schumpeter, we should not hope too much from democracy. It is first of all a system of controlling power. Responsiveness to citizen's wishes is a byproduct and mistaking it for the main goal might have detrimental consequences.

There is an obvious last step in Shapiro's argument that he does not spell out: citizens' respect for democratic procedures. Why does electoral competition provide an incentive for the executive to respect the judiciary? In other words, why would electoral competition deliver more fully on an

incentive-based system? Citizen's respect for democratic procedures is the answer. These procedures, for which citizens can have more or less respect, include the basic rules of the constitution like the independence of the judiciary, electoral rules, etc. If a politician knows his or her political career is over when he or she does not respect the independence of the judiciary or accept the outcome of an election, that is, if citizens punish politicians for not respecting the division of power or rejecting election results even if they are part of their own political camp, then we have the incentive needed to make Madison's scheme work. Without voter's respect for democratic procedures electoral competition would not contribute anything to the problem of lacking incentives for the executive to defer to the judiciary.

Finally, let me explain why Schumpeter's account of democracy spells out a feasibility constraint. The short answer is: there is an ever present danger that politicians who stand for election do not accept the outcome of an election and thus defer to the constitution. The instability that a rejection of the election result would create is the danger we should avoid. Avoiding this danger constrains the sort of democratic procedures, especially the sort of voting rules, that can be implemented. Justice might demand a certain rule; Schumpeter's constraint might speak against it. To see why, imagine an incumbent president who is unpopular amongst a certain minority. The minority is oppressed and a theory of justice with an account of political equality that is sensitive to the powerlessness of an oppressed minority stipulates that this minority should be given an extra vote. Suppose even that this theory is true. Now imagine that the incumbent is defeated at the polls by a margin so small that the minority's extra votes matter. Imagine further that the incumbent rejects the election result, claiming that the weighted voting scheme that favors the minority is unfair[84]. She manages to convince a substantial number of citizens, even though the theory of justice granting the votes is true, and clings on to power with destabilizing consequences as a result. Thus, even if it is justified to give the minority extra votes given their oppressed position in society, there is a feasibility constraint that counts as a reason against giving extra votes. In other words, there is a limit on how much one can tweak democratic procedures to make them more just.

Schumpeter's account of democracy and Shapiro's interpretation thereof give force to this example of an incumbent rejecting an election result because the voting rules were tweaked too much. Schumpeter's account tells us that the real litmus test for the stability of a democracy is whether or not incumbents resign. Shapiro's interpretation of Schumpeter points at what is at stake here. What good is a judiciary that tries to uphold just voting rules when doing so leads to an incumbent

84 Notice how majority rule as a seat allocation rule, i.e. the one-person-one-vote rule, is much harder to brand as unfair. There is a sort of pre-reflective fairness in majority rule that everyone grasps easily and that no politician can easily accuse of being unfair. This, I will argue below, is Barry's reason for endorsing the one-person-one-vote rule.

rejecting them? We should take Schumpeter's theory into account when prescribing institutions for our world. What this says about the ideal democratic principles is another matter. For Schumpeter's constraint does not have to apply eternally. That is not the case because this constraint, as I will argue now, is a malleable equivocal constraint that depends heavily on the presence of certain circumstances for being applicable.

What are the circumstances that determine whether Schumpeter's constraint applies? Above I argued that the level of respect for democratic procedures that citizens have determines the extent to which Schumpeter's constraint is applicable. Citizens' respect for democratic procedures is a circumstance that depends on other circumstances. Here are some of the more salient ones. First, citizens' respect requires the society to be sufficiently affluent, so that the overall political game can be a positive sum game. This lowers the stakes of winning an election and it thus increases the chances that citizen's will respect democratic procedures[85]. Second, citizen's respect requires equality of certain things. If citizens grudgingly feel they are not treated equally they might be less inclined to accept the outcome of an election. Citizens might believe that the system is rigged and tweaked electoral rules will, in the conception of these citizens, easily be seen as being part of 'the system'. Third, perhaps the most important circumstance is a high level of education.

Let me spell out the education circumstance, which probably leaves most room for reform, in more detail. A substantial number of voters must respect the democratic procedures for electoral competition to perform the function of providing the politician who stood for election with a large enough incentive to respect the voting rules. The degree of respect for democratic procedures varies depending on how well-educated overall citizens are. If there is a very low level of education, then democracy is probably not even viable. If too few citizens know about the value of democratic procedures and that the stability of the democratic system is not a given, then too few citizens will have the needed amount of respect for democratic procedures. At a medium level of education, where most established democracies are now, respect for democratic procedures is substantial enough to maintain them. Yet, even at this point, my assessment is that the stability of the democratic system is not something we should take for granted. When citizens are more educated, when they get an obligatory civics course that teaches theories of justice for example, what citizens overall think is fair may asymptotically converge on what is actually fair. In the future then it may be possible to, given that we reach higher levels of education, not only maintain the democratic system but also refine it. It is not impossible that democratic procedures can then be tweaked in order to offset power-imbalances in society or some aspects of society.

85 This is part of the reason why affluence is an important condition for a stable democracy as is mentioned in Przeworski (1999: 49).

The fact that these circumstances might be more or less present turns Schumpeter's constraint into a malleable constraint. What we have described directly above is a descending scale of the applicability of Schumpeter's constraint. The higher the level of education, the less applicable is this constraint. It may be possible that by implementing a reform, introducing an obligatory civics course for example, Schumpeter's constraint no longer tells against the implementation of slightly tweaked voting rules. We can imagine different degrees of tweaking voting rules: from some reserved seats to many reserved seats to one extra vote, to even two or three extra votes. Even though Schumpeter's constraint might in the end not be completely removable, it might leave room for improvement. That, in the case of equivocal constraints, is what it means to be malleable.

Schumpeter's constraint is an equivocal constraint. Schumpeter did not deduce his theory from logical or nomological laws. Yet, in order to be an equivocal constraint, this constraint must at least have the potential to be a hard one. There are two ways in which Schumpeter's constraint might turn out to be a hard constraint. First, the circumstances that a removal of the constraint requires might never be reached. We do not know whether societies will ever be affluent enough; whether we will ever be able to achieve equality in the needed areas; or whether citizens will ever have the degree of education necessary to give minorities extra votes. If we never succeed in removing the constraint and if our ignorance on these circumstances continues, then Schumpeter's constraint remains an equivocal constraint. But, if we ever develop social scientific knowledge that tells us that we can never succeed in removing this constraint then it stops being an equivocal and becomes a hard constraint. Second, and perhaps more plausibly, the need for going against Schumpeter's constraint, for example by granting a minority extra votes, might disappear. That is to say that a way of organizing society might be found that turns an oppressed minority, assuming that oppression would be one of the prime reasons for granting extra votes, into a regular minority. If such a way is found, then the ideal principle that was blocked by the constraint ceases to demand the removal or mitigation of the constraint. The constraint thus ceases to be a constraint in the sense that it is simply bypassed. Yet, this constraint is still the reason why some political institution is and should be the way it is. And, assuming that no ideal principle now or in some possible future demands a further mitigation or removal of the constraint, this institution becomes part of the "ideal constitution". This implies that the constraint explaining this part of the constitution will also remain with us as an explanation of this institution. As such this constraint can be called a hard constraint because it gets the same status as a logical or nomological impossibility. In other words, in words that are too exact for the humanities, it becomes a law of constitutional science[86]. It is

86 This is somewhat inaccurate. If one allows for the conceptual possibility that someone designs a theory of justice that goes against an equivocal constraint that seems quite hard, then it is impossible that an equivocal

more likely that Schumpeter's constraint turns out to be a hard one, if at all, through a combination of these two ways. A minority might still be entitled to a scheme of reserved seats, but then the citizens' overall level of education might be high enough to grant this minority that scheme. Assuming that Schumpeter's constraint then and in any possible future does not constrain any ideal principle, the ideal constitution would be a democratic system based on electoral competition.

Of course Schumpeter's constraint might also turn out to be a soft constraint. It is perfectly possible that we reach the overall level of education and the fulfillment of the other circumstances so that Schumpeter's constraint is removed. It would then be feasible to have a one-person-three-votes rule for some minority member which means that Schumpeter's constraint turned out to be a soft constraint. It is also possible that we find some way of preventing the dynamic described by Schumpeter and Shapiro. If we find another way of forcing the executive to defer to the judiciary, then electoral competition could become much less important. Given that we do not know whether this constraint will turn out to be a hard or a soft constraint we have to treat it as an equivocal constraint.

This then is the normative status of majority rule. It is based on Schumpeter’s equivocal constraint. Whether it is a normative principle depends on whether it is a perennial element in the political system, that is, whether it will ever turn out to be a hard constraint. This is difficult to tell. When we prescribe, however, it would be foolish to assume away Schumpeter’s constraint.

2. Barry's account of democracy

Some may not be convinced by the interpretation of Schumpeter’s constraint just given and the account of normative democratic theory it implies. However, I am in good company. In this section I will argue that Barry held a very similar account of normative democratic theory. In the next I will argue that Beitz too held a somewhat similar view. Barry's account was most clearly laid out in his magnificent article *Is Democracy Special?* This article contains two arguments in favor of the majority principle[87]. First, I explain the role of these two arguments in Barry’s account and my

constraint becomes a ‘constitutional law’ through this second way—by the absence of a normative theory demanding its removal. If, instead of looking at conceptual possibilities, we turn to what is probable—even if we are highly demanding here and look at the smallest probabilities—then an equivocal constraint can indeed become a ‘constitutional law’ through this second way. That is so because it would be foolish to try to reform a well-established element of the political system for the sake of a highly improbable normative principle. This principle might be improbable because it cannot deliver on the desirable state of affairs it promises to realize.

87 Barry saw this principle to imply the one-person-one-vote rule as a seat-allocation rule and simple majority rule as a rule for collective decision-making.

interpretation of them. Then I argue that one of them is similar to Schumpeter's constraint.

One of Barry's arguments is the one based on the social choice paradigm. I will call this the social choice argument. The other is based on, as I will argue, Schumpeter's constraint or at least a similar feasibility constraint. I will call this the feasibility argument. The social choice argument (Barry 1989a: 27-54) applies Duncan Black's median voter theorem to the problem of permanent minorities. It analyzes how well permanent minorities do under majority rule in societies with different sorts of preference curves. It concludes that when the societal preference curve is bimodal, i.e. consists of two peaks, the smaller one being the minority's peak, then majority rule cannot be justified to this permanent minority. I will analyze this argument in detail in the next sections and use it to answer the question whether national minorities are permanent ones. The feasibility argument (Barry 1989a: 54-59) is based on the idea of the natural equality of politicians, and perhaps also citizens. Barry argued that majority rule as the one-person-one-vote rule has the unique property of respecting the natural equality of people. No-one is superior to anyone else and therefore majority rule as a rule for collective decision-making, making all count equally, is to be preferred.

Barry explicitly rejects the social choice argument as an argument for doing ideal normative theory and endorses the feasibility argument as a justification for prescribing institutions based on the majority principle. Notice, however, that both arguments are arguments for majority rule as the one-person-one-vote rule. The feasibility argument thus backs up the social choice argument. We can thus use the social choice argument to analyze the properties of majority rule and, for example, ask when there is a permanent minority problem. What we cannot do is use social choice theory as high-level ideal theory. I thus interpret Barry's account of democracy as differentiating between non-ideal and ideal theory[88]. His feasibility argument is the argument that we should investigate when doing high level ideal theory—note that it may not have much to say with the needed degree of certainty. His social choice argument is the argument that we can use to ask questions on the level of non-ideal theory.

Barry's feasibility argument is able to accommodate Schumpeter's feasibility constraint. Barry does not mention Schumpeter, but notice how his feasibility argument for the majority principle is similar to Schumpeter's feasibility constraint as I interpreted it above. Barry (1989a: 57) argues that:

88 There is no way of knowing whether Barry himself would agree with this interpretation. Although Barry gave a similar criticism of Rawls as G. A. Cohen did, he never, to my knowledge, explicitly deals with the ideal non-ideal distinction. Barry also stopped publishing in 2004, before the debate on ideal and non-ideal theory really started. This makes me think that this distinction had not crystallized in Barry's mind yet when he wrote *Is Democracy Special?* in 1979 or republished it in 1989.

> The most important point about a system of election for representatives is that it provides an intelligible and determinate answer to the question why these particular people, rather than others perhaps equally well or better qualified, should run the country. If people can be induced to believe in the divine right of kings or the natural superiority of a hereditary ruling caste, it may be possible to gain general acceptance for rule based on the appropriate ascribed characteristics. But once the idea of the natural equality of men has got about, claims to rule cannot be based on natural superiority. Winning an election is a basis for rule that does not conflict with natural equality.

Barry (1989a: 57) highlights the importance of determinacy of an election result and argues it is more important than the criterion of how qualified rulers are. One reason why determinacy might be so important is as a response to Schumpeter's feasibility constraint. We need a clear, in the sense of relatively incontestable, and effective way of electing a unique set of leaders. Any voting rule that does not allow for ambiguities will do. But if by ambiguities we understand the possibly different interpretations of the principle of political equality, then the reason why determinateness is important is explained by my interpretation of Schumpeter's constraint.

Maybe Barry did not believe in Schumpeter's constraint, but the case can at least be made that his argument was based on related even if perhaps different equivocal constraints. Notice that Barry made it easy on himself in the quote above. Majority rule as the one-person-one-vote rule can be challenged from two opposite standpoints. First, it can be challenged from a non-democratic standpoint: one can be an aristocrat and claim that the aristocracy should have more than one vote. Why they should have this privilege is of course difficult to explain to people in a society in which 'the idea of the natural equality of men has got about'. Second, and this is the critique that is more difficult to rebut and the one in which we are interested here, the majority principle can also be challenged from the democratic, political equality standpoint. One can argue that a permanent minority is not politically equal to the majority and argue that this minority should therefore be given two votes a person, for example. When Barry gives the feasibility argument he does not consider this possibility. But on the following page Barry (1989a: 58) says:

> It is, of course, true that there is a tension between the formal political equality of one-man-one-vote and the inequalities of wealth, status, and actual power over the lives of others (especially their working lives) generated by the other institutions of these societies. But this is hardly a new thought: it was a commonplace to Victorian conservatives and was elaborated by ideologues of the privileged strata like Maine and Leaky. The tension is still there but I see no sign that the *forces* that have kept it within bounds until now are losing

their efficacy. (italics mine)

Barry made it easy on himself because he stumbled upon a feasibility constraint. He recognizes here the tension between the formal political equality of the one-person-one-vote rule and what fairness demands for a disadvantaged minority like a permanent minority. Yet, here Barry says that this tension has been kept in bounds because of certain forces. I would call these forces Schumpeter's feasibility constraint, but Barry may have had other feasibility constraints in mind that demand the implementation of majority rule. However, we certainly have the structure of a feasibility constraint here. Even though Barry does not talk of feasibility, he recognizes that the principle of political equality may demand in the case of disadvantaged minorities that the one-person-one-vote rule is not applied. Yet, this demand is overridden by 'forces', not normative principles. I can only understand this as a normative principle that is overridden by a feasibility constraint.

There are even indications that Barry thought the feasibility constraint he had in mind was a malleable constraint, possibly an equivocal one. Before the quote given directly above, Barry, in his characteristic style[89], criticizes scholars who speak of a legitimation crisis of democratic institutions. He (Barry 1989a: 58) says:

> It seems to me that the only perspective from which things look sticky now for democratic institutions [based on majority rule] would be one from which the 1950s and the first half of the 1960s constituted the norm. But that period of prosperity and peace among all the advanced capitalist economies was historically unique. (I am not denying that favourable objective conditions help.)

Barry is assessing the circumstances that make the aforementioned feasibility constraint applicable. His assessment is that if the relatively calm and prosperous period of the 1950s and first half of 1960s is the norm, then this feasibility constraint might become less applicable in the near future; then the above mentioned force that overrides the principle of political equality may stop doing so. But Barry thinks the 1950s and the 1960s are not the norm. Today, perhaps, we are more inclined to agree with him. Nevertheless, even though Barry seems to make a timeless judgment that the 1950s and 1960s are not the norm, he does look at empirical circumstances, and that is the important point. Notice also how he feels the need to stress that he is not denying that 'objective conditions' can have a favorable impact. Now it is just a matter of how utopian we are willing to think. It seems foolish to foreclose on the option that, in some distant future, circumstances will improve to such an extent that the 1950s and 1960s are indeed the norm. In that case the feasibility constraint at the core of

89 Barry (1989a: 58) names a whole list of scholars, amongst whom Habermas, Cassandras and says they are "grotesquely over-reacting to the disequilibrium effects of a sudden fourfold increase in the price of crude oil".

Barry's argument for the specialness of democracy is an equivocal constraint. Schumpeter's constraint then is one that fits with Barry's feasibility argument.

If this interpretation of Barry's position is correct then his account of democracy is based on a feasibility constraint that demands the implementation of majority rule. This does not imply that majority rule is an ideal normative principle. Given that Barry usually wrote on relatively high ideal level this explains why he is squeamish about endorsing the social choice model he explains in the first half of his article. He had not differentiated non-ideal and more ideal levels of normative theory, as I did. If one does not differentiate these levels, then the aims of prescribing and of defending ideal principles are the same and, as argued in the second chapter, it is difficult to maintain the right balance between utopianism and realism. The prescriptions one then makes have to correspond to the ideal principles one defends. Majority rule is hard if not impossible to defend as an ideal principle. As a prescription it is, however, much easier to defend: majority rule plays an essential role in stabilizing our political system by disciplining politicians.

Having an account of democracy that is based on an equivocal constraint does imply that, when doing prescriptive non-ideal theory, we should take this constraint into account. We should thus prescribe majority rule. Not as a normative principle that does not allow for exceptions, but as a rule that structures the political system, that says how the bulk of political power should flow. This explains why social choice models that investigate the properties of majority rule do have normative consequences. On the non-ideal level we should use them as the basis on which we prescribe. This also explains why, even though he explicitly dismisses the social choice argument, Barry went through the trouble of constructing a detailed new social choice analysis of permanent minorities. He merely dismisses it as a normative principle but not as something we should take into account when prescribing institutions. We can thus use this analysis to ask which institutions to prescribe and to ask whether national minorities are permanent ones.

3. Beitz's assessment of political equality

In this section I will argue that Beitz too endorsed something like Schumpeter's constraint on the non-ideal level[90]. I will also follow Beitz in making an assessment of how far Schumpeter's constraint has been mitigated.

90 Beitz (1989: 179-187) discusses Schumpeter explicitly but in another context. There he compares Schattschneider's programmatic competition with Schumpeter's elite competition.

It becomes apparent that Beitz endorses something like Schumpeter's constraint in his discussion on racial vote dilution. Beitz (1989: 141-142, 144-145) sees the problem of racial vote dilution as a conflict between qualitative and quantitative fairness. Quantitative fairness is satisfied when all citizens have equal voting power, the institution that quantitative fairness demands is thus the one-person-one-vote rule. Qualitative fairness is satisfied when all describable groups in society have the same prospects of success of getting their preferences satisfied (Beitz 1989: 153). This the most ideal interpretation of the principle of political equality. It demands that the structure of representation is such that inequalities in status, income or power that are present in society are off-set by the representative institution. Black people in the United States are for example treated qualitatively unfair when they do not have the same prospects of success of getting their preferences satisfied as white people because of status inequalities between both groups. If one would express it in votes per person, the principle of equal prospects of success of getting one's preferences satisfied demands perhaps five or ten votes for some persons that belong to the worst-off groups.

Beitz's solution to the conflict between qualitative and quantitative fairness is a compromise between, what he (Beitz 1989: 109-114) calls, two regulative interests of citizenship: the interest in recognition and the interest in equitable treatment (Beitz 1989: 155-156). The interest in equitable treatment demands qualitative fairness and thus equal prospects of success in preference satisfaction. But this interest has to be weighed against an interest in recognition which demands quantitative fairness and thus the one-person-one-vote rule. This compromise goes quite far. The interest in recognition functions as the core principle and the interest in equitable treatment only as an auxiliary principle. The one-person-one-vote rule stands as the core institution, yet it should be supplemented by institutions that serve the interest in equitable treatment. Beitz (1989: 156-157) gives two examples of such auxiliary institutions: promoting party competition (so that parties make an effort to include minorities) and racial gerrymandering (so that minorities get a legislative voice). Both institutions are a far cry from the principle of equal prospects of success in preference satisfaction. Yet, Beitz (1989: 156) says that we should not expect too much from manipulating the structure of representation. We should not expect that we can systematically promote equitable legislation. The principle of political equality only serves as a remedy against certain familiar dangers like the danger of majority tyranny. This already comes close to an endorsement of Schumpeter's constraint.

We can go a step further in teasing out the similarities with Schumpeter, though. Why is Beitz so hesitant to implement the principle of equal prospects of success in preference satisfaction any further? Why does he balance it against the interest in recognition? The interest in recognition is

Schumpeter's constraint in disguise, or at least it does the same work as that constraint, namely demanding the one-person-one-vote rule as a core institution. Beitz mentions a possible objection to his two practical proposals, promoting party competition and racial gerrymandering. The objection Beitz (1989: 159) mentions goes as follows: “It is not implausible that the popular legitimacy of a representation system might be undermined by the widespread perception that its structure was open to frequent revision aimed at conferring procedural advantages on identifiable population groups”. What is “popular legitimacy”? Does it differ from the account of legitimacy that political philosophers discuss? If so, will it always differ from that account? “Popular legitimacy” is what I have called Schumpeter's constraint. As explained above this constraint says Citizen's respect for democratic procedures limits the extent to which we can tweak those procedures. The objection thus says that, in Beitz’s words, one should not confer “procedural advantages on identifiable population groups” because this might undermine the “popular legitimacy of a representation system”.

That it is indeed Schumpeter's constraint that limits the extent to which we can implement the principle of equal prospects of success in getting one’s preferences satisfied is shown by Beitz's response to the objection mentioned directly above. In response to this objection Beitz (1989: 159-160) says:

> [T]he kinds of manipulation that I have suggested have a limited potential for producing legislation at odds with the desires of the majority. There is no threat to majoritarianism in efforts to insure [sic] proportional representation for parties; indeed, the opposite will more often be the case. And gerrymandering to give a legislative voice to disadvantaged minorities will accomplish only that—it will enable those minorities, through their representatives, to put their case to the legislative majority and to play a part in the process of legislative compromise, but it can hardly guarantee them the legislation they want regardless of the desires of others.

The “desires of the majority”, which can be equated with Schumpeter's constraint here, thus limit the kinds of manipulation of the voting rules that Beitz proposes (promoting party competition and racial gerrymandering).

Let us now ask how far Schumpeter’s constraint has been mitigated. The normative principle of political equality is generally taken to be the principle that explains why we have democracies. But what should be equalized? We can imagine a scale of more and less ideal interpretations of political equality. The most minimal or non-ideal level interpretation is what Barry called formal political equality and what Beitz called quantitative fairness. This interpretation is a widely accepted baseline that corresponds to the institution of the one-person-one-vote rule. The most maximal

interpretation of political equality interprets it as equality of prospects of success in getting one's preferences satisfied. Beitz called this qualitative fairness.

Intermediate interpretations of political equality rely on more or less detailed descriptions of power, status and wealth inequalities and ways to offset those inequalities by granting the powerless group devices of group representation like reserved seats and weighted votes. Beitz's compromise between concerns about equal recognition—i.e. the most minimal interpretation of political equality—and equitable treatment—i.e. the most maximal interpretation—is a somewhat more elaborate interpretation of political equality than the mere formal interpretation. Equal recognition, in Beitz view demands the one-person-one-vote rule, but this should be supplemented by promoting party competition and racial gerrymandering, which are demanded by equitable treatment. Iris Marion Young's (2000) theory of group oppression together with her proposal to implement some form of group representation in order to off-set that oppression is one of the more ideal interpretations of political equality given so far. Notice that, when Young turns to prescribing, or applying as she calls it, she seriously weakens the radical potential of her theory (Young 2000: 148-153). She agrees with Lani Guinier in that "multi-member legislative jurisdictions with some form of cumulative voting and proportional representation" are preferable (Young 2000: 152). Furthermore, there should be inclusive representation in courts, public hearings, appointed committees, commissions and consultative processes (Young 2000: 152). This stays far from realizing equal prospects of success in getting one's preferences satisfied for the oppressed groups she describes. Young does not propose a weighted voting scheme.

We thus have an ascending scale of more ideal interpretations of the principle of political equality. We can place this scale next to the descending scale of applicability of Schumpeter's constraint and other constraints with an impact on the democratic system. We saw that Schumpeter's constraint depends on circumstances, like affluence, equality and the level of education, that can be manipulated. These are the circumstances that we need to reform. The more favorable these circumstances, the less applicable is Schumpeter's constraint and the more ideal interpretations of democratic principles are enabled.

Now we can ask where we are on this scale of ideality of the principle of political equality. My assessments is that we should follow Beitz's in saying that we are not so much higher up on this scale than the one-person-one-vote rule. Admittedly Beitz wrote almost thirty years ago. But the prospects for democratic stability have not significantly changed. This does not mean that we cannot do ideal theory. Theories like Young's are useful guides and they can sometimes point out

improvements that one otherwise would not think of. But when we turn to prescribing, we are still close to the one-person-one-vote rule. We simply cannot start tweaking the democratic system at liberty in order to correspond to theories of what a just procedure should look like—even if that theory may be true on an ideal level. This will become important below when I defend the assumptions of the social choice model that I will use to answer the question whether national minorities are permanent ones.

4. Barry and Miller's analysis of the permanent minority problem

If we want to answer the question whether national minorities are permanent minorities, then we have to ask what permanent minorities are. The permanent minority problem is, however, often ill-understood because the proper functioning of majority rule is ill-understood. Majority rule, certainly in majoritarian democracies, is often understood as a winner-take-all model. Barry (1989a: 38-54) and Miller (1998: 229-239) argue, however, that majority rule is usually not a winner-take-all rule. In order to show this they resort to a social choice model. This model makes assumptions. I will come back to these assumptions in the last section.

Barry's argument starts with the common notion that says that one should ‘take the rough with the smooth’. (Barry 1989a: 42) This notion says that if, under a collective decision-making rule, one gets what one wants more than half of the time then one should chip in the other times and accept the collective decision-making rule. We should accept this notion as a starting point because it is a highly ideal principle of collective decision-making, although perhaps not the most ideal principle possible. Notice how it is based on the most ideal interpretation of the principle of political equality: equality of prospects in getting one's preferences realized. However, instead of using a concept of strict equality, Barry uses a concept of threshold equality. By threshold equality I mean that everyone ought to be equal in getting their preferences satisfied up to a certain point. The notion of ‘taking the rough with the smooth’ demands for example that everyone should at least get their preferences satisfied half of the time. It does not go as far as to say that everyone should get their preferences satisfied an equal amount of times. This would require an exactness in comparing preference satisfaction that may never be humanly achievable—although even this we do not know for sure and is thus a principle blocked by an equivocal constraint, not a hard one. Threshold equality of prospects of success in preference satisfaction is an appropriately ideal interpretation of the principle of political equality because it is much more feasible then strict equality of preference satisfaction while at the same time sticking as close as possible to the most ideal interpretation of

political equality. It stays close to the most ideal interpretation since it keeps the main variable between different interpretations of the principle of political equality, namely the object of equality, constant: the object of equality remains prospects of success in getting one's preferences satisfied.

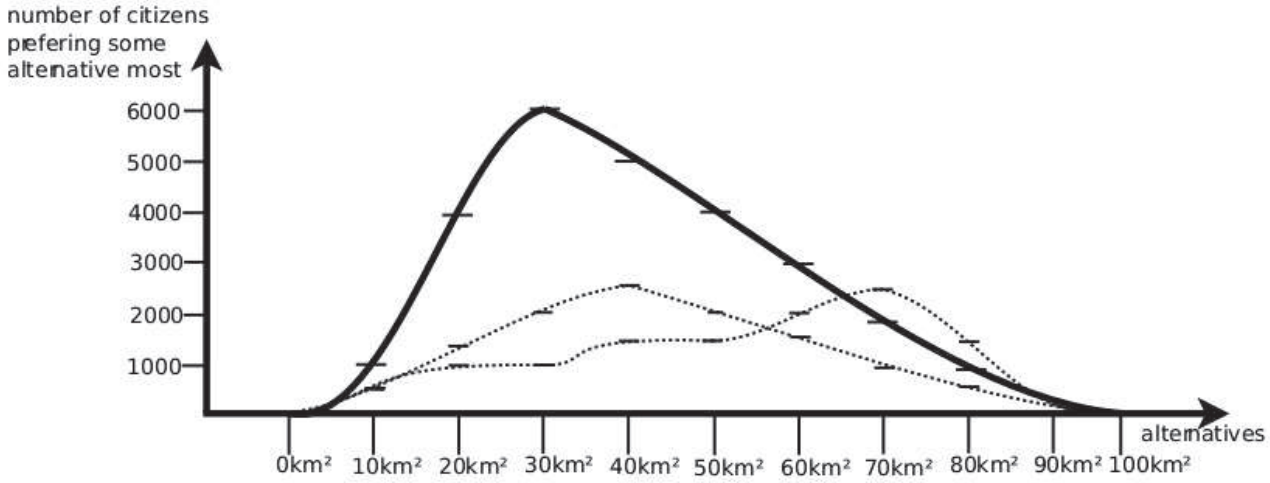
Let me start with the argument that says that majority rule is not a winner-take-all rule. In order to make this argument both Barry (1989a: 32) and Miller (1998: 229) start from the standard social choice model, based on Duncan Black's (1948) median voter theorem. This well-known theorem assumes that citizens have single-peaked preferences and that issues are continuous. Continuous issues are issues with an infinite number of alternatives. In this they differ from dichotomous or polychotomous issues, that have respectively only two and a small number of alternatives. A citizen has a single-peaked preference if he or she has an ideal preference for one of the alternatives along the continuum of alternatives that the continuous issue allows for and ever lower preferences for the alternatives the further away one moves from the ideal preference. Black's median voter theorem stated that if all citizens have such single-peaked preferences then majority rule picks a unique winner: the alternative preferred by the median voter. The median voter's most preferred alternative holds a certain property on which Barry and Miller's argument is based: it maximizes average satisfaction.

To make things more tangible take an easy example. Imagine a collective decision that has to be taken: how large a natural reserve to create. Suppose that the alternatives range from 0 km² to 100 km² and that we have twenty-six thousand citizens. Three assumptions are being made already. First, the issue is one-dimensional. This means that it is only about the creation of this reserve which, let us assume, does not cost any money, has no effect on the housing market, does not prevent exploiting some natural resource, etc. Second, the issue is continuous[91]. Third, there is equal intensity of preferences between the citizens, which allows us to compare preferences-units across citizens and put them in the same model[92].

91 This assumption implies a second one: the no vital interests at stake assumption. The protection or non-protection of a vital interest is a naturally dichotomous issue. Either it is protected or it is not. I will deal with this assumption separately below.

92 Barry and Miller make these three assumptions too or they discuss the alternative of not making the assumption separately. Miller (1998: 229) assumes equality of preferences. Miller (1998: 220-229) discusses dichotomous issues. Miller (1998: 229-239) discusses continuous issues. Miller (1998: 212-213, 219, 227-229, 232) discusses multidimensional issues which he sets aside in the case of continuous issues, because, as we will see in the last section below, the assumption of one-dimensionality does little normative work. Presumably for the same reason Barry does not make the assumption of one-dimensional issues explicitly. Barry (1989a: 44-54) limits himself to discussing continuous issues (after having discussed dichotomous issues). Barry (1989a: 45) makes the assumption of equal intensity of preferences, describing it as follows: “each person experiences the same loss of satisfaction for any given distance between the most preferred outcome and the actual outcome” and, on the same page, “for each person the loss of satisfaction is linear with the distance, in other words it is always true that an outcome [what I call an alternative in the text] twice as far away represents twice as much loss of satisfaction”. Still on the same page Barry also assumes an atomisitic society, which I deal with separately below.

Figure 1: example of a societal preference curve with a one-dimensional continuous issue.



In order to see why the median voter's alternative is the one that maximizes average satisfaction, we need to construct a societal preference curve. If all citizens have single-peaked preferences and the three assumptions above hold, then we can construct such a curve, which is shown in figure 1 (the full line). The horizontal axis shows the alternatives. The vertical axis shows the number of citizens that have some alternative on the horizontal axis as their ideal preference. The two dotted lines represent the single-peaked preference curves of two of the twenty-six thousand citizens (ignore the vertical axis for these two lines—the vertical axis now shows how much these two citizens prefer the respective alternatives). Imagine you draw this individual preference curve for all citizens and then count how many peak preferences there are for all the alternatives. Here we have one thousand peak preferences for a ten km² reserve, four thousand for a twenty km² one, etc. It is important to see that the societal preference curve shows the peak or ideal preferences of citizens. As the two individual preference curves show, citizens still have preferences for the other alternatives and many of them might be quite high. The individual citizen whose preference curve peaks at seventy km², for example, still has a preference that is almost as high for the sixty km² alternative and still more than half as high for the forty km² alternative.

This fact that an alternative that is close to some citizen's most preferred alternative will also be preferred to a large extent by this citizen, explains why we should not understand majority rule as a winner-take-all rule. Majority rule picks the median voter's most preferred alternative and this alternative is the alternative that maximizes average satisfaction. This is so because the median alternative leaves as many citizens on its right as on its left side. In figure 1 the median voter picks

the forty km² alternative. Five thousand people prefer this alternative most. Of the remaining twenty-one thousand citizens we find eleven thousand most preferring alternatives to the left of forty km² and ten thousand picking alternatives to the right[93]. If we would move more to the left and pick the thirty km² alternative, which is preferred by more people than the forty km² one, then we leave more citizens dissatisfied on the right and vice versa. Thus, majority rule picks the alternative preferred most by the median voter and this is the outcome that maximizes average satisfaction. Obviously not all people can have their peak preference satisfied. Yet, next to their primary peak preference people also have secondary, tertiary, etc. preferences. Majority rule is the collective decision-making rule that maximizes average satisfaction in the sense of giving as many people as possible the highest satisfaction (whereby "high" is meant in the same sense as primary is higher than secondary).

Another way of putting the same point is by pointing out two ambiguities in the phrase 'winner take all'. First, there are two ways of understanding "winner" that matter here. One is to understand it as the alternative picked by plurality rule[94]. The other understands winner as the alternative picked by majority rule. Plurality rule asks which alternative beats most other alternatives in pairwise voting and as such it is much closer to what we understand by a winner-take-all rule. Plurality and majority rule need not generate the same outcome. The example from figure 1 shows this. The plurality winner is the thirty km² alternative: it is preferred by the largest number of citizens as their peak preference. The majority winner is, however, the forty km² alternative. So, if one defines "winner" as the plurality winner, then majority rule will not always pick the winner. In this sense it is not a winner-take-all rule.

The second ambiguity is in the word "all". Compare a vote on a dichotomous issue with a vote on a continuous issue, like the one in figure 1. Take as an example of a dichotomous issue the question of permitting or not permitting abortion[95] and a radical minority that says it should not be allowed in any case. With regard to this dichotomous issue the majority will indeed take "all", meaning that at least some kind of abortion will be allowed for. This radical minority will thus always lose out completely, and if it stands apart from the majority on a sufficient number of issues, then this minority is a permanent minority. This is not what happens in the case of one-dimensional

93 Of course eleven and ten thousand are not the same, but this does not matter here. To understand why, imagine that of the five thousand people who prefer forty km² most, 1000 citizens actually prefer thirty-nine km², 2000 prefer forty km² and 2000 prefer forty-one km². Now the real median voter's alternative is still forty km² and this alternative leaves exactly as many citizens on the left as on the right side.

94 This is called the Condorcet winner in the social choice literature.

95 Notice how difficult it is to find an example of a naturally dichotomous issue. It is at least conceptually possible to reduce the vast majority of dichotomous issues to continuous ones. Only issues in which the survival of a particular thing, like a sacred place or some language, or an individual are at stake, cannot be divided any further. The continuous issues assumption is thus not so unrealistic.

continuous issues. In this case satisfying citizen's peak preference might be seen as giving “all” to this citizen, but this does not do justice to the fact that many other citizens will also have fairly strong preferences for this citizen's peak preference. Furthermore, the median voter's alternative is the one for which the number of citizens that have a strong preference is highest. So, in the case of one-dimensional continuous issues there is not really an 'all' that a winner can take, there is only an outcome that leaves some citizens more satisfied than others. Notice, finally, that although the difference between the thirty and the forty km² alternative is not that big, this reasoning applies to a lesser extent also to the citizens who are further removed from the median. It is not as if they get nothing of what they wanted. They do get something of what they want, just not their most preferred option. I will return to this point in the next section.

Thus, as Miller (1998: 229-230) writes:

> the notion of “winning” versus “losing” is greatly softened in the ideological context [i.e. cases in which there are continuous issues at stake]. It is true that, if the political process converges on the Condorcet winner [what I have called the plurality winner above] through a series of parliamentary style votes […], winners and losers are generated on each pairwise vote. But the tally of such wins and losses will have little to do with how satisfied or dissatisfied citizens are with the ultimate collective choice. For example, if the initial proposal is far to the right and is then progressively amended toward the median, extreme leftwing citizens will consistently “win” and rightwing citizens will consistently “lose” in the sequence of votes, but the final (centrist) choice will be (more or less) equally unsatisfactory to both[96].

We can thus conclude with Barry and Miller that seeing majority rule as a winner-take-all rule does not do justice to majority rule. Rather than being the rule that in a fight between a majority and a minority will always pick the side of the majority, it is a rule that gives an incentive to build coalitions and look for the moderate middle ground. Yet, there is a problem with this argument. Is maximizing average satisfaction the only criterion on which to judge a collective decision-making rule? There is another criterion, the Rawlsian maximizing the position of those that are worst off: the maximin criterion. In the next section I discuss how we should approach the conflict between the criterion of maximizing average satisfaction and the maximin criterion.

96 Barry (1989a: 49) gives a similar conclusion.

5. The maximin criterion and Barry's solution

In this section I follow Barry in proposing a compromise between two criteria for judging collective decision-making rules: maximizing average satisfaction and maximin. The criterion Barry proposes is whether there is a valley between the minority and the majority preference curve. But before we turn to this criterion we need to dismiss an alternative criterion.

Someone might propose the 'taking the rough with the smooth' notion as a more basic criterion than both maximizing average satisfaction and maximin. This poses serious problems, though, at least given a feasibility constraint that is constituted by our lack of information. Using the 'take the rough with the smooth' as a more basic criterion would require us to attribute universally agreed upon utilities to all the alternatives available. Without such utilities we would not be able to say what it means when someone has gotten half of what he or she wants. It cannot be as simple as just dividing the utility of the thing that is being voted upon by two. Perhaps half of an eighty km² reserve is a forty km² one. But applying the same logic to the other side of the curve illustrates the problem: did someone who wanted a zero km² reserve get half of what he wanted if the forty km² one is chosen? One would not say that he has. Yet zero stands at an equal distance from forty as eighty. I see no way of solving this problem other than attributing universally agreed upon utilities to all possible alternatives. If we can do so then we can calculate how many times a minority can be how far apart from the majority in order to be satisfied more than half of the time. But we are prohibited from doing so by a strong information feasibility constraint: we do not know these utilities. Until this constraint is resolved we thus cannot use the 'taking the rough with the smooth' notion as a more basic criterion.

The maximin criterion says that we have to maximize the position of those that are worst off. As Miller (1998: 230-231, 249) says, the voting rule that always satisfies the maximin criterion in case of continuous issues is a voting rule that picks out the midrange alternative: a split-the-difference rule[97]. This is so because maximin demands that we minimize the chance of maximally dissatisfying people. The maximally dissatisfied people under majority rule are those that can be found at both extremes of the societal preference curve (I do not intend, at least not in all cases, to label those people with the negative connotation that extremism carries—there is simply no better name for their position). Obviously maximin does not just demand to minimize the chance of dissatisfying the extremists on one side because this would leave the extremists on the other side of the curve maximally dissatisfied. The problem is that the mid-range and the median alternatives do not

97 Miller uses the term “minimax” for the maximin criterion.

always coincide. Only when a societal preference curve is symmetric will the median and the midrange pick the same alternative. Thus, in sum, the criterion of maximizing average satisfaction demands picking the median alternative and thus majority rule; the maximin criterion demands picking the midrange alternative and a split-the difference voting rule.

If the societal preference curve is symmetric maximin and maximizing average satisfaction end up picking the same alternative. Although Barry (1989a: 47-48) is aware of the importance of symmetry, he applies his analysis to symmetrical and asymmetrical curves alike and sticks to analyzing the properties of the median alternative instead of the mid-range one. By way of meeting the maximin criterion Barry (1989a: 49) then puts forth unimodality and not symmetry as a condition for a societal preference curve to sufficiently satisfy the maximin criterion. Unimodality simply means that the societal preference curve only has one peak, or, in other words, lacks a valley, as is the case in figure 1, 2, 3 but not in figure 4. I will now argue that we should follow Barry in sticking to the median and thus majority rule as the alternative that best satisfies our two criteria, and take the condition of unimodality as an extra condition for majority rule to be just.

Figure 2: a symmetric unimodal curve, taken from Barry (1989a: 47)

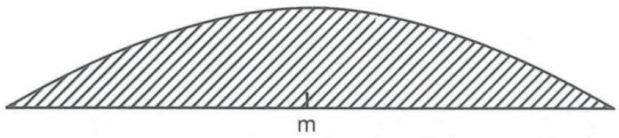


Figure 3: an asymmetric unimodal curve, taken from Barry (1989a: 48)

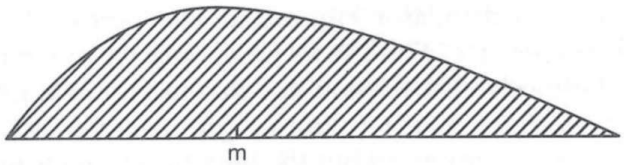
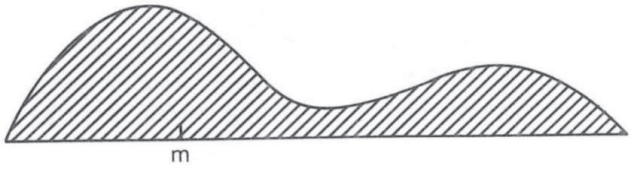


Figure 4: an asymmetric bimodal curve, taken from Barry (1989a: 48)



First of all, there is not such a large difference between the midrange and the median when we

assume unimodality. Notice that a unimodal curve has to be quite asymmetrical for the midrange and the median to diverge significantly. As Barry (1989a: 47-48) demonstrates, bimodality creates a much bigger gap between the median and the mid-range alternative than asymmetry. Compare figure 2, a symmetric unimodal curve, with figure 3, an asymmetric unimodal curve, and figure 4, an asymmetric bimodal curve. The midrange is always simply the middle of the curve. The median is indicated with the letter m. This illustrates that bimodality has a much bigger effect on pushing the median position into the direction of the majority than does asymmetry. Bimodality is thus a more pressing problem than asymmetry. Thus, in realizing more and more ideal interpretations of the principle of political equality, we will first have to deal with the problem of bimodality and only later, if ever, with the problem of asymmetry. The point here is that on a unimodal curve, the median and the midrange are not so far apart.

In addition there are reasons why solving the problem of bimodality should take precedence over perfectly satisfying the maximin criterion.

First, often the "extremists" are indeed extremists in the negative sense of the word. The question is whether they should have any impact on the collective choice at all. There is of course the possibility that an extremist has a valid point. But, certainly when no vital interests are at stake, for example when the question is merely one of providing a public good to some extent, then extremists do not have a valid point. Take our example of creating a natural reserve again. The one thousand extremists that want an eighty km² reserve should not be able to displace the collective choice given that the median alternative is the forty km² one. This would change if the group of extremists was bigger, but then the median would automatically move more into their direction.

Second, given that extremists are always a small minority, perfectly satisfying the maximin criterion is not demanded by the interpretation of the principle of political equality that our world allows for. An interpretation of political equality that requires us to treat all minorities equally, however small they are, is simply way too ideal. Before we can turn to the problems of the smallest minorities we should first turn to the problems of the larger, oppressed and distinct minorities. Implementing too ideal an interpretation of political equality now will often be at odds with doing so.

Third, and most importantly, majority rule is strategy-proof in a way that a splitting-the-difference rule is not. As Miller (1998: 232) says, a split-the-difference rule "would give citizens with moderately extreme preferences an incentive to *express* far more extreme preferences, in the hope that the resulting collective choice would be close to their true (and more moderate) preferences.

Since citizens on both extremes could play this game, there would be a widespread tendency to feign extreme preferences". Miller (1998: 249) adds that it is widely recognized that a split-the-difference rule encourages such behavior. Majority rule is far less susceptible to such strategies. Someone who wants to displace the collective choice in his or her direction needs to convince a substantial number of people before the choice will move substantially in his or her direction. Majority rule thus has a built in barrier against this kind of strategical behavior.

We should thus follow Barry's analysis here in sticking to majority rule but aiming for unimodal societal preference curves as a good compromise between the maximin criterion and that of maximizing average satisfaction. Yet, the problem has not disappeared. Part of what is problematic in applying majority rule in the case of permanent minorities is that they are the worst-off and that their dissatisfaction is not minimized. Let me now discuss in detail what a permanent minority is.

6. What is a permanent minority?

We can see the assumptions already made, i.e. equal intensity of preferences and one-dimensional continuous issues, as features of an ideal society in which majority rule would be fully justified. Two further features determine whether there is a permanent minority problem. Or, in other words, two further assumptions have to be made if majority rule is just in the sense that there are no permanent minorities. These two features or assumptions are: the absence of the problem of fixedness and the absence of the problem of polarization. If these assumptions are at the same time both not satisfied then there is a permanent minority and majority rule cannot be justified to the minority in question. These two problems occur when respectively two conditions are not sufficiently met: the atomistic society condition and non-polarized society condition.

The atomistic society condition says that the distribution of citizens on the societal preference curve is completely random with every new collective decision that has to be made. In other words, the distribution of citizens for a new collective decision does not in any way depend on how citizens were distributed along the curve for previous decisions. Barry (1989a: 42) describes the condition of atomism as follows: "whatever we know of a person's previous voting record, we cannot do better than predict that he or she has a 0.6 probability of being in the majority if the majority is 60 per cent, a 0.7 probability of being in the majority if the majority is 70 per cent, and so on". When this condition is lacking to some extent the problem of fixedness occurs. We then find the same citizens too often in the same position on the societal preference curve. So citizens who like an

eighty km² reserve are too often, i.e. in the case of other collective decisions, at the extreme right side of the curve.

The non-polarized society condition says that the minority and majority preference curves should not be too far apart. Imagine that constructing our societal preference curve would generate two curves. Figure 4 provides an example of the societal preference curve of such a polarized society. In the previous section I have argued, with Barry, that polarization is not a problem as long as we have a unimodal preference curve. When the condition of a non-polarized society is lacking we have the problem of polarization.

Both conditions are gradual. A society can be more or less atomistic. Take, for example, a society that makes one hundred collective decisions. In a perfectly atomistic society the distribution of citizens on the horizontal axis is at random for all one hundred collective decisions. In a perfectly fixed society the distribution of citizens is the same for all one hundred decisions. In reality all societies are somewhere in between both extremes. We often find recurring patterns in the distribution of citizens, which are examples of fixedness. Progressives on socio-economic policy tend to be progressive when it comes to ethical issues. Religious minorities often stand apart from the majority on more than merely religious issues. Yet there are also many examples of atomism. The phenomenon of swing voters is a good one. Another example is a member of a group, like a religious group or the group of progressives, that breaks away from the orthodoxy of her group and holds opinions that are closer to the rest of society. A society can also be more or less polarized. This simply means that the minority preference curve can stand at different distances from the majority one. The Amish's preference curve stands, for example, overall at a greater distance from the one of the majority than the Quakers's curve, which stands at a greater distance than the Catholic minority's curve in the United States.

We can imagine for both conditions a threshold after which lacking fulfillment of the condition is problematic[98]. Assume, for example, that a minority is quite fixed and that we have reached a polarization threshold. The minority gets much less than the majority. It manages to displace the

98 Should we not say, given the reasoning in the previous section, that the threshold in the case of polarization is reached whenever we have a bimodal curve? After all, in the case of bimodality it is impossible to maintain the right compromise between the two criteria for assessing collective decision-making rules: maximizing average satisfaction and maximin. However, this would commit us to saying that the problem of polarization occurs whenever we have a bimodal curve. This would be too extreme or too ideal, though. We would have to say that there is a problem even in the case of a bimodal curve on one of the one hundred collective decisions. Yet such a minority will still get half of what it wants. We thus have two thresholds of polarization: bimodality and the threshold of polarization proper, that I am discussing here. The threshold of bimodality is much stricter than the polarization threshold. We should use the polarization threshold to determine when there is a permanent minority and, whenever there is one, the bimodality threshold to determine what is owed to this minority.

median somewhat in its direction but overall it remains very dissatisfied with the collective decisions. This minority does not get what it wants more than half of the time and thus majority rule is not justified.

We can also imagine a threshold after which the lack of atomism is so pronounced that it generates the problem of fixedness. Take a society that is normally polarized but a minority that is very fixed, it is found on the extreme right side of the societal preference curve for most issues that come up. This minority will end up getting less than half of what it wants and hence majority rule is not justified. We can thus have an idea of such thresholds of polarization and lacking atomism after which respectively the problems of polarization and fixedness occur.

Apart from such a vague idea of these thresholds it is impossible to spell them out in detail. That is so because both conditions cancel each other out. In other words, neither the problem of fixedness nor the problem of polarization on their own are sufficient to create a permanent minority problem. Take the extreme example of a completely fixed society. Yet, suppose this society has a preference curve that is not only unimodal but also quite cohesive. This means that the preference curve has no long extended slopes but one somewhat steep peak. In this society there is no minority, all citizens get their preferences satisfied half of the time, or, what I take to be equivalent here, get half of their preferences satisfied all the time[99]. The society is clearly fixed but there is no (permanent) minority and majority rule is justified.

The problem of polarization on its own does not generate a permanent minority either. However far apart a minority stands from the majority, if this minority is part of the majority on a sufficient number of other collective decisions, this is not a permanent minority. If, for the other collective decisions, this minority mingles perfectly with the majority than it can even stand at a very large distance from the majority on a relatively high percentage of the collective decisions. This would simply mean that we have the rather standard case of some policy issue generating a big though periodic minority of dissenters leaving the center understaffed. But this does not matter when on a sufficiently high number of other issues a sufficiently large number of dissenters are in agreement with the majority. Then the minority overall will still get half of what it wants.

Thus the permanent minority problem occurs when both problems, of fixedness and polarization, combine. In other words, this problem occurs when the societal preference curve is sufficiently

99 This is somewhat inaccurate. The minority would never get its peak preference satisfied. The point is, however, that this problem is not significant given that the minority always gets its secondary or tertiary preference satisfied, which, that is the assumption here, is close enough to its primary peak preference.

polarized on a sufficient number of collective choices.

7. Are national minorities permanent minorities?

Let me finally argue why the case for seeing national minorities in general as permanent ones is very weak. I will first ask whether national minorities are polarized enough, then I will ask whether they are fixed enough and finally I will point out a special kind of non-fixedness that we should take into account in the case of national minorities.

7.1. Are national minorities polarized enough?

Let us first ask the question whether there is a problem of polarization in the case of national minorities? Undoubtedly there is. National minorities often stand apart from the majority. The Scots overall want to remain within the European Union, more welfare benefits, etc. The Walloons want a socio-economic policy tailored to the needs of a post-industrial region. Many more examples exist of nations that collectively prefer something somewhat different from the majority of the state in which they live. We should not jump to conclusions, though. The conclusion we can draw from this is that there is a possible ideal interpretation of the principle of political equality on which we can say that there is a problem of polarization in the case of national minorities.

But should we prescribe institutions on the non-ideal level that can rectify the problem of polarization in the case of national minorities? In order to answer this question we need to ask how pressing this problem is. In this regard a comparison with religious minorities is in order. The problem of polarization is far more pressing when it comes to religious minorities. The level of polarization in the case of national minorities is lower than in the case of religious minorities for two reasons. First, the distance between a non-oppressed national minority's preference curve and the majority's preference curve is in general far smaller than the difference between the curve of the average religious minority and that of the majority[100]. National minorities are not pre-Modern pockets of very distinct cultures. They are modern societies not so distinct from the majority society. Religious minorities are generally more distinct from the majority society than these modern national minorities. Second, national minorities are not very homogeneous or cohesive.

100 I am assuming here that we are speaking about developed democracies in which the levels of trust and security are high. As my comments on consociationalism in the introductory chapter should have made clear, we should not, when prescribing for developed democracies, make the mistake of assuming levels of trust and security that are too low to fit these societies.

They are certainly much less cohesive or homogeneous than the average religious minority. Members of a national minority do not have a doctrine that they all to some extent adhere to like members of a religious minority. A religious doctrine provides much more guidelines on much more political issues for an individual to follow than national traditions or a national character. Typically, then, most members of a national minority will mingle with the rest of society on diverse issues, leaving the nationalist viewpoint to be defended by only a few of the members of the national minority. Whenever the number of these nationalist members is too low to warrant taking into account, then there is no permanent minority problem.

There is an exception that was mentioned in the introduction: indigenous people. The level of polarization with regard to national minorities that are formed by the clustering of formerly colonized indigenous people is comparable to, perhaps even higher than, the level of polarization of religious minorities in general. The Sami minority in the Scandinavian countries and the Quechua-speaking people in South-America provide examples. If these indigenous people have managed to hold on to their ancestral world-view to a sufficient degree then we have a national minority with a much higher level of polarization then in the case of non-indigenous national minorities. The survival of an ancestral world-view is the reason why such indigenous minorities are more distinct than other national minorities and can thus be seen as permanent minorities[101].

Comparison with religious minorities also makes clear that feasibility constraints are indeed at stake. If we want to propose an ideal interpretation of the principle of political equality that tries to rectify inequalities stemming from the problem of polarization, then we should treat all minorities equally if they are affected by this problem equally. Doing otherwise would simply run against the idea of equality. Given that we have to treat all minorities affected by the problem of polarization equally and given that religious minorities are affected more by this problem than national ones, we first have to rectify the inequality experienced by religious minorities. Yet, if we rectify this problem for religious and national minorities together, we will surely violate numerous feasibility constraints, most notably Schumpeter's constraint. So much power would flow through non-electoral channels that electoral competition would be hollowed out to the extent that it can no longer play the role of incentivizing politicians. That much power would flow through non-electoral channels cannot be contested. Barry (2001: 367) corrects Kymlicka's assessment of Young's proposals in this regard. Kymlicka estimated that Young's list of oppressed groups would include

101 Even for these minorities I would not argue that they ipso facto have a right to NSG, although they should get it sooner than regular national minorities. There is a parallel dynamic of socio-economic inequality of the national minority that should not be ignored. Because of this inequality many national minority members might prefer to integrate fully in the majority society in order to increase their socio-economic opportunities. There may also be cases of indigenous national minorities in which this reasoning does not hold.

eighty percent of the population of the United States. Barry convincingly shows it would rather be ninety percent. If ninety percent of the population has a back-channel through which policy can be influenced then we can just as well abolish representative democracy. The only problem is that we then have to look for some other way of disciplining collective decision-makers. The conclusion, thus, should be that the feasibility constraints at work in our age seriously weaken the case for seeing national minorities as permanent ones on account of the problem of polarization. In order to mitigate Schumpeter's constraint to the extent that it allows for taking on this problem we would have to put way too many resources into reforms that can push back this constraint. This is not to say that there are no interpretations of political equality possible that would point at the problem of polarization experienced by national minorities as being a problem of justice. Such interpretations are, however, too ideal to be applied or pursued directly in our world.

7.2. Are national minorities fixed enough?

As was argued in the previous subsection, the problem of polarization has to combine with the problem of fixedness in order to speak of a permanent minority problem. But, as I will show now, the same difficulty occurs for the problem of fixedness. Here the comparison that should be made is not with religious but rather with ideological minorities.

Does the problem of fixedness occur in the case of national minorities? Here too we can say that it undoubtedly does on many occasions. To ask how fixed national minorities are is to ask on how many issues, or on how many collective decisions, the minority stands apart from the majority. Many national minorities are quite fixed: on many different policy questions they will overall prefer something different from the majority. Next to overall preferring a different language policy they usually also prefer a different educational and cultural policy, different forms of symbolic recognition of the nation. Certain nations, like the Scots and the Wallonians, also prefer different socio-economic, international, etc. policies. A case can thus be made that also the problem of fixedness occurs with regard to national minorities. But, here too, we should not jump to conclusions. The conclusion that we can draw is, again, that on some ideal interpretation of the principle of political equality the inequality experienced by national minorities is a problem of justice. But, again, this interpretation is too ideal.

A comparison with ideological minorities serves to make two points. First, the problem of fixedness in the case of national minorities is not as pressing as it is in the case of ideological minorities and,

second, feasibility constraints are indeed at stake. I will not elaborate on the latter point here because it is the same as the one made above. With regard to the former point, compared to ideologies we can see that national minorities have a far lower level of fixedness than ideological minorities. Ideologies offer comprehensive policy proposals or programs. An adherent of some ideology will, for many if not most of the issues that come up for discussion, have a different preference from someone who adheres to another ideology. Anarchism is for example an ideology that sets an adherent of this ideology apart from the majority on most issues. Social-democrats and economic liberals will also mostly disagree, for example on the best way to generate employment, manage public goods, manage public companies, incentivize people, etc. This is not the case for members of different nations[102].

National differences only have a minimal impact on policy preferences. In the introductory chapter I followed Patten's social lineage account of nations or cultures that sees them as the result of a common processes of socialization. I also followed Tamir's account which sees nations as having not necessary objective characteristics, like language, history and territory, and a necessary subjective characteristic: national consciousness. Notice how these accounts of nations are less strong then Bauer's account which sees nations as groups of people with a similar ethno-cultural character. However, even on Bauer's strong account the national character it only has a rather minimal impact on policy preferences. In order to explain what he meant by national character, Bauer (2000: 7-12), following Pierre Duhem, gave the example of how French and English academics have a different national character: in short he said that the French are more rationalistic and the English more empirical[103]. This is a strong interpretation of the national character in the sense that not many contemporary scholars of nationalism would agree with Bauer and say that nations are characterized by such profound differences. Yet, even if we believe that French and English academics operate differently, what is the effect of this difference on policy preferences? Should French academia be organized more or less hierarchically? Should the French hence have more or less rights to funding? Most would say they should not. Compared to all the policy questions that might come up, the differences that are generated by different national traditions or characters are quite minimal—and that is using Bauer's strong account of the national character.

102 Notice that I am assuming here that national and ideological minorities can be compared. Kymlicka might reply that there is a structural difference between them: national minorities provide their members with a context of choice that is important for their autonomy. I would agree. However, and again, in comparison to NCA and the strong right to language maintenance proposed in the previous chapter, we need to ask whether Kymlicka can still resort to this argument here. Given that NCA is implemented, and seen that it also does a good job at maintaining people's context of choice, national minorities are similar to ideological minorities with regard to the issue at hand.

103 Jon Elster also acknowledges such differences in national character. After quoting Sartre who says about love that it requires the impossible synthesis of the assimilation and the maintained integrity of the assimilated object, Elster (1978: 75) adds between brackets: "For those interested in national differences of intellectual style, we may observe that this is French for 'To have your cake and eat it'."

The national character or national traditions indeed generate different preferences when it comes to language, educational and cultural policy. But the effect the national character and traditions might have on policy preferences pales into insignificance when compared to the effect that an ideology has[104].

7.3. Underlying issues and a special kind of fixedness

That feasibility constraints prevent us from implementing more ideal interpretations of political equality does not imply that both problems of fixedness and polarization are gone or that we can disregard them. It simply means that attempts to implement more ideal principles that demand fixing these problems are blocked by Schumpeter's constraints. Nevertheless, these two problems should urge us to look for any kind of possible solution. One of the most promising solutions that usually does not violate feasibility constraints is the protection of minority goods through minority rights. Most minority rights, like the group rights proposed in the previous chapter, do not violate feasibility constraints that constrain the functioning of democratic processes.

The problem of fixedness can help us in deciding which goods ought to be protected by means of minority rights. This problem occurs when a minority stands apart from the majority on many different collective decisions in which many different goods or issues are at stake. Many issues or goods on which collective decisions are taken are related and the phenomenon of single-issue parties points in the direction of an interesting kind of relation that can exist between two issues or goods. One issue or good may "underlie" other issues and thus function as a divisive issue in the sense that it sets minority citizens apart from the majority when decisions on those other issues are taken. This phenomenon is a recurrent one and it is one of the things that makes politics in multinational federations so difficult. In the debate on ethnopolitics pointing at an underlying issue is called 'playing the ethnic card'. In Belgium this phenomenon has come to be known as communitarizing an issue. These underlying issues are primary candidates for protection through minority rights. By protecting an underlying issue or good these minority citizens will become members of the majority again thereby softening or solving the problem of fixedness.

The issue of the maintenance of a national language is such an underlying issue. The fear that a national language will not be maintained, the fear that one's culture is under attack easily spreads in

104 To be fair, nationalism can be an ideology of itself. But the fact that it easily combines with a left- or a right-wing ideology should warn us against assuming that it is the national character that determines the policy preferences. The left- or right-wing ideology is likely to be the main reason for the different preferences.

people's minds from the language issue to issues that are in reality separable from language. As already noted, nationalist politicians will of course also exploit this fear and present unrelated issues as being yet another example of how the national culture is under threat. Or, as I said above, a state that assimilates a national minority gives a very helpful tool to the minority nationalist. If the issue of language maintenance is settled, then some minority that would be a permanent one on an ideal interpretation of the principle of political equality might turn from a permanent into a regular one. Suppose a multinational society decides to implement the right to language maintenance that I proposed. Given that the phenomenon of underlying issues exists, now all these issues of which language maintenance is the underlying issue, will cease to be divisive issues that set the minority apart from the majority. In other words, if implementing language rights that guarantee the maintenance of a minority language was the first of one hundred collective decisions that a society takes and without this decision the minority would stand apart from the majority on fifty issues, now the minority might only stand apart from the majority on twenty issues. In short, settling underlying issues will lower the level of fixedness in a society. It is quite likely that in many cases it will lower the level of fixedness to such an extent that what is a permanent national minority without these language rights becomes regular national minority with them. For this solution to the problem of fixedness to work, an underlying issue has to be fully settled, though. In other words, the good that is at stake in the underlying issue has to be fully protected. This is the reason why, in the previous chapter, I proposed such strong language rights. If these language rights are to have an effect on the degree of polarization of the minority, then the language issue needs to be settled in a way that satisfies the minority.

In conclusion, the case for saying that national minorities are permanent minorities, or the case for saying that the fact that minorities are outvoted is a problem of justice, is at most a very weak one. That is certainly so if one implements strong language rights as NCA does. However, perhaps the analysis proposed here was flawed from the beginning. Are we warranted in making the assumptions of the social choice model on which this argument is based?

8. On the assumptions

Let us turn to the assumptions. Next to the assumed absence of the problems of polarization and fixedness, dealt with above, five assumptions were made: the issues at stake are continuous ones, and one-dimensional ones, there is equal intensity of preferences, people have single-peaked preferences, and there are no vital interests at stake. I will argue that we are indeed warranted in

making these assumptions given that we limit our discussion to non-ideal theory and assume that the strong language rights of NCA are implemented. Let me first briefly indicate which assumptions do most of the work.

Notice how two of the five assumptions do little or no normative work: the single-peaked preferences assumption and the equal intensity of preferences assumption. They are mainly needed to make the model work. Their impact on making the model normatively more appealing is negligible—certainly when applied to non-ideal theory. It is not as if some specific minority is disadvantaged by using a model based on single-peaked preferences. Some minority might feel strongly about a certain issue and thus be disadvantaged by the equal intensity of preferences assumption. But looking at a society at large and thus at this minority throughout a set of collective decisions, the fact that it feels strongly about a certain issue is very likely to be canceled out by the fact that the majority or another minority feels strongly about other issues. These two assumptions thus do little normative work and I will say no more about them.

Also the one-dimensional issues assumption does relatively little normative work. The chances of minorities do not necessarily decrease with the introduction of more dimensions or issues. Rather the opposite happens, because the chance that a minority citizen is on the losing side on each issue or dimension is low (Miller 1998: 229). Finally also the continuous issues assumption as such—in the sense of not mixed with the absence of vital interest assumption—does relatively little normative work. As Miller (1998: 220-229) shows, in the case of discrete (dichotomous or polychotomous) issues, majority rule does not generate bad results either, especially when more than one issue is at stake.[105] These last two assumptions do some normative work and I will return to them below. The vital interest assumption should be dealt with separately because it does most of the normative work.

8.1. Vital interests

The assumed absence of vital interests does do a lot of normative work[106]. If no vital interests are at

105 To be true, next to a politics of discrete and continuous issues, Miller (1998: 239-242) discusses a third type of politics: distributive politics, which we could pejoratively call pork-barrel politics. If, like Miller, we want to construct a model that can grasp actual politics, it is important to discuss this kind of politics as well. However, if we want to use a model for normative purposes only, as we do here, then we can safely ignore this kind of political practice. The distribution of any kind of good on which collective decisions are taken, needs to be done by means of impartial criteria. No group, minority or majority, should lower itself to pork-barrel politics. If a majority does so excessively, a minority that suffers from this practice becomes an oppressed and thus permanent minority.

106 The idea that we can safely make the assumption that vital interests will be satisfied under majority rule has also been defended. McGann (2006) takes in such a position. Yet, notice how, when McGann (2006: 13) at the

stake, aggregative social choice models of democracy are much more appealing even as normatively relevant models. I first point out that NCA, by implementing strong language rights, is likely to satisfy all vital interests of national minorities. Then I turn to the possibility that there are still some vital interests left.

That NCA can satisfy national minorities' interests in language has been argued in the previous chapter. Notice also that NCA devolves cultural and educational affairs to the national minority. This guarantees the survival of the national minority in the sense that its cultural structure, consisting of its language and heritage, are guaranteed to be passed on to the next generation. Since we are asking whether there is a general case for saying that national minorities are permanent ones, we need to make a generally applicable interpretation of what vital interests are at stake for national minorities. The authority of Charles Taylor can at least be invoked to say that cultural survival is the most important interest that national minorities have. Taylor (1994: 61) argued that cultural survival is "what the members of distinct societies really aspire to". This goes in the direction of saying that the vital interests that cultural minorities in general have are interests in the survival of their culture. It is only a small step further to say that there are in general no other vital interests of national minorities at stake. If that is the case then we were right in making the corresponding assumption. NCA satisfies the interest in cultural survival and we wanted to know whether national minorities are permanent minorities in case NCA is implemented. But perhaps this is too strong. Perhaps, in general, some other vital interest is indeed still at stake. I would be at pains to say which one it is in a developed liberal democracy. But let us give the benefit of the doubt to the ones saying there are other vital interests. I do not wish to take the extreme position that dismisses this problem out of hand. Yet, I do think that the problem of vital interests is overrated when assessing democratic procedures. Let me argue why.

First of all, on the non-ideal level there are far fewer vital interests at stake than is often thought. This is so because there is an upper limit to how utopian one can be in recognizing vital interests in our predicament. We have stumbled upon another feasibility constraint here: the legitimacy of the courts in forcing policies upon a society. Shapiro (1999: 59-62), relying on the work of Ruth Bader Ginsburg and Robert Burt, argues for a presumption in favor of representative institutions rather than courts. As Shapiro explains their position, both scholars argue for a certain relation between the courts and a legislator. In short, they argue that the view taken by the United States Supreme

beginning of the book still uses three criteria, equality, fairness and impartiality, in order to asses democratic procedures. Later on in the book (McGann 2006: 39) he has dropped fairness. McGann (2006: 105) also takes a very radical view against (minority) rights. Otherwise his defense of the majority principle, both applied to collective decision-making and to seat allocation, is very informative.

Court in the Brown v. Board of Education was the right one, whereas the one taken in Roe v. Wade threatened the Court's own legitimacy. The problem is that in Roe v. Wade, the court went beyond its proper reactive role (Shapiro 1999: 60). The courts did the work of legislators in this case. By laying out "a detailed test to determine the conditions under which any abortion statute could be expected to pass muster" (Shapiro 1999: 60) Roe v. Wade did not leave space for a democratic resolution of the conflict (Shapiro 1999: 61). In Brown v. Board of Education or in Planned Parenthood of Pennsylvania v. Casey, the Court set some basic parameters (Shapiro 1999: 258) and turned the problem back to the state legislators (Shapiro 1999: 60). The Court "avoided designing the remedy itself, and thus avoided the charge that it was usurping the legislative function"[107]. (Shapiro 1999: 60)

There is thus an upper limit to which vital interests can be recognized by a society. This holds even for the most developed societies. We should be skeptical about efforts at spelling out a finished set of very ideal and timeless vital interests in some area of political philosophy. We are far from recognizing all socio-economic vital interests of humans globally, all vital interests of mentally burdened people, of immigrants, etc. Such efforts of spelling out a timeless set of vital interests cannot strike the right balance between realism and utopianism simply because some relatively far away future might be much more in some and far less utopian in other respects than we can imagine. The point here is that it is impossible to say in a timeless manner which vital interests ought to be recognized and which rights ought to be implemented in future predicaments. This places an upper limit on what we can say about the vital interests that are at stake now. When we ask whether democratic procedures can give vital interests their due place, we should thus not imagine vital interests that may in some faraway future be recognized and protected but rather serious proposals for recognizing interests and granting rights that are around and being rightly and forcefully demanded today. The right to language maintenance is a good place to start.

Notice also that within the confinements that the courts leave to the legislature, democratic and indeed aggregative procedures ought to take the decisions. Neither the full prohibition nor the complete liberty to commit an abortion can be called just. The courts have to strike down both extremes and a good deal more. Yet within the resulting confinements the question remains whether to allow for abortion up until the eighth, ninth, tenth, etc. week and which exceptions to allow for.

107 This argument is strengthened by Hardin's account of constitutions, which will be explained in the next chapter. Hardin argues that constitutions are and should be for now self-enforcing. They can only be self-enforcing when they do not go too much against the interests of, what Hardin calls, politically efficacious groups. In the end democratic constitutions are accepted by the people. There are many ways in which we can manipulate people's willingness to accept constitutions. But in the end their authority is not a given that we can safely assume will always be present.

These questions are rightly settled by a democratic majority, provided that the confinements are set by the courts. The moderate majority, as opposed to extremists on either side, is likely to make the best decision here. In many cases extremists are more interested in political gain. They often use issues in order to fire up political emotions. In such cases, the moderate majority, mainly because it does not use the issue for political gain, is more likely to get the decision right. Thus our proponents from the example given above may claim that vital interests are at stake. But in the case of many interests, here even in the case of the interest in an abortion-free society, it is the democratic majority that rightly makes the decision. So, when the right confinements have been set by the court, there is no vital interest.

Next to this upper limit to the vital interests that can be at stake there are also two further questions to ask. The first question provides us with a lower limit. If the interest is an interest of an oppressed minority, then we can ignore it as well. That is so because we are asking the question whether we are warranted in assuming away the problem of vital interests when constructing a basic democratic model. Oppressed minorities have a right to group representation and are thus taken out of the basic democratic model. If a national minority is oppressed it thus may have a right to NSG, but on account of the oppression, not on account of being a permanent minority. Second, is the vital interest best satisfied by altering the democratic procedure or by granting a right? If the interest is best satisfied by granting a right, like the interest in language maintenance for example, then we can continue to work from the basic democratic model that assumes the satisfaction of this vital interests that is now protected by means of rights. Notice that I am not asking whether the right is everywhere recognized. I am asking whether the interest is best protected by means of a right. If it is then the implementation of such rights is a duty of the leaders of this state. Hopefully we will, one day, have an international court that not only adjudicates war crimes but also extensive human rights. In all likelihood we will still be using basic aggregative democratic models when that time comes.

The question is whether there are any vital national minority interests when we have implemented NCA and after posing these three questions: is it the interest of an oppressed minority; should the interest be satisfied by granting the minority a right; is the interest too utopian for the predicament that the state is in? If any of these questions is answered positively then we can safely work from a social choice model and assume that there are no vital interests among the issues at stake. Apart from the interest in cultural maintenance, which NCA takes care of, I do not see any vital interest of non-oppressed, non-indigenous national minorities in developed democracies that passes this test.

8.2. The assumptions and the interpretation of principles

Let us return to the assumption that the issues at stake are one-dimensional continuous ones. The main reason why we are warranted in making these assumptions is similar as the one why we are warranted in making the assumption that there is no problem of polarization or fixedness: these assumptions are satisfied to the extent required by the interpretation of normative principles that our non-ideal world allows for. Let me briefly repeat that argument here.

Take the principle of political equality. I argued above that an interpretation not much more ideal than that given by Beitz can be allowed for. This means that, given the constraints that define our predicament, we have to stay close to the least ideal formal equality interpretation, i.e. the one-person-one-vote rule. Since that is the case, these assumptions are harmless. In order to see why, suppose a minority slips through the net. Too many issues that are seen as one-dimensional by the majority are seen as multidimensional by this minority and the needed division of these issues into one-dimensional ones is not being realized. The minority ends up not getting what it wants half of the time and thus our model is not justified to this minority. Yet it is not justified on a very ideal interpretation of the principle of political equality: the principle of threshold equality in prospects of getting one's preferences satisfied. After all, Barry's 'take the rough with the smooth' notion analyzes on a very ideal level: the equal prospects of getting one's preferences satisfied—be it the threshold equality variant.

On less ideal interpretations of the principle of political equality it will almost certainly be the case that no injustice has been done to this minority. This is so because, as was explained in the previous section, this minority is no less satisfied under majority rule than another minority like a religious or an ideological one. The problems of polarization and fixedness are more likely to occur in the case of respectively religious and ideological minorities. In a similar way there is no reason to think here that national minorities are more likely to hold dear issues that will not be reduced to one-dimensional continuous issues. Indeed, religious and ideological minorities probably hold dear more issues that will not be reduced to one-dimensional continuous ones as national minorities. Given that this is the case, and if the predicament we are in allows for a more ideal interpretation of the principle of political equality, then it will first demand that something be done for religious and ideological minorities and only later for national minorities. We are not yet in such a predicament on a higher level of ideality because, as was argued above, Schumpeter's constraint still blocks us from doing something about the situation of religious and ideological minorities. Thus, we are

warranted in assuming that the issues at stake are one-dimensional continuous ones.

Given that all the assumptions of the social choice model hold in the case discussed here, our previous conclusion holds. National minorities are not permanent ones. There is nothing wrong with the national minority being occasionally outvoted by the majority. Of course we should not understand "majority" here as the national majority. As argued above, for many collective decisions, majority should be understood as the group that is close to the median voter. This may not always be the case: for pork-barrel politics, for issues on which the minority is polarized or fixed, etc. But before this generates a permanent minority problem, other conditions have to be fulfilled. For non-oppressed, non-indigenous national minorities these conditions are in general not fulfilled.

Chapter Five: The Federal Stability Constraint

Introduction

On the sixth of January 2015, sixteen trucks drove to the ship lift of Strépy in Wallonia, Belgium. The trucks were loaded with fake banknotes. A Flemish nationalist party was making a statement: "we" are subsidizing wasteful public spending in Wallonia. As such this stunt was not big news. Flemish nationalist parties have a habit of lamenting public spending in Wallonia. What made it big news was that the exact same stunt had been done ten years before by a more moderate Flemish nationalist party, the NVA. This time it was the extremists, the Vlaams Belang, who were telling the NVA, which was partaking in the federal government, that they were the true defenders of Flemish interests. In many ways this story indicates the dangers of NSG that I will discuss in this chapter:

In this chapter I will argue that an integrated party system is crucial to federal stability and that NSG causes the disintegration of the party system and federal instability. I define an integrated party system below as a party system in which no regional party or regional branch of a disintegrated statewide party, which has weak links to the federal level organization of this statewide party, or a combination of such parties or branches, obtains more than twenty-five percent of the vote in any federated subunit[108]. A disintegrated party system, then, is one in which such parties or branches get more than twenty-five percent of the vote in one federated subunit. Such a disintegrated party system leads to federal instability.

In order to make the argument that party system disintegration leads to federal instability, I rely heavily on a book by Mikhail Filippov, Peter Ordeshook and Olga Shvetsova: *Designing Federalism, A Theory of Self-Sustainable Federal Institutions*[109]. The argument in this book is very complex and it will take me a rather long second section to explain it[110]. The role of the party system in maintaining federal stability has often been noted[111]. But Filippov et al. (2004) gives an up-to-

108 As I will explain below, the number of twenty-five is inevitably somewhat arbitrary.

109 Norman (2006: 93) calls this book "required reading for any political theorist interested in federalism". This book stands in a long and reputable tradition of federal scholars that points out that federalism is much more the result of choices by political actors, usually political parties, than of some institutional design. This tradition starts with Riker's *Federalism: Origin, Operation, Significance*. See Filippov (2005) for a concise explanation of Riker's theory. Stepan calls Riker the scholar "who has most affected political science approaches to federalism" (quoted in Fillippov 2005: 93).

110 Overviews of the argument can be found in the preface of this book (Filippov et al. 2004: ix-x) and in Filippov and Shvetsova (2012: 168-173). Shvetsova (2005) explains the core of the argument in detail but abstractly.

111 Filippov et al. (2004: 39, 177-182) give an impressive list of federalism scholars that come to a similar conclusion about the importance of parties: Riker, McKay, Kramer, Schattschneider, Hoffstadter, Key, Herring, Wechsler, Wheare, Truman. As Filippov et al. (2004: 181) note, "[i]ndeed, in light of views such as

date and detailed analysis of what causes federal instability and how an integrated party system solves it. If we are to treat the federal stability constraint as an equivocal feasibility constraint then we need such a detailed argument of which we can spell out the empirical premises and thus the range of the constraint's applicability. The argument of Filippov et al. 2004) is based at a crucial point on an account of constitutions developed by Russel Hardin. In the first section I explain that account and argue that it is an equivocal constraint. Given that the argument from Filippov et al. (2004) is based on Hardin's account it is also an equivocal constraint, although I will not argue explicitly that it is.

More specifically, the argument in this chapter will be that in the case of a particular form of federalism, what I called homeland federalism in the introductory chapter, we are certain enough about it leading to federal instability to say that it cannot be prescribed. That is, we are certain enough to say that it violates the federal stability constraint. As I will explain extensively in section three, homeland federalism stands opposed to cantonal federalism on a continuum that ranges from high congruence between a federated subunit and a national minority's area or homeland to low congruence between federated subunits and that area. Simply put, in perfect homeland federalism the borders of the national minority's area of settlement are perfectly congruent with the border of one federated subunit. Such perfect congruence is of course impossible and thus we have to imagine such a continuum.

Filippov et al. (2004) is a descriptive work that aims to explain the dynamic that leads to federal instability. Descriptive books usually describe many causes and rarely identify one of them as a necessary cause let alone as a sufficient cause. Drawing normative conclusions from such descriptive works is not easy, but can and must nonetheless be done if we are to give due weight to a goal like federal stability. That is, we must find a way to draw normative conclusions from such descriptive works if we want to make prescriptive or non-ideal normative political philosophy possible. For, whenever we prescribe a certain institution, goals like stability ought to be given their due weight. Drawing normative conclusions from such a descriptive work requires that we loosen somewhat the level of certainty that we require. Out of the many causes of federal stability that Filippov et al. (2004) refer to, a disintegrated party system is the only one that is important enough to make an inference from the desirability of federal stability to the desirability of an integrated party system. In the third section I will argue that out of the many causes of party system

Schattschneider's, Key's, Hoffstadter's, and Herring's, it is perilous to assume that even an extreme hypothesis such as Kramer's [who argued that the American political process is not protected by the formal defense of the constitution, but rather by integrated parties] is less viable than anything else offered in the literature to explain federal stability and efficiency".

disintegration in a multinational federation, homeland federalism is one of the only ones that is important enough to make an inference from the undesirability of the disintegrated party system to the undesirability of homeland federalism. In other words, homeland federalism is certain enough to cause the disintegration of the party system to warrant our saying that it indeed causes the disintegration of the party system and violates the federal stability constraint.

As I will also argue below, Kymlicka's and Patten's account of NSG demands homeland federalism. Also the consociational form of NSG that Tamir and Kymlicka propose leads to federal instability, given that it aims to give the national minority a party of its own, and thus leads to the disintegration of the party system. In the third section I will argue that territorial NSG, which demands homeland federalism, leads to federal instability. In a short fourth section I point out that NCA does not similarly lead to federal instability.

Kymlicka is aware of the problem NSG may generate. He explicitly asks whether multinational federalism is a viable alternative to secession (Kymlicka 2001: 91-119) and, in the last chapter of the book in which he made the case for NSG, he asks what the sources of social unity are in multinational states (Kymlicka 1995). Credit goes to him for honestly pointing out this question. Nevertheless, his answer remains inadequate. Kymlicka (1995: 189) argues that "if there is a viable way to promote a sense of solidarity and common purpose in a multination state, it will involve accommodating, rather than subordinating, national identities". Kymlicka's idea here corresponds to the idea, explained above, that assimilation is the best tool of nationalism in the hands of the minority nationalist. But this raises the question: What form of accommodation needs to be implemented? For, surely NSG is not the only non-subordinating form of accommodating minority nations. If we compare different forms of minority nation accommodation then how helpful tools of nationalism it gives should also be a criterion. Note in this regard that NCA does not give helpful tools of nationalism to those minority nation politicians. Kymlicka (1995: 191) gives another much vaguer answer: a strong identification with the whole country may be a source of social unity. He also claims that Switzerland has this source of social unity. Another much less vague thing that Switzerland has is an integrated party system. Canada, by contrast, is one of the best examples of a federation without an integrated party system. As Filippov et al. (2004: 210) point out: "among the 301 members of the Canadian Parliament elected in 2000, only 26 had previously been elected to provincial parliaments, and only 12 of 101 senators had provincial-level political experience". This is highly unusual and a case of badly designed federal institutions. Perhaps Kymlicka's argument that national minorities need NSG in order to protect and ensure their minority rights against a far-off federal government that presumably cannot do else but trample on minority rights is informed

by his experience of Canadian politics. If so, then it makes his theory less credible. An integrated party system is a powerful source of social unity in a multinational federation. Regrettably NSG leads to the disintegration of a party system and to federal instability.

1. Hardin's constitutional constraint

The argument from Filippov et al. (2004) is based on Hardin's account of constitutions[112]. Hardin says that constitutions have to coordinate the interests of the major groups or politically efficacious groups. Hardin argues that constitutions are not contracts nor justice-implementation devices[113]. Constitutions are mutual advantage devices that coordinate between the interests of politically efficacious groups. Hardin himself shied away from drawing normative conclusions from his account of constitutions. Yet, that is what we will do here. In this section I will argue that, if we see Hardin's account as referring to an equivocal constraint, then one can give it the proper normative place[114]. This clears the way for the federal stability constraint that I will turn to in the next section. In the three following subsections I respectively explain Hardin's account of the constitutional constraint, argue that it refers to an equivocal constraint, and suggest that seeing it as such solves its ambivalent normative status in Hardin's theory.

1.1. The constitutional constraint

Many political philosophers are constitutionalists: they believe that the ordinary political game that is the public decision-making process needs to be embedded in or limited by some set of constitutional rules in order to maintain political order. Some policies and institutions are

112 The most extensive statement of Hardin's account of constitutions can be found in his *Liberalism, Constitutionalism, and Democracy* (2003b). Hardin opposes his view of constitutions to the contractarian view. Hardin (1989) provides a short version of this argument. As we will see below, he claims to be merely describing how constitutions work in these two publications. Hardin (1990) offers the normative argument in favor of his view.

113 As coordination devices, Hardin's account of constitutions gives an answer to the question "why, 'now that the [Rawls's] difference principle has been established,' the Constitution had not been changed to incorporate it?" (Shapiro 1999: 7-8) As Shapiro tells the story it is a "naïve undergraduate student" who asks the question but he seems to be talking about himself. Shapiro, however, does not discuss this question in the same context as I do. Hardin can easily answer this question: as well will see, constitutions are not justice-implementation devices.

114 In general, Hardin's theory provides the best account I have come across of how we should understand non-ideal theory. I have two related reasons for saying this. First, his theory gives a prominent place to indeterminacy and, a subcategory of indeterminacy, the information constraint (see especially Hardin 1988, 2003a). Second, his theory integrates non-ideal and ideal theory partly by giving indeterminacy its due place. Simply put, Hardin's non-ideal theory leaves a lot of blanks. The kind of ideal theory that is compatible with this simply fills in the blanks. Furthermore, Hardin's theory is well-embedded in purely descriptive or positive theory, including economics and game theory. But he refrains from drawing conclusions that would unnecessarily invalidate ideal principles (although he strongly argues against ideal principles he thinks invalid). As Hardin (1995: xi) himself says "I am almost always engaged in bringing the normative and the positive together". This is a virtue for non-ideal theory.

compatible with those constitutional rules and some are not. In other words, the constitutional constraint constrains the types of policies and institutions that can be implemented. Hardin argues for a relatively restrictive constitutional constraint. Constitutions, for Hardin, are mutual advantage devices that coordinate all politically efficacious groups in order to advance their interests. Notwithstanding its restrictiveness, I believe we should accept the core ideas in Hardin's account of constitutions because it, contrary to many other accounts, gives a plausible answer to the question of what causes a constitution to remain in place: constitutions are self-enforcing. How is this possible? On Hardin's account constitutions can be self-enforcing because they are backed by the mutual advantage of politically efficacious groups. This might seem like an odd claim because, after all, constitutions limit the actions available to political groups. How can they then be in their interest? Hardin's argument consists of a plausible answer to that question. The basic elements of his answer are that constitutions are based on weighty interests on the part of efficacious groups in there being certain constitutional institutions, and on the high cost of re-coordinating on a new constitution. Let us spell out this argument in detail.

Hardin argues that for a constitution, at least a liberal democratic one, to generate political order or stability, it has to be to the overall mutual advantage of all politically efficacious groups. Politically efficacious groups—Hardin (2003b: 90, 94, 316, 320) sometimes calls them politically effective, or simply major or important groups—are politically organized groups that are large enough, and the interests of whose members are to a sufficient extent in agreement for the group to be able to block the decision-making process if its interests are not taken into account. Examples of such efficacious groups are, during the drafting of the U.S. constitution, plantation agrarians and commercial elites (Hardin 2003b: 129) and, during the adoption of the Belgian constitution, Catholics and liberals. These groups may change over time. In most countries socialist movements, for example, became politically efficacious groups. Although Hardin does not claim as much, in a proportional electoral system one can see these groups as consistently large parties. Hardin is right about the importance of these groups. All liberal democratic constitutions are backed by politically efficacious groups and overall these constitutions have to be to the mutual advantage of those groups.

What does it mean for a constitution to be overall to the mutual advantage of all politically efficacious groups? It means that the institutions that make up the constitution have to fall within a certain range. Although Hardin (1989, 1990, 2003b) does not speak of this range, I believe it is the right interpretation of his account. The range is a certain interval on a scale of institutions. So let me describe this scale first. One can put institutions on a scale of ease with which they would be accepted, and describe different categories of institutions depending on their relation to possible

constitutional compromises, as follows.

- Category A institutions: universally accepted constitutional institutions.

  These are institutions at the bottom of the scale that serve important interests of the vast majority of citizens like affluence and security. They are accepted literally by all politically efficacious groups. In the context of the U.S. Constitution the Commerce Clause comes to mind.

- Category B institutions: normal constitutional institutions.

  These institutions are in the interests of most but not all efficacious groups. A constitutional bargaining process will usually include these institutions in the constitutional compromise. The groups that have no interest in them are relatively easily persuaded to accept these institutions either by being handed perks or by being threatened or because the institutions are part of the status quo.

- Category C institutions: perks that are part of the constitutional compromise.

  These institutions might occasionally be part of a constitutional compromise, but it is rather unlikely given that they are in the interest of only one or two efficacious groups.

- Category D institutions: perks that are backed by the cost of re-coordination.

  These institutions might occasionally be part of a constitutional compromise even though they are in the interest of only one or two efficacious groups. Yet they remain in the constitution because of the cost of re-coordination.

- Category E institutions: non-constitutional institutions.

The lower limit of the range within which institutions have to fall to be to the overall mutual advantage of all groups corresponds to the bottom of our scale: category A institutions. In order to understand why category B, C, and even E institutions are still mutual advantage institutions, we need to understand the weight that interests in category A institutions have. The weight of the interest in having these institutions is so high that it makes some efficacious groups accept institutions higher up the scale that are not in their interest. Examples of such A institutions, that Hardin (2003b: 88, 95-96, 106, 241-248) repeatedly gives, are the Commerce Clause of the U.S. Constitution and the elimination of military insecurity that the installment of the Federal

government entailed. Elsewhere Hardin (Hardin 1989: 206) mentions the backing of contracts and property; the enabling of various kinds of cooperative and collective decision-making capacity (i.e. companies); the establishment of an actor (the government) that can create (minimal) public goods that enhance the productivity of all, like building roads and bridges, etc. Importantly, the interest in these bottom institutions is weighty. As Hardin (2003b: 98) puts it, the difference between a society with such institutions and one without them is analogous to the difference between "the average condition in a very primitive subsistence economy and the average condition in a richly productive modern society such as Sweden". According to Hobbes the interest in such institutions is of course so high, the state of nature so brutish, that it commands the choice for an all-powerful sovereign.

The fact that the interests in getting A institutions is so weighty is important because it turns the social interaction of adopting a constitution into an interaction in which the element of coordination is larger than the element of conflict. Hardin (1988: 35-47; 1989; 2003b: 90-103) divides all social interactions into three categories: conflict interactions, coordination, and, in between those two, mixed-motive interactions. In pure conflict and pure coordination interactions the element of conflict and coordination is predominant so that these respective strategies outweigh all other strategies. In mixed-motive interactions, the prime example of which is the prisoner's dilemma, both strategies can be rational and one typically needs an external enforcer, possibly in the form of a state that backs up a contract that the parties have concluded, in order to come to coordination, which in this context is usually called cooperation. Hardin (1989; 2003b: 90-103) argues, against the contractarian tradition, that adopting a constitution is an act of coordination rather than an act of cooperating in a mixed-motive interaction. The weighty interest that we virtually all have in A institutions turns the interaction into one in which coordination dominates. Some politically efficacious group might accept a B, C, and D institution that is not in its interest because it comes with the established agreement on how to organize an A institution. The interest in the A institution then outweighs the cost of having to live under the other institution. In a similar way, relatively small differences between different forms of A institutions also become insignificant. As Hardin (2003b: 92-93) recalls, Hamilton, obviously a staunch defender of the U.S. Constitution, wanted life terms for Senators. Yet, the adoption of the constitution was for Hamilton far more important than whether or not Senators would have life terms. This is the meaning of coordinating on a set of constitutional institutions. We agree to abide by a government that operates in one specific way, decide to use one type of contract, etc. in order to satisfy our weighty interests in the possibility of concluding contracts and in the existence of a state that provides public goods, etc.

Let us turn to the upper limit to our range of possibly constitutional institutions. There are two

elements that define this upper limit. First, the extent to which the value of the A institutions can be stretched so as to include other institutions. It usually stretches to the extent that B institutions are normal constitutional institutions. Depending on the contingent constitutional compromise that is made, it also incorporates C institutions. An institution higher up the scale, i.e. a D institution, goes too strongly against the interest of too many efficacious group for the exchange for an A institution to be possible. But, and this is the second element, the institution might still be part of a stable constitution because of the cost of re-coordination. Thus, D institutions might also be part of a stable constitution. An efficacious group that has a strong interest against a D institution might still abide by the constitution because there is a high cost of re-coordinating on another constitution. This high cost stems from the problem of collective action. The group would have to create a constitutional moment, bring all efficacious groups together, risk the collapse of negotiations, etc. Especially if the group has gotten some perks itself in the established constitutional compromise, this group will not risk losing these perks by pushing for a re-bargaining of the constitution. In sum, the cost of re-coordination is high and it lifts up the upper limit much higher than C institutions; stable constitutions may also include D institutions.

Notice how both elements are in the interest of the efficacious groups: maintaining a bargain from which one profits overall is in one's interest and not incurring a cost of re-coordination is in one's interest. Constitutions that include B, C and D institutions are thus still mutual advantage devices. Even though this upper limit now includes some C and D institutions that go strongly against the interests of some efficacious group, the bargain to get bottom institutions plus the cost of re-coordination still makes it worth it to this group. Notice also that the constitution may not and need not serve the interests of all efficacious groups equally. There is the possibility of unequal coordination (Hardin 2003b: 92-94). In an interaction of unequal coordination, the outcome that is coordinated upon benefits some group more than another, yet it is still in the interest of both groups to coordinate rather than go for a non-coordinating outcome. Finally notice that there is an element of bargaining, exchange or contract in the whole process. Getting an agreed upon list of B and especially C institutions is an exchange interaction. Nevertheless, because of the A institutions backing up each bargain, the element of coordination is higher than the element of conflict and thus the acts of drafting and ratifying constitutions are acts of coordination.

Let me now argue, still with Hardin, why this account of constitutions is worth taking seriously. The short answer is that this mutual advantage account explains why politically powerful actors almost always abide by constitutions in developed liberal democratic states: constitutions are self-enforcing. Because they are overall in the interest of powerful actors—or in the interest of the

efficacious groups that back them—constitutions enforce themselves. However, this answer faces a problem already noted by Hobbes. If we allow B, C and even D type institutions into the constitution, then what is to prevent an efficacious group in power with an interest in abolishing a specific B, C or D institution from not doing so? An efficacious group in power is the closest thing to a Hobbesian sovereign in a liberal democracy. As Hardin (2003b: 135) notes, Hobbes ridiculed "the possibility that a sovereign can be governed by the laws that the sovereign passes and enforces". Just like everyone else, the sovereign cannot commit itself and then have it stick. We stick to the agreed upon terms of a contract because there is an external enforcer. Yet, there is no external enforcer in the case of the sovereign (Hardin 2003b: 98); there is only the constitution, that sometimes contains B, C and D institutions that the efficacious group in power would like to see abolished. Why does this group stick to the constitution?

Hardin's account allows for an answer to this question. As Hardin (2003b: 135) argues, "[w]hat one can do is commit oneself and then *arrange* to have it stick". According to Hardin (2003b: 136), the cost of re-coordination is the arrangement that makes the commitment to the constitution stick. Take a politically efficacious group that is in power under a constitution that largely satisfies its interests. The constitution, however, also contains an institution Di, that was handed out as a perk to another group, and that the group in power rather would not have in the constitution. Furthermore, the constitution contains an institution Ci that the group in power would like to keep in the constitution but that was handed out to it as a perk. Suppose that the group in power is not large enough to eliminate the institution by amending the constitution yet it is large enough to have full control over the government—so, to put it in simple terms, the group has a majority but not a two-thirds majority. Why does this group not simply eliminate institution Di through extra-constitutional means? The reason why such a group sticks to the constitution is the following. If it were to turn to extra-constitutional means, it would devalue the status of the constitution and have little to say when another efficacious group that might come to power later on does the same. The institution that might then be at stake is possibly the Ci institution which was a perk to the first group. Furthermore, re-coordinating on another constitution that includes Ci but not Di might be so costly that this outweighs the interest in a constitution without institution Di. Part of the reason why this cost is so high is that, because of the risk, the constitution as a whole becomes meaningless and the A and B institutions are endangered if our first group eliminates institution Di. Notice how the group in power thereby in a way exchanges institution Ci for Di. To that extent a constitution can be seen as a contract. Yet, it is the cost of re-coordinating that puts a lock on the constitution as it is. Thus, overall it is not a contract but rather a mutual advantage device that is backed by the cost of re-coordinating.

The cost of re-coordinating is thus the kind of arrangement that makes it possible to commit politically efficacious groups in power. This, according to Hardin (2003b: 144, 190), makes the constitution self-enforcing, even in the face of politically efficacious groups in power. Thus Hardin has solved the problem of committing the sovereign while at the same time showing how such a constitution is still a mutual advantage device. He has given a convincing answer to the question: What enforces a constitution? The answer is: it is self-enforcing. The interest that an efficacious group in power has in abiding by the constitution is the interest it has in maintaining institutions that it wants to keep. This gives it a strong incentive, partly the result of the risk of losing institutions it wants to keep and partly the result of the cost of re-coordination, to maintain institutions it might not want to keep but that are part of the constitutional exchange. Hardin's solution, in comparison to Hobbes's solution—which was to settle for an all-powerful sovereign—, has the distinct advantage that instead of solving the problem by creating an all-powerful sovereign, it solves the problem by creating a constitution of a certain form. We can thus have all the advantages of a stable constitution, most notably a powerful state that can provide various public goods but that is still limited in its power. The downside of Hardin's solution is that accepting it commits us to accepting that constitutions are based on the mutual advantage of politically efficacious groups.

For Hardin's solution to work, the constitution cannot include an institution E that goes so strongly against the interests of an efficacious group that it outweighs the cost of re-coordination. Regrettably type E institutions might bring about very desirable states of affairs. Filippov et al. (2004:291-292) give an example of such a type E institution: certain kinds of, what they call, positive rights. They understand positive rights as rights that are intended to guarantee some socio-economic minimum. An example they give is a right to housing for all citizens. Such rights, at least for now, go against the interests of all politically efficacious groups that have to pay for those houses. Usually the result of putting such rights in a constitution is that these rights are not implemented, which goes against, what Fillipov et al. (2004: 292) call the “coordinating authority” of the constitution. Hardin (2014: 46-47) voices a similar worry about constitutions that include too many provisions. Hardin (2003b: 255) says that the best constitution in the case of the U.S. was one that left the disagreement between Jeffersonians and Hamiltonians to be fought out in the economy rather than in the polity. This too is a worry about constitutions that contain too many provisions not being able to perform their stabilizing function.

Hardin's account explains why the most powerful element of the political system, i.e. the element that often constrains what the most powerful politicians can do, can go without a power that backs

it. Thereby he has given a sound explanation of how constitutions function and any theory that is incompatible with Hardin's has to come up with a better explanation. If it cannot, then we should not make any prescriptions on the basis of such a theory, for it means we risk instability. Filippov et al. (2004) are thus right to base their prescriptions on Hardin's account of constitutions and we are right to follow them in doing so.

1.2. The constitutional constraint as an equivocal constraint

Hardin clearly sees his account of constitutions as a feasibility constraint. Hardin (2003b: 37, 130, 318) uses the language of constraints or the dictum that ought implies can. Whether Hardin sees the constitutional constraint as an equivocal constraint is another matter. This requires the constraint to be malleable and there to be uncertainty about the possibility of fully mitigating it. That is what I will argue for here. Let me mention three reasons why it is a malleable constraint.

First, the interests of politically efficacious groups are malleable. We should conceive of these interests as related to the overall circumstances. For example, in times of scarcity a rich politically efficacious group normally has different interests than in times of affluence, and the same holds for a poor efficacious group. By consequence, when a society is affluent the constitution allows for different institutions. Institutions that were type E in the past might become type D, C or even B institutions. In times of scarcity a rich group might, for example, have a very strong interest against levying taxes, turning this into an E institution. In a situation of less scarcity the rich group might allow for more taxes, turning it into an D or C institution. Of course, levying taxes is usually not in the interest of the rich group. But that is not what is argued for here. Supposing that the levying of extra taxes is a type E institution, it does not necessarily have to become a type A institution to be part of a constitution. The rich group might be willing to accept the levying of taxes in order to maintain type A institutions and other institutions that are to its advantage. One way of mitigating the effect of the constitutional constraint is thus by increasing the affluence of one's society. There are many other empirical circumstances that have similar effects on the interests of efficacious groups and the bargains that these new interests enable.

Second, new politically efficacious groups may emerge and old ones may become inefficacious. An example of the former is the socialist movements that emerged in many developed states after the constitution was ratified. An interesting way in which new efficacious groups may emerge and that might explain part of the value of democracy, is the possibility of better tools for organizing

formerly inefficacious groups. The political freedoms that enabled socialists to organize are therefore good ways of mitigating the constitutional constraint. An example of an efficacious group that weighed in at the time of constitution-making but became inefficacious afterwards are the Anti-Federalists at the time of the drafting of the U.S. Constitution. New constellations of efficacious groups enable constitutional amendments.

Third, some way might be found to enforce constitutions so that they need no longer be self-enforcing. The most likely way this might happen is through a strengthening of international organizations[115]. Already today, the pressure that the international community puts on countries to maintain a constitutional order counts for something. This power of the international community may increase by creating supra-state political organizations. Just as the federal government or judiciary can function as a check on federated policies, so too the federal level backs the constitution of a federated polity. Another way of enforcing constitutions might be through a social contract signed by all citizens. This option is, certainly for the foreseeable future, utopian. But it is not impossible[116].

These are three ways of reigning in the constitutional constraint, of limiting its applicability, and thus three potential contents of the duty to mitigate this constraint. There may be still other ways. This is not the place to go into detail about the exact limits of applicability this constraint. It should be clear, however, that it is a malleable constraint.

The constitutional constraint is not a hard constraint. Neither of the elements that make up this constraint are hard constraints like the impossibility of jumping over the moon or taking one thousand difficult decisions in a day. It might be that we become much less self-centered beings in the future so that politically efficacious groups become more altruistic. It may also be that we become much more individualistic which would decrease the power of efficacious groups. We should not, however, treat the constitutional constraint as a soft one. At least the core of the

115 One might object that this merely moves the constitutional constraint up a level so it still exist. Recall, however, that I am asking here whether the constitutional constraint is malleable, not whether it is removable. The only thing I need to show, therefore, is that the range of applicability of the constitutional constraint can be reduced. An international constitution, or a device that performs the same coordinating role, is likely to have a different range of applicability and have the effect of changing the range of applicability of the state's constitutions. The cost of re-coordination may for example be much higher in the case of an international constitution, making it easier for this constitution to be self-enforcing. If the international constitution demands, with some force, that the state constitutions are respected, then it is easier to enforce these constitutions. Thus they might allow for type E institutions that go somewhat against the interests of some efficacious group. The extra force of the international constitution thus slightly reduces the range of applicability of the state constitutions.

116 The social contract is a fiction. But it may already now be a useful fiction. It might function, as it does in Rawls's theory, as a counterfactual thought experiment that enables us to think clearly about what a half-way ideal state, in which full compliance is possible, would look like.

constitutional constraint will still be applicable for the foreseeable future. The fact that so many political philosophers and theorists adhere to constitutionalism of some sort should caution us in assuming the constitutional constraint is easily removed. For the foreseeable future, and probably a long time thereafter, the model in terms of which we should think is a constitutional model.

1.3. The normative status of Hardin's account of constitutions

The normative status that Hardin attributes to his account of constitutions is ambiguous. On the one hand he claims that his account of constitutions is "strictly pragmatic or positive". (Hardin 2003b: 38) On the other hand Hardin does hold that his account of constitutions blocks certain ideal principles from being implemented and as such has normative consequences. I will argue that this ambiguity can be solved by seeing his account of constitutions as an equivocal constraint the applicability of which depends on the presence of empirical circumstances.

Hardin (2003b) takes up an awkward position in between descriptive and normative theory. As said, on the one hand, he claims that his account is purely pragmatic or positivist. He call his theory *sociological* mutual advantage (Hardin 1998: 143; Hardin 2003a: 7, 134) in order to distinguish it from normative mutual advantage theories. It is sociological because it relies on the interests of all efficacious groups, not on the interests of *all* citizens. In the spirit of doing positivist theory Hardin claims merely to investigate what makes a constitution "workable" (Hardin 2003b: 3, 316; Hardin 2003a: 131). Finally, Hardin (2003b: 320) says: "the argument from mutual advantage cannot morally justify the results without some strong additional consideration, a moral consideration". On the other hand, Hardin does hold that his account of constitutions restricts or constrains what can be done. Hardin (2003b: 318) says that "even a theorist whose concern is with moral issues of governance must take problems of workability into consideration. This follows from Kant's dictum that ought implies can". Furthermore, Hardin (2003b: 312) cautiously says that constitutionalism seems to work in very many nations and adds that moral theorists might thus suppose that we can do no better than abiding by the constitution.

If one strikes down normative theories or principles because they violate a removable or mitigatable feasibility constraint, then one is making normative claims and doing normative theory. The only way I can make sense of Hardin's ambivalence here is by seeing him as having in mind an equivocal constraint *avant la lettre*. On this interpretation, then, he is reluctant to make a conceptual argument that does not depend on the empirical circumstances of our times. Such a conceptual

argument, which would do the same work as a hard feasibility constraint, would not only strike down normative principles for our non-ideal world but for all ideal worlds as well, hence Hardin's reluctance. He does, however, maintain that his account of constitutions applies to our non-ideal level and he probably thinks that it applies to the foreseeable future too. Hence he adopts a normative stance, notwithstanding his alleged pragmatism or positivism.

Seeing the constitutional constraint as an equivocal one allows one not to make a conceptual argument, while at the same time prescribing on the basis of the constitutional constraint here and now—just as seeing national identity as an equivocal constraint allows one to prescribe on the basis of nation-building arguments without becoming a nationalist. When we turn to prescribing, we should thus take Hardin's constitutional constraint into account.

2. Federal stability

In this section I explain the analysis of the problem of federal instability that Filippov et al. (2004) offer and the solution they argue for. After elaborating on the concept of federal instability in the first subsection, I explain the overall argument in the second and the core of the argument in the third. In the fourth subsection I conclude the argument by explaining why integrated parties can solve federal instability.

2.1. Federal instability

When it comes to stability, the track record of federations—for the moment I am not even speaking of multinational federations[117]—is not good. Filippov et al. (2004: ix), in a tone similar to many books on federalism, open with the following pessimistic lines:

> [O]f seven European federations of the last decade of the twentieth century (Germany, Switzerland, Belgium, Czechoslovakia, Russia, the USSR, and Yugoslavia), three (Czechoslovakia, the USSR, and Yugoslavia) no longer exist, one is hardly guaranteed to remain democratic or federal except in name only (Russia), and another (Belgium) is arguably surviving as a linguistically divided state largely by virtue of its position as the bureaucratic "capital" of a nascent federation, the European Union. Add to this the fact of the American Civil War, Canada's struggle with Quebec separatism, the bloody conflicts

117 Recall that in the introductory chapter I distinguished between multinational and administrative federations, here I am talking about both.

> that plagued the Swiss Confederation in the first half of the nineteenth century, India's descent to virtual despotic rule under Indira Gandhi, the earlier near disappearance of meaningful Australian federalism, wholly dissolved or disrupted federations (e.g., Mali, Uganda, Cameroon, British West India, Nigeria, Pakistan, Ethiopia), and Europe's often bumpy road to integration, and we can only conclude that the requirements of a successful design are neither trivial nor well understood.

The track record of federations may be bad but that of multinational federations is even worse. According to one count, of the eighteen multinational federations that existed during the last century only four survived: Belgium, Canada, Spain and India (Roeder 2009: 213)[118]. One may wonder whether it makes sense to prescribe federal institutions in a multinational setting at all. Moreover, we should not only look at the extreme case of federal instability: the collapse of the federal arrangement through centralization or break-up. We should, as I will argue now, also look at the quality of the political process. In none of these four federations does politics go smoothly, and federal institutions are often to blame for this.

This raises the question: Which definition of federal instability should we use? In the context of our topic the answer will depend on how we will address the question, When does federal instability become normatively relevant? Does it become relevant when it leads, with some degree of certainty, to violent conflict?; or when it leads to the collapse of the federation?; or when there is uncontrolled constitutional change?; or even when there is disagreement over the division of powers? In order to answer this question let us have a brief look at the relevant criteria. On the one hand, the broader our definition of the concept of federal instability, the broader the range of applicability of the federal stability constraint and the more normative principles it will constrain. If we say that federal stability is in danger even when there is uncontrolled constitutional change, then, presuming that we should avoid federal instability at some cost, we will be striking down many normative principles. On the other hand, the proper functioning of a political system is valuable. It carries the weight of all the things it makes possible. Suppose that having a well-functioning political system means that one can implement interregional solidarity through redistribution from richer to poorer federated subunits, as is the case in Germany. Many people think this is highly desirable and made possible, at least in part, by the well-functioning political system. Uncontrolled constitutional change may make a properly functioning political system impossible. So if we do not go for the broad definition, then

118 Roeder calls multinational federations ethno-federations. The defining feature of an ethno-federation according to
him is whether a national minority possesses a homeland. Roeder's ethno-federalism thus corresponds to my homeland federalism. Switzerland is not mentioned as one of the successful multinational federations because, with the exception of the canton of Ticino, it is a cantonal federation. I will come back to this below.

we end up creating federations that cannot properly function.

A lot of work remains to be done in spelling out the criteria for concepts like federal stability so that they can become useful for normative political philosophy. This is not the place to spell out such criteria. But let me make two points in this regard. First, perhaps the difficulty is that, instead of one concept of federal stability we should use two: a narrow one and a broad one. The narrow concept is to be applied when vital interests are at stake. A minority that shakes up a federal constitution because it is being oppressed is not to be blamed for federal instability. Hence the concept of federal stability we use when vital interests are at stake should be narrow enough so that it does not imply denying this minority the tools to defend itself. For example, when a minority is oppressed it should not be made harder for it to create its own party, even if that implies a disintegrated party system, thus creating a threat to the federal arrangement. This threat should not be counted as federal instability under the narrow definition. The broad concept of federal stability, by contrast, is to be applied to federations operating normally in the sense that they do not oppress minorities. Then we should use a definition of federal stability that includes the proper functioning of the federation. Not doing so amounts to, what I called in the introductory chapter, 'resting on a non-applicable feasibility constraint'. Second, when it comes to the broad type of definition a reasonable middle ground seems discernible. Political thinkers working on federalism do not talk past each other. Despite being a strong defender of normative principles, Kymlicka admits that the sources of social unity pose a problem. As we will see, Filippov et al. (2004) propose to define federal instability as uncontrolled constitutional change or, as they call it, non-institutionalized bargaining. I think this is not so far from the reasonable middle ground.

Notice in this regard that, as I said in the second chapter, we are talking about what justice demands over and above constitutional essentials. Given that NCA is implemented, one can say the same about the cultural justice claims of national minorities that we are investigating here: they stand over and above the justice claims that belong to the constitutional essentials. Furthermore, the model of federalism I will propose, is to be applied in conjunction with strong language rights and the devolving of educational institutions so that the protection of the national minority's vital interests is guaranteed. Given that we are discussing non-constitutional-essential justice claims and given that the minority's vital interests are protected, I believe we should adopt a broad definition here. We should thus opt for a definition of federal instability that includes periodic stagnations of the political process, difficult government formations, recurrent changes to the constitution, etc. Canada, Belgium, Spain and India encounter these difficulties regularly. We should learn from the problems these countries face rather than export their models to other countries.

Filippov et al. (2004) use a broad concept of stability but also a specific one. On the one hand, Filippov et al. (2004: 12) argue that stability cannot mean the absence of changes to the federal constitution or arrangement of federal institutions. Such changes are often part of the normal evolution of any system. The political predicament evolves over time and federations ought to evolve with the general trends. One example is the ratio of the United States federal government's share of revenues to that of the federated subunits, which was 0.6 in 1902 and is 1.0 today (Filippov et al. 2004: 12). Other examples of federal institutions that changed while maintaining stability are: direct election of Senators, increased authority of the Supreme Court, universal and equal suffrage, etc. (Filippov et al. 2004: 11-12). A stable federation must therefore allow for changes to the federal constitution. On the other hand, for these changes to be stable, they must occur under some pre-established rules. In many ways the work of Filippov et al. (2004) is about this relationship between changes to the constitution and pre-established rules, which are part of the constitution. The aim of these authors is to institutionalize the bargaining process. In order to simplify, we can say that the concept of federal stability they use is that of institutionalized bargaining[119]. A federation is stable if the bargaining over the federal constitution occurs in a fixed institutional setting. Thus Filippov et al. (2004: 12) say that stability requires "a 'relatively' peaceful, constitutional, and democratic adaptation of a political system to changing circumstances."

2.2. Federal bargaining and federal constitutions

What causes federal instability according to Filippov et al. (2004)? I will present the core of this argument in the next subsection. Here I explain the overall argument.

The main cause of federal instability is federal bargaining. Federal bargaining consists of bargaining between the federated subunits amongst themselves but mainly between the subunits and the central federal government over federal institutions. Federal institutions are institutions such as the division of power, whether there is a right to secede, whether federal law is supreme, where the residual powers lie, whether and how much redistribution there is between the subunits, whether there are two legislative chambers, how the subunits are represented in the federal chamber, the legislative authority of the federal chamber, etc.[120]. In multinational federations we may add institutions such as the degree of political decentralization to the homelands of national minorities, the language

119 Filippov et al. (2004: 13) gives an abstract definition of stability that will become clear in the next subsections: stability is "an empirical dual of an institutional equilibrium whereby formal rules and individual motives generally and over time remain in agreement".

120 This list is loosely based on Filippov et al. (2004: 334-335).

policy opted for, etc.

Federal bargaining is (re-)distributive bargaining. Notice that the things that are being distributed by federal institutions are in limited supply: authority, revenues, jurisdiction, power, etc. (Filippov et al. 2004: 34). Hence the bargaining is over how to distribute these things. Furthermore, every new bargain or federal constitution will create new winners and losers. In other words, some federated subunits stand to gain from re-bargaining[121]. That there are inevitably winners and losers under every possible constitutions is explained by two factors. First, there are historical changes. A federated subunit may become more populous, may discover oil on its territory, etc. Furthermore, as noted above, the political predicament can change, demanding direct election of Senators, increased authority of the Supreme Court, universal and equal suffrage, etc. Second, there is a very fine balance in the authority between the federal and the federated level. The subunits that are close to the statewide majority, in terms of the preferences of its constituency, will prefer a strong center, perhaps even a unitary state; the subunits that are not will prefer a weak center. Thus, if the federal center is too powerful, the subunits that are in the statewide minority will feel oppressed. This often causes federal collapse (Filippov et al. 2004: 61-68). Even small adjustments to this balance in authority will have a large impact. Combine this with historical changes and we have to agree with Filippov et al. (2004), and Riker, that there is no stable end-result to this bargaining process. Thus every new bargain creates new winners and losers or will in a few years and some subunits always stand to gain from re-bargaining.

This distributive federal bargaining can spiral out of control. When that happens we have federal instability under the definition used here. A process of federal bargaining spirals out of control when too many federal institutions or dimensions, like overall economic policy, the identity and number of the federated subunits, the balance of power between federal and federated government, etc. become the subject of bargaining. Filippov et al. (2004: 79-88), for example, explain the break-up of Czechoslovakia as the result of federal bargaining spiraling out of control. This break-up was caused by a struggle between Vaclav Klaus, the prime minister of Czechoslovakia, and Vladimir Meciar, the premier of Slovakia. The federal bargain spiraled out of control in the sense that many dimensions became part of this struggle: institutional design, economic transformation, the power of

121 Here Riker's influence on the authors of Filippov et al. (2004) becomes clear. As is well known, Riker argued that there is no way of aggregating individual choices into a stable social choice because there is always the possibility of cycling. Cycling occurs when individual preferences are ranked such that no stable coalition to make a certain social choice can be found. Every social choice can then be overturned by forming another coalition. As I argue in the text, Riker's thesis is much more plausible in the case of federations because of the distributive nature of federal bargaining. Although the same problem also occurs in unitary states, a centralized state can at least keep up the impression of treating all regions equally and fairly and thus putting an end to the cycling. Thus a unitary state, contrary to a federation, can eliminate one important source of distributive bargaining.

these two men's office. What could have been a prosperous federation thus ended up as two separate countries. Another example is the break-up of the USSR (Filippov et al. 2004: 88-101). The process that led to this break-up was a "brutal form of redistributive politics" in which neither the institutions, nor the roles, nor the identity of the players was fixed and could not become part of the bargaining process (Filippov et al. 2004: 100). It is very often this spiraling out of control of federal bargaining rather than the incompatibility between the wishes of a federated subunit the federal government that leads to federal instability. Filippov et al. (2004: 105) approvingly quote Bunce saying that "a secessionist outcome may be less the culmination of struggles over autonomy and independence that pit a secessionist region against the center than a by-product of a host of other struggles over money, power, and policy that are going on within the center and the regions". After all, because of economies of scale and increased weight in the international arena, being part of a federation is most often in any region's interest.

Recall that on Hardin's account of constitutions, the cost of re-coordination explains why constitutions can contain the institutions they do while still being self-enforcing. Filippov et al. (2004) adapt Hardin's account so that it applies to the case of federations. Enforcing a constitution is more difficult in the case of federations because, by definition, federations establish, coordinate and legitimize the interests of groups in society: the federated subunits (Filippov et al. 2004: x, 167). Moreover, these subunits are given powers and authority and have the manpower to calculate their interests and to initiate and conduct tedious bargaining. Enforcing a federal constitution is thus difficult because, as we saw, some of these groups or subunits are losing under the current federal bargain or constitution and stand to gain from re-bargaining. Getting a well-established constitution under such circumstances is not only a question of coordinating between the interests of politically efficacious groups. One also needs to take into account, and arm the constitution against, the danger of non-institutionalized bargaining. That is what Filippov, Ordeshook and Shvetsova seek to do.

The problem of federal bargaining spiraling out of control explains the importance of institutionalized bargaining, by which is meant that only small parts of the constitution are being changed at a time. Thus the main difficulty that Filippov et al. (2004) analyze, is how to keep bargaining institutionalized. Filippov et al. (2004: 34-36) argue that the constitution needs to have at least two levels to keep the bargaining institutionalized. The first level, which Filippov et al. (2004) simply call Level 1, is the one that is usually not part of the bargaining process. It defines the players and the basic rules of the game. Level 1 includes a constitutional list of divisions of powers (which is not overly detailed), limitations on the power of the central government, federal

supremacy and comity clauses[122], rules of admission of new federated subunits, etc. (Filippov et al. 2004: 35-36). However, the Level 1 provisions are mere constraints, another example of Madison's parchment barriers, on the federated subunits which are potentially powerful, and a number of them might be losing under the status quo. Therefore Filippov et al. (2004: 36) argue that "a successful federal constitution must provide not only the rules that yield stability in federal bargaining; it must also establish a second level, Level 2, that defines the core institutional structure of the federal center and its relationship to federal subjects in such a way to ensure the maintenance of these rules as a product of people's self-interest". The second level is thus needed to provide the incentives to stick to, or only gradually adapt, Level 1. The second level consists of the obligations, authority, and relations of the different branches of government, the rules for amending the constitution, the rules for filling federal offices, etc. (Filippov et al. 2004: 36).

Filippov et al. (2004: 146) ask what backs up the Level 2 institutions that create incentives for federated subunits to stick to Level 1 institutions. In other words: What forces federated subunits that are losing under the current bargain to push for only gradual reforms? In short, what, eventually, enforces the federal constitution? What eventually enforces the constitution has to satisfy two criteria. First, it has to be democratic and thus has to be endogenous to the constitution. If the enforcement mechanism is exogenous to the constitution and still a power that can enforce the constitution then it can only be a power that stands above the constitution, like a religious council or a dictator. Most people would not think that is democratic. Second, the enforcement mechanism somehow has to stop the infinite regress that is lurking around the corner here. We already have gone from Level 1 to Level 2. We are now asking what enforces Level 2. Suppose we answer with yet another level, then again, what enforces that level? Thus the enforcement mechanism has to be endogenous to the constitution and stop the infinite regress. I will start by showing that the enforcement mechanism Filippov et al. (2004) point at is endogenous to the constitution. It is in fact a variant on Hardin's cost of re-coordination: what the authors call a coalition-proof equilibrium.

By equilibrium Filippov et al. (2004) here mean what I called above a set of type A, B, C and D institutions that coordinates the interests of all politically efficacious groups in the federation, including the federated subunits. Equilibria are thus all potential constitutions for a society. In order to see what Filippov et al. (2004) mean by coalition-proof equilibrium, notice that there is one advantage in federations: there are several federated subunits, some of them gaining under the status quo bargain, others losing. There is thus an additional element that speaks in favor of maintaining

122 Comity clauses describe reciprocal "courtesy" norms that operate between the federal and the federated levels and the federated subunits. These norms demand that both levels or the subunits recognize and often defer to the other's laws and interests.

the status quo: the collective action problem between the federated subunits in deciding whether to abide by the constitution or challenge it. It is this collective action problem, which is a federal variant of Hardin's cost of re-coordination, that explains why federal constitutions, even though they create powerful federated subunits, can be stable under certain circumstances. Here we have arrived at the core of the argument. In the next subsection I will explain, albeit in abstract terms, the circumstances that determine the outcome of this collective action problem. In order to initiate a bargaining process a federated subunit has to form a coalition with the other subunits that stand to gain from re-bargaining.

The most important manipulable circumstance that determines the outcome of the above described collective action problem is the existence of an integrated party system. An integrated party system gives all important federated level politicians a bias in favor of the status quo. As we will see in detail in the next subsection, this greatly decreases the likelihood of forming a coalition of subunits that can initiate a successful re-bargaining. Filippov et al. (2004) thus argue that federal constitutions need a final Level 3: electoral and other institutions that stimulate the maintenance or emergence of an integrated party system. Institutions that do so are endogenous to the constitution and at the same time they do not lead to an infinite regress. This is because electoral institutions that maintain integrated parties are what were called in chapter three incentive-compatible institutions that take individual motives and redirect them to yield socially desirable outcomes (Filippov et al. 2004: 144). As an example of this redirecting of self-interests, Filippov et al. (2004: 144) point to a former Scottish way of electing judges that was mentioned by Benjamin Franklin during the drafting of the American constitution. The Scottish practice was not to let the legislature or the executive but rather the lawyers themselves chose the judge. This is an example of an incentive-compatible institution because lawyers have an incentive to choose the ablest among themselves in order to get rid of him or her so as to take over his or her practice. In this way the ablest lawyers became judges. It has often been noted that electoral institutions have a similar characteristic as Franklin's way of choosing judges: they both turn the effects of vices into virtues. Electoral institutions do so because politicians that got elected through one type of electoral system, that are familiar with that system and have adjusted their party to that system, have an interest in keeping that system. In a similar way, by having electoral institutions that favor an integrated federal party system be part of a federal constitution, the politicians that in the end have to decide on whether or not to change the federal constitution come from integrated parties. They also have an interest in keeping electoral institutions such that they favor integrated parties. This stops the potential infinite regress. The existence of an integrated party system also has, as we will see, the result of federal stability. In that way the problem of enforcing the federal constitution is solved (Filippov et al.

2004: 181-182). The electoral institution thus backs up itself and in doing so the whole federal constitution. We have thus found the institution that is endogenous to the constitution and that does not lead to an infinite regress. We can now understand what kind of institution Filippov et al. (2004: 145) believe a federal constitution should be: an incentive-compatible institution that selects a coalition-proof equilibrium.

2.3. The core argument of Designing Federalism

Shvetsova (2005) offers a detailed explanation of the core argument in Filippov et al. (2004: 167-169; 263-264). The stage for this argument was set in the previous subsection. This core argument shows, albeit in an abstract way, why an integrated party system is necessary to make a federal constitution coalition-proof. The argument is based on a game theory model. The aim of the model is to grasp the strategic interactions between the federated subunits.

The model assumes a federation with three federated subunits that might prefer a different federal constitution: U_1, U_2 and U_3. Next, the model makes some assumptions that were argued for in the previous section (Shvetsova 2005: 129). First, federal constitutions have distributive implications and federated constituencies are not overly altruistic in the sense that they prefer the federal constitutions to be adjusted to their own advantage. Second, politicians at the federated level primarily bargain on behalf of the constituencies of the subunits they represent. In other words, the normal behavior of federated politicians is to represent the interests of, what is after all, their constituency.

The model proceeds in three stages. At the first "popular" stage we, unrealistically, look at the strategic choices available to the constituencies as if they operate in a pure direct democracy, without the interference from politicians. We will ask whether the choice to maintain the status-quo is coalition-proof and we will find that it is not. This implies that representative democracy and the role of politicians is crucial for federal stability. At the second stage we increase the uncertainty of succeeding in forming a coalition, by introducing politicians as imperfect agents, and we find that it makes the status-quo coalition-proof. At the third stage we increase the reward for taking the risk of trying to form a coalition by introducing another factor: an additional redistributive expectation[123]. We find that, when the reward is high enough, this makes the status-quo again not coalition-proof.

123 Instead of "additional redistributive expectation", Shvetsova (2005: 137) speaks of a "exacerbated redistributive implications". Filippov et al. (2004: 30-31) simply say "redistribution".

Let us start with the popular stage. The constituencies in the subunits can chose to abide or to challenge the federal constitution that is currently in place. Given that there are three subunits making this choice, this generates six possible outcomes ranging from all abide to all challenge. Since, federal constitutions are backed by coalitions between subunits, the assumption is that if two subunits form a coalition then the federal constitution is amended in accordance with their preferences. The subunit that was left out of the coalition loses in that case. The exhaustive list of six possible outcomes ranked in order of appeal to U_1, but applicable to all subunits, is the following (Shvetsova 2005: 130):

1) successful re-bargaining of the constitution (abbreviated as O_{12});
2) unchallenged preservation of the constitution, or status-quo (O_0);
3) challenged preservation of the constitution (O_2);
4) failed defection (O_1);
5) exclusion from successful re-bargaining of the constitution (O_{23});
6) all defect or federal collapse (O_{123}).

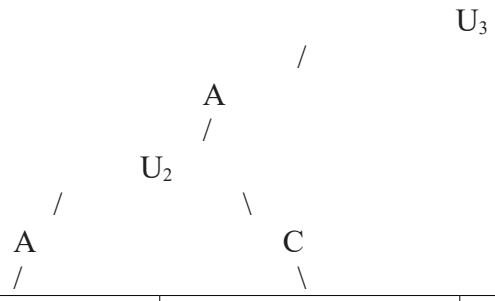
The subscripted numbers in the abbreviations of the outcomes indicate the units that challenged the federal constitution. So, from the perspective of U_1, a defection of the other two units would generate the fifth outcome, O_{23}, or the exclusion from successful re-bargaining. The same six possible outcomes hold for the other two subunits. So, from the perspective of U_2, a defection of the other two subunits would also generate the fifth outcome, exclusion from successful re-bargaining, but here the abbreviation would be O_{13}. I will sometimes use letters instead of numbers to denote the federated subunits in order to make claims that hold generally, for all three subunits. The letter i is then preserved for the subunit from whose perspective we make the claim, the letters j and k for the other two subunits.

The first stage is the simplest in the sense that the payoffs for the subunits only depend on their strategic choices[124]. No other factors come in at this moment. Let us attribute, arbitrarily—the purpose is merely illustrative—, payoff-values to these outcomes: the first outcome O_{ij} or O_{ik} has the payoff-value of 1 for all subunits; the second outcome O_0 that of 0.8; the third outcome O_j or O_k that of 0.6; the fourth outcome O_i that of 0.4; the fifth outcome O_{jk} that of 0.2; and the sixth outcome O_{ijk} has a payoff-value of 0. So the best possible outcome (with a pay-off value of 1) for any subunit is to be part of a successful coalition that succeeds in re-bargaining for a new constitution. The worst outcome (with a pay-off value of 0) is the collapse of the federal arrangement. Doing so gives us the payoff matrix in figure 1, with the strategic scheme for all the

124 Presumably in order to retain a higher level of generality, Shvetsova (2005) does not attribute payoff-values. I think it helps to clarify what is at stake, though. On the downside, these pay-off values of course do not apply in general. For the general model, see Shvetsova (2005).

subunits (see Shvetsova 2005: 131-132 for a similar tree and payoff matrix):

Figure 1: payoff matrix and strategic scheme for constituencies of federated subunits U_1, U_2 and U_3 with preference ranking: Oij=1, O0=0.8, Oj=0.6, Oi=0.4, Ojk=0.2, Oijk=0; and with 'C' standing for challenging the constitutional status quo and 'A' standing for abiding by the constitutional status quo.



A / U_1 \ C	O_0: U_1 = **0.8** U_2 = **0.8** U_3 = **0.8**	O_2: U_1 = 0.6 U_2 = 0.4 U_3 = 0.6	O_3: U_2 = 0.6 U_2 = 0.6 U_3 = 0.4	O_{23}: U_1 = 0.2 U_2 = **1** U_3 = **1**
	O_1: U_1 = 0.4 U_2 = 0.6 U_3 = 0.6	O_{12}: U_1 = **1** U_2 = **1** U_3 = 0.2	O_{13}: U_1 = **1** U_2 = 0.2 U_3 = **1**	O_{123}: U_1 = 0 U_2 = 0 U_3 = 0

Notice how this federal constitution, if one only looks at the first popular stage and thus does not factor in the effect of imperfect agents or politicians, is not coalition-proof. This is shown by the payoffs for U_1 and U_2 in O_{12} (and equivalent payoffs, which are put in bold), which is the incentive U_1 and U_2 have to challenge the constitution. These payoffs are larger (namely 1) than the payoffs for U_1 and U_2 in O_0 (and equivalent payoffs, which are also put in bold) which are their incentives to abide by the constitution (namely 0.8). In other words, it is always beneficial for two units to form a coalition, to team up against the third unit, and thus to challenge the federal constitution in order to get a new federal bargain with a new redistribution that is in favor of the two subunits that teamed up. Thus the federal constitution is not coalition-proof.

At the second stage we introduce the factor of imperfect agency of the politicians. This factor is constituted by any kind of incentive that makes all politicians (of effective parties) unresponsive to their constituency's demand for challenging the federal constitution. In other words, it is a bias in favor of the status quo that all politicians should have. Many factors can generate such a bias: a well-established constitution; affiliation with the central government; etc. As I said above, the most manipulable such factor is belonging to an integrated party is. We can introduce such a bias in the model by adding a probability of imperfect agency, P, or in the reverse, a probability of perfect agency, 1 – P (Shvetsova 2005: 133). Recall that perfect agency means that the politician representing a federated subunit represents this subunit's wish to get the best redistribution without

respect for the status quo bargain or constitution perfectly. A perfect agent is thus not a nice or fair player that does not team up against other subunits, but rather one that perfectly represents the wishes of her subunit. In order to calculate the payoffs we now have to construct formulas that incorporate P. Roust and Shvetsova (2007) tell us that these formulas are the ones given in figure 2 (see footnote for an explanation)[125].

Figure 2: formulas for all units and outcomes with the factor of imperfect agency, P.

Formula for O_0: O_0	Formula for O_2: $PO_0 + (1 - P)O_2$	Formula for O_3: $PO_0 + (1 - P)O_3$	Formula for O_{23}: $P^2O_0 + (1 - P)^2O_{23} + P(1 - P)(O_2 + O_3)$
Formula for O_1: $PO_0 + (1 - P)O_1$	Formula for O_{12}: $P^2O_0 + (1 - P)^2O_{12} + P(1 - P)(O_1 + O_2)$	Formula for O_{13}: $P^2O_0 + (1 - P)^2O_{13} + P(1 - P)(O_1 + O_3)$	Formula for O_{123}: $P^3O_0 + (1 - P)^2O_{23} + P^2(1 - P)(O_1 + O_2 + O_3) + P(1 - P)^2(O_{12} + O_{23} + O_{13})$

We can now calculate the payoffs for all subunits and all outcomes with the factor of imperfect agency added. We only have to fill in the payoffs from figure 1 at the correct place. For example, outcome O_{12} means for U_1 that it is part of a successful coalition. This implies, if we take the utilities from figure 1, the utility of $O_{12} = 1$, that of $O_1 = 0.4$ and that of $O_2 = 0.6$. But the same outcome O_{12} means for U_3 that it is excluded from a successful coalition. Hence the utility of O_{12} for U_3 is 0.2, that of $O_1 = 0.6$ and that of O_2 is also 0.6. We thus have to fill in different values for the

125 Roust and Shvetsova (2007: 253) tell us that the factors in these formulas are the expected costs and benefits dependent on the choices of the other subunit's representatives Given that whether or not the federal constitution is coalition-proof turns on the payoff for outcome O_{ij} or O_{ik}, I limit myself to this outcome. The expected costs and benefits for O_{12} (with u_1 being the expected utility of a respective outcome for U_1) are for example:
- U_1's expected benefit of successful re-bargaining: $B_{sr} = u_1(O_{12}) - u_1(O_0)$
- U_1's expected cost of challenged preservation: $C_{cp} = u_1(O_0) - u_1(O_2)$
- U_1's expected cost of failed defection: $C_{fd} = u_1(O_0) - u_1(O_1)$

Now we can construct the formulas. Let us see how to construct the formula for outcome O_{12} . To repeat, this outcome implies that the constituencies of subunits U_1 and U_2 both instruct their politicians to challenge the constitution and the constituency of subunit U_3 instructs theirs to abide. The formula for the expected utility for U_1 for this outcome is the following (Roust and Shvetsova 2007: 253): $u_1(O_0) + (1 - P)(1 - P)B_{sr} - (1 - P)\ P\ C_{fd} - P\ (1 - P)\ C_{cp}$. Or, in words, the expected utility for U_1 is: the expected utility of preserving the constitution ($u_1(O_0)$) plus the expected benefit of successful re-bargaining (B_{sr}) times the chance that U_1's agent is perfect $(1 - P)$ times the chance that U_2's agent is perfect $(1 - P)$ minus the expected cost of failed defection (C_{fd}) times the chance that U_1's agent is perfect $(1 - P)$ times the chance that U_2's agent is imperfect (P) minus the expected cost of challenged preservation (C_{cp}) times the chance that U_1's agent is imperfect (P) times the chance that U_2's agent is perfect $(1 - p)$. Filling in the above formulas for C_{sr}, C_{fd} and C_{cp} and abbreviating the whole formula we get the following formula: $P^2O_0 + (1 - P)^2O_{12} + P(1 - P)(O_1 + O_2)$, which we find in the appropriate box in figure 2: that for outcome O_{12} (taken from Shvetsova 2005: 133). In order to save space I do not deduce the formulas for the other outcomes. The one for O_{123} is the most complex, but it is also of little interest to us here.

The other representatives also are imperfect with some probability. Here we assume, for simplicity's sake, that they are so with the same probability. See Roust and Shvetsova (2007) for the same model with different probabilities of imperfection for politicians representing different subunits.

different outcomes in the formulas depending on which subunit one calculates the payoffs for. Using the formulas from figure 2 and equating P with respectively 0.20, 0.25 and 0.30 we get the payoff matrix in figure 3.

Figure 3: payoff matrix with preference ranking: Oij=1; O0=0.8; Oj=0.6; Oi=0.4; Ojk=0.2; Oijk=0 and probability of imperfect agency, P = 0.20, 0.25, 0.30.

Outcome 0: P=0.20	P=0.25	P=0.30	Outcome 2: P=0.20	P=0.25	P=0.30	Outcome 3: P=0.20	P=0.25	P=0.30	Outcome 23: P=0.20	P=0.25 P=0.30
U_1=**.8** U_2=**.8** U_3=**.8**	U_1=**.8** U_2=**.8** U_3=**.8**	U_1=**.8** U_2=**.8** U_3=**.8**	U_1=.64 U_2=.48 U_3=.64	U_1=.65 U_2=.5 U_3=.65	U_1=.66 U_2=.52 U_3=.66	U_1=.64 U_2=.64 U_3=.48	U_1=.65 U_2=.65 U_3=.5	U_1=.66 U_2=.66 U_3=.52	U_1=.352 U_2=**.832** U_3=**.832**	U_1=.388 U_2=**.8** U_3=**.8**
Outcome 1: P=0.20	P=0.25	P=0.30	Outcome 12: P=0.20	P=0.25	P=0.30	Outcome 13: P=0.20	P=0.25	P=0.30	Outcome 123: P=0.20	P=0.25 P=0.30
U_1=.48 U_2=.64 U_3=.64	U_1=.5 U_2=.65 U_3=.65	U_1=.52 U_2=.66 U_3=.66	U_1=**.832** U_2=**.832** U_3=.352	U_1=**.8** U_2=**.8** U_3=.388	U_1=**.772** U_2=**.772** U_3=.422	U_1=**.832** U_2=.352 U_3=**.832**	U_1=**.8** U_2=.388 U_3=**.8**	U_1=**.772** U_2=.422 U_3=**.772**	U_1=.339 U_2=.339 U_3=.339	U_1=.397 U_2=.397 U_3=.397

We can now see that the imperfect agency has an effect on the payoff for U_1 in O_{12} (and equivalent payoffs). It has gone from 1 to 0.832 in the case of P = 0.20. Yet 0.832 is still larger than 0.8 and thus the probability of imperfection or the effect of imperfect agency was not large enough to make the federal constitution coalition-proof. However, if P = 0.30 we get a payoff for U_1 in O_{12} of 0.772 and if P = 0.25 we get a payoff of 0.8. Thus, if the probability of imperfection is 0.25 or higher, the federal constitution becomes coalition-proof. We can thus conclude that under these circumstances a probability of imperfection of at least 0.25 is needed in order for the federal constitution to be stable (cf. Shvetsova 2005: 134-135). Notice also that this is so even though the voters' first preference is still to re-bargain to get a better distribution. We can even say that, even though the politicians are imperfect agents of their federated constituencies, the federal constitution is legitimate or accepted by the constituency. That is so because under this circumstance of uncertainty about the success of coalition formation, which is increased by less perfect politicians, the constituency might prefer not to challenge the federal constitution. It might prefer not to challenge even though it would have preferred a re-bargaining if it was certain that the coalition-formation would succeed will—for example because politicians are more perfect. The arrangement thus becomes coalition-proof and is legitimate for this constituency. Or, as Shvetsova (2005: 135) concludes this stage:

> A crucial factor in a [federated sub-]unit's decision of whether to support institutional revision is their beliefs about the behavior of the representatives for whom the unit does not get a chance to vote. If politicians representing the others would yield to local demands and challenge the status-quo, a constituency is better off supporting its own revisionist, since that

> gives it a chance to participate in a redistributive coalition and secure some advantages in the renewed institutional bargaining. If, on the other hand, for some reason the expectation is that the others will be represented by the supporters of the status-quo, a single constituency instructing its representative to mount an institutional challenge risks putting itself at a disadvantage. Thus, [...] the expectation of constitutional revisionism elsewhere breeds constitutional revisionism at home.

Now we can see how a federal constitution, even though it has distributive consequences for the federated subunits, can be stable in the sense that it can be a self-enforcing coordination device. The constituency itself may prefer to abide by the status quo. This is so because of the increased uncertainty about the success of an attempt to team up against another subunit which results from the politician's imperfect agency, in other words, the likelihood of politicians abiding by the constitution instead of acting as perfect delegates or agents for their constituency's redistributive wishes. As already noted, imperfect agency is mainly caused by an integrated party system. This uncertainty increases the chance of a failed defection and decreases the chance of a successful re-bargaining. It is this uncertainty that can change constituency's preference from challenge to abide. Obviously this is a very precarious situation. Let us, to finish the core of the argument, analyze what may go wrong in the third stage.

In the third stage we add an additional redistributive expectation. We will see that it increases the probability of imperfection that a stable federation requires dramatically. As Shvetsova (2005 136; 137-138) says this additional redistributive expectation is primarily caused by ethnic, linguistic or religious polarization but it can also be caused by, for example, the discovery of oil on one's federated territory. All these things heighten the distributive stakes of the federal bargain and can make it much more advantageous for two federated subunits to form a coalition thus rendering the status-quo not coalition-proof. Shvetsova (2005: 137) tells us that the formulas then are the ones in figure 4 (see footnote for an explanation)[126].

Figure 4: formulas for all units and outcomes with the factor of imperfect agency, P, and the exacerbated distributive advantage, Δ.

Formula for O_0: O_0	Formula for O_2: $PO_0 + (1 - P)O_2$	Formula for O_3: $PO_0 + (1 - P)O_3$	Formula for O_{23}: $P^2O_0 + (1 - P)^2(O_{23} + \Delta)$

126 The formulas for calculating the payoffs with an additional redistributive expectation are generated by adding this advantage, which we abbreviate as Δ, to the expected benefit of successful re-bargaining, B_{sr}. So the formula for B_{sr} is then $u_1(O_{12}) - u_1(O_0) + \Delta$. The formulas we get then are presented in figure 4.

			+ $P(1 - P)(O_2 + O_3)$
Formula for O_1: $PO_0 + (1 - P)O_1$	Formula for O_{12} : $P^2O_0 + (1 - P)^2(O_{12} + \Delta)$ + $P(1 - P)(O_1 + O_2)$	Formula for O_{13}: $P^2O_0 + (1 - P)^2(O_{13} + \Delta)$ + $P(1 - P)(O_1 + O_3)$	Formula for O_{123}: $P^3O_0 + (1 - P)^2O_{23} +$ $P^2(1 - P)(O_1 + O_2 + O_3) +$ $P(1 - P)^2(O_{12} + O_{23} + O_{13})$

If we calculate the payoffs using the preference rankings from figure 1, with $\Delta = 0.20$ and for three values of P (P = 0.30, P = 0.40 and P = 0.50) then we get the payoff matrix in figure 5.

Figure 5: payoffs for all units with preference ranking: Oij=1; O0=0.8; Oj=0.6; Oi=0.4; Ojk=0.2; Oijk=0, with additional redistributive implications of the institutional change (Δ) = 0.20, and with probability of imperfect agency (P) = 0.30, 0.40 and 0.50.

Outcome 0: P=0.30 P=0.40 P=0.50			Outcome 2: P=0.30 P=0.40 P=0.50			Outcome 3: P=0.30 P=0.40 P=0.50			Outcome 23: P=0.30 P=0.40 P=0.50	
U_1=**.8** U_2=**.8** U_3=**.8**	U_1=**.8** U_2=**.8** U_3=**.8**	U_1=**.8** U_2=**.8** U_3=**.8**	U_1=.66 U_2=.52 U_3=.66	U_1=.68 U_2=.56 U_3=.68	U_1=.7 U_2=.6 U_3=.7	U_1=.66 U_2=.66 U_3=.52	U_1=.68 U_2=.68 U_3=.56	U_1=.7 U_2=.7 U_3=.6	U_1=.26 U_2=**.87** U_3=**.87**	U_1=.34 U_2=**.8** U_3=**.8**
Outcome 1: P=0.30 P=0.40 P=0.50			Outcome 12: P=0.30 P=0.40 P=0.50			Outcome 13: P=0.30 P=0.40 P=0.50			Outcome 123: P=0.30 P=0.40 P=0.50	
U_1=.52 U_2=.66 U_3=.66	U_1=.56 U_2=.68 U_3=.68	U_1=.6 U_2=.7 U_3=.7	U_1=**.87** U_2=**.87** U_3=.26	U_1=**.8** U_2=**.8** U_3=.34	U_1=**.75** U_2=**.75** U_3=.45	U_1=**.87** U_2=.26 U_3=**.87**	U_1=**.8** U_2=.34 U_3=**.8**	U_1=**.75** U_2=.45 U_3=**.75**	U_1=.45 U_2=.45 U_3=.45	U_1=.52 U_2=.52 U_3=.52

We saw above that without additional redistributive expectation, a probability of imperfection of 0.25 was needed to make the federal constitution coalition-proof. We can now see that introducing an additional redistributive expectation of 0.20 has the effect of increasing the required probability of imperfection. It now has to be 0.40 or higher (for P = 0.30 the payoff for U_1 in O_{12} is 0.87, which is higher than 0.8, the payoff of the status-quo; for P = 0.50 payoff for U_1 in O_{12} is 0.75, which is lower than the payoff of the status quo; for P = 0.40 the payoff for U_1 in O_{12} is 0.80, which is the same as the status quo). Filippov et al. (2004: 264) tells us that for $\Delta = 0.40$, P must minimally be 0.50 and for $\Delta = 1$, P must be 0.70. Of course all these numbers have no substantive meaning, but they do illustrate the relation between the required degree of imperfect agency (P) and the large impact an additional redistributive expectation (Δ) for a subunit has on this required degree. The higher the additional redistributive expectation the higher the probability of imperfection needs to be for the status-quo to be coalition-proof. In other words, and overly simplified, the higher the

ethnic polarization in a federation the more imperfect agents or politicians need to be in order to maintain federal stability. The problem is that NSG increases Δ and lowers P.

2.4. Imperfect agency and integrated party systems

In this subsection I finish the argument from Filippov et al. (2004) by explaining why integrated parties provide politicians with the incentive to be imperfect agents of their constituencies.

Why are integrated parties the only players in the federal political system that can give politicians the incentives to be imperfect agents? As should be clear from the previous subsections, and as Filippov et al. (2004: 187) say, the player in the federal system that can stabilize the system has to be "a player who can act to isolate bargaining over substantive issues from those institutional constraints, encourage political outcomes that are profitable for society at large, moderate the temptation among political actors to overthrow status quo institutional arrangements". This player cannot be a federated subunit or a coalition of federated subunits because of the problem explained in the previous subsection (Filippov et al. 2004: 187). A strong subunit that operates as a guardian of the constitution—and is likely to shape it according to its interests—will at some point face a coalition of weaker subunits that aims to topple its power at some point. Nor can this player be the courts on their own, because they have no independent enforcement mechanism. One of the few, if not the only player that can solve the problem of federal instability is an integrated party. How does an integrated party do that? Let me spell this out by explaining how an integrated party fulfills the three requirements in the quote directly above.

First, and most obviously, an integrated party by definition pulls together politicians from all federated subunits. The integrated party thus has an incentive to treat all federated subunits roughly equally. If it did not do so, then it would stand to lose the vote in the subunit that it treats unfairly (Filippov et al. 2004: 188). Integrated parties thus favor political outcomes that are profitable to the society or federation at large.

Second, there is nothing in the structure of an integrated party that gives it an incentive to move from one federal constitution to another, as long as the status quo arrangement is reasonably efficient (Filippov et al. 2004: 187). Integrated parties thus will act to isolate federal bargaining over substantive issues from the institutional constraints that are meant to guide the bargaining process. Integrated parties, especially aggregative integrated parties in a large federation, are conservative

when it comes to the federal constitution. Such parties are electoral coalitions and in order to preserve this coalition party politicians have an incentive not to pursue tactics with short-term and myopic gain like advocating a change to the federal bargain in favor of some federated subunit. A politician that is a member of an integrated party, even one affiliated with her own federated subunit, will often refrain from advocating re-bargaining in order not to alienate voters from other subunits. In other words, in order not to endanger the party coalition that brought her to power and might bring her to power again (Filippov et al. 2004: 193-195). Thus Filippov et al. (2004: 194) conclude that "jurisdictional disputes are muted in order to maintain party cohesion, and if the authority or functions of different levels of government are to change, then it is in the interest of an integrated party to ensure that that change occurs only in a slow and evolutionary manner and when sufficient consensus exists against the institutional status quo".

Third, an integrated party or the elites of such a party have leverage over its individual politicians. Thus integrated parties also fulfill the third requirement above. They moderate the temptation among political actors to overthrow status quo institutional arrangements. Two factors create this leverage: the party label and career paths. In order to explain the power of the party label, Filippov et al. (2004: 190-191) tell the story of a New York judge who stood for election during one of Roosevelt's campaigns. The judge had made contributions to Roosevelt's democratic party in return for professional assistance from the party. The assistance never came and the judge asked for an explanation. The explanation he got was that his funds were being put to good use: they were put into Roosevelt's own campaign. Much of the power of party elites comes from them being the owners of a label, a source of information that is of the utmost importance when people vote. Most people have no idea about individual low-level candidates but they do have an idea about the parties, which ones they like best and the main candidate they put forth. That is the power of a party-label and that is why the judge was probably indeed helped best by piggybacking on Roosevelt's campaign. Filippov et al. (2004: 185) explain the power of the party label as follows: "Put simply, to the extent that voters rely on party labels when choosing among candidates, a party's endorsement secured through a formal nomination process becomes an important, and even the primary, avenue to higher office". Simply put, merely being able to affiliate with some big party label will contribute many votes for unknown politicians.

Another, more straightforward, source of power of party elites is that they decide on the career paths of individual politicians. As Filippov et al. (2004: 172, 286) explain, if the party is integrated then politicians that are too extreme in advocating their own federated subunit will be blocked from moving further up the supra-subunit career-ladder. Party elites can of course also discipline their

politicians more directly. But it is the label and the career opportunities that give the party elites the leverage needed to discipline individual politicians directly.

Finally, it should be pointed out that integrated parties are not centralized parties. On the contrary, integrated parties need to have strong local and federated organizations. This is to counter the tendency of federal elites to push for centralization. For such centralization has consequences that ought to be avoided. Whether it is because federal elites can never be sufficiently attuned to the issues of the periphery; or because some group will always dominate the federal center; or because people have an innate sense of self-government; very often a federation collapses when centralization has gone too far. In order to avoid this evil, integrated parties need to be firmly rooted in local and federated party organizations. One of the recommendations that Filippov et al. (2004: 236-249) make is to fill many local offices by election. The aim of this recommendation is to facilitate the formation of local and federated party organizations. Furthermore, as Filippov et al. (2004: 241-245) point out, strong local and federated party organizations is the one thing that the United States and Germany—two stable but very different federations—have in common and that Canada—an unstable one—lacks.

With an integrated party system not every distributional gain that a federated subunit stands to make leads the subunit to initiate re-bargaining. As Filippov et al. (2004: 172) says, the function of an integrated party system is to "mute the reflection of a single constituency's particularistic demands by giving its representatives an interest in the welfare of other constituencies". Integrated parties are thus essential to maintaining federal stability.

3. National self-government and federal stability

Let us turn to the argument that NSG causes federal instability. There are two parts to this argument corresponding to the two factors that make it easier for federated politicians to build a re-bargaining coalition: the additional redistributive expectation and the absence of an integrated party system. All federations, by creating federated subunits, create a redistributive expectations and factors that can lead to party system disintegration. Cantonal federalism does so too. However, I argue here that NSG, because it implements homeland federalism, highly increases the effect of both factors. Thus NSG inevitably causes federal instability. Cantonal federalism does not. I will first clarify the distinction between homeland and cantonal federalism. Then I will argue that homeland federalism increases the additional redistributive expectation. In the third subsection I argue that homeland federalism leads to party system disintegration. In the fourth I argue that cantonal federalism does

not. In the fifth I conclude the argument of this section by pointing out how the additional redistributive expectation interacts with the politicians in a disintegrated party system to cause federal instability.

3.1. Homeland federalism

As stated in the introduction, in cantonal federalism one creates per national minority several relatively small subunits without the aim of having culturally homogeneous subunits. It will of course not always be possible to create all heterogeneous cantons. I will deal with that problem below. The prime example of cantonal federalism is of course Switzerland. In homeland federalism one creates per national minority one relatively large and culturally homogeneous subunit. A good example here is Canada. Pure cases of cantonal and homeland federalism do not exist. There is a continuum from pure cantonal to pure homeland federalism that changes according to the degree of congruence between the minority nation and the federated subunit[127]. Close to the cantonal side are cases with little congruence: there are several subunits per national minority and they are culturally heterogeneous. Close to the homeland side we have highly congruent cases: all national minorities have one homogeneous subunit. Catalonia, for example, is close to the homeland side but certainly not a pure case of homeland federalism on account of the high number of Spanish people living in Catalonia. The arguments I will make apply to impure cases close to the homeland side like Flanders, Quebec, Scotland, and even Catalonia. The argument in this chapter is that homeland federalism, by which I thus mean cases that are sufficiently close to pure homeland federalism, cause federal instability. This is so, as we will see (in subsection 3.4), because it makes the position of the federated elite, those that the integrated party system has to turn into imperfect agents and that are at the heart of the problem of federal instability, the same as the position of representative of the minority nation.

There is a threshold of congruence after which cantonal federalism becomes homeland federalism. Regrettably this threshold is difficult to determine. The reason why we cannot be exact here is that it is impossible to tell when federated elites will be seen as representatives of or will be identified with a national minority that makes up perhaps as little as sixty percent of the population of their subunit. Where exactly the threshold of congruence for speaking about homeland federalism lies is highly context-dependent. Many other factors than merely the degree of congruence determine where it lies on the above described continuum. Catalonia, for example, is seen as belonging to the

127 Note that this is an instance of the congruence that nationalism strives for. Homeland federalism better realizes nationalism than cantonal federalism.

Catalans, yet fewer than half of the inhabitants of Catalonia use Catalan on a daily basis—which of course is only a rough indication of people's identification. Factors that undoubtedly fostered seeing Catalonia as belonging to the Catalans are: the tradition of a historically Catalan political unit, the association of Madrid with Franco, the political context which pits an industrialized Catalonia against the rest of Spain which is more conservative and agricultural, etc. These factors have undoubtedly moved the threshold for seeing Catalonia as belonging to the Catalans somewhat in the direction of cantonal federalism. Even though the case of Catalonia is a very impure form of homeland federalism, Catalonia is still seen as the homeland of the Catalans. Luckily, our inability to say where the threshold lies does not imply that we cannot say that less congruence is better. Patten and Kymlicka both argue for more congruence.

The distinction between homeland and cantonal federalism is not very prominent in the literature. Consequently Kymlicka and Patten are not very clear about which of the two models they prefer. However, it seems to be correct to say that they both prefer homeland federalism. Kymlicka (2001: 97-100) asks what criterion a federation should fulfill if it is to satisfy a national minority's right to NSG and he discusses the U.S. federation as an example of one that does not fulfill these criteria. Kymlicka's main criterion is that decisions about boundaries and powers are made with "the conscious intention of empowering national minorities" (Kymlicka 2001: 101). Regarding the division of powers this implies asymmetrical federalism in order to accommodate the national minority's wish to be recognized as a unit with a status higher than that of a mere administrative unit (Kymlicka 2001: 102-108)[128]. It seems difficult to combine the need for accommodating such a wish with cantonal federalism. Regarding the drawing of boundaries it means that they are drawn "in such a way that the national minority forms a majority within a particular subunit, as the Quebecois do in Quebec". (Kymlicka 2001: 110) "A particular subunit," as well as the reference to Quebec, indicates that Kymlicka prefers homeland federalism. Nevertheless, Kymlicka certainly sees Switzerland, the prime example of a cantonal federation, as an example of multinational federalism[129]. I do not see how Switzerland satisfies the wish of the French minority, let alone the Rhaeto-Romance minority, to be recognized as a subunit over and above the other subunits nor does it have a particular subunit.

Patten also argues for homeland federalism. He argues that "[u]nder multinational federal arrangements, those sharing a substate national identity have a forum—one of the units of the

128 Filippov et al. (2004: 282-283) advise against asymmetrical federalism because it can provoke the other federated subunits in demanding equality.

129 Although Kymlicka (2001: 101) also steals away the title of first multinational federation from Switzerland in order to give it to Canada. Furthermore he argues that Swiss federalism was less the result of a conscious wish to accommodate national minorities and more of having common enemies (Kymlicka 2001: 115-116).

federation—in which they form a majority and to this extent can think of themselves as making decisions together as a group, decisions that apply to the group and its territory. Their identity is recognized in the sense that political boundaries are drawn, and powers assigned, in such a way as to acknowledge the group as a group and give it a space in which to enjoy self-government". (Patten 2014: 239-240) It is clear that all those who share a national identity have to have *one* forum so that they can see themselves as making decisions *as a group* and a space in which the group is acknowledged *as a group*. Only homeland federalism gives this to a minority. Cantonal federalism does not acknowledge the group as a group or give it *one* forum.

3.2. Homeland federalism and the additional redistributive expectation

Homeland federalism is much more likely to cause federal instability than cantonal federalism. The reason for this is two-fold and corresponds to the two factors that can increase the chance of federated politicians upsetting the federal constitution. First, homeland federalism gives an additional redistributive expectation to the national minority's federated subunit. That is what I argue for in this subsection. Second, homeland federalism is also more likely to cause the disintegration of the party system. Here I only discuss the additional redistributive expectation but, one should keep in mind here already that these two factors have to be seen in conjunction with each-other. This means that federated homeland politicians, i.e. the better agents, will seize upon the additional redistributive expectation that I will explain here. They will look for and point out reasons why the federal constitution does not give the federated subunit or national minority its due.

As I have already noted, there are many things that can give an additional redistributive expectation to a federated subunit: the discovery of oil, historical changes in socio-economic circumstances like unequal economic growth between subunits, a change of policy, etc. Cantonal federalism also occasionally gives an additional redistributive expectation advantage. Oil can be discovered on the canton's territory. Homeland federalism, however, gives a further additional redistributive expectation on top of the regular ones that can be expected and that a stable federation can cope with. There are three ways in which national communities being congruent with a federated subunit give a further additional redistributive expectation.

First, national communities have similar preferences. The more congruent the federation, the closer it is to the homeland end of the continuum, the less internally heterogeneous it is. Consequently, the federated constituency's preference curve will be more distinct from that of the rest of the country

and closer to the preference curve of the national minority considered on its own. Typically federal re-bargaining leads to devolving powers to the federated subunit. When the subunit has more powers it can make its own collective decisions more in line with the federated constituency's preference curve. Hence, the more homogeneous the federated subunit, the higher the additional redistributive expectation of federal re-bargaining. In other words, one of the things that a national minority in homeland federalism may expect from federal re-bargaining is the satisfaction of more of its preferences that remain unsatisfied when the collective decision-making power for these preferences remains on the federal level. "Preference curve" is an abstract term that denotes many things. In this case, it denotes, next to socio-economic preferences also, for example, a preference for parochialism, a disliking of a large and threatening world that is little understood, a disliking of federal political elites, etc. With the promise of a government close to one's home, homeland federalism also taps into these sensitivities. Thus, homeland federalism gives to the federated constituency a further additional redistributive expectation.

Second, national boundaries are media boundaries, by which I mean that the French read *Le Monde* and the Germans *Die Zeit*. The more congruent a federation, the more the dividing lines between the different media will correspond to the dividing lines between the different federated subunits. This has all kinds of effects. First, inhabitants of the homeland subunit will hear fewer voices external to the federated subunit. In a very cosmopolitan culture all possible voices might be represented by some commentator within the culture. Most, if not all current, national cultures are not so cosmopolitan, though. This implies that less contact with external voices means that certain points of view do not permeate the national culture. Fewer dimensions of a topic will thus be discussed. This becomes important in times of crises, to which I turn in the next paragraph. Second, the public debate in the homeland subunit will be specific to the national minority. Sensitivities local to the homeland subunit can thus emerge. These might lead to separate viewpoints and separate preferences adding to the preferences from the previous paragraph. Third, federal policy will be discussed in an unbalanced way stressing the point of view of the federated subunit and the national minority as opposed to the federal level and the national majority.

Third, if the relationships between the national minority and the rest of the federation is somewhat antagonistic then in homeland federalism the national minority's federated subunit stands in an antagonistic relationship with the rest of the federation. Such an antagonism may be seen as an additional redistributive expectation in the sense that the preferences of the minority's federated constituency may be negative. The national minority may not want to give in to or show solidarity with the national majority. By contrast, in cantonal federalism there are other federated subunits that

are also inhabited by the national minority. The antagonism thus cannot be transplanted on the federal structure. If, the rest of the federation cannot be equated with the majority—because there is a substantial number of national minority members living in the other subunits—, then these negative preferences find fewer other subunits to be directed at. Given that politics is always antagonistic to some extent it is hard to bar such views completely. To this we should add that federations occasionally do have to re-bargain their constitution. When they do, old antagonisms usually resurface. At this point the congruence between homeland and media boundaries becomes crucial. If a homeland constituency only hears about its own side of the story in times of federal crisis it will not have a nuanced view on what has caused the federal crisis and on who is to blame for what.

There may be many other factors that also give a further additional redistributive expectation of a federated subunit. Greater congruence is, however, an important extra factor. Let me now turn to the role of the federated politician which was left out here.

3.3. Homeland federalism and party system disintegration

Here I will argue that homeland federalism causes the party system to disintegrate. As I said in the introduction, a party system is disintegrated when more than twenty-five percent of the vote in one federated subunit goes to a regional party or disintegrated regional branches of statewide parties or to both[130]. If we want to know what causes the disintegration of a party system we thus need to ask what the causes are of the emergence and growth of regional parties and the disintegration of statewide parties. The literature on statewide and regional parties answers that question. Summaries of this literature can be found in Meguid (2008), Swenden and Maddens (2009), Erk and Swenden (2010), Fabre and Swenden (2013). I begin by noting how serious the problem is. Then I discuss the explanatory variables and eliminate those that cannot or should not be manipulated. Finally, I argue that it is inevitable in the case of homeland federalism that political decentralization in combination with non-manipulable variables causes party system disintegration.

130 Admittedly the number twenty-five is somewhat arbitrary. We need to strike a balance here. As we saw above, the problem of federal instability is caused by the process of federal re-bargaining. On the one hand, the smaller the regional share of the vote that goes to regional parties or branches, the less credible these parties and branches are in demanding a re-bargaining of the federal constitution. Suppose these parties form a coalition to initiate federal re-bargaining. If we put the mark on twenty-five, then this coalition still has to find twenty-five percent of the votes to reach the magical fifty percent. That is a considerable barrier against credibly demanding re-bargaining. On the other hand, regional parties can remain small for a long time and then with some luck, like a bad electoral campaign of opposing parties, gain several percentage points. Consequently we have to give a somewhat arbitrary number here.

First of all, it should be noted that there has been a wave of regional parties emerging and statewide parties disintegrating in the last decades. According to one count the number of regional parties has tripled in Western Europe from 1979 to 2009, going from 29 to 93[131]. One should add to this the disintegrated statewide parties[132]. In Western Europe they are: DS (*Democratici di Sinistra* - Democrats of the Left), PSOE (*Partido Socialista Obrero Español* - Spanish Socialist Workers' Party), British Labour, British Conservatives, all established Belgian parties, the Bavarian CSU (Christlich-Soziale Union – Christian Democratic Union) in relation to the CDU (*Christlich Demokratische Union* – Christian Democratic Union). In unitary countries, countries with weak federal features, or countries that have not implemented homeland federalism, this is not problematic[133]. But the problem posed by regional parties and party disintegration is certainly a serious one.

What causes party system disintegration? The explanations for regional party success and statewide party disintegration largely coincide. Swenden and Maddens (2009: 14-25) discuss the explanatory variables for statewide party disintegration. They discuss four clusters of explanatory variables: the type of federalization or decentralization of the state; the territorial or social heterogeneity of the society; electoral variables; party-specific variables. Meguid (2008: 3-14, 199-203) discusses the explanatory variables of regional party success. She speaks of institutional explanations—corresponding to Swenden and Maddens' first cluster—, sociological explanations—corresponding to the second cluster—, and puts forth her own theory based on the strategic actions of statewide parties—which belongs to the fourth cluster.

Swenden's and Maddens's (2009: 18-20) second cluster, territorial and social heterogeneity, consists of economic disparities between the regions, regional national identities, and regional variations in

131 The count is by Massetti (quoted in Hepburn and Detterbeck 2013). See De Winter (1998) for a good discussion of regional parties.

132 Whether a party is disintegrated or not is a difficult question. Often two dimensions of integration are distinguished: vertical integration or joint decision-making between the federal level and the federated branches of the party on the one hand, and autonomy of the regional branches on the other (Swenden and Maddens 2009: 11; Detterbeck and Hepburn 2010: 115-116; Fabre and Swenden 2013: 345; Hepburn and Detterbeck 2013). Parties with strong vertical integration and low regional autonomy are certainly integrated. Parties with weak vertical integration and high regional autonomy are certainly disintegrated. According to Detterbeck and Hepburn (2010: 119-122) the parties mentioned in the text are the statewide parties in Western Europe that belong to this disintegrated category. The two in between categories, combining weak vertical integration with low regional autonomy and strong vertical integration with high regional autonomy, are somewhere between being integrated and disintegrated. I have left these parties out of consideration.

133 Italy has still only weak federal features. The measure of how federalized a country is the balance of power between the federal and the federated government. If the federal government is much more powerful than a federated government than it is not really a federation. Trentino Alto Adige is not very powerful in relation to Rome. Hence I say that Italy has only weak federal features. Great Britain is on the road to becoming a homeland federation. Caution is indeed in order in the case of Italy and Great Britain, although I would not call them federally unstable yet. Germany is certainly not a homeland federation. Belgium and Spain are indeed homeland federations. I am hardly saying anything new when I say that the political institutions of Belgium and Spain are not functioning properly.

number of inhabitants. Disintegrated statewide parties are seen more in affluent regions with a separate national identity. Regions with many inhabitants are usually important to statewide parties and thus, correspondingly, regional branches for regions with few inhabitants are usually more autonomous. The fourth cluster, party-specific variables, consists of whether or not the statewide party and/or regional branch is in office, party ideology and party traditions (Swenden and Maddens 2009: 22-25). Disagreements in a statewide party—which can cause party disintegration—are most likely to happen when the regional branch and the federal party level are both in office. Swenden and Maddens (2009: 23-24) also argue that Socialist and Conservative parties, as opposed to Liberal and Christian Democratic parties, are more likely to be integrated. Finally, a federal tradition in a party makes it more likely to consider further federalization—which may eventually lead to disintegration—as an option.

Meguid notes that there is disagreement about sociological factors like the affluence of a region (Meguid 2008: 10-12, 201-202) and linguistic or cultural differences (Meguid 2008: 202-203) as important explanatory variables for regional party success in Scotland. However, Fearon and van Houten (2002: 19) find that in their sample, which includes Austria, Belgium, France, Italy, and Spain, only the Canary Islands and Wallonia have regional parties without being linguistically different from the center of the country[134]. All the other regions with regional parties are thus linguistically different, indicating that this is an important factor. Jolly (2002: 77) also finds that "the language difference variable is a robustly significant predictor of regional political party entry in electoral competition". Meguid's own contribution is an analysis of the effect of strategic behavior of statewide parties on regional parties. As I will explain more extensively below, she argues that one statewide party can play an adversarial strategy regarding the issue of regional autonomy in order to weaken another statewide party that is vulnerable on that issue.

Why do I list all these variables? It is important to see that we are not left with many options for manipulating parties to remain or become integrated. Note in this regard about these sociological and party-specific variables that they can only be manipulated to some extent. For the sake of political freedom it is highly undesirable to manipulate party traditions and party ideology. The right to freedom of organization, for example, rightly prevents the state from doing so. I will come back to parties playing a certain strategy below. I propose to go quite far in manipulating cultural

134 Language difference does not grasp the whole of national or ethno-cultural distinctiveness. Yet, as Fearon and van Houten (2002: 15) say: "to draw valid inferences about the impact of "ethnic potential" or "ethnic difference" on regional autonomy movements, we need indicators for ethnicity that are neither caused by regional autonomy movements nor more likely to be coded as present just because a movement exists". The measure of language difference that Fearon and van Houten (2002: 15-16) use measures how closely related languages are on the family tree of languages. Spanish and Basque are for example the most unrelated while Spanish and Aranese, which is a dialect of Spanish, are the most related.

heterogeneity by implementing cantonal instead of homeland federalism. But national minorities should not be assimilated and thus cultural heterogeneity will not go away. Cantonal federalism, more so than homeland federalism, is also compatible with having cantons with roughly equal populations. Many people would say that distributing between regions in order to have equally affluent regions is a desirable goal, but given that the distributive nature of federal bargaining is an important factor in causing federal instability we should be careful with interregional redistributions. Given that these factors are not readily manipulable, or NCA already manipulates them as much as possible, if we want to prevent the disintegration of the party system, we have to look elsewhere. We have to look at what Meguid calls institutional explanations and thus at Swenden's and Maddens's first and third cluster.

Swenden's and Maddens's (2009: 15-17) first cluster, the type of federalization of decentralization of the state, consists of dual federalism[135], political decentralization—i.e. the devolution of powers to the federated level—and federal asymmetry—i.e. different federated units have different powers. These three factors increase the chances of statewide party disintegration. Their third cluster, electoral variables, consists of non-simultaneous elections at the different levels and proportional electoral systems (Swenden and Maddens 2009: 20-22). These factors too increase the chance of statewide party disintegration. When it comes to regional party success, Meguid (2008: 6-10) also discusses proportional electoral systems and the level of political decentralization. She adds that presidential systems suppress support for regional parties.

Political decentralization is the most important manipulable variable. I will argue below that in the case of multinational federations we need to cut back on political decentralization to homelands and that not doing so will inevitably lead to federal instability. Let me briefly discuss the other factors mentioned in the previous paragraph. Changing some explanatory variables is infeasible. That is the case with dual federalism. As already noted, according to the theory of Filippov et al. (2004) party system integration requires that the federated subunits have real powers in order to keep statewide parties from becoming overly centralized. Abolishing dual federalism implies abolishing those federated powers. It is less desirable to change some other explanatory variables than to decrease political decentralizing to a homeland. This is the case with presidential systems and proportional electoral systems. But even if, at some point in the future, we decide that it is more desirable to implement a presidential system then to deny a national minority its homeland, then there is the

135 In dual federalism the division of power between the federal and federated level is clearly defined and the relations between both levels are somewhat antagonistic. Dual federalism can be opposed to what I called administrative federalism above. In administrative federalism the federal and federated level often share the power over the same policy-domain and cooperate in the policy-making. Most multinational federations are dual federations.

problem of effectiveness. For, changing some explanatory variables will simply not be effective. That is the case with simultaneity of elections. Implementing simultaneous elections in homeland federations will go some way towards fostering party system integration, but it will not stop the wave of party system disintegration. Furthermore, the literature cited here discusses culturally homogeneous cases together with heterogeneous cases whereas we are interested only in the latter cases. As was argued above, cultural heterogeneity is an important factor in explaining party system disintegration and it cannot be removed. Let us thus turn to political decentralization.

Political decentralization first of all implies the existence of a parliament for the homeland. Obviously the existence of a regional parliament fosters the emergence of regional parties and autonomous branches. As Brancati (2008: 139) says, with a regional parliament "regional parties have a much greater opportunity to govern – that is, to control a legislature's agenda – than is the case in national legislatures". The regional parliament provides the regional politicians with a small pond in which they can be big fish. Such a parliament also implies that the boundaries of constituencies have to be drawn such that they encompass the region—which, in the case of homeland federalism, means that it encompasses mainly the national minority. Furthermore, a regional parliament for a national minority also gives the image that the minority nation is a political unit. Next to a regional parliament, political decentralization mainly consists of devolving powers to the federated or regional level. This presumably also fosters the emergence of regional parties and branches because it makes the federated level more important. Whether devolution of powers also causes regional party or branch success, that is, whether there is a correlation between the number of federated level powers and the votes of regional parties and branches, is contested, however.

What is not contested is that the structure of the party system correlates with the level of political decentralization. Chhibber and Kollman (1998) and Brancati (2006, 2008) both find such a correlation. There is, however, much discussion about the arrow of causation (Swenden and Maddens 2009: 17-18; Meguid 2008: 200-201). Does political decentralization cause party system disintegration or is it rather the other way around? Chhibber and Kollman and Brancati argue that it is the former. Levi and Hechter (1985), amongst others, argue that it is the latter[136].

136 Filippov et al. (2004: 199) are critical of Chhibber's and Kollman's argument. Yet, the aim of Filippov et al. (2004) is to discredit theories of federal design that emphasize what they would call Level 2, as opposed to Level 3 institutions. As noted in above, the main distinction between Level 2 and Level 3 federal institutions is that the former are not tailored to keep parties integrated, whereas the latter are. Filippov et al. (2004) would not deny that it is possible to manipulate the structure of parties by institutional means. They for example recommend, as do I, cantonal federalism in the case of ethno-culturally diverse federations with the aim of manipulating the structure of parties.

The way to make both accounts compatible is to see medium levels of political decentralization as a small contributing factor but to attribute much of the success, as opposed to the emergence, of regional parties to other factors. Medium levels of political decentralization then enable regional parties to exist. But perhaps it does not necessarily cause them to be successful. Denying that medium levels of political decentralization enables regional parties to emerge would be odd. At the very least it has to be admitted that if there is no political decentralization whatsoever one effectively blocks regional parties from emerging. That is, in a unitary country with a relatively high electoral threshold, it is simply impossible, often even mathematically impossible, for a small regional party to enter into the statewide parliament. Furthermore, political decentralization will be helped by all the non-manipulable factors that we encountered above. Finally in the case of homeland federalism we can add the homeland factor to the equation. The federated constituency is mainly a national minority with preferences that deviate from those of the majority. Thus I take it to be the case that medium levels of political decentralization to a homeland do cause regional parties to emerge, but not necessarily to become large.

At high levels of political decentralization I agree with Chhibber and Kollman and Brancati. There is a tipping point after which the level of political decentralization is so high that it does have a significant effect on the success of regional parties and branches. Let me explain why. Obviously the decisions made on the level of the federated subunit should and will also be publicly discussed. The higher the level of political decentralization, the more issues are discussed on the federated level and the more important the federated level becomes. At a certain point the public discussion on the federated level overtakes the discussion at the federated level in degree in which it is democratically carried—in the sense of citizens informing themselves about it—and importance of the issues being decided upon. When this occurs we have reached a tipping point. From now on many will start to conceive of the federated level as delegating politicians to the federal level and we are in a confederal setting. Political decentralization, certainly at high levels, partly causes that tipping point to occur. Other factors are at play as well but political decentralization contributes significantly. Notice also that homeland federalism pushes this tipping point to occur sooner, at lower levels of decentralization. The split in media obviously is important here. The view that the federated level delegates politicians to the federal level is the deathblow to federal stability. Politicians are now supposed to be perfect agents of their federated constituencies and the federal elites of integrated parties, if they still exist, will have an ever more difficult time imposing things on federated branches. Thus, we can say that high level political decentralization does cause the success of regional parties and regional branches. This is also what happened in Belgium. The statewide parties have all split in response to the public discussion being held almost completely on

the federated level.

A regional party, even a small one, being present is all I need to claim that in the long-term this will lead to a disintegration of the party system. That is so because of the unequal competition between the regional and the statewide parties and the fact that the moving of powers has, at least in the last decades, been towards the federated level. By "unequal competition" here I do not mean to imply that the regional party, at least initially, is small whereas the statewide party is large. I mean that there are structural features to the regional election process that favor the regional party. Because of this unequal competition in the long run the tipping point described in the previous paragraph will inevitably be reached. When that happens the deathblow is given to statewide parties and thus the disintegration of the party system follows. Several factors contribute to making this competition unequal.

First of all, the argument in Filippov et al. (2004) was that federal stability requires federated politicians to be imperfect agents of their constituencies. Furthermore, these authors argued that an integrated party gives politicians the incentives to be imperfect. Hence, politicians that are members of integrated parties have a disadvantage in comparison with politicians that are members of a regional party in regional elections. The former's party ought to and most often will take up responsibility for the stability of the federation. The latter's party does not—indeed it will sometimes explicitly aim to destabilize the federation. Furthermore, the integrated party will often partake in policy-making at the federal center. It is thus associated with that center and with policies that will often be to the disadvantage of the federated subunit.

Second, in homeland federalism the regional party can present a program that is attuned to the preference curve and sensitivities of the region. It speaks the language of the region, both in the figurative and the literal sense. For powers that are not in the hands of the federated subunits, the statewide party has to remain close to the statewide median voter. The regional party only has to stay close to the regional median voter. Furthermore, the regional party has no trouble siding with the common opinion on who is to blame, the federated subunit or the federal center, on some longstanding conflict over federal institutions. By contrast, the statewide party has to find an uneasy balanced position in order not to alienate voters from other federated subunits.

The third reason why regional parties have an advantage in regional elections is that the regional issue, whether or not to increase regional autonomy through decentralization, generally is a valence issue. In short, valence issues are political issues for which only one policy direction is emphasized.

Non-valence issues are given meaning by the role they play in a struggle between ideologies. The political marketplace of ideas for non-valence issues is thus structured by ideologies. Valence issues are different. They imply that the political marketplace is structured by brands screaming for attention. The more attention a valence issue gets, the more all parties need to move into the direction that the issue demands. If the regional issue is a valence issue then parties will either try to evade the issue by downplaying its importance or salience or take a pro-decentralization stance. As Maddens and Libbrecht (2009: 227) put it, their data about the Spanish case "strongly suggest that the regionalist issue generally functions as a valence issue. No party was found to opt for an adversarial strategy and to take an intense centralist stance on the issue. Parties adopt either an intense regionalist or a evasive/ambiguous profile". No politician, whether a member of an integrated party or not, is going to advocate centralization in front of a rally of people from a certain region. It is the same in effect, as saying that they are not fit to govern themselves. Politicians from integrated parties can only hope that the salience of the regional issue remains low. But this ostrich strategy is unlikely to work every time. Every now and then the regional party will run a good campaign or have a stroke of luck—whether it is the discovery of oil or some federal policy that antagonized the region.

This has two consequences. First, the regional issue being a valence issue itself gives an advantage to the regional party. The point about valence issues is that one needs to "own" the issue. A regionalist party will always be the more credible owner of the regional issue than a statewide party. Second, and more importantly, once a power has been devolved, it is rarely taken back. This is one of the peculiar things about changes to the division of powers in multinational homeland federations of the last decades: they are one-directional. The powers of the national minority's federated subunit always increase. One would suspect, if homeland federalism were a stable form of federalism, that dividing the powers is a balancing act. Thus, one would suspect that, over the course of fifty years or so, some powers move upwards again. Yet, they very rarely have done so in the last decades. In the long-term, then, political decentralization is likely to increase. Combined with a periodically successful campaign of the regional party, we can thus expect a gradual increase of political decentralization. In periods in which the people's taste for regional autonomy is low, the political decentralization that it has already acquired allows the party to hibernate. When the people's taste for regional autonomy increases, the regional party can demand, and usually gets, further devolution of powers. Furthermore, if Chhibber, Kollman and Brancati are right after all, then it thereby also slowly creates the conditions for its own success.

Fourth, Meguid (2008) finds that an important factor in the success of regional parties is the help it

gets from one of the statewide parties. The regional issue is usually stronger on one side of the political spectrum. In Scotland, for example, it is associated with the left, in Flanders with the right. Meguid finds that the party on the opposite side of the spectrum, the right in Scotland and the left in Flanders, can strategically increase the salience of the regional issue in order to defeat its statewide opponent. Thus, we can say that left-leaning statewide parties in Scotland and right-leaning statewide parties in Flanders are vulnerable on the regional issue. Meguid (2008: 34) constructs a model with the nine different combinations of three possible strategic actions that two statewide parties can do. The strategic actions are: dismiss the issue, which lowers the issue's salience; accommodate the issue, which increases the issue's salience but aims to steal issue ownership from the regional party; being adversarial towards the regional issue, which increases the issue's salience without aiming to steal the regional party's issue ownership (Meguid 2008: 28-30). It is the latter strategy that can fruitfully be played by the statewide party that is the opponent of another statewide party which is vulnerable on the regional issue. All options in which one of the statewide parties plays the adversarial strategy—or plays this strategy strongly while the other statewide party plays the accommodative strategy weakly—increase the regional party's vote share. Meguid (2008: 203-246), for example, describes Labour's struggle with the Scottish Nationalist Party (SNP). Between 1987 and 1997, as well as before, the Conservatives played an adversarial strategy thereby increasing the regional issue's salience (Meguid 2008: 227-229). The party that lost most from this strategy was, however, Labour (Meguid 2008: 242).

Meguid's analysis can be added to the list of competitive disadvantages that, in this case, one statewide party faces *vis a vis* the regional party. One could object at this point by saying that parties need not necessarily play the adversarial strategy. If no party plays that strategy then the regional party does not get extra help from one of the statewide parties. Statewide parties could form a pact not to increase the salience of the regional issue. However, given that the regional issue is usually more associated with either the right or the left, the party on the opposite side of the spectrum has, certainly on the short term, little to gain from such a pact. Furthermore, the help from a statewide party is only one of the factors explaining the success of regional parties.

On the long term it is thus inevitable that homeland federalism leads to ever higher levels of devolution. In other words there is no stable medium level of political decentralization in homeland federalism. With every new decentralization or devolution of powers the importance of the federated level increases and the tipping point after which the federated level overtakes the federal level in importance comes closer. When this tipping point has occurred, federal politicians are seen as delegates from the federated level which gives the final deathblow to integrated statewide parties.

Parties are now supposed to be perfect agents and federal integrated party elites are no longer supposed to discipline federated level party members. Thus even relatively low levels of political decentralization to a homeland inevitably cause the disintegration of the party system in the long run. This has happened in Belgium and Canada and it is happening in Spain and Great Britain. For reasons that will become clear in the next section, it has not happened to the Swiss party system in general. But even in here there is one exception: the League of Ticinesi is a relatively strong regional party in the canton of Ticino. Unsurprisingly, of all the Swiss cantons, Ticino, comes closest to being a homeland for the Italian minority in Switzerland.

3.4. Cantonal federalism and party system integration

It is much less likely that parties disintegrate in cantonal federalism than in homeland federalism even if they have similar levels of political decentralization. In order to understand why, we need to have a look at an argument of which the best version is still that of Ramesh Dikshit (1975).

Dikshit, a political geographer, argues that regional identities, or the identities that federated subunits form, are important for federal stability. Regional identities are a constellation of factors—Dikshit (1975: 11-12) calls them diversities—like economic, religious, historical, linguistic and cultural factors. The exact nature of these factors and how they interact to create a regional identity cannot be defined, according to Dikshit (1975: 17). Any one of them or any combination of them may generate a sentiment for regional identity and autonomy which is a requisite for federalism—in the sense that a federation is not a decentralized unitary state but a state in which several subunits are truly autonomous. The important point is that these regional identities are specific for each region. They are specific in the sense that each region will have a different constellation of identity constitutive factors or diversities.

Federal stability requires that cleavages based on such identity constituting factors, like Protestants against Catholics, cross-cut the boundaries of the federated subunits. Basically, Dikshit gives a federal variant of the cross-cutting cleavages theory of stability. According to Dikshit (1975: 234), his "study of the various federations—Switzerland, United States, Canada, India, Malaysia, etc.—has shown that one of the fundamental factors in federal stability is that the regional identities on which the constituent units of a federation [what I called federated subunits] are based should not be completely mutually exclusive, even though they may largely be conflicting". He means that for the sake of federal stability a people sharing one constitutive factor should not for the most part inhabit

one federated constituency[137]. If that happens, then the regional identities are not completely mutually exclusive, which foster federal stability. Many of the German-speaking Swiss cantons are, for example, Catholic while the majority of them is Protestant. And many of the French-speaking cantons are Protestant while the majority of them is Catholic. The result is that "each of these diversities [i.e. religious and linguistic diversities] finds its house divided against itself. […] These sharply cross-cutting cleavage lines of language and religion [...] neutralize each other's divisive forces and the cleavages are thus transformed into linkages helping to foster an urge for linguistic and religious harmony which alone could be the basis of Switzerland's existence as a nation". (Dikshit 1975: 37) Furthermore, when it comes to Canada, Dikshit (1975: 93) presents a table showing that Quebec was in 1961 the only majority French-speaking and the only majority Catholic —except for New Brunswick—province. Thus he explains Canada's federal instability as being a result of the concentration of cultural dissidence in one federated subunit (Dikshit 1975: 88).

The problem with national identities is that they usually combine two if not more of these identity-constituting factors. Very often the language and history of nations is different from that of the rest or part of the rest of the country. Often religious, economic and cultural differences are added to language and history. If one thus implements homeland federalism one does exactly what Dikshit tells us to avoid: one concentrates cultural dissidence in one federated subunit. Cantonal federalism avoids doing so.

It may be clear that homeland federalism is much more likely then cantonal federalism to become federally unstable on Dikshit's account. But what does this have to do with political decentralization and integrated parties? We have seen that federated politicians that do not belong to an integrated party play a crucial role. They compete with politicians that do belong to integrated parties for the vote of their federated constituency. The proposals of these federated politicians will often have two features. First, these proposals often appeal to one of the constitutive factors of regional identity: the linguistic, religious, economic, etc. specificities of the federated subunit. Federated politicians will often appeal to such factors in order to win votes. Second, these proposals will often require the devolution of powers to the federated level and thus a re-bargaining of the federal constitution. We saw above, that in order to re-bargain these federated politicians have to build a coalition with other federated politicians from other subunits. In building these coalitions the federated politicians have

137 In his introduction, concluding chapter, and throughout Dikshit phrases this point differently and somewhat misleadingly. He says that "[w]hen boundary lines of regionally-identifying diversities in a federal State highly overlap, the cleavages have a tendency to get transformed into linkages and the result is a stable federal partnership". (Dikshit 1975: 234) This gives the impression that the boundaries between the groups on either side of a cleavage based on a regional identity factor should overlap with the boundaries of federated subunits. But that is the opposite of Dikshit's point as explained in the text. Dikshit (1975: 37, 62, 88, 104, 124-125, 136, 265) uses the more common terminology of cross-cutting cleavages to make the same point.

to find a balance between agreement on the content of the devolution and getting many federated subunits on board. This is where the cross-cutting cleavages that one finds more in cantonal federalism become important. It will be more difficult for federated politicians to find wide agreement on devolution in cantonal federalism. A federated politician coming from a linguistically distinct canton will have difficulties finding agreement on proposals for devolution of language policy amongst the federated cantons inhabited perhaps by people who share the same religion but not the same language. *Vice versa*, a federated politician coming from a religiously distinct canton will have difficulties in finding coalition partners on a proposal for the devolution of some religious policy amongst cantons that do not share his religion. Or, as Dikshit says, these federated politicians find their (linguistic or religious) house divided against themselves. Thus in cantonal federalism the proposals for devolution are more likely to be of the lowest common denominator kind. They are more likely to consist of demands for devolving powers on which the vast majority of cantons agree. A stable federation can—and should—devolve powers in accordance with such demands.

One may object by asking what is different in homeland federalism. After all, could the fact that there are several federated subunits with a majority of national minority members not lead to making it easier to build a coalition for federal re-bargaining? Here, however, the same dynamic is at play. Some of these cantons, because of their distinct regional identity, will prefer other kinds of devolution than other national minority cantons. One canton may be rural, another urban. One may be populated mainly be Protestant members of the national minority, the other by Catholic members. These regional identities will play up and will prevent federated politicians from easily speaking for the national minority. Furthermore the cantons in which the national minority makes up only a minority will not so easily be swayed. Thus, again, as Dikshit says, federated minority politicians find their house divided against themselves.

One may also ask why the national minority in a homeland has a much larger advantage in building such a coalition. After all it is only one subunit that has to find other coalition-partners amongst subunits populated by majority nation members or other national minorities. Typically the national minority's homeland will, however, be a much larger subunit than the cantonal subunits. It will thus be in less need of finding coalition partners. Furthermore, here too the same dynamic is at play. The national minority can patiently await its chance in finding a coalition partner now in that subunit with which it shares perhaps a socio-economic interest and some other time in another subunit with which it shares a religious interest. The problem with homeland federalism is that it merges the position of the strategic player in the federal bargain, the federated politician, with the position of the representative of the whole national minority.

The conclusion is thus that federated politicians in cantonal federalism have less of an interest in and are less likely to be successful in increasing the powers of the federated level. In short, they find their national minority house divided against themselves. The level of political decentralization in homeland federalism is thus likely to stay under the tipping point that leads to party system disintegration. There are other factors that make cantonal federalism less prone to ever increasing political decentralization. The media boundaries do not overlap with federated subunit boundaries. This has, as explained above, an impact. The fact that the national minority does not have one parliament but several, divided among several cantons, has an impact. But the dynamic of the divided national minority house is the main reason why cantonal federalism is less likely to lead to party system disintegration.

3.5. Perfect federated politicians and additional redistributive expectation

Let me finally wrap up the argument of this section. Why does NSG, as homeland federalism, cause federal instability? The complete account of the dynamic that causes federal instability combines the additional redistributive expectation for the homeland with the better agency of the homeland's federated politician from disintegrated parties and points at the interplay of these two factors.

Adding better agents to the argument about homeland federalism giving an extra additional redistributive expectation (subsection 3.2) makes that argument stronger. Perhaps the case that I made there for saying that homeland federalism gives an additional redistributive expectation to the homeland is, considered on its own, not strong enough. The preference curves of minority nations and majority nations may not differ that much. Once we add a disintegrated party system and thus better agents for the homeland constituency, the case becomes much stronger, though. Regional party politicians will constantly be on the lookout for reasons that make the case for further devolution. A discovery of oil on the minority's homeland will not go by unnoticed. They will call out politicians from statewide parties whenever they spot them representing the federated constituency imperfectly. Furthermore, whenever there is an antagonism between the national minority and the national majority, homeland politicians have an interest in increasing the tensions.

If we go from federated constituency that has an additional redistributive expectation to the role of the politicians then we also find that the stress on the integrated party system is increased by the further additional redistributive advantage. Federated constituencies will have an easier time

spotting politicians that imperfectly represent their interests, those that belong to integrated parties, when they can compare these politicians with others that vow to represent their interests perfectly. Filippov et al. (2004: 263) make this point—and add Dikshit's argument—when they say:

> We can speculate as to the reasons why ethnicity plays the role it does in our species. But as far as the political agency is concerned, the most evident hypothesis is that, although a constituency acting as a collective principal in a heterogeneous (pluralist) polity may have difficulty informing itself about how well its agent has served its interest, or even determining what its self-interest is, that task is eased considerably when a unit is homogeneous – and even more so when it is homogeneous in a way that differentiates it from other constituencies. Thus, acting as an imperfect agent becomes more problematical, perhaps even impossible. [footnotes omitted]

Finally, notice that there are several states of affairs that are not necessary premises in the argument I have made in this section to support the conclusion, i.e. the conclusion that homeland federalism inevitably leads to party system disintegration. First, my argument does not require that the minority's politicians are nationalist or that the regional party is a nationalist party. Consequently, second, it does not require that the nationalist vision these politicians have is an exclusive, illiberal or ethnic—as opposed to a civic—one. Third, it does not require that the minority's politicians turn to ethnic rhetoric or ethnic outbidding. There is an additional redistributive expectation for the federated subunit, whether the party is an exclusive, illiberal or ethnic nationalist party or not. Being a perfect agent for one's federated constituency also does not require one to be a nationalist. My argument thus applies to any case of homeland federalism. Homeland federalism will inevitably lead to federal instability, whether minority nationalists are present or not.

NSG, given that it implements homeland federalism, thus leads to federal instability. I have argued in the previous chapters that implementing NSG is not highly desirable. Combined with the argument from this chapter we can therefore conclude against prescribing NSG.

4. National cultural autonomy and federal stability

NCA scores much better on federal stability for a two-fold reason that is the opposite of the one from the previous section. By implementing cantonal federalism NCA does not give a further additional redistributive expectation and NCA is much less likely than NSG to cause party system disintegration.

NCA does not give a national minority's federated subunit a further additional redistributive expectation. NCA gives the national minority many cantons which it aims to make as little homogeneous as possible. Nevertheless, there will be cantons that are mainly populated by national minority members. However, this is much less likely to lead to federal instability (as I argued in 3.4). Furthermore, NCA does not implement the same institutions that cause the disintegration of the party system. It does not install a homeland parliament and does not politically decentralize to that homeland. Thus, even though NCA indeed devolve powers to cantons, this is much less likely to lead to federal instability.

On the positive side, NCA satisfies some of the core interests of national minorities. It provides the minority nation with cultural autonomy and the guaranteed maintenance of the minority language. As argued in the previous chapter the national minority's preference curve thus is likely to move in the direction of the majority's curve. This will not only have the result that the national minority's vital interests satisfied, but also that federated politicians have a harder time to convince national minority members of their nationalist project. Moreover, this also means that there is less of a further additional redistributive expectation. Presuming that it is worth something to national minority members to have cultural autonomy and to maintain their language, implementing NCA means that they now have less to expect from federal re-bargaining.

One might, however, still worry about the force of minority nationalism under NCA. There are no foolproof guarantees that minority nationalist parties will not emerge and become succesfull. If such a party emerges it might capture one of the cantons; build a coalition between cantons; and eventually also push for full-scale constitutional reform. Furthermore, by guaranteeing the cultural maintenance of minority nations, this danger will continue to exist. Why then still implement cantonal federalism?

In one sense Kymlicka is right to put forth federalism as a solution to ethno-cultural diversity. Federalism is indeed part of the solution. But the reason for this is not that it maintains minority nations. There are—it should be clear by now—better tools for achieving that goal. The function of federalism is to ensure that the peripheral regions, many of which will be inhabited by minority nations, are not alienated by federal policy. This is desirable on itself but it also prevents instability. For, if such alienation occurs, instability will follow. As Filippov et al. (2004: 61-68) argue and as we saw above, when one of the federal subunits dominates the federal center, federal collapse is near. This is part of the reason why Filippov et al. (2004: 236-249) recommend filling many offices by electoral means and thus keeping the parties decentralized. Integrated parties have a tendency of

becoming too centralized and especially in multinational countries this is problematic. Federalism is a good way of forcing integrated parties to be horizontally integrated, to draw politicians from all over the country.

Still, one may think that majority domination of the center is not so undesirable. One may thus prefer to be on the safe side and do everything to maintain the stability of the country by organizing it in a unitary way. However, NCA still has a few tricks up its sleeve. Let me point them out.

First, NCA strengthens the position of internal national minorities, possibly the statewide majority, within the cantons that are dominated by another national minority. Because of the national register and the strong language rights the maintenance of these internal national minorities' culture is guaranteed. Thus, they will continue to exist as a distinct internal minority within the other national minority's canton. This makes it more difficult for the minority that dominates the canton to see itself as being entitled to the canton or as the titular nation of the canton.

Second, as I said already, it is justified to require all children to learn one language of communication. All the more so when strong language rights are implemented. Thus we may expect in the not-so-distant future that public debates will be better integrated. This means that more or less the same topics are discussed and that the minority nation hears more about the majority nation's side in a federal conflict. This will make it easier for integrated statewide parties to compete with federated parties and branches.

Third, certain forms of decentralization to the non-territorial body are highly undesirable, at least if they are not being proposed together with a full-scale constitutional reform. Devolving socio-economic powers to the non-territorial body can result, for example, in one person having much more welfare benefits than her neighbor. It can result in the richer nation or the nation that manages to muster more solidarity to become the elite throughout the country. This is something that must be avoided and most politicians as well as voters, at least in a well-established democracy, will think alike. Hence minority nationalists are in a way locked up in their non-territorial body. They are forced to deal only with issues that involve cultures because it is highly undesirable to devolve many other political issues to a non-territorial body.

Fourth, NCA separates the spheres of government. Just as religions have no direct place in politics, so nations should have no such place. Issues that involve national cultures should be dealt with by the non-territorial body. This body should have the tools, i.e. strong language rights and educational

and cultural powers, to enforce its language policy and to be culturally autonomous. However, this national sphere should be separated from the political sphere, strictly speaking. Issues that do not involve national cultures should be dealt with in the political sphere. This separation of spheres admittedly is not a very strong argument at the moment. But it might in the future become a principle that is widely accepted and thus carrying some force in a country. If that sounds unlikely then consider that to medieval ears the modern wall of separation between church and state must have sounded strange. The church was involved in everything: community, politics, morality. Thus for medieval people it must also have been inconceivable to clearly separate church and state. Perhaps we have to admit that the distinction is still not as clear as we sometimes think. Jurisprudence about the separation of church and state is much less clean-cut than one might think. Yet, somehow we have made it work. We now have a principle of separation that is widely accepted and that guides jurisprudence. We know now that it is perfectly possible to lead an atheist life at peace with one's community and to have an atheist conception of the good, of morality and of politics. In short, the principle of separating church and state is certainly conceivable now. Perhaps not in a clean-cut way but in a way that makes it possible for it to carry some weight in society. It is not unlikely that a similar separation between nation and state, although not visible in any clean-cut way now, is nonetheless possible. NCA is a promising model in this regard because it is at least in principle a model that keeps nations out of politics and this cannot be said about any nationalist model of minority nation accommodation. If liberalism is the art of separation, as Walzer (1984) said—although he would obviously not agree with me here—, then NCA is the model that applies that liberal recipe to nationalism.

Conclusion

What are national minorities owed as a matter of justice? Tamir, Kymlicka and Patten argue that they have a right to NSG. I argue that they have a right to NCA. As we saw in chapter one (section 3), there are two types of arguments that Tamir, Kymlicka and to some extent also Patten give in defense of NSG: instrumental and equality-based arguments. Instrumental arguments advocate NSG as a means to maintaining national cultures. Equality-based arguments say that some form of equality—equality of political arrangements that give expression to a national culture (Tamir), of nation-building tools (Kymlicka), of recognition (Patten)—between the national minority and national majority is required as a matter of justice. According to the equality-based arguments, NSG implements this form of equality.

In the second section of chapter one I argued that maintaining national cultures does not merely imply maintaining these cultures in some distant corner of the world. Instead it implies that, where numbers warrant,[138] relatively small groups of people are guaranteed access to their culture. Furthermore, it implies that the national cultures of small, dispersed, non-modernized and internal national minorities—what I abbreviated as small national minorities—are maintained. NCA does a better job at maintaining national cultures in the above sense because it is a non-territorial model that can be used to maintain the national cultures of small national minorities and give them access to their cultures. NSG grants larger national minorities a territory (this does not hold for the consociational version of NSG, to which I return below). Therefore, NSG implies that small national minorities have no access to their culture because it denies them the necessary tools to fend off assimilation, possibly assimilation into the larger minority's national culture. In chapter three I developed the account of strong language rights that is part of NCA and that can maintain the national cultures of these small minorities. In short, NCA is better at maintaining national cultures and NSG implies that the national cultures of small minorities are not maintained. These two points together imply that the instrumental argument itself demands NCA rather than NSG. Tamir, Kymlicka and Patten should thus rethink their use of the instrumental argument.

The case for NSG could be saved if the relation between the instrumental and equality-based arguments were to be rethought. I see two possible ways of doing so. First, the equality-based arguments could be made to stand on their own. Second, the equality-based arguments could qualify

138 As I explained in the second section of the introductory chapter, the where-numbers-warrant criterion puts a limit on the smallness of a minority group that can demand accommodations. A group demanding an elementary school in its own language must, for example, count five-hundred members.

the instrumental argument so that compromising on the maintenance of small minority cultures is justified. In both cases the equality-based argument has to be a strong argument ready either to do all the work in making the case for NSG or to do a part of that work while also providing a good reason not to value cultural maintenance in the case of small national minorities. Tamir's, Kymlicka's and Patten's equality-based arguments are, however, not strong enough in these senses. In chapter one (subsection 3.2) I highlighted several problems with these arguments. In particular, they can allow for illiberal nation-building policies (Tamir and Kymlicka); and they can be too restrictive, in the sense that they do not allow for warranted nation-building policies (Patten). I will come back to these problematic aspects of the equality-based arguments below.

In the previous three paragraphs I have summarized the argument of this dissertation insofar as it applies at a relatively high level of ideality. What I mean by "high level of ideality" was explained in chapter two (section 1). There I developed an account of ideal and non-ideal theory that allows us to conceive of different levels of ideality. These levels differ according to how many feasibility constraints are taken into account. At the lowest level of ideality all such constraints are taken into account, including soft constraints of which we know that they can be removed. On higher levels fewer constraints are taken into account. On the highest level we take into account only hard feasibility constraints which I defined as logical and nomological impossibilities. (It can be impossible to know when some constraint is a hard constraint or not. When that is the case I called the constraints equivocal.) Ideal theory is usually taken to mean theory on a high level of ideality. On the lowest level, when we take into account all feasibility constraints that plausibly apply, we are doing non-ideal theory, which I call prescriptive theory.

The question, What are national minorities owed as a matter of justice?, is ambiguous as to the level of ideality assumed. Are we asking what national minorities are owed here and now or at some distant future time at which various feasibility constraints have been removed? In other words, are we doing ideal theory or prescriptive theory? As I said, in the first three paragraphs I summarized the argument of this dissertation insofar as it applies on a high level of ideality. On that level, or in the distant future, I have argued that all people, including small national minorities, have a right to cultural maintenance and, where numbers warrant, access to their culture. Tamir's, Kymlicka's and Patten's equality-based arguments are also problematic on this high level of ideality. For, also on that level, they might allow for illiberal political arrangements or nation-building policies (Tamir's and Kymlicka's) and might not allow for warranted nation-building policies (Patten's). The arguments that were summarized in the first three paragraphs thus directly respond to Tamir, Kymlicka and Patten, for they are also theorizing on a high level of ideality. I do not want to state

these arguments too strongly because I think it is difficult to make this type of argument on such a high level of ideality.

As I argued in chapter two (section 3), it is impossible to argue on a high level of ideality about the proper way of accommodating national minorities. This is so for two reasons. First, we do not know whether the identity constraint—which, as I argued in section 2, consists in our inability to create identities—will be removed or not on this level. The consequence is that we should stick to the status quo and allow majority nations to continue to implement limited forms of nation-building policies. Second, the dynamic duties to mitigate equivocal constraints branch out in reform-paths that go in many directions. This, when it comes to non-constitutional essentials, makes high-level ideal theory that prescribes an institution impossible. Not only does one have to justify one's theory, one also has to justify the reform-path one has chosen. For these two reasons I believe high-level ideal theory for non-constitutional essentials and especially for minority nation accommodation is impossible. Correspondingly I make no claim regarding NSG or NCA as a principle that should guide us on a high level of ideality. I think no-one can make such a claim. Thus, I limit myself to answering the question, What are national minorities owed as a matter of justice?, on the prescriptive, non-ideal level.

When we argue on a non-ideal level, there is a certain argumentative strategy we can use. As I argued in chapter four (section 8.1), NCA satisfies the vital interests of non-oppressed and non-indigenous national minorities in developed societies. Thus if we assume that NCA is implemented, then we may assume that the vital interests of national minorities are satisfied when we ask what they are owed as a matter of justice. This has two important consequences when we argue on a non-ideal level.

First, we can now use, as I did in chapter four, a social choice model—which assumes the absence of vital interests—in order to answer the question whether national minorities are permanent ones. Some advocates of NSG, Weinstock explicitly, Tamir and Kymlicka implicitly, argue that national minorities are permanent minorities and as such have a right to NSG. If we analyze national minorities using the social choice model developed by Brian Barry and Nicholas Miller, then it becomes apparent that national minorities are not permanent ones. As I argued (in subsections 7.1 and 7.2), national minorities are neither fixed nor distinct enough to be called permanent ones. Thus, given that NCA is implemented, there is nothing wrong with putting national minorities together with a national majority in a democratic decision-making body. My argument here relies on what I called Schumpeter's equivocal constraint, which currently demands the one-person-one-vote

rule of collective decision-making on the societal level (section 1). I argue that Barry's account of democracy is based on a similar constraint (section 2) and I argue that Beitz would agree that the one-person-one-vote rule still applies here and now (section 3). Since national minorities are not permanent ones it is not particularly desirable to give them a collective decision-making body of their.

Second, when NCA is implemented we may use, as I did in chapter five, a broad definition of stability or federal stability. By a broad definition of federal stability I mean, as I argued (in section 2.1), the proper functioning of the federal system in the sense that there is no unstructured federal bargaining. Given that NCA is implemented, the vital interests of national minorities are satisfied and thus the proper functioning of the federal system outweighs the weaker arguments in favor of treating national minorities and majorities equally in some sense. Thus we are warranted in taking precautions against minority nationalist movements and parties hampering the proper functioning of the federal system. I argue that we therefore should not implement homeland federalism. This kind of federalism is characterized by a high degree of congruence between the political federated unit and the area of settlement of national minorities and by relatively high levels of political decentralization—which are exactly the things that NSG demands. Such homeland federalism is highly likely to cause the disintegration of the party system, which in turn causes federal instability (section 3). My argument is based on the account of federal stability of Filippov, Ordeshook and Shvetsova (explained in section 2), which itself is based on Hardin's account of constitutions (section 1). Thus we should not prescribe NSG since it implies homeland federalism (or consociationalism, to which I turn below).

The account of ideal and non-ideal theory that was developed together with the identity and federal stability constraint still has another consequence. It provides me with three further arguments against Tamir's, Kymlicka's and Patten's equality-based arguments for NSG (which I discussed in chapter one, subsection 3.3).

The model that Tamir prescribes as being demanded by her equality-based arguments, i.e. consociationalism, rests on a non-applicable feasibility constraint (as I argued in subsection 3.2). By "resting on a non-applicable feasibility constraint" I mean that the prescription one makes depends on a feasibility constraint that does not plausibly apply. Lijphart, the father of consociationalism, admitted already in 1977 that consociationalism was on the retreat in Western European countries. One of the reasons for this retreat was that consociationalism scores less high in terms of identifiability and accountability of the governing party. Consociationalism is a model that is apt for

deeply divided societies that lack the needed levels of trust and security. One should not prescribe it for developed democracies. Tamir does prescribe consociationalism, which makes her account of NSG rest on a non-applicable feasibility constraint. Given that Tamir's equality-based argument demands such a model, this argument either has no application to developed democracies, or it is not a strong argument[139]. If the former, then the burden is again on Tamir to provide another model that can implement her account of NSG in developed democracies. If the latter, then Tamir's equality-based argument cannot take over from the instrumental argument in making the case for NSG.

Kymlicka's equality-based argument is potentially illiberal and destabilizing. Giving national minorities nation-building tools is potentially illiberal in the sense that it multiplies the actors that can implement potentially illiberal nation-building policies[140]. It is potentially destabilizing for the closely related reason that these nation-building tools add an extra dimension to distributive federal bargaining. We saw in chapter five that federal instability is caused by the process of federal bargaining spiraling out of control. It can spiral out of control because federal institutions have distributive implications and there are always federated subunits that stand to gain from a re-bargaining of the federal constitution. If federated subunits have a right to nation-building tools, then this increases the redistributive expectation that a federated subunit has from re-bargaining. Kymlicka assumed that giving the national minority nation-building tools as well, next to the national majority which already has such tools, would lead to some stable end-point. Because of the dynamic that causes federal instability I am skeptical about the possibility of this stable end-point. Federal bargaining is more likely to spiral out of control when national minorities have a right to nation-building tools. Thus Kymlicka's equality-based argument has problems of its own and it too cannot take over from the instrumental argument.

Finally, Patten's equality-based argument said that national minorities have a right to equal recognition. This implies that they have a right to a democratic sphere in which they can make decisions as a group, which NSG provides. I consider this to be the strongest equality-based argument and the one that is most likely to stand on its own. Nevertheless, this argument is problematic too: it does not allow for nation-building policies that are warranted and, for all we know, some nation-building policies may indeed be warranted. The identity constraint may prove to have a hard core in the future. If we were to prescribe institutions on the basis of Patten's equality-

139 As we saw, Kymlicka also proposes consociationalism. Yet he also proposes territorial NSG, and indeed favors territorial NSG, as a model to implement the nation-building tools required by his equality-based argument. Kymlicka thus escapes the dichotomy in the text.

140 This critique also applies to Tamir's proposal for granting national minorities political arrangements in order to express their culture.

based argument today, we would have also to prescribe drastically scaling back the extent to which states currently rely on the majority culture. This threatens the levels of trust and solidarity and the ease of communication that currently exist and that may be crucial for the proper functioning of our existing institutions—as liberal nationalists argue. Hence also Patten's equality-based argument is not strong enough.

Thus, given that all these equality-based arguments have problems, Tamir's, Kymlicka's and Patten's case for prescribing NSG must heavily rely on the instrumental argument. These equality-based arguments cannot stand on their own in making the case for prescribing NSG, nor can they qualify the instrumental argument. In the end these authors' case for prescribing NSG is made plausible by the instrumental argument. However, we saw that NCA is a better instrument on account of its also maintaining the national cultures of small minorities and its providing more people with access to their culture.

Another important point in favor of NCA is that it does not violate the federal stability constraint. To the contrary, NCA even contributes to federal stability by satisfying national minorities' vital interests. As I argued in chapter five (section 4), by doing so NCA reduces the incentive that those minorities have to initiate federal re-bargaining. Moreover, NCA also implements cantonal federalism in order to keep statewide parties decentralized. This makes the central federal government less likely to alienate the national minority. Both things—satisfaction of the minority's vital interests and preventing alienation of the minority—obviously contribute to federal stability. Furthermore, as I argued (in chapter four, subsection 7.3), satisfying a national minority's vital interest in cultural maintenance is likely to bring the minority's preference curve closer to that of the rest of the country. This makes the minority more satisfied with the policies that will be enacted. There is thus a strong case for accommodating national minorities by implementing NCA. Not only does it guarantee the protection of the right to cultural maintenance; it is also a feasible model that strengthens the stability of the federal constitution and increases national minorities' satisfaction with the statewide democratic decisions.

One may still ask whether NSG remains the better model on a higher level of ideality. It might. I do not wish to preclude this possibility. But I think that this is a question that we currently cannot answer with the required degree of certainty. Let me discuss two possible scenarios.

The first scenario is the one in which future evolutions invalidate some part of my case against NSG. One way in which this may occur is through a reduction of the range of applicability of the

federal stability constraint. In other words, this equivocal constraint might be mitigated. My argument was that homeland federalism fails in the face of this constraint, in other words, that the argument from Filippov et al. (2004) makes homeland federalism infeasible. If a way is found that makes homeland federalism compatible with federal stability, then NSG no longer violates the federal stability constraint. Similarly if any other way of mitigating the federal stability constraint is found, for example, by abolishing the need for constitutions to be self-enforcing, then NSG might not violate this constraint either. Notice that we may also decide that Patten's equality of recognition, or Tamir's or Kymlicka's equality-based argument, is highly convincing. Alternatively, more ideal interpretations of the principle of political equality may also become standard. In such cases we have to spend more resources on trying to mitigate the federal stability constraint in order to speed up the reduction of the range of applicability of this constraint. If such a mitigating strategy is successful, it will then be possible to implement NSG in the near future. We could, however, in the course of trying to mitigate the federal stability constraint, also discover that this constraint has a core that cannot be mitigated. In other words, we could discover that federal constitutions are truly and inevitably the balancing acts that Filippov et al. (2004) describe. And perhaps this refined version of the federal stability constraint still tells against prescribing NSG. But it may also be that it allows for NSG. As I said above, yet another way in which the case for NCA might become less convincing is by discovering that it is indeed impossible to create a global identity. This too would alter the normative judgment we should make. All these developments—except of course that of finding out that the federal stability constraint cannot be mitigated—would have a negative effect on the case for NCA and a positive one on that for NSG. If such developments take place, we should revisit the case for NSG and NCA. Thus, it may be that in some more or less distant future the case for NSG becomes stronger than that for NCA. In that sense NSG may indeed be a model that applies on a higher level of ideality. We cannot, however, tell with certainty at the moment.

The second scenario is one in which NCA is implemented and minority nations no longer demand further accommodations. As I said at the very beginning, we live in nationalist times. This was not always the case, though. We have lived in religious times before. We may one day live in religious times again. Or, let us hope, we may one day live in times that are not based on an identity. A prerequisite for nationalist times is that the size of the most important political unit is roughly of the same size as ethno-cultural units. It may be that the size of the most important political unit becomes larger, as in the case of the European Union, or smaller, as in the case of city-states. It may also be that, as I have argued throughout, national minorities indeed primarily care about the maintenance of and access to their cultures. The demands for NSG are then the demands of a small clique of minority nationalists that should not be followed. Moreover, this second scenario is, next

to the ones offered in the previous paragraph, also a realistic one, and this is a normatively important fact. It means that we may hope to live in a non-nationalist world one day. Given that we may hope so, we should not make that world less attainable.

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