5 Constitutional Design: Dealing with Dysfunctionality

> If there is a political form that provides the possibility of resolving [class] conflict peacefully and gradually, instead of pushing it to the point of catastrophe by violent revolutionary means, then surely it is the parliamentary-democratic form. The latter's ideology may be a socially unachievable freedom, but its reality is peace.
>
> — Hans Kelsen,
> *The Essence and Value of Democracy* ([1920] 2013, 76)

5.1 Introduction

Although functional legitimacy does not entail a unique ideal of political organisation, it has practical implications for details of constitutional design. Liberal regimes may differ widely at the level of secondary law. Such subordinate institutions may themselves be analysed through the functional lens. In this chapter, I look at three important determinants of constitutional design and their functionality. I argue that majoritarian democracy, in contrast to autocratic forms of rule, is a functional institutional type because it allows for regular and non-violent changes of government. Whether a particular token of majoritarian democracy is functional depends on the situation of minorities. I also make the point that governments may, under certain conditions, legitimately interfere with individuals' property in the form of taxation or redistribution. Existing property rights have no particular claim to legitimacy and may be dysfunctional themselves. Moreover, I analyse the effect of political decentralization on reducing dysfunctionalities in primary law which result from a high level of social diversity.

Let us revisit the case of marriage as an analogy for political regimes. If we compare the marriage-tokens which are in place in the 2020s in Germany and Sweden, both qualify as functional. Both countries have criminalized marital rape and allow for divorce. Unmarried or divorced people do not suffer from a social stigma. Marriage therefore does not impose burdens upon non-participants, while creating net benefits for married couples in the form of establishing a legal kinship relation among the

partners. There are, however, also differences among the formal institutions of marriage in both countries at the level of subordinate social practices.[298] For instance, certain religious communities in Sweden have the permission to perform wedding ceremonies whereas in Germany, legally binding weddings can only be performed by a representative of the government. Moreover, Sweden allows for the possibility to retain one's former surname as a middle name. In Germany, in contrast, there are no middle names. Instead, upon marriage, one may adopt a double surname which is connected by means of a hyphen.

These differences in the subordinate social practices of marriage are culturally relevant. With regard to legitimacy, however, they do not matter. All practices are arguably functional, so it is a matter of tradition and taste which one to adopt. There are, however, further differences. A particularity of German marriage and tax law is the splitting of taxable income among married partners. The function of this income splitting is arguably to subsidize families organized according to the single breadwinner model (see 3.4.3).

Income splitting arguably has the effect that the spouse who earns less, in heterosexual German marriages typically the woman, is disincentivised to work because the joint tax rate will be applied to the first Euro she earns.[299] This may initiate a path-dependent reliance upon her husband. In the long run, the costs she faces from this dependence may easily outweigh the benefits she yields from the tax savings on the family income. After years spent outside the workforce, some women can find it difficult to support themselves in case of a divorce, but also if their husband dies or becomes unable to work. Income splitting is thus a dysfunctional institutional type which cannot be justified to all married people.

The fact that it includes a dysfunctional institutional type at the subordinate level does not make the contemporary marriage-token in Germany dysfunctional. In the dimension of taxation, however, the German token exhibits a dysfunctionality, in contrast to its Swedish counterpart. Since legitimacy is a binary concept, this does not mean that marriage in Sweden would be *more legitimate* than in Germany. Moreover, it might be the

298 For information concerning marriage in Sweden, see Swedish Ministry of Justice (2013).

299 Even the United Nations' Committee on the Elimination of Discrimination against Women, in its report on Germany (2017, paragraph 35), criticises "an income tax system for couples, depending on the combination of the tax collection categories" under the heading of employment.

case that the Swedish token includes a dysfunctional institution or social practice within another dimension. Different subordinate institutions and social practices cannot simply be weighed against each other because the set of individuals who incur net costs from a dysfunctionality may vary. What we can infer from this example, however, is that if the German government wanted to reform the taxation of married couples, it would be well advised to take Sweden or any other country without income splitting as an example.

Marriage itself is a subordinate institution of the legal order. To be precise, marriage is a subordinate institution of that part of the legal order which consists of primary law. The set of secondary law, which can also be understood as the state's constitution, defines the current regime. Any regime comprises many subordinate institutions, for instance the form of governance. A state may be governed democratically or autocratically, and within each category, a wide variety of further specifications is possible. For instance, the Federal Republic of Germany is a parliamentary democracy. Its electoral system is personalized proportional representation. The Federal Republic is a welfare state with a wide range of compulsory social insurance. As its name says, moreover, it is organized federally. The 16 *länder* are represented in the *Bundesrat* which is a second legislative body alongside the *Bundestag*, the federal parliament.

Even though functional legitimacy cannot provide a ranking of regimes, let alone an ideal of political organization, it allows for evaluating the functionality of subordinate constitutional institutions, both at the level of tokens and types. On the one hand, this creates the opportunity to compare regimes within particular dimensions. Assume, for instance, that proportional representation is a functional institutional type and an electoral system which elects winners of a plurality of district votes is not. If this was the case, we could say that in the dimension of the electoral system, Germany does better than the United Kingdom or the United States. Moreover, an analysis of the functionality of a regime's subordinate institutions helps to identify possible targets of constitutional reform. For instance, if it should turn out that a redistribution of income is not justifiable as an institutional type, constitutions should prevent governments from adopting redistributive policies.

To pursue either of these aims, the functional approach may be applied to a variety of institutions that are subordinate to the legal order at large. In this chapter, I am focusing on three very basic determinants of constitutional design, namely majoritarian democracy, the welfare state, and federalism.

Together with the rule of law and its status as a republic,[300] these three institutions form the foundational structural principles of the Federal Republic's legal order (see Art. 20 of the German constitution). For this reason, and because they also play important roles in other regimes, I believe that these institutions deserve particular attention.

Democracy, in its modern, majoritarian form, is a functional institutional type, or so I argue. Majoritarian democracy serves the function to regularly authorize new governments that are backed by majorities of the electorate. It is thus a procedural form of political rule which allows for periodic and non-violent changes in governance. In contrast, autocratic forms of governance authorise rulers based on their social status, without providing a path to decision-making power for other parts of society. This makes them dysfunctional on the level of types. Majoritarian democracy is a functional type in virtue of being a procedural form of government without these flaws.

Not all tokens of majoritarian democracy are necessarily characterized by actual changes in power. A country's society may be so structurally divided that there are persistent minorities who never see their interests implemented as policies. In these cases, similar to an autocracy, it is socially cemented who belongs to the rulers and who to the ruled, albeit only for contingent reasons. One might therefore doubt whether such tokens are functional. The presence of persistent minorities, however, need not undermine the functionality of a democracy-token. If all individuals, including members of persistent minorities and non-citizen residents, enjoy constitutionally guaranteed rights to freedom of speech, assembly, and association, they face a path to shape policies by means of influencing public opinion. This option would not be open to them in autocracies where public opinion does not matter for legislation. Democracies which grant such rights can thus still be considered functional.

A more serious threat to the functionality not only of a democracy-token, but to the regime as a whole, is posed by the presence of intense minorities. I use this term to refer to individuals or groups which incur external costs from democratic decisions that are so massive such that they

300 As I argued in the previous chapter, the rule of law is among the tenets of liberalism which is a necessary condition of political legitimacy. It thus needs no further scrutiny in this context. That a regime is a republic, moreover, is a mostly formal quality which specifies that the head of state is not a monarch. It is, however, neither a requirement for the rule of law nor for democracy, as the countries with crowned heads of state in Northwestern Europe testify. I therefore take it to be of minor importance.

outweigh any potential benefits that the regime's existence may give rise to. If constitutional restrictions on political authority are lacking, democracy may turn into such a "tyranny of the majority." Importantly, it does not suffice that sensitive decisions must be taken with a high quorum of votes. This would still leave small groups or even single individuals vulnerable to devastating collective decisions, and it also leaves non-citizens out of the picture. Rather, the government must grant everyone with whom it deals fundamental rights to protect their basic interests. Whereas most decisions in a democracy may be made by a simple majority of legislators, everyone—including also migrants and would-be migrants—must have a veto when it comes to decisions which threaten their lives, livelihood, or bodily integrity. Even a democratic regime must therefore be liberal to be functional.

Another dimension of constitutional design is to what extent the government is authorized to interfere with the system of property rights that emerges from individuals' private transactions. This may take place by means of taxation or levying mandatory social insurance fees. The legitimacy of such interference is questioned by libertarians who claim that the government must respect individuals' property claims. I make the point that protecting existing property rights may be counterproductive from a functional perspective. Claims to property originate in contingent historical path dependencies and need by no means be justified themselves. They may even perpetuate dysfunctional discriminatory institutions, such as class or caste systems, racism, or patriarchy. Functional regimes must grant individuals a right to own property, but they may define and redefine property rights claims by means of the tax system. This is not only legitimate but even commendable if the rights claims in question cannot be justified themselves.

Libertarians are also sceptical when it comes to the size of the public budget. A public budget can arguably be functional insofar as it provides public goods, the benefits from which people would not be able to attain otherwise. Moreover, redistributive schemes within a public budget can even be beneficial for those people who are at the moment net contributors in financial terms. For one thing, they also profit from social insurance. Moreover, many redistributive policies have positive spill-over effects even for those who are not the direct beneficiaries, e.g. in the domains of public health or education. Of course, it is unlikely that each policy is beneficial for every taxpayer. A particular public budget is still functional, however, as long as they benefit in total. A constitutional demand that public funds

may only be spent on mutually beneficial policies would thus rule out many functional budget-tokens.

That citizens have different policy preferences and cannot all be pleased at the same time has the effect that there are necessarily some dysfunctionalities at the level of primary law. The more diverse the population, the more numerous such dysfunctionalities will be. A possible way to reduce them by means of constitutional design might be to decentralize political authority to lower-level territorial units within the state, i.e. by creating a federal system. Insofar as people have more homogeneous values and preferences within smaller groups, everyone stands to benefit from such decentralisation.

The mechanism is limited, however, insofar as minorities with similar policy preferences live territorially dispersed. Social subgroups such as sexual or religious minorities, for example, may also be scattered across a state's territory. In this case, a decentralisation of political decision-making may even subject minority groups to policies which are more against their interests than centralised legislation. This is because local majorities may be more extreme than the citizenry at large. Federal decentralisation is therefore most likely to reduce dysfunctionalities with respect to cultural and linguistic policies. In this policy dimension, territorial proximity is typically related to a homogeneity of preferences, which cannot be assumed for other dimensions.

Federalism may, however, offer a way for lower-level jurisdictions to *become* more homogeneous. This is because people have the opportunity to leave lower-level jurisdictions where they are in the minority and go to jurisdictions where policies are more to their liking. The problem with this mechanism is that individuals may face substantial costs of moving to another jurisdiction. Incurring these costs will only be worthwhile if moving promises high benefits or a tremendous cut of costs. High benefits, however, are unlikely insofar as lower-level jurisdictions should be restricted in their decision-making capacity, lest they create spillovers to other jurisdictions. Moreover, in a liberal and therefore functional regime, individuals must not face immense costs anyway. Exit is not a substitute for granting individuals fundamental rights. Rather than decentralising political authority to lower-level territorial jurisdictions, I therefore suggest that governments should allow for more parallel legislation at the central level for issues which lack a territorial component. If individuals may choose the regulation which they prefer most, dysfunctionalities can be avoided.

In the remainder of the chapter, I will proceed as follows. In Section 5.2, I will discuss the function and functionality of majoritarian democracy, addressing also the issues of persistent and intense minorities. I will argue that majoritarian democracy is a functional institutional type, but for a democratic regime to be functional, it must grant individuals fundamental rights. In Section 5.3, I turn to the issue of the levying and spending of public budgets, pointing out the potential benefits of tax-funded public good provision and redistribution. I will also make the point that existing property claims, as they are the product of historical contingencies, may be unjustified and should not be exempt from the reach of political authority. In Section 5.4, I look at the potential of federal arrangements to increase citizens' net benefits from political organization. I argue that federalism is limited in reducing dysfunctionalities and suggest that governments should additionally allow for non-territorial parallel law. Section 5.5 provides a short summary.

5.2 The Function of Majoritarian Democracy

5.2.1 *A Procedural Form of Governance*

A major element of constitutional design is the form of governance, i.e. the way in which rulers are selected. I refer to a regime as *autocratic* if it authorises rulers to govern based on the social position they occupy, e.g. in dynastic succession, the military, the clergy, or within a party organisation. Examples for autocracies, accordingly, are monarchies, military dictatorships, theocracies, and one-party dictatorships. All forms of autocracies are dysfunctional institutional types. This is because their function of conferring political authority and power to people based on their social status is not acceptable for the rest of a state's citizens and residents.

Regimes with an autocratic form of governance may theoretically still be legitimate. This would be the case if autocratic rulers respected citizens' fundamental rights, for example in a constitutional monarchy where the monarch plays an active role in the state's governance but is effectively restricted by a liberal constitution.[301] What is dysfunctional in these cases is

301 The term *monarchy* is sometimes also being applied to democracies where the mostly ceremonial head of state is a monarch. I do not classify these regimes as autocracies, however, because they are ruled democratically.

only the form of governance as a subordinate institution, not the regime as such.

Another form of governance is *democracy*. With this term, I refer to forms of governance where rulers are not authorised based on their social position, but rather on procedural grounds. Democracies, according to this general definition, can be lottocratic, i.e. based on sortition, or electoral, i.e. based on voting. Whereas democracy in ancient Greece was lottocratic, modern democracies are electoral.[302] Electoral systems may differ widely in their institutional design. For instance, voting may be either direct, taking the form of referenda, or representative, with a legislative assembly making decisions. Representative democracies, moreover, may be parliamentary, presidential, or semi-presidential, and within these subtypes, many more refined specifications are possible, e.g. with respect to the electoral system in place.

In contrast to autocracy, democracy is arguably a functional institutional type. It is important, however, to know what its function is to understand what democracy can deliver and what it cannot do, and under what conditions a particular democracy-token qualifies as legitimate.

It is a commonplace in democratic theory that (majoritarian) democracy enables the people to rule itself.[303] This thought can already be found in Rousseau ([1762] 2012, 246) who claims that within a state, majority rule is perfectly compatible with citizens' freedom, insofar as it is a tool to identify what he calls the *general will* (see 4.2.2). Whereas the *will of all* merely adds up all private interests or *particular wills*, the general will contains exactly that which is willed by all (Rousseau [1762] 2012, 182).

According to Rousseau, the general will is to be elicited by means of a majority vote, even though he remains vague as to the exact form of the connection. On the one hand, he hypothesises that a vote is the more truthful to the general will, the closer it approximates unanimity (Rousseau [1762] 2012, 245). On the other hand, he apparently identifies the general

302 Sortition-based democracy is not suited for large, modern societies because only a small part of the population would ever be selected to govern, leaving the rest disenfranchised, as Przeworski (2009, 72) points out.

303 See for example Beran (1987, 77), Christiano (2015, 475), Lafont (2019, 3), Landemore (2021, 19), Przeworski (2009, 72), Urbinati (2014, 24). A different case for the legitimacy of democracy is made by Christiano (2004) who claims that the authority of democratic legislation is legitimate because only by obeying democratic laws can citizens act justly, treating others publicly as equals in light of a pluralism of values and opinions, as well as biased and fallible judgement.

will directly with the outcome of majority voting,[304] claiming that those who are in the minority for any given vote are mistaken about the general will and therefore also about their own interest (Rousseau [1762] 2012, 246).

The concept of the general will is problematic in that it presupposes that there is a common good which all citizens want, even though they need not be aware of it. Only under this assumption can Rousseau claim that "whoever refuses to obey the general will be constrained to do so by the whole body, which means nothing else but that *he will be forced to be free*" (Rousseau [1762] 2012, 175, emphasis added).[305]

Whereas the idea of a common good was popular in the enlightenment era, political theorists more recently acknowledged that competing interests and political parties are an irreducible part of politics (Przeworski 2010, 26–27). Not least, moreover, social choice theory has shown that voting as an aggregation mechanism is both incapable of consistently reflecting voters' preferences and susceptible to manipulation, dispelling the notion that democratic rule is the instantiation of the people's will, obedience to which makes citizens free (see Riker 1982, 238). Insofar as there is no detectable common good willed by all, it appears highly dubious how being subjected to the outcome of a majority vote can count as a form of autonomy.

Leaving the naïve idea of the general will behind, contemporary democratic theory still follows in Rousseau's footsteps insofar as it attempts to fathom how autonomy, or "self-rule," as a legitimacy requirement for political authority can be realised in democratic regimes, although the ambition has been lowered. One strand in democratic theory modestly considers citizens' power to elect and oust their leaders in representative democracy as a tool of self-rule.

William Riker (1982, 242–246), for instance, acknowledges that Rousseau's "populist" version of democracy fails due to the lack of a coherent popular will. Nevertheless, he argues that the democratic promise of freedom, both as non-interference and as self-determination, can be salvaged by a less demanding liberal version of democracy. Liberal democracy, on his definition, only sets the negative standard of voting unpopular

304 This is analogous to the argument put forward by Sieyès ([1789] 2014, 95–96) that, since the common will is made up of individual wills, the common will is identical to the position taken by the majority.

305 Rousseau's formulation finds a contemporary reflection in Lovett's (2018, 121) assertion that a justly imprisoned person in a democratic society is free "in the politically relevant sense," even though she is certainly not free to walk out of the prison.

leaders out of office, giving citizens a "democratic veto" against "official tyranny." Likewise, Adam Przeworski (2010, 166–168) holds that the possibility of governmental change by elections lends credibility to the notion of popular sovereignty even in modern democracies. Insofar as they are held accountable by the instrument of competitive elections, he argues, politicians can be said to rule on behalf of the rest of the people.[306]

A change in leadership by means of competitive elections is an essential benefit for citizens of a democracy, compared to autocratic forms of government. Nevertheless, framing this feature of democracy as an instantiation of individual autonomy is to misrepresent it. Voting is not equivalent to making use of a veto. Under majority voting, individuals lack an equal chance of their opinion becoming law insofar as members of the minority have no impact on legislation. That a government rules by the mercy of a popular majority does not even mean that the members of the majority rule themselves; they simply happen to be in the majority.

Another attempt in democratic theory to address the impossibility of identifying a common good by means of voting is *deliberative democracy* (Mackie 2018, 219). Deliberative democracy, according to the definition by Amy Gutmann and Dennis Thompson (2004, 7), is

> […] a form of government in which free and equal citizens and their representatives justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching decisions that are binding on all at present but open to challenge in the future.

There is no space to discuss the whole family of theories of deliberative democracy in detail here. In particular, I will not touch upon the epistemic case for deliberation,[307] as it is circumstantial from the cost-benefit perspective of functional legitimacy.[308] The important point for the purposes of the chapter is deliberative democrats' idea that, even though there is no pre-existing general will, the practice of open and uncoerced deliberation

306 Przeworski (2010, 38) even claims that autonomy is numerically maximised in a democracy where power alternates between parties as citizens' preferences change.

307 The argument that deliberation is conducive to finding truth and making good decisions is, among others, made by Landemore (2013) and Estlund (2008).

308 As Mackie (2018, 231), notes, epistemic accounts of democracy do not invoke a reflection of individual preferences in collective decisions as an argument to justify democracy. Insofar as they do not consider costs and benefits, these accounts are not relevant for my argument.

among equals prior to democratic voting creates a public forum of joint political will formation. For this reason, deliberation is supposed to be a mechanism enabling all citizens to perceive themselves as the authors, rather than mere recipients, of law.[309]

According to democratic theorist Bernard Manin (1987, 359), for instance, the majority rule is justified insofar as it closes a deliberative process in which all positions could be presented and heard. Deliberation therefore succeeds and supersedes the general will as a guarantor of autonomous legislation and, accordingly, legitimacy (Manin 1987, 352).

For Jürgen Habermas (1997, 152–62), too, *public autonomy*, as the legitimacy criterion for laws, is reconciled with *private autonomy* in the form of individual rights by means of a discursive formation of opinion and will.[310] Private autonomy, for Habermas, is a negative freedom which relieves legal subjects of the burden to act according to publicly acceptable reasons, thus allowing them to pursue their self-interest. The apparent tension between public and private autonomy can be solved, Habermas claims, by realising that a system of individual rights granting private autonomy is a necessary condition for institutionalising the forms of communication which enable politically autonomous legislation.[311]

Deliberative democracy constitutes a valuable advancement in democratic theory beyond the simple majoritarianism of Rousseau, going a long way in the direction of making the process of democratic decision-making more consensual. Public discourse can indeed make democratic legislation more tolerable and transparent to minorities. Moreover, Habermas's emphasis on private autonomy contributes an awareness for the importance of liberal rights to the debate.

Deliberation, however, cannot turn majoritarian democracy into a form of self-rule. Even deliberation must ultimately lead to a vote. And since deliberation cannot create a harmony of interests out of deep disagreement,[312] a collective democratic choice might diverge significantly from what any

309 Note that Rousseau ([1762] 2012, 182–185) himself is averse to communication, fearing that it will divide the people into factions which have only private and particular wills, but no general will any more.

310 As Habermas (1997, 133–34) puts it, in this discourse the *unforced force* ("zwangloser Zwang") of the better argument prevails.

311 Similar to Habermas's argument, Kelsen ([1934] 2008, 123–124) observes that so-called private rights are political as well, insofar as they also enable citizens to participate in political will-formation, and therefore in political governance.

312 See also Przeworski (2010, 26–27), Vallier (2018a, 1123).

individual would have chosen, even after undergoing public deliberation.[313] Communication may create acceptance for majority decisions, but it cannot overcome the deep cleavages that characterise many modern democracies, for instance between rural and urban areas or between owners and renters. As long as decisions are made by majority rule, members of the minority still surrender their autonomy.[314]

Yet this does not imply that majoritarian democracy is not a functional institutional type. It is just not the function of majoritarian democracy to enable citizens to rule themselves. Rather, the function of majoritarian democracy is to authorise governments to rule which are backed by shifting majorities of voters. Those citizens who are currently in the minority are not supposed to rule. This is not a construction error, but part of the definition of majoritarian democracy.[315]

Even though it is the function of majoritarian democracy to authorise a small set of rulers who are backed only by a part of the population (albeit the larger part of the citizenry), it is a functional institutional type. This is because majoritarian democracy is a procedural form of governance which does not privilege a group of people based on their social status.[316] Instead, it authorises those who meet certain procedural requirements.[317] Importantly, authority is transferred to another set of people if these now happen to meet the procedural requirement, and those transfers take place

313 Gaus (2011, 387–388) criticizes that deliberative democracy cannot account for deep disagreement; it must assume that consensus is achievable. Insofar as this is not the case, deliberations must end with a vote. According to him, this amounts to a majority dictating its evaluative standards upon a minority.

314 As Wolff (1998, 39) puts it, "[a] member of the minority […] appears to be in the position of a man who, deliberating on a moral question, rejects an alternative only to find it forced upon him by a superior power."

315 Tullock (1994, 40), too, misrepresents the function of democracy when he writes that "[t]he basic objective in democratic government is to have the government behave as much as possible in accordance with the wishes of its citizens. Unfortunately this frequently means only with the wishes of a majority."

316 This advantage also accrues to sortition-based forms of democracy. Since modern democracies are election-based, however, I focus on majoritarian democracy here.

317 Peter (2023, 200–206) also ascribes legitimacy to majoritarian democratic decisions on procedural grounds. Since her account of political legitimacy is primarily an epistemic one, however, she only understands democratic decision-making as legitimating in those situations where disagreement among citizens needs to be resolved but nobody has epistemic authority to which others ought to defer in making their political judgments. Moreover, she does not invoke the benefits of proceduralism but rather puts forward democracy on the grounds of citizens' equal moral permission to be decisive in such situations.

non-violently. This is an enormous benefit for all those living within the borders of the state which can hardly be overstated.[318]

In contrast, the narrative that democratic regimes are legitimate insofar as and to the extent that they enable "the People" to rule itself is an elusive myth which risks doing more harm than good. Although governmental authority is not a direct function of citizens' beliefs (see 2.3.3), a widespread perception that rulers lack political legitimacy may over time lead to an erosion of the rule of recognition. A belief in the myth therefore poses a risk to the stability even of legitimate regimes such as representative democracies.

Measured by the standard of self-rule, our democratic reality is only too likely to appear disappointing and corrupted. What Christopher Achen and Larry Bartels (2017) refer to as the *folk-theory of democracy* as "government of the people, by the people, for the people" (in reference to Lincoln 1863) is an illusion. The non-realisation of this ideal may fuel discontent with reality and the belief to be run by a self-serving elite (Achen and Bartels 2017, 8). Such anti-elitism is one of the two constitutive features of populism (the other being anti-pluralism) as defined by Jan-Werner Müller (2016, 19–20).[319] Müller (2016, 76) also directly relates the appeal of populism to the "broken" democratic promise of popular self-rule.

The narrative of self-rule may therefore even obscure the real and tangible merits of democratic regimes. An intellectually more honest—and no less worthy—reason to support democracy as a regime type is that it is a functional form of governance where power changes take place regularly and without violence. Democratic theory should thus be careful not to inadvertently underrate the legitimacy of existing democratic regimes (or

318 A similar observation has been made by other authors. Already Hume ([1748] 1994, 194–195) notes that a state's population does not so much wish to choose their leaders but to have an orderly succession of power without violence. Kelsen ([1920] 2013, 76), moreover, identifies democracy as the most promising consensual alternative to violent conflict. Similarly, Popper ([1945] 2013, 118–119), refusing to equate democracy with any essentialist notion such as "the rule of the people," emphasizes instead that elections offer a non-violent route to changes in governmental power and that democracy as a fallibilistic regime type protects individuals from tyranny. And Hayek ([1979] 1998, 5), while noticing that democracy does not embody individual freedom, values the non-violent changes of government as a necessary precondition for freedom.

319 Landemore (2021, 17) actually recognizes that her account of "Open Democracy" may be considered populist but is not to be bothered by this fact.

however one may want to call them)[320] by sticking to the myth of self-rule, without taking notice of the more fundamental credentials democracy has to offer in the form of individual benefits from non-violent changes of political authority and power.

5.2.2 *The Case of Persistent Minorities*

For citizens eligible to vote, majoritarian democracy holds the promise that their own preferences may one day become policy in their state. Even though there is no guarantee that this will happen, there is at least a chance because the electoral mechanism does not confer political authority based on pre-determined social characteristics but follows an open-ended procedure. It may turn out, however, that some people never see their preferences and values become policy because they belong to *persistent minorities* who systematically find themselves outvoted.[321] This may happen because policy preferences are not distributed randomly but tend to be correlated with social parameters.[322] Insofar as these correlations are stable, members of minority social groups find themselves excluded from any path to control a democratic government.[323]

The situation of persistent minorities can be described using the selectorate theory developed by Bueno des Mesquita et al. (2003). In their terminology, the *selectorate* comprises all those people who are eligible to vote or otherwise determine the ruler(s), whereas the *winning coalition* is the subset of the selectorate which is actually required for gaining and retaining authority. In a majoritarian democracy, the winning coalition

320 Robert Dahl (1956, 37) diagnoses that no existing regime lives up to the ideal of "populistic democracy" defined by the two requirements of popular sovereignty and political equality which are supposed to be jointly satisfied by majority rule. For this reason, Dahl (1956, 75–83) suggests that political science rather occupy itself with the more modest and better measurable concept of "polyarchy."

321 Simmons (1993, 94) therefore warns that majoritarian democracy entails the "problem of tyranny by permanent majorities."

322 Lipset and Rokkan (1990) provide evidence the party systems of several consolidated democracies are structured by deep social-structural *cleavages*, i.e. dividing lines along social and cultural differences. Examples of salient electoral cleavages are geographical location, ethnicity, language, religious denomination, and class.

323 As Przeworski (2009, 79–82) points out, the mere possibility of alternation in modern majoritarian democracies does not guarantee that different parties rule in turn. Only insofar as preferences change and/or parties are deficient in representing them can office alternate between parties.

constitutes a majority of the selectorate. This sets it apart from autocracies, where winning coalitions are much smaller. Insofar as there are entrenched social cleavages, however, citizens have different chances of ending up in the winning coalition, although they all have an equal vote as members of the selectorate. The structural impermeability of the winning coalition has the effect that the right to vote is more of a formality than a means to initiate a change of government.

A lack of political equality is a serious issue from the perspective of democratic theory. Democratic theorists consider equality to be a core value which democracy is supposed to serve.[324] This value is jeopardised if some citizens are de facto excluded from the polity's governance. Chiara Cordelli (2022, 70) therefore even claims that for political authority to be justified, there must be no persistent minorities. She holds that members of such minorities will perceive themselves as passive subjects, not as citizens who participate in a common political will. Arash Abizadeh (2021, 753) also fears that political equality would be undermined by entrenched social structures in a purely majoritarian system. This is why he argues that counter-majoritarian institutions such as representation and federalism are required to offset the numerical power of members of the majority and to restore equality.[325]

From a functional point of view, the case is somewhat different. An institution may be functional even if individuals are not treated equally. This may be the case, for example, for conventions solving games of the battle of the sexes type. What matters is not so much that citizens interact with each other as equals, but rather that all of them at least gain nonnegative benefits from an arrangement.

The problem with entrenched cleavage structures, however, is that it may undermine the procedural character of majoritarian democracy. This proceduralism is the very reason why democracy creates benefits. In a completely rigid society, rulers are effectively authorised based on social characteristics, not unlike in an autocracy. Of course, even in the limiting case, the effect of empowering rulers based on their membership in a certain social group would only happen accidentally in a majoritarian democracy. It would still not be part of the function of majoritarian democ-

324 See for example Abizadeh (2021, 743), Buchanan (2002, 710), Christiano (2004, 276), Dahl (1956, 37), Przeworski (2010, 32), Riker (1982, 5), Urbinati (2014, 19).

325 Note that Abizadeh (2021, 748) is not concerned with the outcome of a vote failing to equally align with the *preferences* of members of a minority. His argument addresses a lack of equal *agential power* he identifies with persistent minorities.

racy. Thus, majoritarian democracy is still a functional type. It might be the case, however, that tokens with deep and stable cleavages must count as dysfunctional.

As an example, consider a society which is deeply divided among its rural and urban population on all issues that people care about. If the rural folk is in the majority and both groups remain unchanged in size, urbanites will never see their policy preferences implemented on anything that matters to them. From their perspective, it might seem, living in a democracy is essentially not different to living in an autocracy where rulers are selected exclusively from the rural population. They apparently have no de facto chance of non-violently influencing policy.

This is certainly a marginal case. Real societies can be assumed to be much more dynamic due to changing birth rates and migration. Different cleavages may also cut across each other, making room for shifting coalitions. In the example, both urbanites and rural folk may additionally be divided among religious people and agnostics, which may impact their positions on certain policies. In this way, urban dwellers who adhere to the majority worldview may still have some of their preferred policies implemented. Although the same is not true for adherents of the minority position, the example is still highly oversimplified. In complex and pluralistic societies, each individual's identity is composed of a different set of manifold and overlapping group memberships (see also Young 2011, 48).[326] And the assumption that an individual's preferences are wholly determined by her identity is also too crude to be realistic.

Crucially, moreover, the functionality of a democracy-token is not so much a question of the social structure of the citizenry and its cleavages. Even in states where majorities alternate, governments exert authority over people who are not only excluded from the winning coalition, but even from the selectorate. Most prominently among those are minors and non-citizen residents. Although these people usually have the prospect of gaining (full) citizenship rights in a couple of years, some never will, and they all lack them in this moment. Thus, in contrast to members of persistent minorities, they do not even have a procedural *ex ante* chance

326 Group memberships which are relevant for an individual's identity may be either self-chosen, as in the case of religion, or externally imposed by means of social categories such as race or gender. This is why Pierik (2004, 535) distinguishes between *social groups*, which are categorised mainly by processes of external ascription, and *cultural communities* which self-categorise by means of what he calls inscription and community-building. Whereas social groups aim for recognition as members of the broader society, cultural communities have a distinct conception of the good life.

of non-violently determining who will be the state's rulers by means of a vote. A token of majoritarian democracy where these people are completely deprived of any influence on the policies they live under would arguably always be dysfunctional, whether or not there are persistent minorities in the citizenry.

It might appear, now, that no token of democracy can be legitimate because there are always people living under the government's authority who lack the right to vote. However, subjects of political authority who are excluded from the selectorate, just as members of persistent minorities, may still have a way to non-violently exert an impact on elections and policies. This is possible via the detour of public opinion. Deliberation, in the form of public discourse, is therefore indeed important for the function of democracy,[327] even if this function is taken to be non-violent changes of authority and policy, rather than popular self-rule (see 5.2.1).[328]

To guarantee an open public discourse, it must be institutionalised by constitutional provisions. In a functional democracy, every individual, not only citizens, must therefore enjoy the right to free speech, as well as the freedoms of assembly and association.[329] This gives them the opportunity to draw attention to their values and needs and to exert pressure on the

327 Gaus (2011, 387–388) criticises that in deeply divided societies, deliberation does not lead to consensus and must still end with a vote. This, he claims, amounts to a majority dictating its evaluative standards to a minority. It would, however, ask too much of deliberation to expect that it may overcome the power of majorities over minorities in majoritarian democracy. Rather, as Manin (1987, 359–60) argues, exactly because the majority decision goes against the interest of minorities, such minorities should have the chance to continually voice their position.

328 In democratic theory, in contrast, public opinion formation is considered to be a means to citizens' self-rule. For instance, Urbinati (2014, 24) argues that freedom of speech does not only protect citizens against political power but also maintains their own power. In the terms of Lafont (2019, 8–10), pure majoritarian proceduralism is a "democratic shortcut" around deliberation which requires the minority to blindly defer to majority judgements and therefore does not qualify as a form of self-governance. And according to Habermas (1997, 160), there must be a fundamental right of participation in processes of opinion and will formation to legally guarantee that the conditions are given for citizens to judge whether the law they legislate is legitimate according to his discourse principle.

329 Freedom of association may also have epistemic benefits for the political process. Sunstein (2005, 157), for instance, praises it as a tool to create many different perspectives and arguments. Even though groups might internally tend towards polarisation and conformity, the fact that there are many different groups should prove beneficial for society as a whole, he argues.

government without resorting to violence.[330] Insofar as regular elections take place, rulers are alert to public opinion, even if they hail from a social-structural majority group.[331] In this way, the regular and procedural determination of leaders still has a beneficial effect for all individuals, even though there are groups which lack a path to leadership, and some individuals are even (temporarily) excluded from the selectorate. It is therefore crucial for the functionality of majoritarian democracy that individuals enjoy the rights to make their opinions known and to protest such that a tyranny of the majority can be averted.

5.2.3 *Protecting Intense Minorities*

For the functionality of majoritarian democracies, not only the fate of persistent minorities matters. Democracies must protect the interests of minorities and disenfranchised groups, whether they are permanently in conflict with the majority position or only exceptionally. In particular, the treatment of what I call *intense minorities* is important not only for the functionality of a token of democratic governance but even for the legitimacy of the regime as a whole. This is because, insofar as majority decisions may threaten individuals' most fundamental interests, minorities need not be persistent to suffer net costs from the existence of a regime.[332]

330 Hampton ([1997] 2018, 111) also emphasizes that even though the procedure of voting does not lead to a decision which pleases everybody, it is possible for all sides to make their views heard while decisions are reversible at a later point in time. In this way, she argues, democracy makes disagreement productive and forestalls violent revolution by allowing for a peaceful change of government.

331 This is what distinguishes liberal democracies from constitutional monarchies which grant fundamental rights but are governed by a monarch. Although the latter can be justified as regimes, their form of governance is dysfunctional because individuals lack any leverage to non-violently shape policy.

332 The cases of persistent and intense minorities tend to get mixed up, however. For instance, Pettit (2012, 304) suggests addressing the issue of persistent minorities by excluding certain issues from political choice. Yet this solution is appropriate to tackle the problem of intense minorities instead. As I argued in the preceding section, the issue of persistent minorities is best addressed by granting free speech and freedom of association. Moreover, Pitkin (1966, 44) draws attention to the fact that members of a persistent minority group who are being abused and exploited by the majority lack a procedural means to challenge the majority's authority. Yet the fact that the majority is in the position to inflict severe harm on the minority is even problematic if the minority is only temporary.

Consider, for example, the case of a country where the legislature decides with a large majority to build a dam holding back a river in order to create a reservoir lake for the production of electric power. In the area to be flooded, however, there lies a small town which is surrounded by agricultural land. The bill does not provide for any form of compensation. Thus, once the river is dammed, the denizens of the town will lose their homes without replacement. Entrepreneurs will be deprived of their commercial premises and farmers will be dispossessed of their agricultural land. If the decision is in line with constitutional rules, there are no legal means by which the townspeople can fight the authoritative decision and even physical resistance against the overpowering executive will not stop its coercive implementation. Thus, the people from the town are worse off than they would be in the state of nature where they would be on an equal footing with encroaching neighbours.

Majoritarian democracy as a form of governance does not automatically protect individuals against unbearable externalities from political action. Yet it is a necessary condition for the functional legitimacy of a regime that individuals' basic interests are protected against a government yielding political authority and a monopoly of power, even if it is a democratic government. In other words, the fact that political authority is wielded democratically is not sufficient for the regime to be legitimate. To guarantee that a majoritarian democratic regime is even functional, it must be a *liberal democracy*[333] where individuals enjoy fundamental rights.[334] This requirement is straightforward insofar as *any* regime must be liberal in order to qualify as functional (see 4.3.2).

It is important, however, to emphasize that for protecting intense minorities, it does not suffice to merely require that decisions be made with a supermajority. This is because the minority affected may be infinitesimally small. In the case of the dam, imagine that decisions are made by direct democracy and that the society has one million inhabitants, 9,999 of whom live in the small town. Then the law might still pass even if the supermajority quorum was 99 percent. This would be the case if all 990,001 individuals who do not live in the town but stand to benefit from the dam would vote

333 The case for democratic regimes (like all other regimes) to be liberal is different from the so-called liberal view of democracy. According to Riker (1982, 9–14), the latter conceptualises the control exercised through elections as sufficient for liberty—in contrast to Rousseauvian populism, which identifies popular rule with liberty itself.

334 As Stemmer (2013, 188) notes, majority rule would hardly be bearable without fundamental rights which restrict the majority's power.

in favour of it. Supermajority rules thus cannot securely guarantee that all individuals yield nonnegative benefits.

Notably, this problem is insufficiently accounted for in Buchanan and Tullock's constitutional model which aims to strike a balance in the supposed trade-off between individual protection and facilitated decision-making. Buchanan and Tullock ([1962] 1999, 130–31) even suggest that constitutions provide special rules for issues which are particularly likely to intensely affect minorities. Yet their approach is unsatisfactory for two reasons. For one thing, Buchanan and Tullock ([1962] 1999, 47) already presuppose individual and property rights, as well as sanctions in case of their violation, to exist at the constitutional stage, omitting their definition from the analysis.[335] What is more, however, the protection suggested by Buchanan and Tullock for such "rights" consists merely in raising the internal costs for changing them. This takes place by adding further veto players,[336] i.e. by requiring the assent of more individuals by means of supermajority rules, or another institutional agent such as a second chamber.

On the one hand, Buchanan and Tullock ([1962] 1999, 73–75, 82) envision higher majority thresholds for issues which affect changes in individual and property rights where externalities from collective action may be particularly high. This would have the effect that changes in such rights become more difficult because more people need to agree. Moreover, Buchanan and Tullock ([1962] 1999, 241) point out that bicameral legislatures have higher thresholds for issues about which a minority cares more strongly than the majority, compared to an equal or random distribution of preference intensities. Yet increasing the internal costs of collective decision-making by adding more veto players is insufficient to guard individuals against intensive externalities. As Buchanan and Tullock ([1962] 1999, 72) themselves underscore, any decision rule short of unanimity exposes the individual to the risk of external costs.[337] Supermajority decisions do

335 In *The Limits of Liberty*, Buchanan ([1975] 2000, 11–12) himself notes that this question was left out in *The Calculus of Consent*.

336 Tsebelis (2002, 19) defines veto players as agents whose consent is required for changing an existing policy. Institutional veto players may be defined by the constitution, such as the president, the House of Representatives, and the Senate in the US. There may also be veto players without an institutional role, such as political parties.

337 Elsewhere, Buchanan ([1986] 2001, 170) even claims that having a say in delineating the private from the public sphere is more valuable to the individual than being entitled to vote.

not provide sufficient protection to intense minorities in the democratic process of legislation.

In the limit, an intense minority might consist of one single individual who could only be protected by a rule of unanimity. In other words, every individual would need to be a veto player on her own to fend off collective action exposing them to excessive harm. For sensitive issues which threaten an individual's freedom, bodily integrity or livelihood, unanimity is the only decision rule which guarantees functionality, provided no other institutional mechanisms are in place. Any less restrictive rule allows for the adoption of laws which put some individual(s) in a situation which for them is worse than the state of nature.[338]

Since the individuals affected will never consent to a policy depriving them of what they care for most, unanimity in sensitive decisions effectively means to ban these issues from collective choice. Indeed, effectively protecting what individuals feel most strongly about can be achieved at minimal internal costs by completely excluding those and only those issues from the sphere of political authority where individuals and minorities are intensely vulnerable to majority decisions (see 4.2.2). A legitimate regime must therefore exclude the mere possibility of passing intensely harmful laws such as laws mandating that mentally ill people are to be sterilised, that adherents of a particular religion may be killed and used as organ donors, or that the unemployed may be utilised as compulsory labourers by the government.

Insofar as individual rights are protected by the constitution and exempted from the range of political authority altogether, they become *inalienable*. This sets them apart from rights in Buchanan and Tullock's sense which merely require broad coalitions to be changed. Although Buchanan and Tullock ([1962] 1999, 250) note that "the doctrine of inalienable rights—institutionally embodied in constitutional provisions limiting the authority of legislative majorities" is compatible with their approach, they only consider it as tangential to their project.

From the perspective of functional legitimacy, however, inalienable rights are a requirement of political legitimacy, even in a majoritarian or supermajoritarian democracy which provides some precautions against in-

338 Elsewhere, Buchanan ([1993] 2001, 259) fittingly warns that "[t]he tyranny of the majority is no less real than any other, and, indeed, it may be more dangerous because it feeds on the idealistic illusion that participation is all that matters."

fringements of minority interests.[339] Their existence is what makes political authority legitimate, not the fact that it is based on the support of a majority of citizens.[340] Majorities may also adopt dysfunctional policies.[341] Yet this does not threaten the functionality of the regime as long as individuals' inalienable rights are being respected and the costs from particular policies do not outweigh the general benefits of peaceful coexistence. To this end, certain issues must be exempt from majority decisions.[342]

Inalienable rights need not only be enshrined in a constitutional document; they must also be respected. This is why in all functional regimes, including democracies, government officials must adhere to the rule of law. Moreover, inalienable rights must be legally recoverable to effectively protect individuals and minorities. Thus, regimes must provide individuals with the option to take legal action if they see their fundamental rights threatened or violated, either in a constitutional court or within the regular judicial system.

5.3 The Legitimacy of Public Funds

5.3.1 *The Arbitrariness of the Status Quo*

A functional regime must grant individuals inalienable rights but beyond that, the government enjoys much leeway. In particular, it may interfere with the structure of existing property rights by raising public funds such

339 This is in notable difference to Rawls (1971, 224) who makes the case for majority rule which is not restricted by constitutional provisions such as supermajority requirements, a bill of rights, or a bicameral legislature. His argument is that the simple majority rule maximises the equal political liberty of individuals whereas constitutional restrictions limit participation, although they may be compatible with political equality.

340 In contrast, Przeworski (2009, 86–88) claims that democratic self-government can only take the form of "counting heads," even though a numerical minority may feel much more intensely about an issue than the rather unaffected majority. He holds that countermajoritarian devices such as constitutions or veto players only protect the interests of the wealthy against the majority of the not-so well off. Yet this argument is flawed insofar as fundamental rights protect *everyone* against unacceptable collective decisions, including the poor.

341 Similarly, Rawls (1971, 356) holds that although the majority has the right to make laws given that the background structure is just, this is no guarantee that the laws enacted by the majority will be just as well.

342 See also Nagel (1987, 239) who describes majority decisions in democracies as instances where it is justified to let a majority decide at all.

as taxes or compulsory social security contributions. Governments may use these funds to provide public goods and to redistribute income and wealth for social purposes. Such fiscal manoeuvres are compatible with the functionality of the regime at large insofar as the rule of law prevails and the government respects individuals' fundamental rights. Nevertheless, it is an open question whether public spending is functional in its own right as a subordinate institution.

The idea that the government, unsolicitedly providing public goods and acting as a "welfare state," is entitled to interfere with the property rights claims of individuals is met with particular resistance on the part of libertarians. This is because libertarianism considers the only justifiable *raison d'être* of government to consist in the protection of pre-political property rights claims (see 4.2.3). Such existing rights claims, however, are heavily influenced by contingent path dependencies. From a functional perspective, it may therefore be the case that a particular system of property rights is itself illegitimate, in the sense that its existence entails net costs for some individuals who incur the burden of having to respect rights claims.

Libertarians consider a structure of property claims legitimate if and only if it has historically come about voluntarily, without a violation of pre-existing property rights.[343] At the outset, rights are supposed to originate in initial acquisition, as held in the Lockean tradition, or negotiated at the constitutional stage, as argued for by Buchanan ([1975] 2000, 37). These rights are to some degree arbitrary, reflecting differences in strength and opportunity.

According to Locke ([1689] 2005, 286), the things created "by the spontaneous hand of Nature" belong to all humankind together. Yet since people possess their bodies, they also possess their labour and whatever they take from nature and thereby mix it with their labour. In this way, it is possible to appropriate goods, under the only restriction that "there is enough, and as good left in common for others" (Locke [1689] 2005, 287–288).[344] Libertarian Lockeans such as Narveson and Nozick adopt this assumption.[345] Moreover, they hold that property rights can only be transferred voluntarily

343 See for example Buchanan ([1975] 2000, 27–28), Narveson (1988, 151), Nozick (1974, 153–55).

344 This condition has been popularised by Robert Nozick as the "Lockean proviso." Nozick (1974, 178) subscribes to the proviso in the weak form which requires that enough must be left for others to use, claiming that the proviso may only be violated if the others affected are being compensated otherwise.

345 Narveson (1988, 85), Nozick (1974, 151).

after the initial acquisition, in exchange against other property rights or as gifts.[346]

Buchanan, in contrast to Locke, does not assume natural rights in a strict sense. In his theory, property rights which individuals exchange at the post-constitutional stage during the trade of goods are initially defined in negotiations at the constitutional stage, which is akin to a Hobbesian state of nature (Buchanan [1975] 2000, 40).[347] Concluding the constitutional contract, however, presupposes a "natural equilibrium" of predation, production and defence, he claims (Buchanan [1975] 2000, 76).[348] The proto-property rights which are defined by this equilibrium and serve as the basis for the constitutional contract are completely contingent upon individuals' personal circumstances and skills. A one-time initial redistribution of these natural claims may be required to reach consent to the constitutional contract (Buchanan [1975] 2000, 83). Once the constitutional contract is in place, however, transfers in property must be consensual, he claims (Buchanan [1975] 2000, 50).

Both the Lockean strand of libertarianism and Buchanan's idiosyncratic version have in common that they enshrine claims which are the product of historical contingencies and withdraw them from the government's authority. Yet the fact that people *have* certain rights, even if they acquired them before the current regime, or even before the state came into existence, does not mean that they are *justified* to have them according to the functional account. Existing property rights regimes may well be dysfunctional, e.g. if they cement privileges for members of a certain gender, class, caste, or ethnicity. Rather than taking it as given, the status quo is itself to be evaluated against to the contractarian measure of unanimous and voluntary consent (see also Vanberg 2004, 162–63).

In the counterfactual choice situation, which abstracts away from all existing property rights, the condition of unanimity is crucial to determine whether a system of property rights is functional. Insofar as a regime meets this test, the government is justified to define and re-define property rights claims. Libertarians' insistence that legislative decisions concerning property rights must be unanimous entails a conservatism with respect to

346 Narveson (1988, 94), Nozick (1974, 160).

347 Buchanan ([1975] 2000, 38, footnote) is aware that rights have historically developed in an evolutionary way, not being the result of an actual contract. Yet he assumes otherwise for analytical reasons.

348 Here, Buchanan diverges from Hobbes for whom no equilibrium is possible in the state of nature because individuals are equally vulnerable to each other.

property rights which is not always warranted from a functional perspective.[349] This is because, within an existing society, unanimity protects the institutional status quo.[350] Elinor Ostrom (1986, 13) sums it up as follows: "There is nothing inherently conservative about a unanimity rule unless the default condition is the status quo."[351]

This is exactly where libertarianism differs from the functional conception of legitimacy. Functional legitimacy employs the state of nature as a baseline and uses the criterion of unanimous consent under these counterfactual circumstances as the measure to determine that the *existence* of an institution is legitimate. Libertarianism, in contrast, evaluates a *change* in an institution in terms of unanimous consent in the status quo. This is a very different approach from functional legitimacy.[352]

In particular, a concern for protecting existing and pre-political property rights against changes does not follow from the fundamental liberal right to property which a functional regime must grant. Functional legitimacy only demands that the government must respect those rights which it defined and that expropriations, if they take place at all, must be compensated. The government may, however, create new property claims and redefine property rights by changing the tax code or other regulations without committing expropriation.

Nevertheless, a pragmatic reason for governments not to interfere with existing property rights might be that these rights impose constraints on what is implementable. On Buchanan's ([1975] 2000, 107–10) account, people will not accept governmental interference with their rights as binding

349 In contrast, Meadowcroft (2014, 97) argues that Buchanan's contractarianism is not a conservative defence of the status quo, pointing out that Buchanan charges current institutions to lack legitimacy and calls for a constitutional revolution. Indeed, Buchanan ([1975] 2000, 213) envisions a constitutional revolution. The reason, however, is that he believes the government to have overstepped its bounds and violated citizens' pre-existent rights claims.

350 Munger and Vanberg (2023) also hold that Buchanan's theory is biased in favour of the status quo insofar as it privileges those individuals who do well in the status quo, which is a consequence of his employment of unanimity as a criterion for evaluating the legitimacy of institutional changes.

351 Munger and Vanberg (2023) note that even under simple majority rule, normatively problematic structures may be perpetuated if at least half of the population benefits. Here again, the conservatism lies not in the decision rule but in the status quo which is chosen as the baseline.

352 As Munger and Vanberg (2023) point out, Buchanan does not even give a criterion for judging the legitimacy or illegitimacy of existing regimes. He is only concerned with determining whether a suggested change to an existing constitution counts as legitimate.

because it violates the constitutional contract. Thus, they will only comply with the law if the prospect of being sanctioned is sufficiently threatening. In the long run, he warns, even the stability of the legal order is threatened when the protective state enforces rights which do not square with individuals' bargaining power and the government thus loses its authority.

To visualise the idea, take an example from the sphere of traffic. The city council wants to strengthen the rights of cyclists and decides to phase traffic lights such that the optimal speed for catching a "green wave" is 18 kilometres per hour. Yet car drivers, used to an uninterrupted traffic flow, may prefer not to comply and simply drive through the red traffic lights rather than slow down. In this way, the coordinative function of traffic lights is undermined and traffic rules in general forfeit their usefulness as heuristics for how other road users will behave. To keep up the order and maintain its own authority, the council would probably need to install more radar traps, which massively increases enforcement costs.

In the same vein as Buchanan, Michael Munger (2018) argues that the status quo is relevant because existing power structures impose a limit on what is feasible. Likewise, John Meadowcroft (2014, 96–99) holds that redistributive policies which are not in everyone's interest lack a realistic account of power.[353] And Binmore (1998, 348), too, shares Buchanan's position that the status quo must be the starting point of social contract negotiations because this is a requirement for its acceptability.[354]

These arguments make it seem as if a government's authority was very fragile and easily undermined by non-consensual legislation. That impression, however, is not warranted in a stable regime. If the government effectively wields political authority, it is authorised to change existing rights by virtue of its very authority. Citizens and residents will recognize any alterations in their property rights insofar as they recognize the bindingness of the legal order, on which they are dependent, and the authority of the government. The government, moreover, is empowered to enforce the legal order by means of its executive branch which deters resistance.

353 Meadowcroft (2014, 96–99) even claims that, by setting a precedent of non-consensual legislation, social democratic policies will eventually erode the constitutional contract such that nobody can count on having any rights against predation anymore.

354 Moreover, Binmore (1998, 348) interprets Buchanan's reference to an underlying equilibrium in the state of nature as an expression of the fact that any social contract must be feasible, i.e. an equilibrium in the "game of life."

In certain passages, even Buchanan, ([1975] 2000, 54-8, 61-63, 94, 111-112, 227) allows for political changes in property rights made by a majority, insofar as this is specified by the constitutional contract.[355] The idea is that individuals at the constitutional stage unanimously agree on non-unanimous decision-rules for the post-constitutional provision of public goods.[356] This premise implies that individuals' rights are inextricably linked to accepting membership in a polity with defined collective decision rules. Thus, rights are not conceived as pre-political but as a consequence of the legal order and subject to legislation. Such an understanding of property rights is much more compatible with the functional conception of legitimacy.

Property, on the functional account, is not an end in itself but contributes to the function of a legal order of providing security and peace for the citizens and residents of a state. If it is clearly defined what belongs to whom, individuals need not be afraid that they wake up one day with nothing to support themselves. This is what they would need to fear in the state of nature where there are no positive claims to property.[357] A peaceful political order and security of one's possessions are also necessary for individuals to find it worthwhile to be productive and to engage in mutually beneficial exchange (Olson 1993, 567–72). Since a functioning economy with production and trade is the basis of all individuals' livelihood, a system of clearly defined property rights is crucial for any functional regime (see 4.2.3).[358]

That property rights claims must be defined, however, does not preclude that the government may define them in a way that displeases those individuals who amassed or inherited riches which have their origin in brute force or in dysfunctional social practices such as slavery, coerced labour, or racism. Neither does it rule out that governments may levy taxes or social security contributions, as long as they adhere to constitutional rules.

355 G. Vanberg (2020, 664) also holds that the tension between democratic decision-making and constitutionalism can be solved at the constitutional level, where individuals unanimously select regimes with both majoritarian governance and constitutional restrictions on political authority.

356 There is a close affinity between this suggestion and the model used by Buchanan and Tullock ([1962] 1999).

357 See Hobbes ([1651] 1996, 90), Locke ([1689] 2005, 350), Rousseau ([1762] 2012, 176).

358 See also Mises ([1929] 2011, 14) who denies that private property is an institution which only serves the propertied classes at the expense of everyone else. If the latter was the case, he claims, private property ought indeed to be abolished. Functional legitimacy would have the same implication.

A certain amount of redistribution may even be required in a functional regime. The social contract rationale provides a strong case to guarantee a social minimum to individuals who cannot support themselves (see also Kavka 1986, 211–212).[359] This follows from the fact that individuals mainly enter the social contract in order to obtain security.[360] If the poor have nothing left to lose, they are not only as miserable as they would be in the state of nature. In fact, they are even worse off because they are additionally subjected to a property rights regime which bans them from taking goods from others, which would be possible in the state of nature.[361] A regime with such a system of property rights would accordingly be dysfunctional. Thus, functional legitimacy demands that everyone within the state is guaranteed a social minimum which ensures that they are materially not worse off than in the state of nature.

5.3.2 *The Justifiable Size of the Public Budget*

A public budget can be considered a functional institutional type insofar as controlling its own funds enables the government to create security and peace. Raising money provides the government with the resources to maintain internal and external order, as well as to ensure that all people in the state achieve the social minimum of material security. Beyond these existential functions, however, governments tend to use their funds to provide a wide range of other goods and services. Yet it may be doubted whether extensive public-sector tokens qualify as legitimate according to the functional account. The reason is that people incur high costs from paying for many public goods and services, few of which actually benefit them. Many "public goods," in fact, are not public in the sense that everybody wants them equally, or even at all (see also Gaus 2011, 534).[362] Examples are subsi-

359 Kavka (1986, 223) claims that Hobbes himself envisions a guaranteed economic minimum for those who cannot work.

360 Note that even Hayek ([1979] 1998, 55), who is generally sceptical of government interventions, considers the provision of a minimum income or social security net as an essential part of the anonymous "Great Society" where poor relief is no longer organised by personal networks.

361 This is why Buchanan ([1975] 2000, 83) envisions that before a constitutional contract can even be concluded, some initial transfer of resources must take place.

362 Treisman (2007, 177) argues that even the medical specialisation of a local hospital benefits some groups more than others, e.g. families with young children or senior citizens.

dies for cultural establishments, public childcare funding, or the provision of free highways (since not everyone has a car).

This may be seen as a reason to call for a *small state* where the public sector is subject to strict limitations. For instance, Buchanan ([1975] 2000, 130–131) cautions that if the government becomes larger, i.e. provides more goods and services, the probability rises that the individual loses out on total. He considers this threat to be particularly intensified by majority voting.[363] Buchanan ([1975] 2000, 204–205) even voices the apprehension that a democratic government may turn into a Leviathan with an inflated budget, arguing that constitutional restrictions on spending are necessary to avert this threat. And Nozick (1974, 149) leaves no room for doubt when he claims that "[t]he minimal state is the most extensive state that can be justified."

Apparently, taxation for purely redistributive purposes is a zero-sum matter (see for example Mueller 1998, 182), taking resources from some to give them to others. It must be noted, however, that even goods and services that governments provide to directly benefit some individuals, e.g. by means of transfers or by providing an infrastructure for them, may be considered public. This is the case insofar as these policies cause positive externalities for all members of society (see also Tiebout 1956, 416–417).[364] If these benefits are sufficiently high, they may outweigh not only the costs borne by those who make use of the good or service themselves, but even the costs for all other contributors. Under this condition, such goods and services are functional.

Subsidised childcare is arguably a public service which falls in this category. Although only parents of young children benefit in monetary terms, there are indirect (potentially net) benefits for all members of society

363 Accordingly, Buchanan ([1975] 2000, 195–196) claims that majority voting can lead to a level of public expenditure at which everybody pays more than they obtain. Insofar as taxes are taken from all individuals but need not benefit everybody equally, he fears, the public sector will be inefficiently large. In a footnote, however, Buchanan ([1975] 2000, 196) points out that the bias towards a larger state is a historical fact, but not a theoretical necessity. If benefits of public spending, rather than the costs of taxation, would have to be distributed equally, the public sector would be systematically too small.

364 Cordelli (2022, 26–27) argues that if the public sphere was defined based on calculations of externalities, there would be an underproduction of education and an overproduction of public fireworks. This argument, however, overlooks that there arise not only positive externalities but also costs from the collective provision of fireworks. Conversely, not only costs but also external benefits are entailed by public education.

insofar as parents can work more hours, increasing the economy's productivity. Moreover, subsidies for childcare might slow down falling birth rates, which in the long run stabilises labour supply and the pension system.

The externalities argument also extends to forms of poor relief that go beyond the social minimum. Accordingly, the rich may actually benefit from supporting the poor. Murphy and Nagel (2002, 86), for instance, make the point that the public provision of certain social and cultural goods to the lower classes may have positive spill-over effects for wealthy people. The examples they give are economic benefits from public education and the value of living in cities where people with a variety of backgrounds and occupations find a home. One might also add certain health care services here: Even though the rich can buy private health insurance, they have an interest in public hygiene and in preventing the spread of communicable diseases.

Kavka (1986, 441), moreover, lists three concrete benefits of a social insurance scheme which also accrue to the rich: (1) their future selves or their children may themselves fall upon hard times and benefit from assistance to the poor, (2) redistributive schemes can contribute to equality of opportunity, which in turn is conducive to economic productivity, and (3) if the poor have a stake in the existing social order, they pose a much lesser threat to the stability of the regime.[365]

There are, however, also public expenses which do not qualify as public goods at all. In other words, they do not even indirectly benefit all contributors through net positive externalities. For instance, public broadcasters, financed by mandatory fees, may purchase the expensive television rights for sports events which only a subset of citizens and residents is interested in watching. This spending decision, seen in isolation, cannot be considered functional.[366] Sports-averse individuals would be better off if overall fees were lower and everyone could privately spend their money on programmes they actually enjoy watching.

365 In a similar vein as the last point, Buchanan ([1975] 2000, 94–95) notes that it may be worthwhile for the better-off to accept a one-off redistribution of goods in exchange for their remaining property rights to be honoured.

366 Similarly, Gaus (2011, 534–535) emphasizes that to be publicly justified, a policy providing a public good at a certain cost must be worthwhile for all individuals to whom it is to be justified.

Should such dysfunctional public spending policies be constitutionally banned? This is what libertarian-leaning authors tend to argue.[367] The result of constitutional restrictions on adopting spending policies which impose net costs on any individual would be a fairly small state, allowing only for such expenses which entail net positive externalities for all contributors.[368] Governments of states with large and heterogeneous societies in particular will find it difficult to come up with concrete spending policies which do not impose net costs on anyone.

A large public budget, however, need not be dysfunctional on the whole, even if it comprises subordinate policies which are. Keeping the government's fund small may thus turn out to be overcautious, depriving individuals of the possibility to gain net benefits from a more generous public spending scheme. Constitutions, however, should not only restrict rulers from pursuing policies which impose net costs on the ruled. At the same time, they should also enable them to create cooperative benefits (see also Vanberg 2008, 115–16). Adopting dysfunctional policies can be understood as a false positive error and not passing functional law as a false negative. A constitutional design which prevents the adoption of any dysfunctional redistributive scheme aims exclusively at minimising false positives while tolerating false negatives. It is thus short-sighted since both types of errors entail costs.[369]

The costs of false negatives may not be as apparent as the costs of false positives. This is because they are *opportunity costs*, i.e. foregone benefits. For instance, Buchanan and Tullock ([1962] 1999, 258) claim that there is a fundamental difference between adopting and blocking public policy, as the former entails external costs whereas the latter prevents them.[370] Yet this

367 Muldoon (2016, 103–5), for example, demands that the distribution of benefits from social cooperation must be according to the Pareto principle. Narveson (1988, 232) rejects taxation and the provision of goods and services for which the individual has no demand. And according to Vanberg (2006, 93), redistribution must at least *ex ante* benefit everybody who is to contribute to it, functioning as an insurance scheme.

368 Other goods, as long as their usage is excludable, might be provided according to the "benefit approach" suggested by Mueller (1998). This would mean that those and only those individuals ought to contribute to public infrastructure such as roads, bridges, or parks, who actually use them, provided that their use is excludable. For instance, if technologically possible, highway tolls ought to be introduced, ensuring that only those pay for the infrastructure who actually benefit from it.

369 See also Vallier (2018b, 125), Vanberg (2000, 20).

370 This is surprising insofar as, in the appendix of *The Calculus of Consent*, Buchanan ([1962] 1999, 323) actually notes that both types of error may entail costs.

view ignores the opportunity costs of unrealised benefits from collective action, that is, the costs of false negatives. If blocking public spending is systematically easier than granting it, people would be deprived of net benefits they could otherwise realise.[371]

A constitution which enshrines a small public budget where all subordinate spending policies must be functional on their own thus potentially obstructs the creation of a functional, i.e. mutually beneficial, public spending scheme. On the functional account, in contrast, relatively large budget tokens may be legitimate, as long as all individuals benefit from their existence in total.[372] In a nutshell, functional legitimacy requires the limited government of liberalism, but not the libertarian minimal state.

5.4 Diversity and Decentralisation

5.4.1 *The Costs of Diversity*

Modern states are characterised by large populations.[373] Particularly in rich democracies, moreover, people tend to exhibit a wide variety of identities, assumptions about the world, preferences for public goods, and value systems, which translate into very different ideas concerning which policy choices are the right ones. For such large and heterogeneous societies, it becomes increasingly difficult to pass policies that please everybody. Insofar as people disagree about the goals of political decision-making, political disagreement is irresolvable by argumentation. In such a situation, many citizens and residents will merely feel subjugated to authority and the existing legal order.[374]

371 Gaus (2011, 458–60) accordingly notes that Buchanan and Tullock's ideal decision rule, which he conceptualises as a supermajority rule, outperforms the majority rule in reducing false positives while doing worse when it comes to false negatives.

372 Invoking the principle of fair play, Klosko (1987, 255–256), too, argues that the individual is obligated to comply with a scheme of public goods beyond the minimal state as long as the overall benefits do not exceed the overall costs. Even Hayek ([1979] 1998, 45) argues that a system of public spending can be justified as an exchange: Whereas most individuals will need to contribute to goods and services they do not care about, they will be in favour of a system of taxation as long as they expect to benefit as least as much as they pay in total.

373 Every member state of the United Nations has more than 10,000 inhabitants, and in four fifths of member states, the count exceeds one million.

374 See also Moehler (2018, 1–2), Müller (2019, 159).

This is no surprise because diversity has the consequence that the legal order is characterised by a high amount of dysfunctional primary law. Although the regime in itself is legitimate, such deep diversity makes it simply impossible to have laws that provide net benefits for all individuals, particularly in certain domains. Examples for policies with irresolvable disagreement are the legalisation or prohibition, respectively, of assisted suicide, drugs, prostitution, fire weapons, or abortion. Such policies are purely zero-sum, i.e. they entail costs for some individuals if they are passed and opportunity costs for others if they are not passed. Either way, the costs are high for some part of the population.

The issue with such contested policies is the fact that they are adopted by a part of the state's large and diverse population but become binding for everyone within its borders. Whereas both more lenient and more strict constitutional rules for legislation would simply favour one substantial position,[375] it appears that political authority concerning contested issues should rather be divided analogously to the divided population.[376] Thus, it seems, such a state should be organised in smaller and more homogeneous jurisdictions below the central government. If the constitution is designed such that political authority is located at more than one level, the regime is a *federal* one.[377] William Riker (1964, 11) classically defines federalism as follows:

> A constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which

375 Since both regulation and deregulation can be dysfunctional, it is no help to resort to more laissez-faire in these situations. Realising that the costs of political organisation increase with the size and diversity of a society, Buchanan and Tullock ([1962] 1999, 115–16) prescribe a higher degree of private organisation of activities for those societies with deep disagreement on values. Yet laissez-faire is not a neutral option. The individuals benefitting from less regulation are those with libertarian views, but those with more demand for more public guidelines incur substantial costs. The problem in such societies is precisely that it is both costly to adopt certain policies and not to adopt them.

376 As Buchanan (1986, 252–253) observes, in a situation of political decision-making between two alternatives, it would be better for everyone to get what they want, rather than centrally choosing one option for the whole population. This would constitute a Pareto-improvement since external costs would be eradicated for individuals who are otherwise being outvoted, without imposing new externalities on anybody else.

377 Treisman (2007, 23–26) distinguishes political from administrative decentralisation. Only political decentralisation, where lower tiers have some political authority, qualifies as federalism.

> it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere.[378]

From a functional perspective, the appeal of a federal system where political authority is decentralised to lower levels is that it may mitigate the costs arising from diversity by allowing for different legal regulations of the same issue within the same state. In other words, the decentralisation of political authority makes it possible to have a horizontal variety of parallel jurisdictions with different sets of regulation, taking the geographical distribution of political positions and cultural preferences into account. Individuals benefit from decentralisation insofar as policies which are adopted at the lower level are matched closer to their respective preferences (see also Ederveen, Gelauff, and Pelkmans 2008, 23).

As Nozick (1974, 312) aptly points out, people are so different that there is not one single Utopia for all of them. Utopia can therefore only be understood as a "meta-utopia," a framework which includes a plurality of utopias. Whereas for Nozick (1974, 333–334) himself, the framework for Utopia is embodied by the minimal state, functional legitimacy allows for an extensive public sector, under the premise that it creates net benefits for all individuals (see 5.3.2). Federalism may help ensure that this is indeed the case, by tailoring policies to the set of people who actually benefit from them.[379] In this way, it may be possible to reduce the number of dysfunctional policies without sacrificing functional ones in exchange. In other words, federalism offers the chance of creating institutional benefits without any costs. It may thus be the framework for Utopia of functional legitimacy.

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378 Another definition is given by Bednar (2009, 18–22) who lists three criteria for federalism: geopolitical division, independent bases of authority and direct governance.

379 A very different case for decentralising political authority is made by Thunder (2024). Based on an Aristotelian account of human flourishing, he argues that individuals can only experience essential human capacities within communities and that a good life is constituted by membership in communities. A single and overarching legal order, Thunder claims, does not allow for membership within several communities, which is constitutive of a good life. Instead, there should be voluntary and bottom-up communities where rulers are epistemically, culturally, and spatially close to the ruled.

5.4.2 *The Problem of Local Minorities*

The way in which federalism may reduce the number of dysfunctional policies in a legal order is that diversity within sub-jurisdictions might be lower. If people living close to each other have the same policy values, the same decision can create net benefits for all of them. This is intuitively plausible. Take the case of a multi-lingual federation such as Belgium, Canada, or Switzerland.[380] People within different geographic sub-units speak different languages and follow different customs.[381] If linguistic and cultural policies were made at the central level, as a one-size-fits-all solution, many individuals would be unhappy and feel alienation towards their rulers.[382] This would be the case even if the central government was elected by a majority of citizens of the whole state.[383]

To be sure, a parallel variety of law could also be decided by the legislative at the central level and merely be administered by local executive officials, as suggested by Daniel Treisman (2007, 58).[384] Lower-level governments, however, seem to have a twofold advantage. First, officials have direct access to local knowledge.[385] And second, they are also electorally accountable to lower-level jurisdictional constituencies. This gives them an incentive to cater to the interests of their respective constituents—or at least to a majority of them.

380 If the European Union should one day become a federation, its internal heterogeneity of cultures and languages would be even higher.

381 Weinstock (2001, 79) makes the point that in multi-ethnic societies, federalism is conducive to political equity, insofar as it confers the clout to be decisive in certain decisions of central importance to cultural minorities.

382 According to Hayek ([1979] 1998, 146), the "widely felt inhumanity of the modern society" is due to political centralisation which deprives individuals of the right to co-determine local issues. Allard-Tremblay (2017, 702), moreover, argues that decentralised decision-making can create epistemic acceptance for the exercise of political power which would not be possible for centralised decisions.

383 Kelsen ([1920] 2013, 75) even argues that majority decisions only make sense within culturally and linguistically uniform polities. These may be located at a lower level than the central state.

384 Treisman (2007, 60–61) notes that combining political centralisation with administrative decentralisation may even internalise positive spill-over effects if several lower-tier jurisdictions have the same preferences, e.g. if there are dispersed communities of the same linguistic minority.

385 See also Allard-Tremblay (2017, 701), Oates (2004, 315).

This caveat, however, must be taken seriously in a regime with democratic governance.[386] Territorial sub-jurisdictions in a federal state may be homogeneous in terms of language, culture, or religion, but they may exhibit a high level of diversity in other dimensions where those in the minority are still being outvoted. There is no reason to suppose that many substantial policy preferences are correlated with geographical location. Moreover, even ethnic and religious minorities do not benefit from decentralisation if they are dispersed through the whole territory of the state and live in different lower-level jurisdictions (see also Treisman 2007, 239).[387] The same applies to sexual minorities who are particularly prone to being scattered across federal sub-jurisdictions, finding themselves in the minority everywhere. The only way for such minorities to influence sub-jurisdictional policies is by means of public opinion.

Local majorities need, however, not be open to the arguments from minorities. They may even be more extreme in their position towards minorities than the majority at the central level. Consider the case of gay marriage which is actually discussed by Richard Schragger (2005) as well as Erin O'Hara and Larry Ribstein (2009, 161–71) as an example for the benefits of federalism.[388] If a conservative majority in a lower-level jurisdiction bans same-sex marriage, it thereby withholds the benefits of marriage from homosexual couples within the jurisdiction. This might not have happened if the decision would have been taken at the central level, given that the nationwide majority is more tolerant. Under such circumstances, granting authority to local majorities entails that homosexual couples who are denied the benefits of marriage incur net opportunity costs from federalism.

386 In non-democratic regimes, rulers are not accountable to any constituency, so this argument for decentralisation becomes obsolete.

387 Treisman (2007, 241–43), moreover, cautions that decentralisation along ethnic lines might induce radicalisation and weaken identification with the centre. As an alternative, he suggests veto and representation rights at the central level. As the example of the European Union shows, however, decentralisation and representation may also be combined.

388 According to Schragger (2005, 154–56), the authority to issue marriage certificates should rest with cities since marriage is the sanctioning of a union by a local community. He envisions marriage status to depend on residency within a city which acknowledges the union. Making marriage status dependent on residency, however, creates problems if one or both partners move away. O'Hara and Ribstein (2009, 165–66), who focus on the level of US states, therefore suggest that states should recognise marriages celebrated in other states, but should not grant the benefits to them which they confer in order to incentivise marrying, e.g. tax benefits.

Thus, the dysfunctionality remains, and additionally, those incurring the net costs are members of a vulnerable minority.

William Riker (1964) even argues that federalism favours the values of a "privileged minority," i.e. of a group which is nationally in the minority but constitutes the majority at a lower level. In the case of the US at his time of writing, the beneficiaries of federalism are "Southern white racists," as Riker (1964, 155) bluntly states.[389] Their ideal of racial segregation translates into policies that impose net costs on members of racially stigmatised minorities and are therefore dysfunctional. Insofar as the majority at the central level is less racist, taking authority away from sub-jurisdictions would thus reduce the number of dysfunctional policies. Such a measure might even be required to render the whole regime functional, by ensuring that racially discriminated people enjoy net benefits of peaceful coexistence in the state.

The case discussed by Riker is certainly an extreme example. Moreover, if the state's constitution is thoroughly liberal, local officials must also abide by the rule of law and respect all individuals' fundamental rights, just as the government at the central level. Nevertheless, locating political authority with smaller geographical units is simply no guarantee for achieving higher levels of homogeneity in many particularly contested policy dimensions. Therefore, it is also not a panacea for dealing with dysfunctionalities in primary law. The appeal which federalism has from the perspective of functional legitimacy wanes quite a bit upon loosening the assumption that smaller jurisdictions are internally more homogeneous than the central level (see also Oates 2004, 317). This seems to speak against decentralising much authority beyond questions concerning local and regional customs.

5.4.3 *The Potential of Exit for Homogeneity*

Although homogeneity cannot be presupposed in a federal regime, federalism may itself have the effect that jurisdictions become more homogeneous. This is because it offers people who are in the minority within their current local community an alternative to go somewhere else where they might be in the majority, or where at least public opinion is more in favour of their case. In fact, the opportunity to choose among different sub-jurisdictions with their own policies may be the main advantage of federally organised

389 See also Gerken (2010, 46), Latimer (2018, 300–301).

democratic systems for addressing the costs which arise from diversity.[390] Individuals may not be able to influence policies in their own jurisdiction because they are in the minority. Yet this matters less to them insofar as they can choose to be subjected to a different policy by relocating to another jurisdiction with a majority which is closer to their preferences.

The idea that individuals can impact the set of rules they are subject to not only by means of participation, but also through withdrawal, was formulated by Albert O. Hirschman (1970) who distinguishes between *exit* and *voice*. Hirschman conceptualises exit and voice as two alternative responses to a decline in the quality of a good or service provided by a firm or other organisation. Dissatisfied customers, members, or citizens may either quit without an explanation or stay on and complain. Within a federal system, exit takes the form of physical relocation to another lower-level jurisdiction. Exit in the political sphere has been credited not only with increasing efficiency in the provision of local public goods,[391] as well as with providing epistemic benefits,[392] but also with beneficial effects on legitimacy.

For instance, exit may be attractive for consent theorists, insofar as it offers a way to approximate unanimity,[393] and arguably the only one for large populations. Whereas no existing political institution can meet the ideal of actual consent, exit at least affords individuals with the opportunity to *withdraw* their consent to their subjection to a government's authority (see also Lemke 2020, 269–271). Insofar as the exit mechanism increases homogeneity and thus provides a path towards unanimity, moreover, it also

390 See also Müller (2019, 170) who suggests extending the scope of individual choice to genuinely public issues in order to overcome the problem of insurmountable value pluralism.

391 See for example Aligica (2018, 28–29), Boettke, Lemke, and Palagashvili (2015), Buchanan (1995/96), Hayek ([1979] 1998, 146), Oates and Schwab (2004), Ostrom, Tiebout, and Warren (1961), Vanberg (2006), Vanberg (2008).

392 Müller (2019, 138) argues that a political order where people have a choice among different sub-jurisdictions exhibits three epistemic advantages: (1) it enables people to find new and better ways to organise society, (2) it is a way to test hypotheses and establish new facts, thus reducing disagreement concerning the empirical realm, and (3) it offers a way to mitigate the difficulties which arise in highly diverse societies by allowing for self-selection into polities. Moreover, Friedman (2020, Chapter 7) argues for an "exitocracy," in contrast to technocracy, on epistemic grounds. And Somin (2016, 136–38) claims that "foot voting" (in contrast to "ballot box voting") avoids the problem of voter ignorance because individuals have an incentive to get informed about their options, since the choices they make will necessarily have an impact upon their lives.

393 See also Mueller (1998, 177), Somin (2016, 139).

constitutes an alternative to reaching consensus by means of deliberation, i.e. voice.[394]

Exit has even been ascribed the effect of liberating individuals from domination, i.e. arbitrary power. As Mark Warren (2011, 690) argues, exit may for instance be a means for individuals to free themselves from domination in a marriage, by means of divorce. Analogously, he notes, individuals may free themselves from the authority of a lower-level government by means of exit from lower-level jurisdictions within a federal system.

Within classical liberalism, moreover, the possibility to escape a government's authority is valued as a remedy against governmental overreach. For instance, Peter Kurrild-Klitgaard (2010, 350) suggests that providing institutions with an exit option constitutes an alternative to both anarchy and the coercive threat of a Leviathan. And Buchanan (1995/96) even argues that it is simply incoherent of libertarians, conservatives and classical liberals to oppose federalisation because federal structures limit state coercion. He envisions a federal system where the central level plays the role of the protective state whereas lower levels serve as productive states (for the distinction between productive and protective state, see 4.2.3).[395] In this way, the individual is protected both from the central government, due to the absence of legislative competences, and from the lower level, thanks to the possibility of exit.

Providing individuals with an exit option is also attractive from the viewpoint of functional legitimacy. This is because citizens and non-citizen residents can evade policies from which they incur net costs.[396] If individuals would generally choose to exit when a policy entails net costs for

394 See for example Taylor (2017, 67), Vallier (2018a).

395 For similar suggestions, see also Hayek ([1979] 1998, 63), Müller (2019, 170–171), Nozick (1974, 329–330).

396 Buchanan and Tullock ([1962] 1999, 114–15) also argue that the opportunity to leave in a decentralised system can reduce the individual's costs of social interdependence. They make the point that if individuals have alternative jurisdictions to choose from, they may decide to live where they face fewer external costs from being outvoted and where they will also see less need to incur the internal costs of bargaining. Thus, Buchanan and Tullock claim, exit-induced homogeneity reduces both types of costs from social interdependence. Internal costs, however, may be far more effectively reduced by political representation (see 4.4.1) than by decentralisation. A community of such a size that all citizens can personally participate in decision-making must be extremely small. Dahl (1967, 963), for example, calculates that if each member is supposed to meaningfully participate, a community must not have more than around 40 members. At such a low level, there are barely any relevant decisions to be made, he points out. This would be different for a

them, the legal order might include fewer dysfunctional primary laws. Importantly, this can be achieved without imposing restrictions upon political authority that would make it difficult to adopt net beneficial policies. For instance, imagine a local jurisdiction where the majority decides to invest a high amount of public funds into creating a new bike infrastructure. This decision may impose net costs upon those residents who do not use bikes. Yet if all individuals for whom the costs would outweigh the benefits decided to leave, the policy would be functional, yielding net benefits to all the remaining inhabitants.

Insofar as individuals can influence their subjection to policies not only by participating in collective decisions, but also through private choice, a decentralised system of jurisdictions introduces the market forces of supply and demand into the realm of politics, as Buchanan and Tullock ([1962] 1999, 114–15) observe. Notably, the effect of exit does not only pertain to the demand side. That citizens and residents can shop for the policies most beneficial for them may also give rise to competition among sub-jurisdictions as suppliers of primary law.[397] Local governments may compete with each other with regard to the public goods they provide, such as infrastructure, and also in terms of regulation, adjudication, and enforcement (see also Vanberg 2006, 82). Insofar as jurisdictions compete for residents, they have an incentive to provide benefits and abolish dysfunctionalities.[398]

Competition among jurisdictions may thus reduce the extent to which individuals are subject to political authority and power against their will. Accordingly, Richard Epstein (1992, 149) argues that horizontal competition in federal systems can serve as a means to protect the individual against an abuse of power on part of the state. And Robert Taylor (2017, 70) even

representative committee of the same size. Thus, exit is far more pertinent for reducing external than internal costs.

397 For a historical overview of theories of institutional competition, see Vaubel (2008).

398 Vanberg (2000, 24), for instance, understands jurisdictional competition as an element of constitutional design by which individuals may avoid legislation which privileges special interests. A case study to this effect is provided by Lemke (2016). Drawing on the case of the Married Women's Rights Acts in 19th century America, she argues that jurisdictional competition for female residents along the frontier incentivised policymakers to abandon the institution of coverture, which stripped married women of legal agency, and to extend rights of property-ownership to them.

claims that a perfectly competitive market for local jurisdictions could eliminate political domination at the local level.[399]

A decentralised and competitive political system may even be conducive to approaching an ideal of justice. Brian Kogelmann (2017), for instance, claims that if citizens adhere to different conceptions of justice, a polycentric system,[400] where political units compete with each other both horizontally, via exit, and vertically, via voice, is the best embodiment of Rawls's "well-ordered society." This is because it achieves the three desiderata posited by Rawls: laws and institutions are subject to public scrutiny, a shared notion of justice creates social unity, and people are able to reach full autonomy as self-legislators.[401] Alexander Schaefer (2021) also claims that polycentricity is more likely to offer individuals the opportunity to be subject to a conception of justice they at least approve of, although he cautions that even in a polycentric system, it cannot be guaranteed that all individuals live under their most preferred conception of justice.

Competition among local jurisdictions can be formalised in a model such as the one formulated by Charles Tiebout (1956). In his model, "consumer-voters" choose from a wide variety of local communities which do not create externalities for each other.[402] City managers offer different amounts of public goods within their respective communities. Consumer-voters then pick a community according to their preferences. Tiebout claims that the local level is better placed to cater to the preferences of

399 Taylor (2019, 217) argues that to effectively restrict domination, the jurisdictional market must be characterised both by competition and by "resourced exit," i.e. support for leaving.

400 According to Ostrom, Tiebout, and Warren (1961, 831), polycentric systems are characterised by a plurality of decision centres which consistently interact with each other by means of competition, cooperation, or shared mechanisms of conflict resolution. Aligica and Tarko (2012, 252), moreover, identify three attributes of polycentricity, namely a plurality of decision centres, an encompassing system of rules and a spontaneous order resulting from competition.

401 Although he takes a Rawlsian position on justice, Kogelmann (2017, 780) holds that Nozick's framework for Utopia comes close to a polycentric political order.

402 Levy (2007, 461) claims that this model is not realistic, arguing that most federal states in the world have too few and too large sub-units, which enjoy a monopoly on most policy issues, to allow for meaningful jurisdictional competition and citizen self-selection. Moreover, if jurisdictions are created along identity lines such as ethnicity or language, competition and sorting are effectively blocked. The latter point is why Bednar (2009, 48–49) recommends deliberately not drawing state frontiers along agglomerations or territories of ethnic minorities in order to enable residents to leave the state while staying within the same region.

individuals concerning public goods than the federal level.[403] His model, however, relies on highly idealising assumptions. Not only is there a wide variety of communities which do not create externalities for each other. Importantly, he also assumes that consumer-voters live from dividend income, have complete information, and are perfectly mobile. Yet, as Tiebout himself notes, moving to another community constitutes a cost,[404] namely a cost of transaction.

The fact that moving is costly may be understood as an argument in favour of consequent decentralisation down to the very level of local jurisdictions. Leaving one's town or city may be easier than moving out of a state or province.[405] Within a territorially extensive federation, however, one's preferred jurisdiction may in fact be very far away, potentially on the other side of the continent. The costs of moving may thus involve leaving behind friends, family, and fond memories.[406] They might also include higher housing prices, and potentially a lower income or even unemployment if an individual's preferred local community is so remote she has to find a new position.[407]

Moreover, what individuals gain in terms of benefits for incurring the costs of moving may turn out to be meagre. This is because the political authority of lower-level governments in a federation must be limited by spill-over effects to other jurisdictions.[408] If spillovers entail net benefits, i.e. positive externalities to members of other jurisdictions, the amount provided locally is inefficiently low. For instance, if a local jurisdiction reduces emissions from industry production, neighbouring jurisdictions will

403 Treisman (2007, 83–87), however, argues that a central government could also use the Tiebout mechanism of local competition for public goods, without decentralising political authority.

404 Tiebout (1956, 422) does not give much weight to this restriction. He compares the costs of moving to another city to the costs of transportation which are readily incurred in private markets. Yet in the private market, too, some transportation costs are prohibitive for exchange to take place. For instance, it is often not worthwhile for small sellers to ship articles very far.

405 This point is for example made by Bednar (2009, 35–36), Buchanan ([1975] 2000, 131) and Schragger (2005, 179).

406 Tucker (2024, 168) also notes that the costs of moving are often prohibitive.

407 Tiebout (1956, 419) does not bother about individuals losing their job when relocating, as he assumes that consumer-voters live from dividend income.

408 Buchanan and Tullock ([1962] 1999, 113), for example, argue that political decisions should be decentralised up to the point where spill-over costs to other jurisdictions get higher than the benefits from saving decision-making costs within the jurisdiction itself.

benefit from higher investment levels.[409] In this case, the benefits created by this public good or service would be higher if the decision was made at a higher level.[410] Negative spillovers in contrast, impose net costs on other jurisdictions. They may occur for instance in a "race to the bottom" where, after one jurisdiction lowers its regulatory or social standards, others have to follow suit in order to remain competitive.[411] To avoid net costs for other jurisdictions, such decisions also should be made at a higher political tier.

On the other hand, if moving is costly, leaving one's jurisdiction of origin behind may only be worthwhile if an individual's fundamental interests are at stake. In a functional legal order, however, individuals must not find themselves in such a situation in the first place. This is because individuals' fundamental interests are to be protected by fundamental constitutional rights.[412] For instance, it cannot be expected from individuals belonging to a religious minority in a functional state that they leave their home jurisdiction for not being subject to expropriation and physical assaults. Rather, all sub-jurisdictions must guarantee that citizens and residents can reap the benefits of peaceful coexistence without the need to leave. In this respect, functional legitimacy differs from more libertarian accounts of federalism which consider exit as a substitute for substantive individual rights.[413]

409 In the case of a public good such as fighting climate change, the spillover even requires decisions to be made beyond the level of states, which is arguably why it proves so challenging to provide.

410 See also Ederveen, Gelauff, and Pelkmans (2008, 23), Treisman (2007, 83).

411 This is why Oates and Schwab (2004, 177) argue that in a federal system, redistribution must be organised centrally.

412 As Latimer (2018, 297) notes, leaving such things as rights up to experimentation and the spontaneous forces of evolution could turn out to be extremely harmful. Notably, those individuals who are not able to move at all would be subjected to dysfunctional and therefore illegitimate political authority.

413 Buchanan ([1995] 2001, 72), for instance, holds that in an ideal federal system, subunit policies are not restricted by the constitution or the federal level. Their room for manoeuvre depends solely on what their citizens are willing to go along with. Similarly, in the "free society" envisioned by Kukathas (2003, 96–97), individuals merely have the fundamental right to leave the associations they belong to. As long as they do not exercise this right, the association's authority over them is to be considered legitimate. For Kukathas (2003, 137), "the decentralization of tyranny is to be preferred" to uninhibited central authority. And Somin (2016, 148–54) even cites the case of African Americans from the South who migrated to the North and the West of the United States in large numbers during the Jim Crow era as an example for the benefits of exit. In light of Riker's fierce criticism of federalism as racist (see 5.4.2), this example is rather striking. The Jim Crow laws, after all, were upheld by local governments.

Thus, the overall benefits which individuals can expect from choosing local public goods or regulations by moving may often not offset the costs. To this must be added that even at the local level, consumer-voters cannot pick their favourite policies one by one. Rather, they need to choose among large bundles of public services.[414] These, moreover, are also subject to collective decisions in the future which may turn out to be adverse for the individual. It can therefore be expected that people put up with a good deal of local legislation they do not particularly like before they consider moving. This makes jurisdictional competition by means of geographical exit a blunt tool for reducing dysfunctionalities which result from diversity at the level of primary law.

5.4.4 *The Possibility of Non-Territorial Parallel Law*

The appeal of exit for addressing the effects of diversity could be considerably enhanced if it did not entail geographical relocation. Without the costs of moving, exit would be worthwhile in more cases. It would thus be attractive to have a legal system that includes parallel institutions which individuals could choose from, irrespective of their territory of residence.[415] Such a non-territorial concurrency of legislation would be particularly valuable for all social-cultural groupings which lack a clear territorial base. Among these are, for instance, territorially scattered ethnic or religious communities, sexual minorities, but also individuals who share the same political-ideological convictions. Moreover, if parallel primary law existed beyond territorial jurisdictions, individuals would not need to choose or reject the whole bundle of public goods offered by a particular local community (see also Aligica and Tarko 2013, 734). Rather, they would be in the position to withdraw only from those policies which impose net costs on them.

The idea of non-territorial authority is not as new as it might seem.[416] Before the Westphalian Peace, which gave rise to the modern territorial state, Europe exhibited a legal pluralism where laws and institutions applied

414 See also Aligica and Tarko (2013, 734), O'Hara and Ribstein (2009, 14).

415 See also Aligica and Tarko (2013, 734), O'Hara and Ribstein (2009, 28), Somin (2016, 158), Tullock (1994, 47–48), G. Vanberg (2020, 666–667).

416 See for example Jellinek ([1900] 1959, 395) who notes that it is a modern phenomenon that political rule is territorially bound. According to Thunder (2024, 19–20), it was Hobbes's Leviathan that shifted the focus of political philosophy

to individuals in a personal way, rather than on the basis of territory (Salat 2023, 5). Another historical example for non-territorial decentralisation would be the *millet* system in the Ottoman empire.[417] Several non-Muslim minorities were given the autonomy to adjudicate internal matters according to their own law in exchange for a special tax payment. Remnants of the system remain even today in the Middle East. Alas, these have the tendency to counteract equal citizenship rights and to subject individuals from minority groups to religious authorities and patronage while not being an effective remedy for a weak central state (Barkey and Gavrilis 2016). It may thus be questioned to what extent non-territorial decentralisation of political authority is possible in a modern nation state.[418]

A noteworthy suggestion for non-territorial jurisdictional choice in the particular context of US federalism is offered by O'Hara and Ribstein (2009, 213). They propose a federal choice of law statute which allows parties to choose their preferred state's regulation when they enter into a contractual agreement with each other. The statute drafted by O'Hara and Ribstein does not require parties to have a connection with the state whose law they are choosing. States may, however, pass "super-mandatory" laws for their own residents which must be respected by courts in other states and at the federal level in order to ensure that states are indeed in a position to make their own regulations (O'Hara and Ribstein 2009, 208–9).

Apart from the extant market for the regulation of business transactions,[419] O'Hara and Ribstein (2009, 165–175) also envision a market for both marriage and divorce law in the US. For instance, they suggest that couples who want to commit more to their marriage could get married in states which do not allow for divorce and that other states ought to accept this rule and not divorce the couple either. Moreover, O'Hara and Ribstein (2009, 175–181) discuss potential law markets for surrogacy and

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to a unified social structure capable of providing peace, rather than networks of overlapping and diverse groups.

417 Tucker (2024, 174–75) gives more examples of non-territorial political organisation before and parallel to the Westphalian system of territorial states.

418 Levy (2007, 473), for instance, is sceptical of non-territorial federalism, claiming that most legislative and executive issues in modern states are territorially bound. He fears that non-territorial minority governments would degenerate into mere arenas for rent-seeking without political discourse and decision-making power.

419 O'Hara and Ribstein (2009, 3) claim that a "law market" already exists, allowing individuals and firms, by means of relocating, to choose the regulations most profitable for them from the highly diverse supply of states and federal states.

living wills as opportunities to experiment with legal regulation at the state level in response to technological innovation.

The proposal by O'Hara and Ribstein is intriguing in that it allows parties of a contract or similar agreement to choose the law of a state with which they are not affiliated in any way, merely because it best matches their demand. Individuals are given more choice concerning what legislation they are subjected to, while at the same time it is always clear what law applies in the case of a conflict. Their suggestion appears somewhat incomplete, however, in that states as territorial entities still play a central role: State legislatures enjoy legislative authority for contract regulation, and state courts share judicial authority with federal courts. Moreover, the notion of super-mandatory law still subjects citizens to an authority which they may only escape by physically moving.

A more radical scheme, devised for the European context, is provided by Bruno Frey and Reiner Eichenberger (2004) with their notion of functional,[420] overlapping, competing jurisdictions (FOCJ). FOCJ are single-issue jurisdictions providing public goods and regulation. They compete on overlapping territories in the case of territorially bound goods and otherwise non-territorially.[421] In contrast to the Tiebout model, thus, exit is possible without physically moving. Another difference to Tiebout is that FOCJ must be democratically constituted—exit and voice must complement each other (Frey and Eichenberger 2004, 38). Moreover, the FOCJ scheme goes farther than the choice of law statute by O'Hara and Ribstein in that it dispenses with the somewhat arbitrary allocation of bundles of authority to federal states as territorial entities and gives individuals more exit options without moving.

On the downside, decentralising political authority to numerous small and functional jurisdictions raises issues of practicability. It is certainly overly demanding to expect citizens to participate in all the democratic settings of the wide variety of single-purpose jurisdictions of which they are members. After all, in existing federations, even lower-level elections for jurisdictional "bundles" are usually considered to be "second-order elections" where turnout is low since citizens care more about national than local issues (see Treisman 2007, 158). Creating many new democratic decision-making bodies would give rise to internal costs of decision-making,

420 The term „functional" is used here in opposition to "territorial," not in the sense in which it was defined in the context of functional legitimacy in Chapter 3.

421 Similarly, Binmore (1998, 503) envisions an ideal "whiggish" state as a decentralised polity with overlapping geographical and non-geographical units.

in the sense that elections would have to be organised and representatives would need to invest time into finding a decision. If jurisdictions are too numerous and their authority is too curtailed, citizens might not find it worthwhile to incur these costs.

Another serious issue is constituted by the fact that the implementation of chosen law must be ensured for the whole territory of the state. Imagine that a homosexual couple celebrates a wedding according to one FOCJ's marriage law, but officials from another jurisdiction refuse to accept their marriage. To ensure the implementation of chosen law everywhere within the state's territory, it is arguably advisable to authorise the central government to apply and enforce functionally decentralised law throughout the country.

A workable alternative to FOCJ might thus be "sociological federalism" as advanced by Gordon Tullock (1994). The term describes a political setting where different lower-level governments make their own laws whereas sovereignty remains with the central government.[422] Parallel associations without a territorial monopoly, e.g. ethnic or religious communities, would then raise their own taxes and provide public goods and services such as schooling or marriage parallel to the state. Their "governments" would have the authority to make laws for members, as long as these laws would not be in conflict with the state's legal order. Parallel governments would also be entitled to adjudicate conflicts, but they would rely on the state for enforcement.

For non-territorial jurisdictions below the level of federal states, however, the question is not only how law is implemented, but also how it is to be adjudicated. Theoretically, it is of course possible for each community to maintain its own court system. Yet in reality, the costs would be substantial, disincentivising the creation of new jurisdictions and making it difficult for established ones to survive. Since a judicial system comes with economies of scale, it would be inefficient to create one for each non-territorial jurisdiction. Jurisdictions might also find it difficult to hire judges, since they would need to be trained in their particular law.

It is therefore plausible to allocate judicial authority for non-territorially decentralised law with the central government. This is not as far-fetched as it seems. For example, in US business law, for contracts regulated by state law, disputing parties from different states may choose between state and federal courts if at least $75,000 in value is at stake, as O'Hara and

422 Gerken (2010, 9), too, argues for granting minorities the right to make decisions without sovereignty, albeit on a territorial basis.

Ribstein (2009, 69) point out. And in Germany, not only does the executive branch of government collect taxes for the main Christian churches. The judiciary also adjudicates labour law particular to churches as employers. In most well-functioning modern states, the judiciary at the central level would probably be capable to adjudicate parallel legislation.

In fact, allowing for non-territorial choice of law does not require the decentralisation of political authority at all, not even of the legislative branch. The central legislature could simply adopt a default regulation for contract-like arrangements such as marriages but also e.g. living wills. Taking into account potential spill-over effects, it could additionally define a range of permissible deviation for alternatives among which parties would be free to choose. For instance, spouses might be able choose among marriage options with different levels of commitment.[423] Another case of application could be work contracts, with employers and employees agreeing on a set of e.g. Muslim, Christian, or secular holidays to be exempt from work duties.

Insofar as these alternative sets of regulation are not imposed on anyone against their will, they need not originate in the authority of a democratic government.[424] Instead, their emergence may be left to evolutionary forces. Small groups of legislators, but also civil society organisations or political entrepreneurs, may draft their own proposals within the scope defined by the legislature.[425] These proposals could then become valid upon a court ruling that confirms that the alternative is within legal bounds. It should also be possible to challenge the legally admissible range of regulation by means of constitutional complaint at a court. For instance, judges could be asked to decide whether the legislative was entitled by the constitution to define marriage as a relationship among exactly two persons by polyamorous interest groups. By decentralising the drafting of parallel law but maintaining legislative, executive and judicial authority at the central level, constitutional design may avoid an inflation of lower-level

423 O'Hara and Ribstein (2009, 171), too, suggest that governments could offer a variety of marriage tokens or grant certain private alternatives to marriage.

424 But of course, the legislative could also adopt a variety of options. In the case of marriage in Germany, for instance, the existing law allows couples to choose their family name, the matrimonial property regime, and whether they want to file a joint tax return.

425 O'Hara and Ribstein (2009, 223–24), in contrast, argue that insofar as law-making is a public good, there is also a reason why it should be undertaken by public agents. Since it is costly for private individuals and groups to draft their own legislation, the central legislature needs to adopt a default option.

jurisdictions as in the FOCJ scenario, while still granting individuals some choice of law on a non-territorial basis.

If governments provide non-territorial parallel law, individuals gain an opportunity to opt out of policies where the costs they face outweigh the benefits. Such an innovation would therefore indeed have the potential to reduce dysfunctionalities in primary law. It must be noted, however, that its scope of applicability is narrowly limited. Only policies which are not territorially bound and belong to the sphere of private law, e.g. labour or family law, are eligible because externalities for other citizens and residents are low.[426]

In other cases, it is hardly possible to free individuals from costs without creating new costs for others. The legal orders of diverse and complex societies are thus prone to include much dysfunctional primary law. This is not necessarily an impediment to their legitimacy.[427] As long as the secondary laws of the de facto constitution guarantee the regime's functionality, it can be assumed that this is a price individuals would be willing to pay for the peace and security they enjoy as a consequence of living in a liberal regime.

5.5 Summary

Functional legitimacy is only a minimal standard, not an ideal. It merely demands that a regime must be liberal, providing the rule of law and fundamental individual rights. Nevertheless, the functional account has substantial implications for constitutional design. This is because the criterion of

426 In contrast, Tucker (2024) envisions that there could even be non-territorial states which delegate governmental tasks either to computers or to local contractors. The idea of non-territorial states, however, is in conflict of the very function of legal orders to ensure peaceful coexistence within a territory by means of shared rules. Individuals within the same territory often find themselves in situations where they would benefit from rules that enable them to coordinate or cooperate with each other. Yet insofar as they are members of different non-territorial states, they may fail to reap these benefits or even incur substantial costs, just as they would in the state of nature, because it is unclear which rules apply. From a functional perspective, this means that only that part of political authority may be open for non-territorial choice which regulates individuals' private lives, i.e. their voluntary interactions.

427 Vallier (2018b, 120–21) claims that the justification of constitutional rules is a function of whether they entail justified or unjustified legislation. Yet a legal order does not become illegitimate merely because it includes a dysfunctional token of marriage or other forms of dysfunctional primary law which are compatible with peaceful coexistence.

functionality cannot only be applied to the institution of the regime as such but also to subordinate institutions of primary and secondary law. In this chapter, I analysed three subordinate institutions at the constitutional level, namely majoritarian democracy, public budgets, and federalism.

On the functional account, majoritarian democracy as a form of governance is neither necessary nor sufficient for the legitimacy of a regime-token. It is not necessary because other forms of governance, such as constitutional monarchy, may also be liberal. It is not sufficient, moreover, because majorities may decide to impose intense costs on minorities if their authority is not restricted. As a subordinate institution, however, majoritarian democracy is a functional institutional type. Notably, its function is not to enable individuals to rule themselves, as assumed in democratic theory, but rather to provide regular and non-violent changes of government on a procedural basis. Autocratic forms of governance, in contrast, are dysfunctional. Their only function is to authorise individuals or groups to rule based on their social status.

At the token-level, majoritarian democracy must respect the rights of minorities to qualify as functional. On the one hand, there may be persistent minorities. Although authority is allocated procedurally, members of persistent minorities do not face a realistic chance of ever bringing about a change in government merely by their impact in elections. To be justified both to persistent minorities and to residents who lack the franchise, a democracy must therefore grant everyone rights to free speech and freedom of assembly as an indirect way to non-violently influence policy.

Moreover, minorities may be intense, i.e. feel strongly about a decision. In a functional regime, people must be securely protected against decisions, including democratic decisions, that negatively affect their most basic interests. This cannot be achieved by requiring supermajorities for sensitive decisions because intense minorities may comprise very few individuals. Rather, an effective protection requires fundamental and inalienable rights.

Another dimension of constitutional design is the extent to which the government is authorised to raise a public budget to fund public goods and the welfare state. A libertarian argument against public spending is that the government lacks the right to interfere with individuals' property claims. This argument is not convincing from a functional perspective, however. Existing property regimes are the product of contingent historical processes and interactions. There is no reason to assume that they are functional. Insofar as governmental intervention may correct unjustified distributions,

a presumption against the raising of public funds is not warranted on the functional approach.

Although it is justifiable that governments raise funds, however, there may be restrictions on how these may be spent. Insofar as the function of political authority is peaceful coexistence, governments arguably need to provide the public goods of internal and external security, as well as a social minimum. Other spending policies, e.g. on infrastructure or extensive social security, however, might be dysfunctional in the sense that they impose net costs on some contributors. I argued that for one thing, positive externalities from public spending must not be underestimated. Moreover, I made the point that even a public budget that includes some dysfunctional spending policies may be functional in total. A constitutional ban on passing spending decisions that impose net costs on any individual would thus rule out many potentially functional budgets, denying all individuals benefits they could otherwise have achieved. This would be too high a price to pay for avoiding all dysfunctionalities at the policy level.

In large and complex societies, dysfunctional policies are not rare. Individuals have incompatible preferences and values, so net benefits for some translate into net costs for others. One apparent way to address this phenomenon is by means of federalism. A decentralisation of political authority to lower jurisdictional levels can reduce the amount of dysfunctional primary law insofar as the population within sub-jurisdictions is more homogeneous. This is often the case with respect to language and customs. In many other dimensions, however, sub-jurisdictions need not be particularly homogeneous since many minorities live territorially dispersed. Such minorities may even face higher costs and more dysfunctional policies if they live in a sub-jurisdiction where the majority is more extreme than the majority at the central level.

Federalism itself may, however, contribute to the internal homogeneity of sub-jurisdictions. This is because individuals have the option to leave jurisdictions where they do not agree with the majority. Jurisdictions might even adapt their primary law to compete for residents. Yet for the individual, the benefits from moving to another jurisdiction with better policies are outweighed in many cases by disproportionate costs of leaving behind loved ones and also possibly their homes and jobs. Incurring these costs is rarely worthwhile insofar as only few benefits are to be gained at the local level.

Offering individuals a choice among parallel legal regulations of the same issue is much less costly if it does not require geographical relocation.

As I argued, governments might provide a default option and define a scope for civil society actors to draft alternatives which would also be enforced and adjudicated by the central government. This would be most feasible for legal institutions regulating private contracts, such as marriage or employment. In many other domains, individuals arguably need to put up with some dysfunctional policies in return for the benefits of peaceful coexistence which they gain within a functional regime.