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Ethnic Identity and Constitutional Design for Africa

ALEMANTE G. SELASSIE*

Recently, unexpected areas of the world have experienced a remarkable democratic resurgence and a new consciousness of rights.¹ In country after country, from Romania to Ethiopia, citizens have risen up in valiant acts of self-determination to sweep away long-established dictatorships and to reclaim their rights

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¹ The widespread call for freedom and rights in many lands has reinvigorated the hope that constitutional liberties are finally attainable even in countries lacking democratic traditions. See Gibson K. Kuria, *The Rule of Law in Kenya and the Status of Human Rights*, 16 YALE J. INT'L L. 217, 233 (1991); Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L. J. 745 (1991); Symposium, *Transitions of Democracy and the Rule of Law*, 5 AM. U. J. INT'L L. & POL'Y 965 (1990). One writer has argued, however, that "[w]hat is being universalized is not democracy, but the capitalist economic system and its attendant form of government—historically antithetical to precisely those individual liberties at the heart of any fundamental charter of human rights." Anthony Chase, *The Rule of Law and the Capitalist State: Bills of Rights in Jeopardy*, 65 ST. JOHN'S L. REV. 85, 87-88 (1991) (footnote omitted). Professor Chase even doubts "the survival, let alone the vitality," of the U.S. Bill of Rights. *Id.* at 88.

The ubiquity and strength of the demand for greater civil liberties and more accountable governments everywhere have rekindled a keen interest in the principles and practices of constitutional government and the rule of law. See generally EDWARD J. ERLER, *THE AMERICAN POLITY: ESSAYS ON THE THEORY AND PRACTICE OF CONSTITUTIONAL GOVERNMENT* (1991); Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat)*, THE HARRIMAN INSTITUTE FORUM 1 (1991); Mark R. Beissinger, *The Party and the Rule of Law*, 28 COLUM. J. TRANSNAT'L L. 41 (1990); Ulrich K. Preuss, *Perspectives of Democracy and the Rule of Law*, 18 J. L. & SOC'Y 353 (1991); Issa G. Shivji, *Law in Independent Africa: Some Reflections on the Role of Legal Ideology*, 46 OHIO ST. L. J. 689 (1985); *What Should a Law-governed State Be?*, SOVIET L. & GOV'T, Summer 1989, at 51-65.

and dignity.² As Hannah Arendt argues, however, "[T]here is nothing more futile than rebellion and liberation unless they are followed by the constitution of the newly won freedom."³ John Adams, commenting on the newly written constitution of the United States, suggested, "Neither morals nor riches, nor discipline of armies, nor all these together will do without a constitution."⁴

A wave of constitution-making has accompanied newly democratic nations' shift from authoritarian rule⁵ and underscored the importance of a suitable constitution to democratic governance.⁶ In the Western liberal tradition, constitution-making is worth the effort only if it secures individual dignity⁷ and restrains state

² Since 1989 several countries in Eastern Europe have undertaken the transition from single-party rule to constitutional democracy. Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 447 (1991). In Africa numerous dictatorships have fallen. See generally Samuel Decalo, *The Process, Prospects and Constraints of Democratization in Africa*, 91 AFR. AFF. 7 (1992). Africa, at a "political dead-end morally" and "economically bankrupt," is currently susceptible to the wave of democratization that is sweeping the world. *Id.* at 14. With the end of the Cold War, moreover, Africa can no longer obtain material aid by playing the United States and the Soviet Union against each other. *Id.* at 17. Instead, the continent must become democratically more presentable in order to continue to carry favor with the United States, World Bank, and IMF. *Id.* at 22.

³ HANNAH ARENDT, *ON REVOLUTION* 41 (1963).

⁴ *Id.* (quoting John Adams).

⁵ The current wave of constitution-making in Eastern Europe has reached Albania, Bulgaria, Czechoslovakia, Poland, and Romania. See Elster, *supra* note 2, at 447. History has seen a number of similar waves of constitution-making efforts. See EDWARD MCWHINNEY, *CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE* 3-5 (1981); Elster, *supra* note 2.

Constitution-making takes two distinct forms: "In the first, constitution-making is concerned with demarcating the basic political relationships among the constituent groups: what will be the structure of the state, what modes of representation will prevail, what conception of society and the relations among groups will be given institutional expression?" Keith G. Banting & Richard Simeon, *Introduction: The Politics of Constitutional Change*, in *REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE* 1, 8 (Keith G. Banting & Richard Simeon eds., 1985). In the second, where the constitution serves as not only the expression of a fundamental relationship but also as a statement of precise decision-making rules, constitution-making also includes the task of adapting or modernizing rules in order to achieve administrative rationality and coordination. *Id.* at 9. The democratic changes in most countries have required constitution-making of the first type, which "reveals in a microcosm the political climate of the larger polity during the transition." ANDREA BONIME-BLANC, *SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING* 2 (1987).

⁶ On the importance of the process of constitution-making to democratic governance, see generally BONIME-BLANC, *supra* note 5.

⁷ T. R. S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 CAMBRIDGE L. J. 111, 111 (1985) (arguing that modern Anglo-American constitutional theory is preoccupied with devising a means for protection and enhancement of individual human rights in a manner consistent with the democratic basis of the institutions of these societies). See also JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIO-*

power from invading the private arena.⁸ The twin concepts of limited government and individual rights capture the enduring value and the very purpose of every "true" constitution.⁹ According to S. A. De Smith, an earlier commentator on sub-Saharan African constitutions, constitutionalism in its formal sense means:

the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content. . . . Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.¹⁰

To what extent is this traditional perspective adequate to meet the needs of sub-Saharan African nations? Two values are in tension. On the one hand, constitution-making should prevent the exercise of unlimited state power that in the past thirty years of African independence has frequently resulted in massive violations of human rights.¹¹ Past policies encouraging economic development and nation-building in sub-Saharan Africa were held to require a truncated conception of human rights.¹² These

LENCE AND THE RULE OF LAW 36 (1991) (in order to protect human dignity, Western constitutionalism focuses on limited power and public reason).

⁸ Robert B. Seidman, *Perspectives on Constitution-making: Independence Constitution for Namibia and South Africa*, 3 LESOTHO L.J. 45, 50 (1987).

⁹ In 1961, addressing a flurry of constitution-making in Eastern Europe, Asia, and Africa, Giovanni Sartori proposed that many of the constitutions should be called "façade constitutions." Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861 (1962). Others used the terms "semantic" or "nominal" for these constitutions. See, e.g., Karl Loewenstein, *Reflections on the Value of Constitutions in Our Revolutionary Age*, in CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II 191, 204-06 (Arnold J. Zurcher ed., 1955).

¹⁰ S. A. De Smith, *Constitutionalism in the Commonwealth Today*, 4 MALAYA L. REV. 205, 205 (1962). See also William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1, 2 (1991) (identifying the three main characteristics that define American constitutionalism: consensual basis of government, enumeration of specific rights guaranteed against government intrusion, and independence of and enforcement by the judiciary).

¹¹ See Issa G. Shivji, *State and Constitutionalism in Africa: A New Democratic Perspective*, 18 INT'L J. SOC. L. 381, 383 (1990) (noting that "[c]onstitutionalism was eroded in substance even as constitutions continued to pay homage to some of its elements.")

¹² For example, Julius Nyerere, ex-president of Tanzania, argued that Western constitutionalism would tend to deny development. JULIUS NYERERE, *DEMOCRACY AND THE PARTY SYSTEM* 195-203 (1961); see also S. K. B. Asante, *Nation Building and Human Rights in*

policies have been heavily criticized.¹³ Today, African nations need to focus upon defining a "bill of rights" and designing appropriate institutions, processes, and mechanisms to enforce human rights. Consequently, any new constitutional order in Africa must incorporate basic individual rights in its design and protect them in actual practice.

On the other hand, constitution-making in Africa must take into account the needs and stresses of the African experience.¹⁴ Constitution-making cannot be "an a priori exercise in taking principles from on high and parachuting them into any environment. . . ."¹⁵ Africans must heed what Robert Seidman describes as "the Law of Non-Transferability of Law."¹⁶ While Africans will do well to borrow freely from the legal principles and institutions that have worked elsewhere,¹⁷ their constitutions will not function and endure if they are not molded to meet their countries' special needs. African constitution-makers must avoid the tendency to copy uncritically constitutional provisions from other countries, as if constitution-making were "participation in an

Emergent African Nations, 2 CORNELL INT'L L. J. 72, 83 (1969) (discussing "the much canvassed thesis that the stark realities of nation-building in Africa do not admit of the luxury of human rights"); Kéba M'Baye, *Human Rights in Africa*, 2 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 583, 599 (Karel Vasak & Philip Alston eds., 1982) (suggesting that African governments have sacrificed human rights in the interests of development and political stability).

¹³ See, e.g., P. Anyang Nyong'o, *Political Instability and the Prospects for Democracy in Africa*, 13 AFR. DEV., No. 1, at 71, 77 (1988) (arguing that "there is very little evidence that Africa has been better off in terms of economic growth and development because governments have no [sic] had to be bothered by popular pressures").

¹⁴ Every constitution constitutes a solution for the particular difficulties its authors perceive. Seidman, *supra* note 8, at 50. In the West, the central problem constitution-makers perceived was the arrogance of state power and its corrupting influence. Designing a means by which to limit this power thus became the standard constitutional solution in the West. *Id.* at 59.

¹⁵ DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY 101 (1991).

¹⁶ ROBERT B. SEIDMAN, THE STATE, LAW AND DEVELOPMENT 34-36 (1978) (noting that "[l]egal transplants practically never work"). Edward McWhinney also expresses that the post-colonial imposition in developing nations of constitutions based on Western models was:

the too-ready application to non-European societies of essentially European constitutional stereotypes, without prior examination of whether the different communities concerned were at the same essential stages of political and economic development, and whether, in consequence, the socio-economic infrastructures that inevitably condition the operation of positive law prescriptions were the same.

McWHINNEY, *supra* note 5, at 4.

¹⁷ "There is nothing wrong with borrowing institutions. After all, how can any people be expected to invent everything from scratch? The trick is to borrow the right institutions, those that are apt for the predicament of the borrowers." HOROWITZ, *supra* note 15, at 101.

elaborate buffet . . . from which the constitution-maker can fill her plate to her taste."¹⁸

For African constitution-makers, no issue is more perplexing or more critical than how African societies should treat ethnic identity. This is not a uniquely African situation; from the former Yugoslavia to Somalia to Canada, ethnic divisiveness remains problematic. But the seriousness of this question for African countries can hardly be overemphasized, and inattention to it cannot be excused. In the past, African regimes have suppressed ethnic demands in the interest of forging national unity and fostering loyalties beyond the confines of ethnic and regional particularism; however, such suppressions have failed. The de facto break-up of Ethiopia¹⁹ and the civil war in the Sudan²⁰ have resulted from uprisings staged by ethnic groups demanding rights. Moreover, in the present period of democratic resurgence, world opinion is decidedly against the maintenance of the multi-ethnic state system when it rests simply on the denial or suppression of ethnic claims.²¹ Nothing less than the future hope of Africa for stability, democracy, and development is at stake. Thus, constitutional design for Africa must provide a framework for accommodating ethnic differences without impairing national unity and stability.

This Article explores the extent to which African constitution-making and constitutional development should take ethnic claims into account. The Article proceeds from the author's belief that resolution of the fundamental problems confronting many of these countries—the crises of national integration and political

¹⁸ Seidman, *supra* note 8, at 56.

¹⁹ Ethiopia is on the verge of disintegration. In the north, the Eritrean secessionists have already formed an independent government with the collusion and blessing of the Ethiopian transitional government that was established soon after the demise of the dictatorial regime in May 1991. There are ominous signs that the precedent established for Eritrea may embolden or encourage other ethnic groups to demand similar dispensations.

²⁰ The Sudan has experienced civil war intermittently since 1956. See generally Dunstan M. Wai, *Geoethnicity and the Margin of Autonomy in the Sudan*, in *STATE VERSUS ETHNIC CLAIMS: AFRICAN POLICY DILEMMAS* 304 (Donald Rothchild & Victor A. Olorunsola eds., 1983). In recent months, the Southern Peoples Liberation Army has declared that, unless the country makes fundamental democratic changes, it will seek political divorce from the rest of the Sudan. See F.B.I.S. (Sub-Saharan Africa) June 1, 1992, at 1.

²¹ Joseph E. Magnet, *Collective Rights, Cultural Autonomy and the Canadian State*, 32 *MCGILL L.J.* 170, 175 (1986) (changes in world system thwart use of multinational state as an organizing unit of politics). The breakup of the Soviet Union, Czechoslovakia, and Yugoslavia and the international recognition accorded to the successor states demonstrate this proposition. See generally S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Right Claims*, 75 *IOWA L. REV.* 837 (1990).

legitimacy—requires the recognition and entrenchment of ethnic claims as part of a new constitutional settlement in Africa as a matter not only of practical expediency but also constitutional theory. Part I of the Article discusses the role and importance of ethnicity in the process of self-definition and identifies in that process a major source of ethnic conflict and division that continues to plague these countries. Part II suggests why, despite the importance of ethnic claims in constitution-making, African constitution-makers in the past lacked specific concern for ethnic-based claims in constitutional design. Two factors seem to account for the lack of such concern: the influence of liberal constitutionalism, with its exclusive focus on the individual, and the extreme sensitivity of African regimes to ethnic questions. Part III argues that neither factor justifies ignoring ethnic claims in constitutional design. In fact, recognition of ethnic claims will protect and advance important fundamental values. Part IV critically examines the elements of a new approach to constitutionalism presently emerging in Ethiopia²² to determine the extent to which ethnic claims may be given explicit constitutional grounding. The Article concludes that this approach corrects classical liberal constitutionalism's emphasis on individual rights and consequent failure to adequately address ethnic claims. However, as the Ethiopian experiment suggests, in addressing such claims, constitution-makers may go further than is prudent or necessary to deal with the motivations underlying the assertion of group ethnic claims.

I. THE ROLE AND IMPORTANCE OF ETHNIC IDENTITY

Before discussing the extent to which ethnicity may be considered in the design of African constitutions, it is important to explore briefly the important role that ethnic identity plays in the process of self-definition. The perspective gained from exploring ethnic identity's role is helpful in two ways. First, it helps identify and enhance understanding of a major source of ethnic conflict and division. Second, it offers constitution-makers suggestions for mitigating ethnic problems through constitutional design.

²² Ethiopia is appropriate for such examination for two reasons. First, it is probably the only country in Africa which has spawned numerous ethnicity-based movements demanding ethnic rights. Second, it is so far the only country in which these movements have succeeded in entrenching their ethnic claims in a constitutional document. For a discussion of these claims, see *infra* notes 197-249 and accompanying text.

A. *Ethnic Identity and Self-Definition*

An old European saying identifies an ethnic group as a group of "persons united by a common error about their ancestry and a common dislike of their neighbors."²³ This neatly sums up the basic characteristics of ethnic group identity: a notion of unity and a notion of being different from others. Both of these aspects arise from common origins, historical experiences, and values that are not shared by others.²⁴ In reality, as the adage suggests, this perception may be erroneous.

Erroneous or not, group identity plays a major part in both the process of self-definition and the process of definition by others.²⁵ "In defining ourselves, we rely heavily on others' views of us, real or imagined, and on our connections with others," ethnic or otherwise.²⁶ Rarely does a person engage in self-definition without some reference to his or her connections to others.²⁷ In numerous societies, individuals largely identify themselves by their membership in an ethnic group.²⁸

Why does ethnic identity play a role in self-definition? What is it about ethnicity that compels one to define oneself in its terms? The ubiquity and salience of ethnic identity indicate that it responds to essential needs. Harold Isaacs suggests two needs in particular: the need to belong and the need for self-esteem.²⁹ Few individuals can do without either. Kenneth Karst has noted the importance of group identity in satisfying the need to belong and the self-esteem that goes with the satisfaction of it: "[Bonds to family, religion, and ethnic group] not only provide a tie to other people, but also offer us our very selves. No wonder that we develop a bond 'to the very tie itself.' " Helen Lynd captured the idea in one simple but elegant sentence: "Some kind of answer to the question 'Where do I belong?' is necessary for an

²³ KARL DEUTSCH, *NATIONALISM AND ITS ALTERNATIVES* 3 (1969).

²⁴ NAOMI CHAZAN ET AL., *POLITICS AND SOCIETY IN CONTEMPORARY AFRICA* 102 (1988). Awareness of the existence of other ethnic groups is a prerequisite to ethnic consciousness. That is, the concept of "us" requires the concept of "them." Walker Connor, *The Politics of Ethnonationalism*, 27 J. INT'L AFF. 1, 2-3 (1973).

²⁵ See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 307-09 (1986).

²⁶ *Id.* at 307.

²⁷ *Id.* Thus one is "a mother," "a law student," "[a] black," "a Jew," "an old man," "[a] child of Korean immigrants," etc. *Id.*

²⁸ See generally DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 6-7 (1985).

²⁹ Harold R. Isaacs, *Basic Group Identity: The Idols of the Tribe*, in *ETHNICITY: THEORY AND EXPERIENCE* 29, 34 (Nathan Glazer & Daniel P. Moynihan eds., 1975).

answer to the question 'Who am I?' "³⁰ Indeed, the language of ethnicity "is suffused with the intimacy of kinship referents."³¹ It identifies those who belong and those who do not.

Ethnicity is especially significant in the lives of individuals in less developed countries, where secondary identities deriving from class, educational, occupational, or professional status are less pronounced.³² Its importance in the process of self-definition in these countries is indicated by the overwhelmingly ethnic responses that such open-ended questions as "Who are you?" tend to elicit.³³ For example, "I am an Oromo" instead of "I am an Ethiopian" and "I am a Kikuyu" instead of "I am a Kenyan" are labels often used to identify oneself in these ethnically segmented societies.

Viewed from this perspective, ethnicity has very little or no offensive connotation. Indeed, its role in the process of self-identification and identification by others makes it an inevitable component of human existence.³⁴ But the proliferation of ethnic conflicts all over the world belies or casts doubt on ethnic identity's positive effects. The next section briefly explains why, despite its importance to self-definition, ethnic identity has tended to foster division and conflict.

B. *Ethnic Difference and Fear of Domination*

No single theory can adequately explain the causes of ethnic conflict.³⁵ Nonetheless, one explanation having implications for

³⁰ Karst, *supra* note 25, at 308 (footnotes omitted). Similarly, Donald Horowitz, an influential scholar on the subject of ethnicity, identifies the needs for familiarity, community and emotional support as important needs met by ethnicity. HOROWITZ, *supra* note 28, at 88. Ethnicity is also useful as an instrument for "mobilizing and aggregating" the interests of an ethnic group in competition with other ethnic, occupational, and business interests for state-controlled political and economic resources. CHAZAN, *supra* note 24, at 105-106; see also Daniel Bell, *Ethnicity and Social Change*, in *ETHNICITY: THEORY AND EXPERIENCE*, *supra* note 29, at 141, 169 (noting ethnicity's role as "a new mode of seeking political redress in the society").

³¹ Crawford Young, *Patterns of Social Conflict: State, Class, and Ethnicity*, *DAEDELUS*, Spr. 1982, at 71, 74; HOROWITZ, *supra* note 28, at 57.

³² See Ibrahim J. Wani, *Cultural Preservation and the Challenges of Diversity and Nationhood: The Dilemma of Indigenous Cultures in Africa*, 59 *UMKC L. REV.* 611, 640 (1991).

³³ HOROWITZ, *supra* note 28, at 6.

³⁴ See Isaacs, *supra* note 29, at 32; see also ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 205 (1981) ("[T]he story of my life is always embedded in the story of those communities from which I derive my identity").

³⁵ For an in-depth and critical review of these theories, see HOROWITZ, *supra* note 28, at 95-228. For a brief discussion of some of these theories as they pertain to Africa, see Dunstan M. Wai, *Sources of Communal Conflicts and Secessionist Politics in Africa*, 1 *ETHNIC & RACIAL STUD.* 286 (1978). Wai lists the following as "salient conditions that lead to

constitutional design is that the need to belong and the need for self-esteem—the very needs which ethnic identity fulfills—are themselves major sources of conflict.³⁶ Both of these needs are not merely individual but are also collective.³⁷ Both are “achieved largely by social recognition,”³⁸ with collective need receiving its recognition through political affirmation.³⁹

The juxtaposition of two or more ethnic groups in the same political environment often results in each group attempting to disaffirm the other politically. Groups behave in this manner as a result of fear and distrust which are inherent in the very notion of group identity. As Karst explains:

If my group identity tells me where I belong—and *that* I belong—it also tells me that you, who do not wear the same identifying labels, do not belong. We can trust the members of our own cultural group because we know the meanings of their behavior and know what to expect of them. Conversely, distrust of the members of a different cultural group flows from fear, not just of the unknown but fear that outsiders threaten our own acculturated views of the natural order of society.⁴⁰

The fear and suspicion that differences in ethnic identity engender are well documented. In Africa such fear and distrust first surfaced at the time that independence from colonialism was impending.⁴¹ In Mauritania, Chad, and Sudan, all of which con-

communal conflicts and subsequent attempts at secession in independent African states:”

- (1) Cultural pluralism and value incompatibilities;
- (2) Historical hostilities and mutual distrust;
- (3) Psychological factors;
- (4) Right to self-determination;
- (5) Relative social and economic deprivation;
- (6) Elite instability and crisis of leadership;
- (7) Ideology and external factors;
- (8) Governmental ineptitude and closed channels of dissent.

Id. at 287.

³⁶ See HOROWITZ, *supra* note 28, at 181. Professor Horowitz argues that “[a] more fruitful explanation” of ethnic conflict lies in the “disparaging evaluations of group worth” that an ethnic group receives at the hands of another ethnic group. These evaluations lead the disparaged group “to want to do something to retrieve [its] self-esteem.” *Id.* A disparaging evaluation threatens the value of one’s ethnic affiliations, which produces anxiety and defensiveness and thus leads to conflict. *Id.*

³⁷ *Id.* at 185.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Karst, *supra* note 25, at 309; see also HOROWITZ, *supra* note 28, at 181.

⁴¹ See HOROWITZ, *supra* note 28, at 188 (noting that the departure of the colonial rulers and the prospect of self-government produced intense anxiety and uncertainty regarding who would rule).

tain Arab and African populations, the persistent question has been: Is the state to be "Arab" or "African?"⁴²

Fear of ethnic domination defines much of African politics. "Kikuyu domination" is still feared in Kenya.⁴³ Prior to 1991, the perception of "Amhara domination" fueled various ethnic uprisings in Ethiopia.⁴⁴ And fear of "Tigre domination" has already begun to fester.⁴⁵ As one delegation to a Nigerian constitutional conference stated:

We all have fears of one another. . . . These fears may be real or imagined; they may be reasonable or petty. Whether they are genuine or not, they have to be taken account of because they influence to a considerable degree the actions of the groups towards one another and, more important perhaps, the daily actions of the individual in each group towards individuals from other groups.⁴⁶

Fear and insecurity, in turn, foster intense competition for power. This kind of competition is a zero-sum game, with each group seeking to dominate the political environment.⁴⁷ The winning group imposes its identity on the state, though it frequently may disguise it by projecting a culturally neutral image of the nation.⁴⁸ This imposition excludes the losers from the political

⁴² *Id.*

⁴³ *See id.*

⁴⁴ The perception of Amhara domination is largely on account of official policies that in the past encouraged the use of Amharic, the language of the Amharas, in schools and government administration. Some commentators even claim that the Amhara refer to other ethnic groups in the country as "nationalities," which is used "derogatorily" to imply that other ethnic groups must some day be molded in the national image of the Amhara. *See, e.g.,* Jason W. Clay, *Nation, Tribe, and Ethnic Group in Africa*, 9 CULTURAL SURVIVAL Q. 2 (1985). But "nationality" is a term that came into vogue in Ethiopia with the rise of socialist thought in that country. It is not a term the Amharas invented.

⁴⁵ After the fall in May 1991 of the military dictatorship that had ruled Ethiopia since 1974, the Tigre-dominated Ethiopian Peoples' Revolutionary Democratic Front seized government power. Sam Kiley & Michael Binyon, *Ethiopian Regime Dies in Short, Sharp Battle*, THE TIMES, May 29, 1991, at 1. The fear of Tigre domination has since become prevalent.

⁴⁶ 1 A. H. M. KIRK-GREENE, CRISIS AND CONFLICT IN NIGERIA: A DOCUMENTARY SOURCEBOOK 1966-1969 14-15 (1971) (footnote omitted).

⁴⁷ This often leads to serious ethnic violence. *See* HOROWITZ, *supra* note 28, at 189. The symbol used to express the intention to capture the state for one ethnic group varies from country to country. For example, in Nigeria the anti-Ibo riots of 1966 occurred when the military regime headed by an Ibo seemed to favor Ibo officers in promotion. *Id.* In Sri Lanka, on the other hand, the Official Language Act, declaring Sinhala the official language, marked the beginning of ethnic tension on the island. M. L. Marasinghe, *Ethnic Politics and Constitutional Reform: The Indo-Sri Lankan Accord*, 37 INT'L & COMP. L.Q. 551, 560-61 (1988).

⁴⁸ Crawford Young states that "Rwanda is unambiguously associated with Hutu domination, as Burundi is with Tutsi." Young, *supra* note 31, at 85. In Zaire the wide-

community, undermines their confidence and wounds their group self-esteem. When wounded, the collective esteem "is like a bent twig, forced down so severely that when released, it lashes back with fury."⁴⁹

Sudan provides the most extreme illustration of this phenomenon. That country has been in civil war since the mid-1950's, because the Arab North has, since independence, sought to impose its identity on the South.⁵⁰ Successive governments in the North have self-righteously pursued policies aimed at Arabizing and Islamizing the largely Christian and animist South.⁵¹ The transformation of the Sudanese legal system through the application of Sharía as of 1983 and the rise of a fundamentalist Islamic state are the latest examples of the North's tendency to treat the people of the South as second-class citizens.⁵²

The consequences of such policies have been predictable. As the North persisted in defining the State in terms of its own ethnic identity, the South felt increasingly wounded and its struggle to preserve its own identity and self-worth intensified. As one scholar has noted, "A society which inflicts the distress of a sense of exclusion and inferiority cannot wholly succeed in assimilating into its affirmative consensus those whom it wounds."⁵³ In the case of Sudan, the South views the North as a force so alien that the South must seek political divorce.⁵⁴

II. AFRICAN APPROACHES TO ETHNIC DIVERSITY: A CONSTITUTIONAL PERSPECTIVE

A. *The General Setting*

1. *Africa and Ethnic Diversity*

Sub-Saharan African states generally are divided by language, culture, and religion. This may seem unremarkable, as cultural

spread perception is "that the state is identified with an Equateur and Lingaphone inner core" *Id.*

⁴⁹ Allister Sparks, *Good and Bad Nationalism: South Africa Is the World in Microcosm*, WASH. POST, Jan. 26, 1992, at C7 (quoting Oxford University philosopher Isaiah Berlin).

⁵⁰ See Wai, *supra* note 20, at 307-08 (discussing the imposition of Arabic and various Islamic customs in southern schools, including changing the weekly holiday from Sunday to Friday).

⁵¹ See *id.* at 316 (noting that "the 'Sudanese state' has continuously since independence reflected the identity of the Arab Northern Sudanese") (emphasis omitted).

⁵² See generally Abdullahi Ahmed An-Na'im, *Constitutionalism and Islamization in the Sudan*, 1988 THIRD WORLD LEGAL STUD. 99.

⁵³ Wai, *supra* note 20, at 316 (quoting EDWARD SHILS, *CENTER AND PERIPHERY: ESSAYS IN MACRO SOCIOLOGY* 164-82 (1975)).

⁵⁴ See generally Wai, *supra* note 20.

and ethnic diversity exists in many other countries.⁵⁵ But the African continent is unique in its breadth of diversity. The continent is home to hundreds of ethnic groups speaking over 800 languages.⁵⁶ With very rare exceptions, most of these states contain numerous ethnic groups which came to live together within the same country only as a result of colonial fiat.⁵⁷ Before colonialism, they at best enjoyed little or no contact. At worst, they were hostile.

Ethnicity tends to be more important to Africans than it is to individuals elsewhere. In much of Africa, ethnicity is the hub around which life revolves. The more important aspects of an individual's life are determined by rules emanating from the individual's ethnic group.⁵⁸ Though a subject of the state, it is often the individual's membership in the ethnic group that he considers more important. Consequently, the ethnic group in Africa constitutes an important "semi-autonomous social field."⁵⁹

2. *Ethnicity and Political Demands*

Ethnicity is prominent in the realm of politics as well. It now serves as a basis for articulating demands against the state.⁶⁰ The civil wars in Ethiopia, Liberia, Nigeria, Sudan, and Uganda, and the massacres between Hutus and Tutsis in Burundi and Rwanda have all involved ethnicity and demands based on it.

⁵⁵ The world is inhabited by about 5000 ethnic groups. Anaya, *supra* note 21, at 840. The number of independent states, by contrast, is approximately 176. *Id.* Only a handful of states, such as Ireland, Denmark, Japan, and Germany, are nearly homogeneous. Sharon O'Brien, *Cultural Rights in the United States: A Conflict of Values*, 5 LAW & INEQ. J. 267, 268 n.2 (1987). In Africa only Somalia is homogenous. I. M. Lewis, *The Nation, State, and Politics in Somalia*, in *THE SEARCH FOR NATIONAL INTEGRATION IN AFRICA* 285 (David R. Smock & Kwamena Bentsi-Enchill eds., 1976). Somali homogeneity is rooted in a common pastoral culture, a common language, and Islam. *Id.* Yet, all of these factors have proved to be incapable of preventing Somalia's decline into inter-clan animosity and warfare.

⁵⁶ CHAZAN ET AL., *supra* note 24, at 4.

⁵⁷ The modern political map of Africa is largely the creation of the nineteenth century partition of the continent among European powers—a process that culminated in the Berlin Conference of 1854-85. *See generally* THE PARTITION OF AFRICA: ILLUSION OR NECESSITY? (Robert D. Collins ed., 1969) (describing the scramble for Africa). Ethiopia alone was able to avoid the full impact of this process, though it lost Eritrea, a name coined by the Italians to refer to the northern-most part of the country bordering on the Red Sea.

⁵⁸ *See* Gordon R. Woodman, *Constitutions in a World of Powerful Semi-Autonomous Social Fields*, 1989 THIRD WORLD LEGAL STUD. 1, 4-7.

⁵⁹ *See id.* at 4. The term "semi-autonomous" is from SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 54-58 (1978).

⁶⁰ For an account of the various economic and political demands, *see generally* STATE VERSUS ETHNIC CLAIMS: AFRICAN POLICY DILEMMAS, *supra* note 20.

From a constitutional perspective, these demands fall into two categories: demands for freedom from discrimination based on ethnic identity and demands for collective ethnic entitlement.⁶¹ The first includes claims for non-discrimination and equal treatment for members of an ethnic group as they seek to participate in the institutions and processes of the larger society.⁶² For example, Liberia's indigenous population was denied its rights by a minority of American-Liberians who dominated the government.⁶³ The Hutus in Burundi and Tutsis in Rwanda have also faced severe discrimination.⁶⁴ The second category of demands goes beyond nondiscrimination to embrace more radical claims ranging from efforts to preserve cultural identity and linguistic equality, to more aggressive claims for political autonomy.⁶⁵ These radical demands have figured prominently in Ethiopia and Sudan.⁶⁶

3. *Africa and the Two Classic Strategies for Ethnic Accommodation*

Ethnic and cultural diversity may be accommodated in either of two ways: assimilation or cultural pluralism.⁶⁷ Assimilation is grounded in the principles of individual non-discrimination and equality and is manifested in a system of individual rights. The second approach draws support from a scheme of collective rights.

African states, by and large, have historically followed the first model.⁶⁸ Little in the African states' constitutions reflects the states' consciousness of their ethnic diversities and conflicts. Rarely has an African constitution recognized the collective rights of ethnic groups to maintain their culture, language, or au-

⁶¹ Anaya, *supra* note 21, at 837.

⁶² *Id.* (nondiscrimination principle embedded in Universal Declaration of Human Rights, International Human Rights Covenants, and International Covenant on the Elimination of all Forms of Racial Discrimination). *See also* Asbjorn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 NOTRE DAME L. REV. 1311, 1333-36 (1991) (noting the "paramount importance" of nondiscrimination and full participation of all individuals as a means for avoiding ethnic conflicts).

⁶³ *See* Warren Weinstein, *Africa, in* PROTECTION OF ETHNIC MINORITIES: COMPARATIVE PERSPECTIVES 208, 214 (Robert G. Wirsing ed., 1981).

⁶⁴ *See id.* at 216.

⁶⁵ Anaya, *supra* note 21, at 838.

⁶⁶ *See generally supra* notes 19-20.

⁶⁷ O'Brien, *supra* note 55, at 268.

⁶⁸ Shivji, *supra* note 11, at 389 (noting that the assimilationist tendency in Africa has been so strong that it has destroyed even "the relatively voluntary unions" found between the former Zanzibar and Tanganyika).

tonomy.⁶⁹ The lack of recognition has persisted even in those countries that have experienced disastrous civil wars originating from ethnic grievances.⁷⁰

Why have African states persisted in their reluctance to go beyond the discourse of individual rights? Two factors are primarily responsible: the influence of liberal constitutionalism focusing on individual rights, and the tendency of African states to view ethnic diversity as "a burden and an evil to be obliterated,"⁷¹ rather than a factor to be accommodated as a valued aspect of nationhood.

B. *The Influence of Liberal Constitutionalism*

Liberal constitutionalism has held sway in Africa at and since the time of independence.⁷² The colonial governments had little

⁶⁹ *Id.* There have been a few exceptions, however, at least on paper. Article 3 of Benin's constitution provides:

The People's Republic of Benin is a unified multinational state. All nationalities are equal in rights and duties. Consolidating and developing their union is a sacred duty of the State, which shall assure to each one a full development in unity through a just policy toward nationalities and an inter-regional balance. . . . All nationalities shall be free to use their spoken and written language and to develop their own culture.

BENIN CONST. ch. I, art. III (1977), *reprinted in* II CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990). *See also* ETHIOPIA CONST. art. II (1987), *reprinted in* V CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990).

Ultimately, these guarantees have been empty. Both Benin and Ethiopia have sought to channel all activities of national life according to the norms set by Marxism-Leninism, with its system of one-party domination. This has not proven to be a hospitable climate for a multi-ethnic society.

A more serious public commitment seems to be apace in Namibia. In 1990 Namibia adopted a constitution which declares:

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

NAMIBIA CONST. ch. III, art. XIX (1990), *reprinted in* XI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990). For an early assessment of this provision see Lynn Berat, *The Future of Customary Law in Namibia: A Call for an Integration Model*, 15 HASTINGS INT'L & COMP. L. REV. 1, 29 (1991) (suggesting that Namibia adopt an integration approach, because "[i]ntegration is a juridical halfway house between pluralism and uniformity").

⁷⁰ The Sudan is the preeminent example. The Arab North's imposition of Shari'a law and its unilateral abrogation of the Addis Ababa agreement of 1972, which had granted the people of the South a measure of self-government, reversed the modest advances made in dealing with ethnic grievances. *See* An-Na'im, *supra* note 52, at 105-12.

⁷¹ Shivji, *supra* note 11, at 389; *see also* Clay, *supra* note 44, at 2 (discussing African states' efforts to "eliminate" ethnic and cultural identity).

⁷² *See* Filip Reyntjens, *Authoritarianism for Francophone Africa From the Colonial to the Post-Colonial State*, 1988 THIRD WORLD LEGAL STUD. 59, 75 ("As a ticket for access to statehood the possession of a constitution was necessary but not sufficient: it had to be

use for this principle, denying the African peoples their fundamental rights and freedoms.⁷³ But at the end of the colonial era, the colonial powers conditioned the African states' independence on the acceptance of liberal constitutions.⁷⁴ The African nations were not necessarily opposed to the values of liberal constitutionalism. Many African nationalist leaders were versed in these values,⁷⁵ having used the moral precepts of liberal constitutionalism to embarrass the colonists for their denial of human rights to the colonized.⁷⁶ Whether by imposition or by choice, the constitutions of independent African states proclaimed their allegiance to principles which they considered components of liberal democracy, such as racial equality and the freedoms of speech, association, and assembly.

Liberal constitutionalism is concerned only with individual rights, specifically the relationship between the individual and the state.⁷⁷ Viewed in its own contractarian terms, this relationship consists of two basic understandings between the parties. First, the relationship is about individual rights, which in turn set limits on the rights of others, such as those in the majority or those holding political power.⁷⁸ Second, these rights are guaranteed by the state to individuals.⁷⁹ Therefore, the state's role and duty is to protect individual rights.

liberal-democratic as well if one was to be taken seriously by other members of the club"); see also Robert B. Seidman, *Constitutions in Anglophonic Sub-saharan Africa: Form and Legitimacy*, 1969 WIS. L. REV. 83, 94.

⁷³ During the colonial period, the colonial powers were "authoritarian to the core." Robert B. Seidman, *Judicial Review and Fundamental Freedoms in Anglophonic Independent Africa*, 35 OHIO ST. L.J. 820, 820 (1974). The colonial powers justified the denial of fundamental rights and freedoms to their African subjects on the convenient theory that they were "naturally unequal to Europeans." Dunstan M. Wai, *Human Rights in Sub-Saharan Africa*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 115, 118 (Adamantia Pollis & Peter Schwab eds., 1979). The powers were thus able to keep down the African population and thwart any form of political opposition.

⁷⁴ See SEIDMAN, *supra* note 16, at 379.

⁷⁵ Some Africans had studied abroad in Europe and America. Wai, *supra* note 73, at 118. Others were products of missionary schools at home. *Id.* Indeed, some African leaders such as Ahmadou Ahidjo of Cameroun, Félix Houphouët-Boigny of the Ivory Coast, and Léopold Sédar Senghor of Senegal had been active in French government. ALI A. MAZRUI & MICHAEL TIDY, NATIONALISM AND NEW STATES IN AFRICA 21, 78, 91-92 (1984). These leaders had become assimilated persons through France's tendency toward "macro-integration." See *id.* at 382.

⁷⁶ See Wai, *supra* note 73, at 119.

⁷⁷ See Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 740 (1990); see also Vernon Van Dyke, *Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought*, 44 J. POL. 21 (1982).

⁷⁸ Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CAN. J. L. & JUR. 217, 221 (1991).

⁷⁹ *Id.*

Consequently, liberal constitutionalism fails to account for the rights of ethnic or cultural communities.⁸⁰ Founded on the uncompromising duality of the individual and the state, it lacks any regard for any other actors on the social and political stage.⁸¹ In other words, the state regards ethnicity with the same detachment as it does religion: with "benign neutrality."⁸² This view considers ethnicity a private matter in which the state has no business. While the state will protect an individual from ethnic discrimination and ensure the individual's freedom to preserve his or her ethnic identity or heritage it will not affirmatively nurture ethnic affiliations, nor honor claims of entitlement based on ethnic identity alone.⁸³

This vision of constitutionalism animated African states at the time of independence and has since remained the dominant vision.⁸⁴ The troubled history of constitution-making in Nigeria illustrates the ideological influence of this vision. When Nigerian politicians met in a constitutional conference in 1958, smaller ethnic groups widely feared domination by the majority.⁸⁵ These

⁸⁰ See *supra* note 77; see also ROGER M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 47-49 (1985); OWEN M. FISS, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 171-72 (1976) (individual rights theories cannot account for affirmative action policies).

⁸¹ Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 119; see also Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1013-14 (1983).

⁸² Will Kymlicka, *Liberalism and the Politicization of Ethnicity*, 4 CAN. J. L. & JUR. 239, 241 (1991).

⁸³ In a liberal society "the state sets before itself the model that group membership is purely private, a shifting matter of personal choice and degree, something that may be weakened and dissolved as other identities take over. . . ." Nathan Glazer, *Individual Rights Against Group Rights*, in HUMAN RIGHTS 87, 98 (Eugene Kamenka & Alice E. Tay eds., 1978). The judicial tradition of the United States, as in *Brown v. Board of Education*, 347 U.S. 483 (1954), illustrates this approach. The Supreme Court's interpretations of the equal protection clause and other constitutional guarantees continue to perpetuate a vision of an American society committed to tolerance of cultural and ethnic diversity. See generally Karst, *supra* note 25, for an analysis of the ways in which the Court used these constitutional guarantees to foster diversity and tolerance.

⁸⁴ See *supra* notes 72-82 and accompanying text; see also Shivji, *supra* note 11, at 382-83. Independence constitutions in Africa followed three general patterns. The Nigerian model, followed in Nigeria, Kenya, Uganda, Zambia, and Sierra Leone, "contain[ed] an elaborate charter of human rights, spelled out in precise legal terms." Asante, *supra* note 12, at 74-75. The Chadian model, followed by most Francophone countries, proclaimed "in general terms its attachment to the principles set forth in the Declaration of Rights of Man of 1789, and the Universal Declaration of Human Rights, 1948." *Id.* at 75. The Ghanaian model "did not incorporate a Bill of Rights in the usual sense; nor was any institution set up to protect the rights of the ordinary citizen." *Id.* at 75 (emphasis in original).

⁸⁵ See S. A. DE SMITH, *THE NEW COMMONWEALTH AND ITS CONSTITUTIONS* 178 (1964); see also Moses E. Akpan, *The 1979 Nigerian Constitution and Human Rights*, UNIVERSAL HUM. RTS., Apr.-June 1980, at 23, 27; B. O. NWABUEZE, *A CONSTITUTIONAL HISTORY OF NIGERIA* 151 (1982).

smaller groups argued for the creation of new federated regions as the sole effective means to guarantee their interests.⁸⁶ In response, the British colonial administration set up a commission to inquire into the minority ethnic groups' fears and to consider ways to allay them.⁸⁷ Although the commission's proposal that fundamental individual rights serve as a guarantee of equality and non-discrimination met with an unenthusiastic response, the commission nonetheless recommended the constitutional entrenchment of individual rights instead of the creation of new regions for minorities.⁸⁸

These constitutional guarantees proved ineffective in protecting minorities.⁸⁹ That the government in a heterogeneous nation—particularly one that is severely divided along ethnic lines—will respond with benign neutrality is a heroic assumption.⁹⁰ In many African nations a particular ethnic group dominates or is identified with the government. This dominance calls into question the impartiality of public institutions.⁹¹ Only after a bloody civil war and a series of civil riots did the Nigerian government consider constitutional modifications aimed at guaranteeing individual rights and reflecting the nation's ethnic and cultural diversity through various means, including the creation of separate regions for minority groups.⁹²

The assumption of a benignly neutral liberal constitution, moreover, is undercut in those nations in which a particular ethnic group's language is accorded sole official recognition.⁹³

⁸⁶ DE SMITH, *supra* note 85, at 178.

⁸⁷ *Id.*; Akpan, *supra* note 85, at 28; NWABUEZE, *supra* note 85, at 151.

⁸⁸ DE SMITH, *supra* note 85, at 178.

⁸⁹ NWABUEZE, *supra* note 85, at 151.

⁹⁰ The liberal constitutional model also posits a "value neutral state": a state which takes no sides in social conflict and serves as a "neutral tool" for carrying out the policies of the government of the day. Seidman, *supra* note 8, at 59-60, 64. This is not, however, altogether realistic. *Id.* The neutral state thesis also assumes that making citizens virtuous is not an appropriate role of the state. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191-205 (1985). The agitation for "family values" by the Republican Party during the 1992 U.S. election, however, belied the value-neutrality of the state.

⁹¹ See HOROWITZ, *supra* note 28, at 193-94; see also Clay, *supra* note 44, at 4 (noting that the distribution of development aid demonstrates domination of most African states by one or two ethnic groups); Young, *supra* note 31, at 85.

⁹² For an analysis of Nigeria's struggle to accommodate ethnic diversity, see Larry Diamond, *Issues in the Constitutional Design of a Third Nigerian Republic*, 86 AFR. AFF. 209 (1987); Rotimi Timothy Suberu, *Federalism and Nigeria's Political Future: A Comment*, 87 AFR. AFF. 431 (1988).

⁹³ In many countries language is viewed as a "symbol of domination." For example, the Assamese in India, the Sinhalese in Sri Lanka, and the Moors in Mauritania have demanded that their languages be given exclusive official status as an authoritative acknowledgment of their claim to greater respect. HOROWITZ, *supra* note 28, at 219-20.

Other ethnic groups may plausibly claim that the state is partially establishing an official culture in public administration and education.⁹⁴ Language, after all, is a powerful means of assimilation.⁹⁵ By failing to provide protections for other languages, the state contributes to their eventual demise and the cultural heritage embedded in them. Consequently, in several countries in Africa, including Ethiopia, Mauritania, and the Sudan, minority ethnicities have demanded linguistic equality and cultural autonomy.⁹⁶

C. *The Need to Build a Nation*

At the time of their independence from European colonialism, most African states lacked coherence. The colonial state structures inherited by the new nations did not displace indigenous social, cultural, and political institutions. A large portion of African peoples' loyalty to their particularist ethnic groups surpassed their allegiance to the state. Thus, many African leaders were apprehensive that ethnic loyalties would prove divisive and seriously threaten the viability of their fledgling states.⁹⁷

Consequently, uniting and assimilating into one nation the medley of ethnic communities within the post-colonial artificial state borders became an urgent necessity.⁹⁸ As the Swiss experience demonstrates, cultural diversity is not necessarily incompatible with a common national identity. Nevertheless, African governments, believing that multiple cultures and languages foster divided loyalties and a sense of separateness, have too frequently assumed that nation-building requires supplanting the individual's ethnic and other particularist ties.⁹⁹ Thus, they have

⁹⁴ Kymlicka, *supra* note 82, at 242 (noting liberal theory difficulty in reconciling official languages with "'benign neutrality'"). Several commentators have called for greater protection of linguistic minorities in the United States. See, e.g., Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L. Rev. 885 (1986); Kathryn J. Zoglin, *Recognizing a Human Right to Language in the United States*, 9 B.C. THIRD WORLD L.J. 15 (1989). This call has been especially prompted by the advocacy for and adoption of "English only" legislation in the United States to preclude what some view as the "'erosion of the use of the English language.'" Zoglin, *supra* at 16.

⁹⁵ Karst, *supra* note 25, at 351 (noting that "[t]he adoption of English as a primary language is . . . one measure of assimilation into the larger American society").

⁹⁶ Weinstein, *supra* note 63, at 216.

⁹⁷ See Asante, *supra* note 12, at 83-84.

⁹⁸ *Id.* (discussing the "herculean" efforts to forge new nations on the fragile foundation of ethnic diversity); Minasse Haile, *Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality*, 24 VA. J. INT'L L. 575, 594-595 (1984).

⁹⁹ See Asante, *supra* note 12, at 83-84. In many parts of Africa, "tribalism was considered a scourge, even traitorous, and it became an invective to be referred to as a tribalism." Wani, *supra* note 32, at 633.

considered it imperative to adopt common national languages and to discourage ethnic affiliations.¹⁰⁰ To this end, many African states have adopted and promoted the use of European languages as their national language.¹⁰¹ In a similar vein, African governments have retained the colonial legal systems, with little or no sensitivity for African culture and legal institutions.¹⁰²

It should not be surprising that the use of ethnicity as a source of collective claims against the state would be considered radical, if not heretical. A group rights approach would preserve ethnic differences and cultural diversity where the modern African state has upheld national unity and encouraged assimilation and homogeneity. African states have refused to consider minority rights as anything other than claims to equality and nondiscrimination.¹⁰³ A guarantee of individual rights safeguards such enumerated rights as equality under the law regardless of ethnicity. But it does not safeguard the rights of minorities *qua* minorities to share political power or to preserve their identities, customs, and traditions. Protection of these rights requires a group rights approach. However, giving implicit legitimacy to group identity and loyalty that is less than national in scope would startle many African governments wedded to the ideology of nation-building.¹⁰⁴

This misguided approach to nation-building has led to unfortunate results. First, pursuing the goal of nationhood has resulted in perpetuating the colonial subordination of African cultures and languages. If continued, it may eventually lead to the extinction of indigenous languages and cultures. Second, this policy has already resulted in the loss of millions of lives, dislocation of economic and social structures, and severe environmental degradation. Although the various ethnic conflicts in Africa are not always or completely attributable to the pursuit of

¹⁰⁰ Wani, *supra* note 32, at 631.

¹⁰¹ *Id.* Recently there has been outspoken, nonviolent dissent to these policies. For example, Sembène Ousmane, one of Francophone Africa's greatest artists, decries the failure of the Senegalese government to promote the use of national languages in schools. See Fírinne Ní Chréacháin, 'If I Were a Woman, I'd Never Marry an African,' 91 AFR. AFF. 241, 241-42 (1992).

¹⁰² Wani, *supra* note 32, at 631.

¹⁰³ See *supra* notes 85-88 and accompanying text.

¹⁰⁴ Some have questioned the value of nation-building itself. For example, Woodman states that "[i]t is not always clear what is the intrinsic or instrumental value attributed to nation-building, nor whether it has any objectives other than the enhancement of the power of those who control the state, and the advancement of modes of production from which they primarily benefit." Woodman, *supra* note 58, at 16-17.

this policy, fear of ethnic domination and the desire of ethnic groups to maintain their identities have spawned many such ethnic conflicts.

Finally, single-minded focus on nation-building has jeopardized the values underlying liberal constitutionalism itself. In theory, constitutionalism envisions the state in culturally neutral terms.¹⁰⁵ As the experiences of countries such as the United States demonstrate, individual identification with the nation is not an all-or-nothing proposition. The Equal Protection Clause and other substantive guarantees allow the individual to belong to the nation, while protecting his or her need to identify with an ethnic community.¹⁰⁶

In much of Africa, however, government preoccupation with nation-building has often led to little or no concern for the values of constitutionalism. Despite ringing constitutional affirmations of basic human rights, the process of nation-building treated human rights as a mere luxury.¹⁰⁷ For example, a state would curtail any freedoms of speech and association used to advance particularistic interests or disrupt national unity.¹⁰⁸ Indeed, fear of politicized ethnicity eventually led to the widespread adoption of single-party or military governance in order to cope with the problem of ethnic fragmentation and the crisis of national integration.¹⁰⁹

Some countries had a narrow vision of constitutionalism from the start. These states' constitutions restricted the freedoms they purported to guarantee so as to forestall ethnic demands. For example, the Guinea Constitution makes any "regionalist propaganda" punishable.¹¹⁰ The Congo Constitution contains a similar provision.¹¹¹ In sum, the influence of liberal constitutionalism and the mission of nation-building in Africa have worked in tandem. Both purport to view the state as culturally neutral. Both make the assertion of collective ethnic claims against the state impossible. A genuinely liberal state would partially accommodate the preservation of ethnic identity at least as

¹⁰⁵ See *supra* text accompanying notes 80-83.

¹⁰⁶ Karst, *supra* note 25, at 337.

¹⁰⁷ See, e.g., Asante, *supra* note 12, at 83.

¹⁰⁸ *Id.* at 86.

¹⁰⁹ See Haile, *supra* note 98, at 594.

¹¹⁰ GUINEA CONST. art. 13 (1958), reprinted in VI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1985).

¹¹¹ CONGO CONST. art. 11 (1979), reprinted in IV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz. eds., 1989).

a private matter. But in Africa, where welding a conglomeration of ethnic groups into one nation continues to assume overwhelming importance, states view ethnicity with hostility.¹¹²

The reemergence of ethnic identity and separatism and the vast democratic changes occurring in the world, however, no longer permit the state to continue treating ethnicity with hostility. These changes challenge the continued viability of the nation-state as a unit of political organization.¹¹³ Ethnic groups that do not dream of coexistence cannot survive as a state,¹¹⁴ much less become "one nation, indivisible." African constitution-makers must consider carefully the extent to which they can accommodate their diverse ethnic communities not just through the guarantee of individual rights, but also by addressing the special demands of ethnic communities.

III. SHOULD AFRICAN CONSTITUTIONAL DESIGN RECOGNIZE COLLECTIVE ETHNIC CLAIMS?

As discussed, the ideology of nation-building in Africa does not officially recognize different ethnic groups existing within the state. Liberal constitutional theory is equally devoid of any conceptual space for the rights of ethnic groups.

The goal of national unity explains largely the ideology of nation-building in Africa. In theory, both the importance and desirability of this goal can hardly be questioned. Also unquestionable is the importance of the principles of equality and nondiscrimination in the enjoyment of individual rights.¹¹⁵ Nevertheless, constitutional solicitude for certain collective ethnic claims is not necessarily incompatible with these goals. Assimilation is not the only path to realizing them. In fact, the policy of focusing on national unity to the exclusion of group rights may lead to violence and social discord, and fail to protect fundamental values that the recognition of collective ethnic claims would promote.¹¹⁶

As a basis for shaping African constitutions, the assimilationist model, based on liberal constitutionalism,¹¹⁷ has serious limitations. Understanding these limitations requires an

¹¹² See Weinstein, *supra* note 63, at 209.

¹¹³ Magnet, *supra* note 21, at 171.

¹¹⁴ *Id.* at 176.

¹¹⁵ Eide, *supra* note 62, at 1334.

¹¹⁶ For a discussion of these values, see *infra* notes 188-193 and accompanying text.

¹¹⁷ Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368, 371 (1991).

examination of liberalism's discord with the notion of collective rights. Identifying the sources of this discord will clarify the issues and concerns that a different approach to constitution-making in Africa must address.

A. *Liberal Opposition to Ethnic Claims*

Many factors explain liberal constitutionalism's opposition to recognition of ethnic claims. For our purposes here, a discussion of the four major ones is sufficient.

1. *"Methodological Individualism"*

The most formidable objection to the notion of collective rights is what one author refers to as "methodological individualism."¹¹⁸ This philosophical objection is rooted in the thoughts of Locke, Hobbes, Rousseau, and, more recently, Rawls.¹¹⁹ The essence of this objection comes from liberalism's focus on the relationship between the individual and the state.¹²⁰ The liberal democratic tradition pits the individual against the state.¹²¹ In Rawls's latest formulation, individuals alone are the "self-originating sources of valid claims," the ultimate units of moral worth, and the ultimate agents of action.¹²² Consequently, the community has no moral existence and cannot be the source of any valid claims against the state.¹²³

Egalitarianism, another tenet of liberalism, provides an additional reason to deny collective rights. Because all individuals have an equal moral status, all must be treated with "equal concern and respect."¹²⁴ According to liberal theory, if all individuals are treated equally, without regard to their communities, the communities need not have distinctive rights of their own.¹²⁵

Thus, under principles of individualism and egalitarianism,

¹¹⁸ Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 630 (1992).

¹¹⁹ Clinton, *supra* note 77, at 740-41.

¹²⁰ *Id.*; Gedicks, *supra* note 81, at 100 ("American liberalism, with its uncompromising focus on state and individual, often overlooks institutions like religious groups that are neither governmental nor individualistic").

¹²¹ See Clinton, *supra* note 77, at 740.

¹²² Will Kymlicka, *Liberalism, Individualism and Minority Rights*, LAW AND THE COMMUNITY 181, 184 (A. C. Hutchinson & Leslie M. Green eds., 1989).

¹²³ *Id.* ("There seems to be no room within the moral ontology of liberalism for the idea of collective rights.") Therefore, the concept of collective rights is a "metaphysical absurdity." Addis, *supra* note 118, at 631.

¹²⁴ Kymlicka, *supra* note 122, at 184.

¹²⁵ *Id.*

the only "true" constitution is one which disregards ethnicity or race. Collective ethnic rights have no place in a liberal constitutional order.¹²⁶

2. *Balkanization of the State*

On a pragmatic level, liberalism assumes that official recognition of different ethnic groups would hamper a society's integration and assimilation.¹²⁷ Cultural and linguistic differences are a threat to the nation because diversity limits the nation's unity and its government's effectiveness. As an American federal court stated,

Effective action by the nation-state rises to its peak of strength only when it is in response to aspirations unreservedly shared by each constituent culture and language group. As affection which a culture or group bears toward a particular aspiration abates, and as the scope of sharing diminishes, the strength of the nation-state's government wanes.¹²⁸

Furthermore, opponents of collective rights worry that the attribution of rights to ethnic groups will constrain the free flow of goods, capital, labor,¹²⁹ and even ideas. In Nigeria, for example, a policy of "Northernization"¹³⁰ sought to exclude individuals from the south of the country from equal participation in the economy and government of the north. Under this policy, Ibos (southerners) were barred from operating hotels and working under contract for the government and even private enterprises.¹³¹ It is also feared that collective rights may reinforce ethnic identities, making political cooperation and consensus harder to achieve.¹³²

3. *Apartheid and Associated Evils*

Liberals also fear that official recognition of collective rights may represent the first step down a dangerous road. They associate, in part, recognition of collective rights with South Africa's

¹²⁶ *Id.*

¹²⁷ Glazer, *supra* note 83, at 98.

¹²⁸ *Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978).

¹²⁹ Sanders, *supra* note 117, at 375.

¹³⁰ B. O. NWABUEZE, *CONSTITUTIONALISM IN THE EMERGENT STATES* 130 (1973).

¹³¹ *Id.*

¹³² Sanders, *supra* note 117, at 375.

system of apartheid and tribal homelands.¹³³ Under such a system, the notion of a common citizenship or equal protection of the law is meaningless because all rights flow from and are determined by an individual's membership in a particular ethnic group. By definition rights are for members only, so non-members are likely to face open and invidious discrimination.¹³⁴

Moreover, liberals are concerned that the individual might be "run over by the collective steamroller."¹³⁵ Within a system of collective rights, the risk exists that individual rights will be sacrificed for the good of the community. Finally, opponents of collective rights fear that recognition of such rights may lead to expulsions of non-members of an ethnic community.

4. *Translatability or Redundancy of Collective Rights*

A final argument against collective rights questions their necessity. The argument assumes that individual rights adequately protect and promote the values that would underlie any collective rights.¹³⁶ This argument implicitly assumes that collective rights are "translatable" into individual rights.¹³⁷

The above arguments against recognizing group claims appear forceful. It might thus seem incautious to suggest that constitution-makers incorporate ethnic claims in the constitutional order of African states. However, several arguments support such incorporation.

B. *The Case for Collective Rights*

One can approach the case for collective rights from two angles. The first questions the theoretical and practical assumptions underlying liberal constitutionalism. The second provides affirmative reasons for protecting certain collective rights. Both approaches underscore the importance and value of community to African existence.

¹³³ See Addis, *supra* note 118, at 632.

¹³⁴ [A]s the founders of modern liberalism well understood, when a government undertakes actively to promote through law and public policies a distinctive "way of life," it inevitably impinges on the sense of equal treatment and equal participation of those minorities who are not part of the community and who do not share in their sense of collective good.

F. L. Morton, *Group Rights Versus Individual Rights in the Charter: The Special Cases of Natives and the Quebecois*, in *MINORITIES AND THE CANADIAN STATE* 71, 81 (Neil Nevitte & Allan Kornberg eds., 1985).

¹³⁵ McDonald, *supra* note 78, at 227.

¹³⁶ *Id.* at 229.

¹³⁷ Garet, *supra* note 81, at 1007.

1. *The Limitations of Methodological Individualism*

Liberalism's essential premise that the individual is the ultimate and sole unit of moral worth is not self-evident. Why should the individual be the focal point? Should constitutionalism instead protect the ethnic community without which the individual would cease to be human? The following passage captures the deontologist conception of this unattached, isolated, self-interested individual:

Freed from the dictates of nature and the sanction of social roles, the deontological self is installed as sovereign, cast as the author of the only moral meanings there are. As inhabitants of a world without *telos*, we are free to construct principles of justice unconstrained by an order of value antecedently given. . . . And as independent selves, we are free to choose our purposes and ends unconstrained by such an order, or by custom or tradition or inherited status. So long as they are not unjust, our conceptions of the good carry weight, whatever they are, simply in virtue of our having chosen them.¹³⁸

Under this conception, the individual exists prior to and independently of any experience in community. But to Africans and others in the non-Western world, this conception is strange and counterintuitive.¹³⁹ Africans see themselves as social beings for whom memberships in the extended family, clan, and ethnic group are crucial to the recognition of individual rights.¹⁴⁰ The "sacralized individual" of methodological individualism that single-handedly strikes a social compact with the state is difficult to find within the African conception of rights.¹⁴¹ Rules of law springing from group contexts characterize the social order in much of Africa.¹⁴² In addition, traditional legality in Africa in-

¹³⁸ MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 177 (1982).

¹³⁹ Clinton, *supra* note 77.

¹⁴⁰ Claude E. Welch, Jr., *Human Rights as a Problem in Contemporary Africa*, in *HUMAN RIGHTS AND DEVELOPMENT IN AFRICA* 11, 15-16 (Claude E. Welch & Ronald I. Meltzer eds., 1984) (noting that African social systems emphasize rights deriving from group membership); see generally GEORGE B. N. AYITTEY, *INDIGENOUS AFRICAN INSTITUTIONS* 14-23 (1991) (discussing the relationship between the individual and the community in Africa).

¹⁴¹ Asmarom Legesse, *Human Rights in African Political Culture*, in *THE MORAL IMPERATIVES OF HUMAN RIGHTS* 123, 124 (Kenneth W. Thompson ed., 1980) ("No aspect of Western civilization makes an African more uncomfortable than the concept of the sacralized individual whose private wars against society are celebrated").

¹⁴² Woodman, *supra* note 58, at 1. Clinton, *supra* note 77, at 742 (noting that non-Westerners derive their legal vision from their tribal associations, tribal traditions and the natural ecology).

volved more than issues between the individual and the group or the state. It more often addressed issues between groups within the state.¹⁴³ The liberal vision of the individual's precedence over the community and existence in isolation from organized society in some mythic, disorganized state of nature inappropriately describes African reality and understanding of the source of rights.

One need not be an African to doubt the plausibility of methodological individualism as a norm or means of description. Misgivings abound even in the West. Without discounting the importance of individual rights, Ronald Garet has offered an insightful analysis of an "intrinsic value theory" of groups.¹⁴⁴ He justifies all rights—individual, group, and social—on the basis of existence.¹⁴⁵ He defines existence as the "human mode of being" with three structures essential to a human being and characteristic of the intrinsic human good: personhood (the individual good), communality (the group good), and sociality (the social good).¹⁴⁶ Existence, he says, "carries its own moral value (i.e., the intrinsic good) and insists upon that value in the form of the right."¹⁴⁷ Each structure of existence exemplifies an intrinsic good and establishes a basis for rights.

To establish communality as a structure of existence, Garet relies upon an obvious fact that methodological individualism overlooks:

Not only is groupness an unfathomable *fact* of all of our lives, but it is also an unfathomable *value*. We are born into certain groups, others we choose, and still others choose us. Life not subject to the call of groupness is as difficult for us to imagine as life not subject to the individuating call of personhood or to the sociating call of sociality.¹⁴⁸

The renewed ethnic militancy and the reassertion of group rights in many parts of the world, including Western countries such as Canada and Spain, confirms that groupness is an "unfathomable fact" and an "unfathomable value." Given these realities, it is odd, if not downright arbitrary, to insist on personhood as the only structure of existence for which rights are essential.

¹⁴³ Asante, *supra* note 12, at 100.

¹⁴⁴ Garet, *supra* note 81, at 1001.

¹⁴⁵ *Id.* at 1002.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1070.

The practical effect of insistence on personhood alone is group destruction. Ethnic groups seek the right of self-presentation, "the right of groups to maintain themselves and to pursue their distinctive courses."¹⁴⁹ By focusing exclusively on the individual, liberalism compels assimilation. Some may defend assimilation as an indispensable first step toward treating all individuals equally, irrespective of membership in a cultural or ethnic group.¹⁵⁰ However, ethnic groups do not seek merely the right of the individual members to equality and participation within the larger society. They also seek group security and survival, because assimilation threatens to destroy their group and their members' individual integrity. A community's integrity is threatened when the community is unable to sustain the language, culture, history, and traditions that are the sources of its existence. Without community integrity, it is difficult to achieve individual integrity. Thus, collective rights are needed to preserve individual identity as well as group identity.

One may argue that official recognition is unnecessary for ethnic group self-preservation, for as long as the national government preserves its neutrality, each group is free to maintain itself in its own ways. But a government's purported neutrality cannot be assumed. In many nations, the government's neutrality is questionable when it is often identified with the culture of one or more dominant ethnic communities.¹⁵¹ Moreover, it is difficult to reconcile a state's supposed benign neutrality with regard to particular cultures with the recognition of an official language.¹⁵² Therefore when a state uses a particular language for official purposes such as education and administrative services, it also partially establishes a corresponding culture and casts doubt on its claim of neutrality.¹⁵³

The premise of state neutrality also conceals the uneven playing field for dominant and minority cultures.¹⁵⁴ The state purports to be neutral but, from the start, politically dominant

¹⁴⁹ See *id.* at 1002. Yoram Dinstein maintains that "two collective human rights are accorded by general international law to every minority anywhere: the right to physical existence and the right to preserve a separate identity." Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 118 (1976).

¹⁵⁰ See Addis, *supra* note 118, at 634.

¹⁵¹ The Amhara-Tigre coalition in Ethiopia, the American-Liberians in Liberia, and the Arabs in the Sudan, Mauritania, and Zanzibar illustrate this phenomenon in Africa.

¹⁵² *Id.* at 242; see also *supra* notes 93-96 and accompanying text; *infra* notes 217-218 and accompanying text.

¹⁵³ See Karst, *supra* note 25, at 351-52.

¹⁵⁴ See Sanders, *supra* note 117, at 373.

cultures have an inherent advantage. As a result, dominant groups can outvote or outbid minority cultures for the resources necessary for the latter's survival.¹⁵⁵ Thus, minority groups constantly face the threat of cultural extinction. The dominant group's refusal to effectively protect group rights essential to the minority's self-preservation, if not intentionally, favors assimilation and therefore group destruction.

2. *Collective Rights and Fear of Negative Consequences*

To be sure, one cannot lightly dismiss the risk that recognition of collective rights might result in balkanization of the state, accentuation of ethnic differences, and even the denial of individual rights. These concerns trouble all Africans who care about the unity of their countries and the welfare of their inhabitants. Yet, recognition of certain collective rights is a practical necessity, not a theoretical luxury.¹⁵⁶

Following traditional nation-building ideas,¹⁵⁷ most African governments have ignored, sought to suppress, or even obliterated ethnic differences.¹⁵⁸ These attempts to disregard ethnicity, however, have failed and led instead to ethnic resentment, disaffection, resistance, and political disorder—the obverse of nationhood.

A political order's legitimacy and stability rest largely on government's ability to persuade the governed that it shares and represents their ethnic identities.¹⁵⁹ Unity and the social compact depend on how strongly the people feel about the state and government.¹⁶⁰ Forced assimilation in multi-ethnic societies is un-

¹⁵⁵ Kymlicka, *supra* note 122, at 196; Addis, *supra* note 118, at 643.

¹⁵⁶ See Sanders, *supra* note 117, at 375-76.

¹⁵⁷ See *supra* notes 97-102 and accompanying text.

¹⁵⁸ See Shivji, *supra* note 11, at 388 ("Many African constitutions vigorously condemn, outlaw, make treasonable and frown upon any expression of nationality consciousness").

¹⁵⁹ This is implicit in what John Stuart Mill indicated long ago is prerequisite to a liberal democratic state:

Free institutions are next to impossible in a country made up of different nationalities. Among people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist. The influences which form opinions and decide political acts are different in the different sections of the country. . . . [I]t is in general a necessary condition of free institutions that the boundaries of government should coincide in the main with those of nationalities.

JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 230, 232-33 (1958).

¹⁶⁰ See *Guadalupe*, 587 F.2d at 1037.

likely to foster positive feelings. Groups facing assimilation perceive it as an affront because it denies them social recognition. A group's demand to maintain its language and culture is an assertion of the worth of its people and their collective self-esteem. Ethnic groups resist assimilation because its inherent precept of equal protection of the law focuses only on interpersonal equality,¹⁶¹ whereas ethnic groups seek intergroup equality. Collective rights will ensure such equality, which, in turn, will nurture the feelings required to establish political stability and governmental legitimacy.

Admittedly, recognition of collective rights to preserve the unity of the state requires fusion of different ethnicities and cultures. But given the realities of much of Africa,¹⁶² the alternative is an all out war with no winner, for many ethnic groups are powerful enough in their own right to dissolve the state order. Moreover, when political disorder occurs, everyone suffers the loss of whatever modicum of individual rights the state recognizes. Harassed governments are not punctilious about rights or the rule of law even for members of dominant groups.

Those opposing recognition of collective rights as a method of ethnic accommodation point to the United States as an example of a country that is solicitous of individual rights but hostile to collective rights.¹⁶³ But holding out the United States as a model is misleading because there is a fundamental difference between the types of claims made by cultural and racial minorities there and the claims of ethnic groups in Africa.¹⁶⁴ First, the demands of the most active racial minority, African-Americans, generally have not been incompatible with the goal of assimilation. African-Americans have principally demanded not to be denied the equal enjoyment of individual rights and equal participation in the institutions of the state and economy.¹⁶⁵ African-Americans do not inhabit, nor seek to inhabit, a separate territory¹⁶⁶ or speak a different language. In contrast, many ethnic groups in Africa demand group self-preservation, not assimilation. And unlike the United States, the typical African state is a

¹⁶¹ See Garet, *supra* note 81, at 1058-60 (discussing the difficulty of basing group rights on the antidiscrimination principle).

¹⁶² See *supra* notes 60 and 92 and accompanying text.

¹⁶³ Sanders, *supra* note 117, at 377.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

federation of peoples, each people maintaining a distinct territory, language, and culture.

Moreover, aside from Native Americans and African-Americans, ethnic groups in the United States are not considered entitled to state recognition of their ethnicity, because immigration was not imposed upon them. Although this difference does not justify state imposition of the larger culture upon voluntary immigrant groups, it does suggest the state is not required to support ethnic institutions such as language and culture. In Africa, on the other hand, no particular group is justified in requiring conformity by all to its language or culture. If the description of the typical African state as a "federation of peoples" is correct, then the fundamental nature of the social order is in sync with and should give rise to a state's obligation to recognize some collective rights.

The argument that recognition of such rights will lead to the trappings of apartheid or will encourage a policy of tribal homelands misconstrues the purposes served by these policies. Apartheid, based on an ideology of racial supremacy, is designed to keep black South Africans in a permanent state of political subordination and economic exploitation.¹⁶⁷ The related policy of tribal homelands also maintains white supremacy by keeping blacks divided. The policies are neither rooted in, motivated by, nor related to respect for cultural differences. Collective rights, by contrast, are aimed at promoting group self-preservation and group equality, as well as including every group in the country's political life and economy. To equate collective rights with apartheid is to suggest that the constitutional systems of countries such as Canada and Switzerland¹⁶⁸ are similarly tainted.

3. *Nontranslatability of Collective Rights*

As noted, some critics deny the necessity and existence of collective rights, arguing that collective rights are translatable into individual rights. According to this view, collective rights are merely "elliptical" ways to describe individual rights.¹⁶⁹ For example, freedom of assembly and association are expressed in the

¹⁶⁷ Addis, *supra* note 118, at 632 n.50.

¹⁶⁸ For a brief discussion of the ways in which Canada protects cultural diversity, see Magnet, *supra* note 21. For a review of the manner in which Switzerland protects its national and linguistic groups, see generally, CAROL SCHMID, *CONFLICT AND CONSENSUS IN SWITZERLAND* (1981).

¹⁶⁹ Garet, *supra* note 81, at 1037.

idiom of individual rights, but they cannot be exercised effectively in isolation from other individuals or groups.

The "translatability" theory, however, fails to address essential distinctions between individual and collective rights. Ronald Garett uses two U.S. Supreme Court decisions to illustrate the difficulties posed by attempting to translate collective rights into individual rights. In *Wisconsin v. Yoder*,¹⁷⁰ the Court created a partial exemption to a state compulsory schooling law. The ruling prevented Wisconsin from prosecuting Amish parents who sought to preserve their community's traditional way of life by refusing to place their children in state schools.¹⁷¹ *Santa Clara Pueblo v. Martinez*¹⁷² involved a Native American tribe. The Court, deferring to tribal autonomy, held that the Indian Civil Rights Act of 1968¹⁷³ did not create a federal forum to review tribal legislation¹⁷⁴ that discriminated against a woman and her children in violation of the "equal protection of the laws" guaranteed by the Act.¹⁷⁵ As Garett explains:

because there are certain things that only groups, and not individuals, can have—such as socialization processes (*Yoder*) and kinship structures (*Santa Clara*)—there are *a fortiori* certain things that only a group can hold a *right* to have.¹⁷⁶

Garett argues that the rights the Court protected in these cases can be justified only in terms of "groupness" or "communal-ity."¹⁷⁷ An individual rights analysis cannot plausibly explain these decisions.¹⁷⁸ In *Santa Clara*, the Court upheld a group right of the tribe against cultural erosion.¹⁷⁹ Respect for the individual right of the female member of the tribe would lead to granting rather than denying a federal forum.¹⁸⁰ Similarly, Justice Douglas stated in *Yoder* that the individual right to free choice would

¹⁷⁰ 406 U.S. 205 (1972).

¹⁷¹ *Yoder*, 406 U.S. at 234-36.

¹⁷² 436 U.S. 49 (1978).

¹⁷³ 25 U.S.C. §§ 1301-03 (1988).

¹⁷⁴ *Santa Clara*, 436 U.S. at 66, 72.

¹⁷⁵ "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws" 25 U.S.C. § 1302(8) (1988).

¹⁷⁶ Garett, *supra* note 81, at 1038 (original emphasis).

¹⁷⁷ *Id.* at 1035.

¹⁷⁸ *Id.* at 1043-44.

¹⁷⁹ *Id.* at 1035 ("[T]he central drama of *Santa Clara* is whether a group, long subjected to laws and social practices (first Spanish and then American) erosive of tribal groupness, can attempt to halt this sort of erosion by applying an internal control").

¹⁸⁰ *Id.* at 1036.

protect the Amish children's rights against their parents, rather than the parents' right to perpetuate a way of life without state intrusion.¹⁸¹ This analysis suggests that collective rights are not translatable into individual rights, but rather are a distinct category of rights.

Consider the French-Canadians' concerns with preserving their language and culture. The guarantee of an individual right to express one's language and culture is inadequate without the protection of group rights. One cannot meaningfully exercise this right unless institutions exist enabling its enjoyment. Such institutions preserve, for example, the right to cultural autonomy, which addresses a group concern, not an individual one. It is in this sense that this Article discusses collective rights.¹⁸²

¹⁸¹ *Id.* at 1032 (Douglas, J., dissenting in part) (citing 406 U.S. at 245-46).

At the center of [the *Yoder*] picture is a group trying to protect its constitutive intrinsic value, its groupness. On one side stands the state, pressing claims based upon certain collective interests and upon the fundamental right of society to be a society of equal shares. On the other side stand the Amish children, persons for whom the good of belonging in the Amish group is in some degree of tension with the good of free individual religious choice.

Id. at 1034.

¹⁸² For an elaborate statement of the distinction between group and individual rights, see W. S. Tarnopolsky, *The Equality Rights in the Canadian Charter of Rights and Freedoms*, 61 CAN. BAR REV. 242 (1983). Tarnopolsky sets forth two fundamental distinctions between individual and collective rights:

The first is that an assertion of an individual right emphasizes the proposition that everyone is to be treated the same *regardless* of his or her membership in a particular identifiable group. The assertion of group rights, on the other hand, bases itself upon a claim of an individual or a group of individuals *because of* membership in an identifiable group. This distinction should not be obscured by the fact that certain individual rights are either of no consequence unless enjoyed in community with others, or are asserted on behalf of individuals who happen to be members of identifiable minority groups. Thus, although it is true that the fundamental freedoms of expression, religion, assembly, and association are intended to be exercised by several individuals in common or for the purpose of communication, the intention is that each of these freedoms is to be enjoyed equally by everyone. If one asserts the right to worship as one pleases within the law, this is asserted regardless of whether the person happens to be a Christian, a Jew, a Muslim or a Hindu. However, to the extent that certain rights of religion vary because of special protection for certain religious groups, such a right is no longer an individual right, but a group right. . . .

Certain rights, such as language rights, seem to lie in a borderland. When examined more closely, however, the distinction referred to above becomes clear. A guarantee of freedom of expression, for example, assures one the right to communicate, regardless of which language is used as the medium of communication. It does not, however, give any assurance that the communication will be understood, nor that the reply, if there be any, will be in a language which the initiator of the communication will understand. . . .

This leads to the second distinction between group rights and individual rights. The guarantee of an individual right like free expression essentially requires the noninterference of the state. A language right[,] on the other hand,

To some, recognition of collective rights may suggest preferential treatment for groups, which is contrary to the ideal of equality. On the contrary, collective rights are intended to protect vulnerable ethnic groups from the onslaught of a culturally and politically dominant group. Individual rights cast in universal terms are not sufficient to ensure genuine equality. They can only integrate and assimilate these minority groups into the dominant group or help them achieve negative equality, such as freedom from state interference. This only grants minority groups a right to be poor imitations of the dominant group—not a right to preserve their own group identity.¹⁸³

4. *The Value of Collective Rights*

As Yoder and Santa Clara indicate, rights for the community are sometimes gained at the expense of individual rights. In those cases, the individual rights of the Amish children and the Pueblo woman directly conflicted with the collective interests of the Amish community and the Pueblo tribe. Nevertheless, advocates of the supremacy of individual rights may question the value of collective rights and be reluctant to endorse them. In Africa, where ethnic groupness is a fundamental feature of social existence,¹⁸⁴ many governments have disregarded and attempted to destroy ethnicity in the name of building nations which command absolute allegiance.¹⁸⁵ Ironically, an individual's definition, dignity, and fulfillment all depend significantly on membership in a social group.¹⁸⁶ It is therefore disingenuous to suggest that individual worth and dignity can be respected while obliterating the group and culture with which the individual identifies.

requires positive governmental action. It may be that the government is required to have civil servants who can comprehend the language of the citizen and reply in that language, or is required to expend funds to provide instruction in the language to promote cultural activities which protect and promote the guaranteed language. . . . In a homogeneous country there is no need for constitutional protection for the language which is spoken by the people. . . . Language rights need constitutional guarantees only in those places where there are minorities who want to safeguard a language other than that spoken by the majority of the country or the province, or where the majority language is threatened by the minority which is majority in the rest of the country.

Id. at 259-60.

¹⁸³ See Addis, *supra* note 118, at 657.

¹⁸⁴ See *supra* notes 23-34 and accompanying text.

¹⁸⁵ See *supra* notes 140-143 and accompanying text.

¹⁸⁶ See Magnet, *supra* note 21, at 176; see also Gedicks, *supra* note 81, at 116 (discussing the importance of groups as contexts for personal expression, development, and fulfillment).

Thus, "a principal value protected by a system of collective rights is the preservation of those institutions by which the group maintains itself."¹⁸⁷ Without these institutions, communities face threats to their integrity. And without group integrity, individual integrity and choice lose much of their meanings.¹⁸⁸ As Alasdair MacIntyre noted, "The story of my life is always embedded in the story of those communities from which I derive my identity."¹⁸⁹ Committed individualists may ignore the value of community, not only in terms of individual identity, but also in terms of fostering true equality. Individuals belonging to groups whose cultures are targeted for destruction cannot be truly the equal of those belonging to cultures that do not face such danger. Consequently, recognition of collective rights is necessary to foster true equality, by assuring every group the right to preserve its institutions.

A system of collective rights will also protect group autonomy.¹⁹⁰ The essential purpose of group autonomy is to guarantee ethnic groups some degree of freedom from control and interference by the central government regarding group matters.¹⁹¹ Political legitimacy and stability, the lack of which have plagued African politics, are more likely to be achieved through providing some group autonomy.¹⁹²

Finally, collective rights will help most, if not all, ethnic groups, especially minorities, to obtain a degree of representation in a state's political institutions. Nigeria, for example, promotes this value through a so-called "federal character" principle,¹⁹³ which constitutionally mandates that federal and

¹⁸⁷ Magnet, *supra* note 21, at 176.

¹⁸⁸ See Kymlicka, *supra* note 82, at 239-56.

¹⁸⁹ MACINTYRE, *supra* note 34, at 205.

¹⁹⁰ Magnet, *supra* note 21, at 176.

¹⁹¹ *Id.*

¹⁹² See text accompanying notes 229-248.

¹⁹³ NIGERIA CONST. (1989), reprinted in XIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990.) See, e.g., *id.* §§ 14(3), (4). The directive "to reflect the federal character of Nigeria" is frequently referred to in other parts of the Constitution. The basic idea behind the "federal character principle" is that the government at all levels—national, state, and local—should strive to give all ethnic groups in the country a sense of belonging to the nation. KENNETH R. REDDEN, 6 MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.3(J)(4) at 6.390.48 (1990). It may at first seem counterintuitive that the ethnic-balancing this principle seems to emphasize would promote national unity. On the contrary, the multi-ethnic character of the country, rather than overlooking reality, deals courageously with ethnic diversity and provides for a stronger, more stable nation. See *id.*

state governments reflect the country's ethnic diversity in its more important political institutions.

In sum, the liberal perspective on constitutional design tends to favor assimilation. Assimilation is unlikely to succeed in addressing the fundamental problems many African countries face—the crises of legitimacy and integration arising from ethnic diversity and division. In countries such as Ethiopia and the Sudan, these problems have become acute, threatening disintegration of the state itself. These problems require a new approach to constitution-making that addresses not only individual rights but also essential collective needs of ethnic groups.

IV. TOWARD A NEW APPROACH TO CONSTITUTIONALISM IN AFRICA

A new approach to constitutionalism in Africa should go beyond the discourse of individual rights and embrace the collective rights of ethnic groups. Ethiopia, for example, has recently embarked upon such an approach. Section A presents in summary form the elements of this approach and the rationales behind them. Section B evaluates the importance of these rights to ethnic identity and cultural diversity. This section also suggests some pitfalls that the recognition of collective rights may entail and offers suggestions for minimizing or avoiding them. In particular, the final section addresses the tension that exists between collective and individual rights and suggests an approach to resolve that tension.

A. *What Collective Rights Should African States Recognize?*

The particular rights that a state may choose to recognize will vary from country to country and even within one country, because the needs and characteristics of ethnic groups vary.¹⁹⁴ Some groups may find collective rights to land essential to their survival and development,¹⁹⁵ while others may find language or

¹⁹⁴ See generally Sanders, *supra* note 117, at 382.

¹⁹⁵ Land rights are extremely important for indigenous peoples. According to a statement widely attributed to a Nigerian chief, land belongs to the dead, the living, and the yet to be born. This statement neatly summarizes the deep and special relationship that exists between indigenous peoples and their land. A U.N. Report described this relationship in more elaborate fashion:

It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.

For such peoples, the land is not merely a possession and a means of pro-

culture crucial. In general, the current approach of the Ethiopian government illustrates several ways a state may accommodate ethnic diversity through recognizing collective rights of ethnic groups. The Ethiopian approach is contained in the Transitional Period Charter¹⁹⁶ that came into force as part of an effort to lead the country through a transition to democracy following nearly two decades of military dictatorship and ethnic strife. The Charter recognizes the right of an ethnic group to:

- (a) preserve its identity and have it respected, promote its culture and history, and use and develop its language;
- (b) administer its own affairs within its own defined territory and effectively participate in the central government on the basis of freedom and fair and proper representation; and
- (c) exercise its right of self determination of independence when the concerned [ethnic group] is convinced that the above rights are denied, abridged or abrogated.¹⁹⁷

The Charter also affirms individual rights, as declared in the Universal Declaration of Human Rights.¹⁹⁸ This international declaration proclaims the fundamental freedoms and rights of individuals in a liberal society, which accepts the natural equality of all its members and the corresponding right to participate equally in the process of government.¹⁹⁹

The Charter's affirmations are a groundbreaking development in Africa. They indicate an emerging trend among constitution-makers in Africa to consider seriously the collective claims

duction. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.

U.N. Comm'n on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Population, at ¶¶ 196-97, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (16) (1986), *quoted in* Addis, *supra* note 118, at 662. *See also* AYITTEY, *supra* note 140, at 285-86. "In virtually all traditional African societies, there was a widely held belief that the land belonged to the dead ancestors. The living only exercised a right to use it." *Id.*

Ayittey states that the preamble to the constitution of the Saan (Bushmen of Namibia) provided, "The land of our villages belongs to our fathers' fathers and our mothers' mothers." *Id.* at 285.

¹⁹⁶ TRANSITIONAL PERIOD CHARTER OF ETHIOPIA, NEG. GAZETA (50th Yr. No. 1, 1991).

¹⁹⁷ *Id.* art. 2.

¹⁹⁸ *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. GAOR, at 71, U.N. Doc. A/810 (1948). *See also* ARTHUR R. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 196 (2d ed. 1982).

¹⁹⁹ Eide, *supra* note 62, at 1337.

of ethnic groups.²⁰⁰ These affirmations also impliedly reject the traditional African view that official recognition of ethnic diversity is incompatible with the goals of nation-building, political stability, and modernization.²⁰¹

Recognition of both individual and group rights suggests a broad idea of democracy that emphasizes equality among individuals and groups.²⁰² Democratic equality among groups implies cultural pluralism,²⁰³ which in turn stresses the importance of diversity and the contribution of distinct cultures to the society's

²⁰⁰ The Namibian Constitution of 1990 provides for similar rights but in a diluted form. Article 19 guarantees that:

[e]very person shall be entitled to enjoy, practice, profess, maintain, and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

Quoted in Berat, *supra* note 69, at 1. This provision tracks the language of article 27 of the International Covenant on Civil and Political Rights, except that the Namibian provision does not explicitly guarantee that an individual may enjoy culture, language, and tradition "in community with the other members" of ethnic or religious groups. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967). The covenant's language, "in community with other members," suggests a recognition of a collective right to language or culture. See S. Ward Atterbury, Note, *The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights*, 32 VA. J. INT'L L. 471, 538 (1992). But for many, the rights recognized by article 27 are individual rights. See, e.g., Addis, *supra* note 118, at 638 ("[A] close reading of the article suggests that ultimately that which is protected is the right of the individual to choose with whom to associate and under what conditions, rather than the rights of the groups which are mentioned in the article"); ARTHUR R. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 37 (2d ed. 1982). These scholars emphasize the fact that Article 27 accords the rights to members of ethnic or linguistic groups.

²⁰¹ See, e.g., Shivji, *supra* note 11, at 389.

²⁰² Although the rights to autonomy and separate identity are easily justified by democratic principles, the right of secession is not. See Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991). Traditionally, secessionists have based their claim to self-determination on democratic principles of consent and popular sovereignty. *Id.* at 184. The claim rests on a simple syllogism. Government must stem from the consent of the governed. A government which lacks consent has no political legitimacy. Because consent is the keystone of legitimacy, a disaffected ethnic group has the right to secede from an existing state. *Id.* This logic is misleading: "Government by the consent of the governed does not necessarily encompass a right to opt out. It only requires that within the existing political unit a right to participate through electoral processes be available." *Id.* at 185.

²⁰³ One commentator distinguishes between "liberal pluralism" and "corporate pluralism." Milton M. Gordon, *Toward a General Theory of Racial and Ethnic Group Relations*, in *ETHNICITY: THEORY AND EXPERIENCE*, *supra* note 29, at 84, 105-06. Under liberal pluralism, the government refrains from the "recognition of racial, religious, language, or national origins groups as corporate entities with a standing in the legal or governmental process, and [prohibits] the use of ethnic criteria of any type for discriminatory purposes, or conversely for special or favored treatment." *Id.* at 105. "Under corporate pluralism racial and ethnic groups are formally recognized as legally constituted entities with official standing in the society." *Id.* at 106. The government actively encourages and reinforces pluralism. Canada illustrates such a society. See generally John Porter,

richness.²⁰⁴ Recognition of both individual and collective rights is the means by which individual identity may be respected, collective survival ensured, and assimilation resisted.

B. *Assessing the Importance of Collective Rights*

1. *The Right to Separate Language*

Recognition of an ethnic group's right to preserve its identity satisfies the members' sense of collective self-worth and belonging in the polity. It also assures an ethnic group's freedom from forced assimilation into a dominant culture.²⁰⁵ Language is one institution that preserves a group's identity.²⁰⁶ Conversely, it is also an effective means of assimilation.

Those who view language solely in terms of its communicative function will overlook the connection between language and preservation of a separate identity. Some may argue that selecting a primary language for a nation has very little or nothing to do with cultural domination or assimilation. Rather, the official use of such language reflects a need to find a uniform means of communication which also serves the needs of national unity and economic and political modernization.²⁰⁷ Adopting this view, many African countries employed English or French as a means to achieve national integration through language without, they believed, surrendering Africa's cultural identity.²⁰⁸ Proponents of this view may deny that the official use of a particular language was motivated by the policies of assimilation and homogeneity; this instrumental view of language assumes that it is a "vehicle equally fitted to convey any beliefs"²⁰⁹ without regard to culture.

Ethnic Pluralism in Canadian Perspective, in *ETHNICITY: THEORY AND EXPERIENCE*, *supra* note 29, at 267.

²⁰⁴ Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133, 136 (1978).

²⁰⁵ See Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L. Q. 102, 118 (1976).

²⁰⁶ See *supra* notes 195-196 and accompanying text.

²⁰⁷ Some scholars recognize that language functions in two ways: as a vehicle for transmitting a particular culture and as a culturally neutral means of communication which allows people with different cultural backgrounds to communicate with one another in the same political community. See Rainer Knopff, *Language and Culture in the Canadian Debate: The Battle of the White Papers*, 6 CAN. REV. STUD. NATIONALISM 66, 67 (1979). Those who view language as a utility argue that governments can enact official languages without necessarily implying or legislating thereby official cultures. *Id.* Under this view, the success of a particular culture owes little or nothing to the language of its expression. For a refutation of this proposition see *infra* notes 210-214 and accompanying text.

²⁰⁸ See Wani, *supra* note 32, at 632, 636.

²⁰⁹ ROGER W. BROWN ET AL., *LANGUAGE, THOUGHT, AND CULTURE* 1 (1958).

This assumption is inaccurate because language serves purposes beyond its uses of communication and national integration. First, linguists have noted the importance of language as a general frame of reference for its users' thoughts and ideas.²¹⁰ Benjamin Lee Whorf has shown that relationships exist between a language's general aspects and the cultural milieu in which it develops.²¹¹ Paul Henle describes this relationship by saying, "The world appears different to a person using one vocabulary than it would to a person using another."²¹² Language also satisfies the human desire for cultural security and continuity. Ethnolinguists have identified the role of language in the transmission of culture from one generation to the next ("enculturation") and from one culture to another ("acculturation").²¹³ "In the ethnic context, language is both the vehicle and the expression of cultural values."²¹⁴ Experience shows that when an eth-

²¹⁰ Piatt, *supra* note 94, at 896. See also *In re Manitoba Language Rights*, 1 S.C.R. 721 (1985), in which the Supreme Court of Canada noted the foundational importance of language:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us.

Id. at 744.

²¹¹ Piatt, *supra* note 94, at 896.

²¹² *Id.* at 897 (citing *BROWN ET AL.*, *supra* note 209). The relationship between "world-view" and language is reciprocal:

If we are right in claiming an influence of vocabulary on perception, it might be expected that vocabulary would influence other aspects of thought as well. The divisions we make in our experience depend on how we perceive and so would be subject to the same linguistic influence as perception. Once again, one would expect the influence to run in both directions. If, in thinking about the world, one has occasion to use certain ideas, one would expect them to be added to the vocabulary, either directly or through metaphor; this is probably the primary influence. Once the term is in the vocabulary, however, it would constitute an influence both on perception and conception.

BROWN ET AL., *supra* note 209, at 8.

²¹³ Piatt, *supra* note 94, at 896.

²¹⁴ Leslie Green, *Are Language Rights Fundamental?*, 25 *OSGOODE HALL L.J.* 639, 656 (1987). Professor Green argues that language rights are fundamental. One reason could be the "interest in the survival of language groups over time." *Id.* at 653. This interest might draw support from the fact that language is a "valuable depository" of human experiences of which the speakers of a language should not be deprived. *Id.* at 655. But Green dismisses this as a basis for grounding a right to language as fundamental. *Id.* at 653-657. She argues that "[t]he fact that a language might die out is of no moral concern apart from the interest its speakers take in it." *Id.* at 656. Thus our "concern is not with the endangerment of a linguistic species, but with the continued flourishing of a group of speakers whose desire to transmit their culture to future generations is an aspect of their well-being." *Id.* For Professor Green, even this factor is not decisive because linguistic-survival is a "future-oriented interest" that is unlikely to be of moral concern. *Id.* The future is unlikely to be of great moral concern because the identity of languages in the distant future is problematic. *Id.* at 656-57. Languages

nic group demands the right to teach in its language, its interest is not only in language use but also the cultural content of the education.²¹⁵ A group's concern for the survival of its language also demonstrates concern with the cultural well-being of its speakers.²¹⁶ Thus, language is a means by which a people expresses and preserves its culture.

Language also signifies identity and expresses one's connection to a community.²¹⁷ De Tocqueville observed that "The tie of language is, perhaps, the strongest and most durable that can unite mankind."²¹⁸ Ironically, it is also one of the strongest dividers of people. A distinctive language sets one ethnic group apart from others.²¹⁹ For example, there is little else that divides Amharas and Tigreans in Ethiopia,²²⁰ or the French and English Canadians.²²¹ Yet, despite or perhaps because of increased education and modernization, these groups have allowed their linguistic differences to be a source of division.

Some may doubt the role of language as a vehicle of cultural transmission or a source of ethnic identification.²²² But no one can ignore its value as a source of dignity for the individual and for the group. Evidence indicates that a language becomes a

change over time owing to factors such as immigration, patterns of residence, and power to use one's language in public. *Id.* at 657. Consequently, Green argues, the better way to understand our interest in language should focus on the concern for "linguistic security." *Id.* at 658 (emphasis deleted). According to her, linguistic security has two aspects:

First, speaking a certain language should not be a ground of social liability; and second, one's language group should flourish. Note that the latter is not the future-oriented value of survival, but the present-oriented value of the human relations and interactions which a shared linguistic culture makes possible.

Id.

²¹⁵ See Dinstein, *supra* note 205, at 119.

²¹⁶ Green, *supra* note 214, at 656.

²¹⁷ *Id.* at 659 (noting that "most people feel an attachment to their mother tongue which cannot be reduced merely to its utility in communication: it is for them a marker of identity, a cultural inheritance and a concrete expression of community"); Zoglin, *supra* note 94, at 24; Karst, *supra* note 25, at 351-52.

²¹⁸ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 29 (Reeve trans., 1945).

²¹⁹ Karst, *supra* note 25, at 352. Professor Karst notes that "one consistent unhappy consequence" of language differences in the United States has been "discrimination against members of the cultural minority." *Id.*

²²⁰ One Ethiopian scholar has observed, "Ethiopia is the despair of the compulsive classifier." Abraham Demoz, *The Many Worlds of Ethiopia*, 68 AFR. AFF. 49, 49 (1969). Nevertheless, applying a number of criteria of classification—"genetic, regional, linguistic, religious, ecological, social structural"—Donald Levine classifies Amharas and Tigreans in the same category. DONALD N. LEVINE, *GREATER ETHIOPIA: THE EVOLUTION OF A MULTIETHNIC SOCIETY* 33, 36-37 (1974).

²²¹ Green, *supra* note 214, at 659.

²²² See *supra* notes 207-208.

source of embarrassment²²³ rather than a source of identity for its speakers when the language lacks societal status and its speakers are denied the right to view the world through it.²²⁴

People whose self-esteem is injured from a lack of linguistic security often react negatively. The experiences of Sri Lanka and Ethiopia are instructive. Sri Lanka is divided mainly between two ethnic groups—the Sinhalese majority and Tamil minority. When the government declared Sinhala the country's only official language, it evoked in the Tamils a fear of cultural and linguistic demise and feelings of inferiority such that they resorted to violence to demand linguistic equality.²²⁵

The civil war in Ethiopia also cannot be understood without understanding that the issue of language was a major precipitating factor. As in Sri Lanka, non-speakers of the official language, Amharic, came to view the recognition of Amharic as a symbol of the preeminence and prestige of Amharic speakers. The lack of official status for their own languages engendered feelings of resentment, subordination, and denigration of self-worth. Reflecting this concern, the Ethiopian Charter now affirms the right of an ethnic group to promote its culture and to use and develop its language. It is aimed at reassuring ethnic groups of their collective dignity, equality, and separate identity.

Because African nations are characterized by broad linguistic diversity, official recognition of all the languages spoken in a country would be impractical. Therefore, justifications must be found for making some languages official at the national level and some at the regional level. How widely a language is spoken in a given country or parts of it would seem to provide one important justification. For example, of the eighty-plus languages that exist in Ethiopia, only two or three are widely spoken.²²⁶ One or more of these may be given official status at the national

²²³ Green, *supra* note 214, at 658 (noting the embarrassment that immigrants experience as they "surrender" to a dominant culture). In the United Kingdom and the United States, for example, cultural and societal forces have pushed non-native English speakers to learn English in order to succeed in the society. Piatt, *supra* note 94, at 898 n.67.

²²⁴ See Piatt, *supra* note 94, at 896-97.

²²⁵ See M. L. Marasinghe, *supra* note 47, at 560-61. During the parliamentary debate regarding Sinhala's official status, a participant stated, "[The Tamils] do not want to feel that their language and through their language, themselves are looked down upon as an inferior section of the people of this country." *Id.* at 561.

²²⁶ The most widely spoken language is Amharic. No other language comes close to the position it occupies as a common means of communication in government, education, and the media. The next most commonly spoken languages in descending order are Oromo, Tigrigna, and Somali.

level,²²⁷ and a few others could serve as regional languages.²²⁸

Language recognition, however, should not be a quantitative exercise. If language is to be considered a basic means of cultural reproduction, the rights of ethnic groups to teach in their languages and to use them in local government should be respected, even if some languages do not otherwise become official.

2. *The Right to Autonomy*

A second way an ethnic group may preserve its distinctiveness is through autonomy. This approach is exemplified in the Spanish constitution, which "recognizes and guarantees the right to autonomy of the nationalities and regions [comprising Spain]." ²²⁹ The Canadian federal structure, which grants a measure of autonomy to Quebec, is designed to accomplish the same purpose.²³⁰

The Ethiopian Charter, in so far as it allows ethnic groups to administer their own affairs, is also designed to provide the institutional means for distributing collective rights. The Charter envisions the creation of autonomous regions defined by their ethnic character to allow each ethnic group, or at least the dominant groups, to manifest their identity through their region. Nigeria is an earlier example of how autonomous, ethnically homogenous states were created to comprise a federal union.²³¹

The right to autonomy is important for several reasons. Most significantly, it provides an institutional means to satisfy the psychological needs of ethnic groups for recognition of their iden-

²²⁷ Doing so would be following the example of the 1987 Accord between India and Sri Lanka, in which Sri Lanka declared Tamil an official language at par with Sinhala. Marasinghe, *supra* note 47, at 566. In addition, English was declared a "link language." *Id.*

²²⁸ This is essentially the approach India took to deal with its "linguistic confusion." See Ainslie T. Embree, *Pluralism and National Integration: The Indian Experience*, 27 J. INT'L AFF. 41, 48-49 (1973). As in Sri Lanka, India adopted English as well as Hindi as link languages, while local languages are used for education. *Id.* at 49.

Similarly, although the Spanish constitution declares Castilian to be the official national language, it allows other languages to be official in their respective regions. SPAIN CONST. art. 3(2) (1978), reprinted in XVI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1991).

²²⁹ See SPAIN CONST. art. 2, *supra* note 228.

²³⁰ See, e.g., CANADA CONST. §§ 71-80, reprinted in III CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1991).

²³¹ See Ziyad Motala, *The Record of Federal Constitutions in Africa: Some Lessons for a Post-Apartheid South Africa*, 7 ARIZ. J. INT'L & COMP. L. 225, 233-34 (1990).

tity.²³² Such an arrangement serves to reassure each ethnic group that it enjoys equal status with other ethnic groups. Essential to the idea of autonomy is freedom from centralized control and interference.²³³ And autonomy is the hallmark of a federal constitutional arrangement, which has a number of advantages.

One advantage is the latitude the federal system offers for local experimentation with different laws.²³⁴ Another is freedom from government tyranny.²³⁵ This is especially important for countries in Africa where the state has historically shown a tendency to assert unbridled power. Finally, federalism allows ethnic diversity to exist.²³⁶ For Africa, this means federalism provides a framework for institutionalizing diversity. A carefully designed federal structure offers a real possibility for neutralizing ethnic conflict and reducing ethnic antagonism.

A different constitutional model based on a unitary state currently prevails in much of Africa. The governments of such unitary states commonly exercise centralized control of activities and allow little diversity in economic, legal, or cultural affairs.²³⁷ A unitary state has the tendency to regard the whole country as a single decision-making unit.²³⁸

The type of diversity that generally leads a nation to federalism varies from country to country. In many African states, it is the desire of ethnic groups to protect their identities, languages, and cultures. Under federalism each ethnic group retains the freedom to pursue its own culture and tradition and to use its own language. In terms of language, for example, this arrangement would allow different regions to adopt different official lan-

²³² See Ivo D. Duchacek, *Antagonistic Cooperation: Territorial and Ethnic Communities*, *PUBLIUS*, Fall 1977, at 3, 6. Territorial organization induces a sense of belonging. "[A] territory-bound political authority still continues to elicit a greater degree of rational support and emotional identification—both essential conditions for an effective collective action—than any other non-territorial and functional alternative." *Id.* at 5-6.

²³³ Although the term "autonomy" is vague and has no accepted definition, independence from governmental or political interference in internal affairs is an essential component. See Hurst Hannum & Richard B. Lillich, *The Concept of Autonomy in International Law*, 74 *AM. J. INT. L.* 858, 860 (1980).

²³⁴ Cf. Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 *U. CHI. L. REV.* 483, 498 (1991).

²³⁵ See *id.* at 498-99.

²³⁶ Cf. *id.* at 498. See also Motala, *supra* note 231, at 230 ("The federal form of state allows the people of each of the units to express their individual identities within their own territory").

²³⁷ Motala, *supra* note 231, at 226.

²³⁸ *Id.* at 227.

guages, although the federal government may decide to use one or more languages to serve as national ones.

Although using federalism as a framework for dealing with ethnic strife and expressing cultural diversity is basically sound, 'ethnic' federalism has its pitfalls. To appreciate these dangers, it helps to consider the difference between ethnic federalism and political federalism present in the United States. In the United States, state boundaries bear little "correlat[ion] with deep ethnic, cultural, religious, and linguistic divisions."²³⁹ Under ethnic federalism, by contrast, ethnicity is the principal and decisive basis upon which the federation would be organized. Since the regions created under such a system will be identified with a major ethnic community, each region is likely to see itself as a distinct political entity. Once ethnic groups are given significant autonomy in their own region, it may be difficult to persuade these groups, some of which may be accustomed to conflict, to cooperate with one another for the sake of national unity. Thus, ethnic federalism may endanger the integrity and stability of the state by nurturing rival nationalisms alongside one another.

This is not idle speculation. The experiences of the erstwhile European communist states vividly demonstrate the hazards of compelled ethnic federalism. The Soviet Union, Yugoslavia, and Czechoslovakia relied on ethnic federalism as one of the fundamental legal means to solve the "nationality problem."²⁴⁰ But they sought to contain the destructive potential of ethnic identity through a civic culture based on the ideology of Marxism-Leninism and the discipline of a unitary party structure—the communist party. Yet, common national interests were maintained. The demise of the party and its ideology led to preoccupation with parochial, ethnic self-interests and caused national disintegration, chaos, and civil war.

There is a profound lesson in this for Africa: A state founded

²³⁹ Amar, *supra* note 234, at 505.

²⁴⁰ Viktor Knapp, *Socialist Federation—A Legal Means to the Solution of the Nationality Problem: A Comparative Study*, 82 MICH. L. REV. 1213, 1214 (1984). Lenin laid down the theoretical foundations for ethnic-territorial federalism. *Id.* "Lenin perceived two aspects of the multinational state: the necessity of unity of the working people, and the national and territorial autonomy of the individual nations living in the territory of the multinational state." *Id.* As a theoretical matter the unity of the people and the diversity of their ethnic identities "meet and merge dialectically." *Id.* The constitution expressed this unity in diversity in the language that "[t]he Union of Soviet Socialist Republics is a unitary, federal, multinational state, formed on the basis of the principle of socialist federalism." *Id.* at 1215. Furthermore, the constitutional monopoly of power enjoyed by the communist party guaranteed the social homogeneity of the state. *Id.*

on ethnic federalism in a context where separatist inclinations are high and unifying institutions are weak is unlikely to survive as a unified nation. Ethiopia, for instance, faces a serious risk of national disintegration given the de facto separation of Eritrea, the demonstrative effect of the separation on other regions, the demobilization of the national army in the wake of its defeat by Eritrean separatists and other essentially ethnicity-based guerrilla armies, and the absence of strong national parties. Thus, African constitution-makers must consider alternative constitutional models that accommodate ethnic diversity without impairing national unity.

Federalism is a serviceable constitutional model for Africa and any search for models should begin with it. But each ethnic group should not necessarily be given its own separate state or federal unit. To do so will, in some countries, create large concentrations of regional power that will rival national power and even threaten state integrity. The original federal structure of Nigeria, for instance, created three main regions, each controlled by a single ethnic group.²⁴¹ This structure fostered an attitude of self-sufficiency, intolerance, and separatism among the regions.²⁴² Effective federalism requires fostering a national awareness that by itself each region is relatively insignificant.²⁴³ One way to achieve this diminution is to break up large ethnic regions into smaller units, taking into account other factors such as history, economic viability, administrative convenience, and other criteria calculated to encourage interdependence and mutual cooperation.

A federal arrangement along these lines would promote a sound cultural diversity, but minimize the risk of disrupting national unity. Federalism in Africa should combine the goals of national unity and ethnic accommodation. Equating ethnic autonomy with ethnic federalism, and thereby drawing lines on solely ethnic grounds, is inadequate for this task. It does not contain sufficient safeguards to withstand the centrifugal forces. The more subtle approach advocated here allows an ethnic group to pursue its language and culture in an ethnically homogeneous unit. But the need for cultural diversity does not require that this unit comprise an entire ethnic group.

A workable federal system in Africa—one which contains or

²⁴¹ NWABUEZE, *supra* note 85, at 134, 149-50.

²⁴² *Id.* at 148.

²⁴³ *See id.*

minimizes the danger of ethnic separatism—also requires a suitable party system. In the past, many African countries adopted single party systems to resolve the problem of ethnic divisiveness. But the days of the one-party system are gone. Many African countries tried that approach with disastrous consequences. Moreover, despite its superficial appeal, banning ethnic parties or permitting only a predetermined number of national parties, as some countries in Africa have done,²⁴⁴ is unrealistic. Strong ethnic feelings cannot be contained by such policies. Limiting the number of parties or banning those that are ethnically-based is wrong in principle, for such a policy contradicts the freedom of association which liberal constitutionalism rightly proclaims and upholds.

A well-designed electoral system is needed for federalism to work in Africa. Such a system “is by far the most powerful lever of constitutional engineering” for ethnic accommodation and harmony.²⁴⁵ Nigeria offers an intelligent electoral system for choosing a president in a divided society. To win the presidency, a candidate must meet two requirements. She must win the majority of the votes nationwide,²⁴⁶ and one-third of votes in two-thirds of all the states.²⁴⁷ Thus, this system encourages candidates to reach out beyond their ethnic regions and strike compromises with other parties.

3. *Self-Determination and the Right to Secede*

The Ethiopian Charter contains one of the more radical collective rights an ethnic group might claim: the right of self-determination.²⁴⁸ International law defines the right to self-determination as the right to independence for a people under foreign domination.²⁴⁹ The existence of the right to self-determination for an ethnic group within the framework of an existing

²⁴⁴ Nigeria, for example, has decided to limit the number of parties in the Third Republic to two. The decision was “shaped by the desire to challenge the tendency for political competition to reduce to a three-player ethnic game between [sic] the Hausa-Fulani, Yoruba and Ibo with the ethnic minorities as electoral pawns.” Rotimi Timothy Suberu, *Federalism and Nigeria's Political Future: A Comment*, 87 AFR. AFF. 431, 437-38 (1988). This gimmick is not a failsafe method to contain ethnic politics in Nigeria, as there is anxiety about the two major political parties forming along the north-south ethnic divide. *Id.* at 438.

²⁴⁵ See HOROWITZ, *supra* note 15 at 163.

²⁴⁶ NIGERIA CONST. art. 132 (1989), reprinted in XIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990).

²⁴⁷ *Id.*

²⁴⁸ See *supra* note 197.

²⁴⁹ Dinstein, *supra* note 205, at 108.

state is controversial under international law.²⁵⁰ Nevertheless, the Ethiopian Charter indicates that a state may grant ethnic groups the right to secede when their rights are "denied, abridged or abrogated."²⁵¹

Creating a constitutional right to secede is generally inconsistent with the practice of modern federal constitutions. Aside from the Soviet Union and a few other Eastern European countries,²⁵² federal constitutions, including that of the United States, have been silent on the question of secession. Moreover, U.S. constitutional jurisprudence suggests that the acceptance of a federal constitution mandates the establishment of a permanent and indestructible union.²⁵³ The U.S. Supreme Court has rejected the argument that the nature of the federal union creates an implied right to secede.²⁵⁴

Why then would a constitution grant the right to secede, as the Ethiopian Charter does, and thereby legalize the destruction of the very union it purports to establish? The Charter suggests some reasons. Recall that the right to secede under the Charter exists only if an ethnic group's rights to separate identity, language, culture and autonomy are not respected. Advocates favoring such rights would argue that these rights are fundamental to ethnic integrity and are meaningless without some remedy. The right to secede is that remedy. Thus, these advocates might justify secession rights as an effective deterrent to government violation of an ethnic group's rights.²⁵⁵ A government faced with such a drastic sanction is unlikely to risk incurring it. Furthermore, in countries experiencing profound ethnic divisions, the existence of a secession right is essential to allay ethnic fears and suspicions. Finally, experience suggests that whenever ethnic movements play a central role in constitution-making, the right to secede figures prominently.²⁵⁶

²⁵⁰ See *id.*

²⁵¹ See *supra* note 197.

²⁵² See UNION OF SOVIET SOCIALIST REPUBLICS CONST. art. 72, reprinted in XVIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990) ("Each Union Republic shall retain the right freely to secede from the USSR"); DRAFT CONSTITUTION OF THE CZECH AND SLOVAK FEDERATIVE REPUBLIC art. 3(3), reprinted in IV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

²⁵³ See *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States").

²⁵⁴ See *id.* at 724-26.

²⁵⁵ See Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 635.

²⁵⁶ See *id.* at 634.

But creating a constitutional right to secede is ill-advised as a practical matter and ill-conceived as a matter of constitutional theory. As a practical matter, those convinced that the right to secede is self-evident have trouble realizing that secession has no stopping point. Once started, the process spawns a never-ending cycle.²⁵⁷ The separation of one region not only leads to the separation of other regions but also subjects the seceding unit to similar claims internally.²⁵⁸ In Ethiopia, for example, Eritrea's *de facto* separation from Ethiopia has encouraged similar claims by other regions of the country.²⁵⁹ Given the arbitrariness of the national boundaries that colonial powers fixed for these states, a right to secede risks national disintegration. African states therefore should be opposed to secession.

While the right to secede has a great deal of political and psychological value,²⁶⁰ it is of little practical value to ethnic groups. No legal mechanism can exist to enforce this right. Even if the right were subject to judicial review, its enforcement would require the cooperation of the very state resisting the attempt to secede. "[W]hen a people endeavours to secede from an existing State, the latter is not apt to accept calmly the prospect of its being carved up between several peoples, and it tends to resist the secession movement."²⁶¹ Some may discount the problems of secession because the right may only be invoked upon a failure to respect the rights of ethnic groups. "A state that violates its textual commitments to civil rights and liberties will probably not respect its textual commitment to secession."²⁶² Therefore a constitutional right to secede provides no firm legal basis for independence. Consequently, it makes more sense to address the motivations underlying claims to secession.

²⁵⁷ See also Addis, *supra* note 118 at 628 n.38 (arguing that "more than a mere identification of an ethnic unit in a given territorial unit and a complaint by that unit must be required before secession is advocated as a solution to the problem of inter-ethnic conflict. Otherwise, we shall be locked into a never-ending claim for secession").

²⁵⁸ See HOROWITZ, *supra* note 28, at 589. Secessionist regions are themselves ethnically heterogeneous. For example Eritrea, which for all practical purposes has seceded from Ethiopia, is characterized by deep historical, religious and ethnic divisions. The case of southern Sudan, which also is seeking secession, is the same. At the present time, both regions appear to maintain a united stance against the center. The attainment of independence, however, is likely to increase internal ethnic divisions. See *id.* at 589-90.

²⁵⁹ For example, some sections of the Oromos, one of the largest ethnic groups in Ethiopia, have shown an inclination to secede.

²⁶⁰ See Dinstein, *supra* note 149, at 108.

²⁶¹ *Id.*

²⁶² Sunstein, *supra* note 255, at 667-68.

As a matter of constitutional theory, the right is ill-conceived. A constitution has value as a "precommitment strategy."²⁶³ The strategy must ensure the peaceful and unhampered operation of democratic politics in the face of severe ethnic differences. Recognizing a right to secede does not serve this purpose. In a society divided along ethnic lines, such a right is apt to lead to politics of brinkmanship rather than cooperation among ethnic groups. It would encourage ethnic groups to engage in strategic behavior aimed at obtaining benefits or minimizing burdens.²⁶⁴ This is especially likely with ethnic groups that command strategic resources such as natural wealth, geographic location, or a relatively large population. Such groups are likely to use the right to secede as a club to force concessions from the nation. A nation operating under such a threat is unlikely to be strong enough to protect and pursue its collective interests.

The risk of termination or dismemberment is a fundamental and painful question for any country. Credible claims of secession inevitably and quickly inflame and polarize a society. Such an atmosphere prevents a government from conducting politics as usual or undertaking programs of social and economic recovery. It is the function of a constitution to prescribe political structures and processes which provide for mutual accommodation, compromise, and negotiation. One way to accomplish this is to remove, wherever possible, highly contentious issues which will infect daily politics and routine government processes. The right to secede is such an issue. Consequently, refusing to recognize a constitutional right of secession is an essential precommitment strategy, especially if a constitution addresses the major sources of discomfort—autonomy and other collective rights—that give rise to claims of secession.

C. *Limits on Collective Rights: Some General Principles*

The reluctance of states to recognize a right to secede suggests a wider principle: the interests served by collective rights should be limited. The nature of the applicable limit will depend on the strength of the competing interest to be protected.

²⁶³ *Id.* at 637. Professor Sunstein characterizes constitutions as "precommitment strategies" that "permit the people to protect democratic processes against their own potential excesses or misjudgments." *Id.* The rights that should be included in constitutions are only those that arise from or protect democracy, not those that may endanger it. Because the right to secede has a range of harmful consequences to democratic politics, it should not be included in a constitution. *See id.* at 648-54.

²⁶⁴ *See id.* at 648.

The need to protect state integrity is one such limit. "The need to safeguard the integrity of the state and to avoid encouraging separatism is a legitimate concern of any government."²⁶⁵ Thus, although the state may recognize an ethnic group's right to express its individuality through a federal structure or some form of autonomy, the right does not entitle the ethnic group to organize as a single federal or autonomous unit. The collective right to autonomy cannot be exercised in ways that endanger state unity and stability.

The state's need to promote good relations among ethnic groups and to foster a sense of national spirit defines another limit. Suppose, for example, an ethnic group enacts a law prohibiting the teaching of another ethnic group's language within its defined jurisdiction under the claim that the teaching of another language would threaten the survival of its own. Such a ban should not be upheld because it would foster ethnic division and intolerance and may well provoke retaliation. The group seeks to ban an essential means of cultural influence and dialogue. The policy would inhibit mutual understanding among ethnic groups and a sense of national spirit. The purpose of the collective right to a separate identity is to prevent forced assimilation, not to preclude cultural interchange and dialogue.

The question of setting limits on collective rights raises another fundamental problem: To what extent, if at all, should individual rights limit the interests served by collective rights? Where the two rights conflict, how should such conflict be resolved? A constitutional system which is committed to both sets of rights naturally creates this tension.

The fundamental issue is whether the rights of an ethnic group are limited by the individual rights of its members. Consider the following example. A woman inherits some clan land from her father by a valid will. During her old age, she sells the land to someone who is not a member of the clan. The clan challenges the validity of the sale under customary law. Under customary law, women have no right to sell clan land, although they are entitled to its use and enjoyment during their lifetime.

This example illustrates a typical dilemma faced by a constitution committed to cultural diversity as well as individual rights. On the one hand, the collective right to autonomy may demand

²⁶⁵ FRANCESCO CAPOTORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES*, at 54, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979).

deference to the practices and preferences of the clan. On the other hand, such deference would deprive clan members of the right to challenge the clan's practices and preferences as a violation of their guarantees of individual rights. Clearly the customary law discriminates against women. Thus, a direct collision arises between respect for cultural diversity and a commitment to the fundamental liberal value of nondiscrimination on the basis of gender.

One obvious solution to the problem is for the state to uphold the rights of the individual over the rights of the group. Such a solution may especially emphasize the need for a uniform, national standard governing the enjoyment of fundamental individual rights. After all, uniformity and consistency in the application of legal standards are central to the very idea of justice. John Rawls suggests that "citizens of a just society are to have the same basic rights."²⁶⁶ Similarly, Ronald Dworkin states that principles of consistent treatment and legal integrity require government to "extend to everyone the substantive standards of justice and fairness it uses for some."²⁶⁷ The justice and fairness argument may be especially compelling when invoked in defense of individuals, such as women, who are vulnerable and need the protection of national standards. In many regions of the world, including Africa, women face rules that systematically subordinate and oppress them. Thus, when a group seeks to exercise its autonomy in ways that discriminate against women, cultural diversity invariably means tolerance for oppression. Should the state be neutral in the face of such oppression?²⁶⁸ The foregoing arguments suggest a negative response.

But such an answer raises several problems. First, as the Ethiopian Charter indicates, a constitutional system which is committed to respect for collective and individual rights "guarantees" both sorts of rights without ranking them according to their relative importance. More importantly, upholding individual rights

²⁶⁶ JOHN RAWLS, *A THEORY OF JUSTICE* 61 (1971).

²⁶⁷ RONALD DWORKIN, *LAW'S EMPIRE* 165 (1986).

²⁶⁸ Some scholars suggest that the state should not be neutral in the face of oppression. See, e.g., Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, in *COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA* 77, 92 (Mark Tushnet ed., 1990). Professor Minow argues "that it is impossible to be neutral in the struggle between points of view and a normative commitment." *Id.* "The notion of oppression enables a meeting ground between a commitment to preserve distinctive cultures and a commitment to implement laws against gender discrimination." *Id.* This approach may provide some guidance in many cases, but its helpfulness will be limited. Who will define oppression and from what cultural perspective?

against claims of collective rights, as Dworkin's and Rawls's theories of justice suggest, tends to negate the very values that a regime of collective rights is intended to protect. The right to separate identity is intended to guarantee a group's desire to be different and self-defining. Similarly, the right to autonomy is intended to guarantee a group freedom from external interference in the conduct of its internal affairs. Both are guarantees against cultural intolerance. They require respect even when a cultural practice may appear inconsistent with liberal standards of universal justice for the individual. Justice for the individual under these standards may well be injustice for the group. The clan may argue that collective rights are meaningless unless they protect its survival. State enforcement of the antidiscriminatory principle in this case may destroy the very existence or cohesiveness of the community. The clan might argue that upholding the land sale is tantamount to forcing the clan to accept into its midst unwelcome strangers. Allowing the sale might change the community's membership, organization and self-definition—changes that the rights to separate identity and autonomy are designed to avoid.

If these arguments are persuasive, they suggest the outline of another approach: individual rights that impair the capacity of the group to continue as a group or to maintain its identity are presumptively unenforceable. The burden of proof would rest on the group. With respect to the hypothetical sale, the result should be the same regardless of whatever approach is followed. Although the clan has purported to demonstrate the group-destructiveness of the sale, it has not met its burden of proof. To meet this burden, the clan must explain how land sales by women impair the integrity of the community any more than sales by men. In both cases, strangers are admitted into the community. It would be a different case if customary law had outlawed all sales of land to outsiders, though such a case may provoke outsiders to challenge the restriction as discriminatory. If the restriction is vital to the community's continued existence, however, the force of the discrimination argument would be minimal.

Collective rights are meaningless unless the community is allowed to survive. But the prohibition against sales by women seems motivated by a desire to hold women down rather than by the need to ensure the community's survival. Consequently, the right of the community must give way to the right of the individ-

ual to nondiscriminatory treatment. Although this result favors the individual, the theory of the case implicitly suggests a hierarchy of rights: an individual right will not be upheld if a competing collective right is essential to the continued existence of the community. Perhaps this is not a severe limitation in most cases, but it is an important one nonetheless.

An example from Canada illustrates the difficulties in assuming that an individual right is more important than a collective right. In *Ford v. Quebec*,²⁶⁹ the Canadian Supreme Court addressed whether Quebec could prohibit the use of the English language on commercial signs. Quebec asserted that the goal of the ban was to ensure that the *visage linguistique* (linguistic face) of the province would be French.²⁷⁰ The province claimed that the action was necessary to preserve the French language and constantly to communicate to its residents the reality of a French milieu.²⁷¹ The Supreme Court held that the law violated the freedom of expression of citizens who did not know French.²⁷² It reasoned that, although the law could have required "the predominant display of the French language," requiring the exclusive use of French went further than necessary to achieve Quebec's purpose.²⁷³

The foregoing analyses indicate the difficulties inherent in a system committed to cultural pluralism. Yet it bears repeating that in many other African societies, cultural pluralism is the indispensable element that can allow ethnic groups to feel secure and that they are part of the nation. Dogmatically eliminating cultural diversity or subordinating the values it serves to various individual rights will not generate such feelings. Nor can exaggerating the importance of trivial cultural differences build a stable and unified nation.

This suggests that one solution to the problem raised at the outset of this section is for the constitution-makers to agree on a hierarchy of rights in which certain individual rights would be upheld over collective rights. Three categories of rights are basic in this regard. The first is the right to life and security of person, including freedom from torture, slavery, servitude, forced labor, and cruel and degrading punishment. The second category is the

²⁶⁹ 2 S.C.R. 712 (1988).

²⁷⁰ *Id.* at 717.

²⁷¹ *See id.*

²⁷² *Id.* at 718.

²⁷³ *Id.* at 717.

right to liberty, including procedural rights to a fair trial and freedom from arbitrary arrest and arbitrary invasion of privacy. The third category includes the freedoms of thought, conscience, speech, expression, and association. Beyond these categories, it is difficult to generalize about which individual rights are more important than collective rights. Much depends on the circumstances of each country.

Ford v. Quebec and the hypothetical land sale may be used by opponents of group rights as examples that appear to give substance to their worst fears: the subordination of individual rights to collective rights. The anxious individualist may be inclined to dismiss collective claims to avoid the potential for such tragedy. But such a stance fails to recognize the danger posed by insistence on uniformity and homogeneity. Ethnic groups have experienced many atrocities in the name of nation-building and homogeneity.²⁷⁴ The individualist stance, moreover, assumes that a cultural group is immune from internal and external pressures that may lead to changes in the group's practices and customs. Indeed, one of federalist diversity's appealing qualities is that it offers the possibility for dialogue among different levels of government and different cultures. It is this dialogue which provides a "continuing referendum on first principles."²⁷⁵

V. CONCLUSION

The liberal expectancy that modernization will weaken or eclipse ethnic attachment has not occurred. The Marxist prediction that class consciousness will supersede consciousness of ethnic identity also has not come to pass. Ethnicity has proved a resilient force and an important source of individual and group self-identification.²⁷⁶

The 1990's have highlighted the dangers of ignoring or resisting individual and collective claims rooted in ethnic identity. The vast democratic changes occurring in the world and the influence of successful and militant ethnic uprisings have come to

²⁷⁴ See *supra* text accompanying notes 50-52.

²⁷⁵ A. E. Dick Howard, *Protecting Human Rights in a Federal System*, in *COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA*, *supra* note 268, at 115, 132.

²⁷⁶ There are ominous signs that ethnic antagonism is increasing. Even in the United States, the classic "melting pot," where differences of race, wealth, religion, and nationality are submerged or supposed to be submerged in the pursuit of democracy, the idea of assimilation is giving ground to the celebration of ethnicity. Will liberal politics become hostage to ethnic group pressure? For a discussion of this and related issues, see generally ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1992).

encourage, not dampen, enthusiasm for the assertion of such claims. Unless these claims are properly and forthrightly accommodated, in some regions the integrity of the nation-state as a unit of politics may be in jeopardy.

African states face difficult times ahead as they emerge from one-party rule and military dictatorship and begin a transition to democracy. In the past, many of these states had sought to eliminate ethnic diversity in the interest of national unity. Few can dispute the value and importance of national unity. But it is a non sequitur to think that national unity must mean ethnic and cultural homogeneity. Homogeneity and assimilation are adverse to ethnic identity, and policies eliminating ethnic diversity often tend to exacerbate ethnic friction.

In the past, African constitution-makers have consciously or unconsciously assumed that liberal constitutionalism, with its emphasis on individual rights, sufficed to accommodate ethnicity. Liberal constitutionalism views ethnicity with the same detachment as it does religion: with benign neutrality. Thus, it is not surprising that while African society is ethnically diverse and profoundly conscious of its ethnicity, little in the constitutions of African states reflects this reality. It seems these constitutions were written for a culturally and ethnically homogenous society.

Where the state comprises a federation of peoples, its claims to neutrality are difficult to sustain. State neutrality under such circumstances is an illusion, because frequently the state is identified with one ethnic group or another. This situation often leads to ethnic resentment and estrangement on the part of those who feel that their languages, cultures, and status are not respected. These ethnic groups fear domination by the group in power and loss of ethnic identity through assimilation. Merely guaranteeing their individual rights to equality and nondiscrimination does not ensure the preservation of their separate identities, languages, and cultures.

Recognition of this fact requires a new approach to constitutionalism in Africa. Such an approach should take into account the rights of ethnic groups as well as individual rights. Providing ethnic groups with collective rights to preserve their identities, to use their languages, to promote their cultures, and to administer their internal affairs is essential for ensuring intergroup equality, a sense of belonging to the nation, and genuine ethnic accommodation. It is disingenuous to suggest that individual worth, dignity, and self-fulfillment can be respected without respecting the

languages or cultures with which the individual identifies. Collective rights also offer greater possibilities for maintaining or attaining state unity, legitimacy, order, and stability. Consequently, respecting ethnic diversity through collective rights is a constitutional imperative, not a mere policy choice.

Collective rights are not without their own dangers. The rights of the individual may be sacrificed in the name of or for the good of the community. Groups may secede and undermine the state's existence. A particular ethnic group may dominate power in the state. Care should thus be taken to minimize these dangers. A bill of rights that emphasizes the basic rights of the individual but does not ignore the right of the group to self-preservation should minimize the first danger; an appropriately designed federal system should mitigate the others. But to assume that ethnicity will cease to be an issue is a mistake because in Africa, ethnicity is central to one's self-definition and definition by others.