On This Side of the Law and On That Side of the Law

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On this side of the law
On that side of the law
Who is right?
Who is wrong?
Who is weak?
Who is strong?
Who is for
And who's against the law?
—Johnny Cash¹

Value pluralism is the idea that legitimate human values and goals are many, often incompatible, and not reducible to any single overarching principle or Good. Value pluralism is probably the central idea—you could say the single overarching idea—in the work of Sir Isaiah Berlin, the English philosopher and historian of ideas.² Berlin's theme is that individuals, and societies as well, have ideals and aspirations that conflict, and that therefore cannot all be fully realised. Thus a society cannot have perfect equality and perfect liberty because some people will exercise freedom to differentiate themselves, and hence to make themselves unequal to their fellow citizens. Equality or freedom may be at odds with other values as well, such as tradition, or the desire for

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1. JOHNNY CASH, *This Side of the Law*, on I WALK THE LINE (Columbia Records 1970).

2. See ISAIAH BERLIN, *The Pursuit of the Ideal*, in THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 1, 11 (Henry Hardy & Roger Hausheer eds., 1997).

social unity, or for social tolerance. Good government may be at odds with self-government, secularism with the desire for common faith, and so on. Value pluralism sees good in many irreconcilable aspirations, ways of life, and public and private choices.

What are the implications of value pluralism for law and legal thought?

Value pluralism can be invoked, it would seem, on any side, or at least on many sides, of various legal issues.

STATE ACTION

There is a good case that value pluralism supports the “state action doctrine” in the United States, except when it doesn’t. The Fourteenth Amendment to the U.S. Constitution provides, “No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”³ The state action doctrine—generally adhered to by the courts but very unpopular (at least in the mid-to-late twentieth century) among academic commentators—holds that the institutions of American government are bound by these constitutional provisions, which the courts often interpret very broadly, but that private persons and companies generally are not.⁴ The laws and policies of the government, in other words, must respect equality, due process, secularism—no “establishment” of religion—and a variety of other “substantive” rules and values derived from or read into the Fourteenth Amendment, but there is no constitutional obligation on the private citizen or private organisation to do likewise.

If Berlin is right, and human values are many, conflicting, and irreconcilable, then the state action doctrine seems right. Private persons should be presumptively free to act in accordance with various and differing values, lest some good values be submerged altogether. These

3. U.S. CONST. amend. XIV, § 1.

4. For a sample of scholarly articles from that era criticising or condemning the state action doctrine, see Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975); Charles L. Black, Jr., Foreword: “State Action,” *Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69 (1967); Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Anthony Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1; William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

might surely include values different from the Constitution's—or the courts'—ideas about equality, about proceduralism, about secularism, and so on. Many good ways of life might be inegalitarian in one way or another, or informal about decisionmaking in ways that would not satisfy due process. The state action doctrine frees private persons to choose for themselves, unless legislation, popularly enacted and popularly revocable, intervenes to require private compliance with the value choices that the Constitution lays down for the government.

But the acid test for the state action doctrine, or the exception that proves the rule, was a racially restrictive housing covenant that the Supreme Court refused to enforce in a case called *Shelley v. Kraemer* in 1948.⁵ *Shelley* involved a house that was sold to a black family in 1945 in defiance of a racial covenant among the neighbouring private homeowners. The Court said it was unconstitutional for any court to enforce the covenant and to bar the sale.⁶

But if court enforcement of a restrictive covenant is state action, the implication is that private contracts in general should not be enforced if they conflict with the values laid down for the government in the Constitution. The trouble is that this could preclude enforcement not only of racially discriminatory contracts but of contracts supporting religious institutions, or even contracts that call for something to happen—like liquidated damages—without the parties giving each other hearings on the matter (no due process). What is more, contracts are merely one type of private ordering. If contracts conflicting with constitutional values were unenforceable, there is no reason in principle why courts should enforce noncontractual rights that private citizens might exercise contrary to these values. So a discriminatory will—nothing for Cousin Morty unless he gives up Scientology—might be null and void; and it might violate the Constitution for the police, at your request, to expel or arrest a trespasser who wants to give a speech in your living room. Ultimately, state action in the sense of *Shelley* is implicit in any private act, so long as the state stands ready to enforce against all comers your right to do the private act. The Supreme Court has steadfastly refused to draw these conclusions or indeed to infer any

5. 334 U.S. 1, 20 (1948).

6. *Id.*

general principle from *Shelley*.⁷ *Shelley* was an unusual if not a unique decision. But taken to its logical conclusion, the decision implies that private acts are inseparable from government action, and therefore that the state action doctrine is no limit at all to the obligatory and uniform reach of the values laid down in (or read into) the Constitution.

If every citizen were really bound to act as the government must do under the Constitution, especially under expansive interpretations of the Constitution's commands, the scope for pluralism would shrink significantly. So the state action doctrine seems to sit well with value pluralism. Yet it is difficult to see *Shelley v. Kraemer* as an assault on pluralism. Restrictive covenants, which were extremely common in the United States until the civil rights revolution, scarcely promoted pluralism.⁸ There was not much pluralism altogether about racial mores at the time: segregation and discrimination were depressingly uniform in America, almost monolithically so in the South. The pluralist argument for *Shelley* and the ensuing civil rights decisions is that they helped to crack the monolith and to expand freedom. Civil rights emancipated black Americans and in a sense everyone; and more freedom means more freedom of choice and hence more pluralism in practice.

Still, opponents as well as supporters of the landmark civil rights decisions could and did invoke pluralism. Much of the public opposition to these decisions, in fact, relied on a kind of pluralist argument: in the parlance of the time, that the Warren Court decisions undermined the "Southern way of life," with all of its differences, hitherto, from other regions. This sort of criticism moreover had historical roots. Since before the Civil War, Southern leaders often preferred to argue for state sovereignty rather than to insist too overtly on the charms and virtues of slavery or discrimination as such. More sophisticatedly, the "Southern agrarian" intellectuals took something of the same line, into the 1950s and beyond.⁹

Value pluralism, certainly in many contexts quite remote from the struggle over segregation, does seem to support the state action doctrine. But Jim Crow is a reminder that there was a good pluralist case against the state action doctrine as well, at least when that doctrine might have stood in the way of breaking down a pervasive—in that sense monist—

7. See Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 SUP. CT. REV. 129 (reviewing the Supreme Court cases and providing a value pluralist defence of the state action doctrine).

8. See generally CLEMENT E. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (2d prtg. 1967).

9. See *TWELVE SOUTHERNERS, I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION* (1930) (offering a kind of manifesto by twelve "Southern agrarian" writers and poets).

pattern of segregation and discrimination. Jim Crow is also a reminder that there was even a pluralist argument, albeit perhaps a bad or perverse one, in favour of segregation and discrimination.

JUDICIAL ACTIVISM

Along somewhat similar lines, if more broadly, value pluralism might be said to weigh in against judicial activism, unless it doesn't. The role of the courts, obviously, has been an important issue in American government ever since—in fact even before—*Marbury v. Madison* established judicial review, the idea that courts could strike down laws as unconstitutional.¹⁰ Value pluralism might imply scepticism toward judicial activism, if not outright opposition to it, because public policy made by the courts tends to be more uniform than policy made by other institutions of government. The American court system is a hierarchy, with a single apex at the United States Supreme Court on constitutional and federal questions. Federal district courts are answerable to the federal courts of appeal, which in turn are answerable to the Supreme Court. State courts too are subject to review by the Supreme Court on federal questions, including constitutional ones. Constitutional adjudication, in particular, tends to impose a single, almost unchangeable standard across the country. On any given point of constitutional interpretation, appellate review, supervised ultimately by the Supreme Court, means that only one judicial interpretation can prevail, at least in principle, at any given time. Deference to precedent tends to preserve such sole, exclusive interpretations even over time. Constitutional adjudication thus tends to create uniform national rules and standards. During the first third of the twentieth century, the “substantive due process” era, the Supreme Court struck down federal, state, and local wage and hour laws, laws favouring trade unions, and child labour laws.¹¹ A more or less laissez-faire economic policy therefore became obligatory across the country. More recently, constitutional cases have interpreted the Bill of

10. See PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 1–6 (2008) (examining attitudes towards judicial review in the era leading up to the framing of the Constitution).

11. A.L.A. Schechter Poultry Corp. v. United States (*The Sick Chicken Case*), 295 U.S. 495, 550 (1935) (striking down federal wage and hour regulations); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (striking down statute discouraging child labour); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking down state law against no-union employment contracts); *Lochner v. New York*, 198 U.S. 45, 63–64 (1905) (holding state wage and hour law unconstitutional).

Rights to set forth rules of criminal procedure, for example, that apply everywhere: search and seizure principles, *Miranda* warnings, and much else.¹² So likewise for “free exercise” and “no establishment” of religion: the same nationwide rules to govern aid to parochial schools, moments of silence and “creation science” in public schools, and crèches on public property. School desegregation cases in the late 1960s and 1970s interpreted the Constitution and the broad provisions of the federal civil rights statutes to create a national policy, with roughly the same approach taken in cities across the country to defining segregation, ordering controversial remedies such as busing, but generally rejecting “interdistrict” remedies that would merge city and suburbs, and so on.¹³ In general, the more judicial review for constitutionality, the more centralised, national, and uniform the law.

As the school desegregation example implies, a centralising tendency may be at work in judicial interpretation of federal statutes as well as in constitutional cases, especially when federal laws are interpreted more rather than less broadly. If “discrimination,” as forbidden by the Civil Rights Act,¹⁴ is interpreted to include de facto patterns of separate schooling, then more school systems across the country will be subject to uniform remedies imposed by the courts.¹⁵ The difference between constitutional adjudication and statutory interpretation, of course, is that statutes can be amended or repealed more easily than constitutional provisions, so that at least over time there is more scope for a plurality of rules—one statutory rule today, a different one tomorrow. But the difference is one of degree. Enacting a new federal statute is easier than amending the Constitution, but it is still not an easy job. Activist or “adventurous” judicial interpretation of federal statutes, like constitutional judicial review, helps to create national uniformity of law.

Nonjudicial branches of government, by contrast, are by their nature more pluralist. There are more of them—federal and state—and they are more independent of one another. Valid federal laws are supreme under the Constitution, but they do change over time, and executive interpretation and enforcement can vary. All government officers are

12. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 477–79 (1966).

13. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 201, 203 (1973) (holding past intentional segregation in a few Denver schools required a citywide integration decree, including busing). But see *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (rejecting interdistrict busing between Detroit and its suburbs). See generally J. ANTHONY LUKAS, *COMMON GROUND: A TURBULENT DECADE IN THE LIVES OF THREE AMERICAN FAMILIES* (1985) (exploring the struggle over school busing in Boston).

14. See 42 U.S.C. §§ 2000a to 2000a-1 (2006).

15. For a highly critical view of the school busing programs ordered by federal courts in cities across the country, see STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 325–47 (1997).

bound by the Constitution.¹⁶ But they have to follow their consciences, or the policy of the public agencies they serve, when interpreting the Constitution, unless a judicial interpretation is binding in a particular situation. Hence, even constitutional interpretation by nonjudicial branches of government will differ from time to time and from place to place. A policy decision or an interpretation of the Constitution by any one of them is more easily changed or overruled than the doctrines of the courts. In general, the less adjudication—especially constitutional adjudication—the more decentralised, local, and varied the law, which is to say the more pluralism of outcomes and hence of values as well.

All of this suggests that value pluralism counts against judicial activism. Yet far from stymying pluralism, court decisions—especially twentieth-century constitutional decisions—can be seen, on the contrary, as having greatly promoted pluralism. This goes for pluralism in a variety of related senses: enhancing the practical possibilities for more varied political outcomes, welcoming interest groups hitherto excluded, and hence promoting a climate more tolerant of a plurality of values in American life.¹⁷

Thus, as with the restrictive covenant cases, equal protection decisions combating segregation and discrimination meant that large numbers of people who had been excluded could now participate more freely in public life (and suffer less indignity in private life). This made possible, among other things, a broader range of political outcomes.¹⁸ Judicial review of censorship, likewise, or of restrictions on religious freedom, protected pluralism of thought or of religion at times when there might have been strong majority pressures for uniformity. In the early and middle years of the twentieth century, for example, the social climate of the country was sometimes politically and religiously conformist, at least by comparison to the post-1960s decades. Free speech decisions like *De Jonge v. Oregon*, *Herndon v. Lowry*, and *Yates v. United States*, which put constitutional limits on laws against Communists and syndicalists, counteracted somewhat the prevailing pressures.¹⁹ So likewise did the

16. U.S. CONST. art. VI, §§ 2, 3.

17. See generally Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 NW. U. L. REV. 961 (2001).

18. See generally KATHERINE TATE, *FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS* (1994); ANDREW YOUNG, *AN EASY BURDEN: THE CIVIL RIGHTS MOVEMENT AND THE TRANSFORMATION OF AMERICA* (1996).

19. *Yates v. United States*, 354 U.S. 298, 338 (1957) (setting aside Smith Act convictions); *De Jonge v. Oregon*, 299 U.S. 353, 364–66 (1937) (overturning conviction

free exercise decision in *West Virginia State Board of Education v. Barnette*, striking down a compulsory flag salute regulation during the Second World War.²⁰ Sceptics about judicial review might point out that these were rather exceptional decisions in their era: most First Amendment cases in the 1930s, 1940s, and 1950s went against radical speakers and organisations.²¹ A more libertarian wave of decisions arrived in the 1960s and thereafter, when the public climate itself was more libertarian.²² Still, these earlier libertarian decisions can fairly be seen as a force, however occasional, for pluralism.

Pluralism can even be seen as the rationale for the “more searching judicial inquiry” that Justice Stone anticipated in the famous *Carolene Products* footnote²³—or nearly so. Stone suggested the need for judicial activism when legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or when the political process fails to protect “discrete and insular minorities.”²⁴ But the cases Stone cited approvingly can all be viewed as examples of judicial review that promote pluralism: striking down restrictions on the right to vote and on dissemination of information, striking down interference with political organisation and with peaceable assembly, and so on. In each case, the decision tended to encourage a wider variety of political outcome, greater tolerance for dissenting political values, or both.

Sometimes, it seems, value pluralism can very plausibly be invoked in favour of judicial activism as well as against it.

GAY MARRIAGE

The state action doctrine, and certainly judicial activism, are broad and hence somewhat amorphous concepts. Perhaps it is no surprise that their relationships to value pluralism might be varied, even conflicting, depending on the particular context. But even with narrower public questions, value pluralism can often be invoked on all sides, or at least on various sides. Does value pluralism point the way to an answer, for example, in the debate over same-sex marriage?

under criminal syndicalism statute); *Herndon v. Lowry*, 301 U.S. 242, 262–64 (1937) (overturning conviction of a black organiser for the Communist Party in Georgia for “inciting insurrection”).

20. 319 U.S. 624, 642 (1943).

21. See, e.g., *Dennis v. United States*, 341 U.S. 494, 516–17 (1951) (upholding Smith Act convictions of Communist Party organisers).

22. E.g., *Cohen v. California*, 403 U.S. 15, 23–26 (1971) (finding a free speech right to wear a jacket bearing the words “Fuck the Draft”).

23. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

24. *Id.*

Value pluralism emphasises that there are various competing and conflicting visions of life and that there is good in many of them. It implies that there should be the greatest feasible tolerance for differing ways of life. So there is an obvious argument that pluralism supports gay marriage. Gay marriage would add to human choice. Heterosexual marriage is lawful everywhere, after all; no one proposes to forbid it. But if there is good in heterosexual marriage and in the ethos it bespeaks, there might be good in gay marriage as well, and in the different body of values that it might represent. Instituting gay marriage would expand the range of human possibilities; it would in no way contract it.

But the case against gay marriage can be put in value pluralist terms as well. Gay marriage might not expand human choice so much as it would tend to substitute a new ethos for the old one—an ethos in which marriage no longer means what it used to mean. Up to now, marriage has remained substantially a traditional institution. Marriages are no longer indissoluble, if they ever were, but they are not purely private agreements whose terms are up to the parties. Legally as well as culturally, there are important elements in marriage that derive from religious ideas: “[T]o have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part, according to God’s holy ordinance.”²⁵ As such, marriage is a remnant, or an oasis, of premodernism—of what Henry Maine called “status” and Ferdinand Tönnies called *Gemeinschaft*—in a modern or postmodern world that is overwhelmingly driven by the values of “contract” or *Gesellschaft*.²⁶ To preserve marriage in something like its traditional form, from a value pluralist point of view, is to preserve an institution whose values are at odds with the main currents of modern life: currents dominated by free choice and free contract, by mobility, by innovation, by reason, or by what Max Weber called “rationalization.”²⁷ Gay marriage, to be sure, might not erode the values

25. BOOK OF COMMON PRAYER 220 (Oxford 1815).

26. See HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 304–05 (14th ed. 1891) (concluding the progress of societies is from status to contract); FERDINAND TÖNNIES, *COMMUNITY & SOCIETY [GEMEINSCHAFT UND GESELLSCHAFT]* (Charles P. Loomis trans. & ed., Mich. State Univ. Press 1957) (1887). For an overview of the sociological classics on this topic, see ROBERT A. NISBET, *THE SOCIOLOGICAL TRADITION* (1966).

27. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1968).

now implicit in marriage, but strengthen them, by extending them to gay couples. But it is at least possible to view gay marriage as a big step towards “rationalizing” marriage, towards adapting it to the range of choices that modern or postmodern people are accustomed to in the marketplace. To update marriage in this way, a value pluralist might think, would be to erode an institution, and an area of life, embodying values that challenge and provide an alternative to the values now prevalent in most other areas of life. Hence gay marriage would be a step towards greater uniformity of values, not towards greater pluralism.

These are at least plausible value pluralist arguments for and against gay marriage, and there is no obvious formula for resolving which is the stronger. And the controversy over gay marriage hardly seems unique in that plausible arguments for and against can both be put in value pluralist terms. Is abortion on demand—“choice”—or is freedom for American states to regulate abortion more pluralist? Does pluralism support unrestricted immigration, or is it more pluralist to try to maintain the distinctive cultures of different nations? Is it more pluralist to allow Nazi speeches, songs, symbols, and memorabilia, or to forbid them as many European democracies do under their criminal law?²⁸ Value pluralism seems to be equivocal, not just about broad political concepts for which there might always be exceptions or qualifications, but about specific legal and policy disputes as well.

FEDERALISM

Value pluralism may at least have implications for the structure of public institutions. Federalism in particular—the division of sovereignty and of governing power between a central government and constituent states or provinces—suggests itself as promoting value pluralism. This should not be surprising, given the common ground between value pluralism and liberalism, and between liberalism and federalism, at least if the Federalist Papers are persuasive that federalism promotes liberty, or if Lord Acton was right about the links between multiculturalism, federalism, and human freedom.²⁹

28. See, e.g., Strafgesetzbuch [StGB] [Penal Code] Nov. 5, 2008, Bundesgesetzblatt, Teil I [BGBl. I] 2149, §§ 86, 86a, available at http://www.gesetze-im-internet.de/englisch_stgb/index.html (German law prohibiting Nazi symbols).

29. See LORD ACTON, *Nationality*, in *ESSAYS IN THE LIBERAL INTERPRETATION OF HISTORY* 131, 156 (William H. McNeill ed., 1967) (“[W]hen different races inhabit the different territories of one Empire composed of several smaller States, it is of all possible combinations the most favourable to the establishment of a highly developed system of freedom.”); see also PIERRE ELLIOTT TRUDEAU, *FEDERALISM AND THE FRENCH CANADIANS* [LE FÉDÉRALISME ET LA SOCIÉTÉ CANADIENNE-FRANÇAISE] 197, 203 (1968) (invoking Acton in support of the idea that Canadian federalism is conducive to liberty).

Federalism steers a middle course, in a sense, between two untenable or undesirable extremes toward which value pluralism may tend to devolve. At one extreme, there is the ideal of unlimited pluralism under the laws of a given community or country. This is the idea that no value or goal or way of life should be precluded or perhaps even discouraged. The trouble with this is that it would preclude any decisions or public policies at all that themselves preclude alternatives, as they all do. Laws tending towards laissez-faire preclude socialism, and vice versa. Public subsidies or bailouts go to this but not to that; and subsidies or bailouts certainly preclude a public policy of no subsidies or bailouts. Public school curricula include this and exclude that; there are only so many hours in the day. For that matter, compulsory education precludes a childhood without pencils, books, and teachers' dirty looks, and vice versa.

The alternative pluralist extreme—or *reductio*—is uniformity or monism within a given community or state, and pluralism among the various different communities and states. One country might be libertarian, another country socialist. One country might require, or heavily encourage, adherence to one religion, another country to another or to no religion: *cuius regio, eius religio*.³⁰ One country might be Nazi, at least if one can imagine Nazism without ambitions toward world conquest, Nazism in One Country; or if that goes too far, then fascism or falangism in one country, democratic institutions in another. Strong ethnic, linguistic, or cultural nationalism in one country, liberalism in another. John Gray's reinterpretation of Isaiah Berlin points clearly in this direction.³¹ Other authors sympathetic to cultural nationalism or identity politics also seem to support or to claim the mantle of this version of pluralism.³² The trouble with this version is that it is likely to

30. See STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* 172–73 (2d ed. 2009) (observing that most of the post-Reformation German territories followed the practice of *cuius regio*, “the religion of the ruler is the religion of the state,” and the Peace of Westphalia in 1648 “reaffirmed the right of rulers to determine the religion to be followed in their territories”).

31. See generally JOHN GRAY, *ISAIAH BERLIN* (1996) [hereinafter GRAY, *ISAIAH BERLIN*]; JOHN GRAY, *TWO FACES OF LIBERALISM* (2000) [hereinafter GRAY, *TWO FACES OF LIBERALISM*] (arguing that political liberalism is no more than one legitimate option among others).

32. See, e.g., Will Kymlicka, *Liberal Nationalism and Cosmopolitan Justice*, in *ANOTHER COSMOPOLITANISM* 128, 128–44 (Robert Post ed., 2006) (arguing for cultural nationalism in the name of pluralism). Charles Taylor takes much of the same position.

mean very little choice or pluralism for the individual person. The social and psychological barriers to exit and entry are considerable even in informal ethnic, religious, or family circles. But the legal and economic barriers are much higher still at the frontiers of a sovereign country. Even if a nation imposes heavy, illiberal pressures for or against a particular language, religion, culture, or way of life, it will be difficult or impossible for most dissidents to emigrate and to make new lives in a new and different country.

In a federal system, by contrast, it is often possible to have laws that reflect diverse, even conflicting, values within a single nation. In a federal state, especially where the powers of the central government are limited, the various state or provincial governments have considerable freedom to adopt their own values and policies, which will differ from time to time and from place to place. Tax rates can be higher in one state or province, lower in another; social welfare provision can be more generous in one than in another; business regulation can be more or less onerous; one state can have the death penalty, another can abolish it. In some federal countries—Belgium, Canada, India—different states or provinces have different official languages. One could imagine a federal country with an established religion in some states but not in others.³³ Value pluralism implicitly underlies many of the classic justifications for federalism: that states can best reflect local values, that states can experiment with a variety of policies that the country might not be prepared to risk nationally, and that states give more scope for effective participation by citizens because of their smaller, more accessible scale. Mobility, at the same time, exerts some discipline upon the states, precisely because the barriers to exit and entrance are not prohibitive. In a pinch, citizens—and companies and institutions, too—can vote with their feet.

As such, federalism is an attractive vehicle for value pluralism. Federalism enhances human possibilities in a practical sense, without discouraging or paralysing the political choices that inevitably preempt other and conflicting choices. Whereas emigrating to a foreign country is unrealistic for most people, federal pluralism within one country can mean considerable freedom of choice for citizens about where to live, under which laws, and hence by which values to live.

See generally PHILOSOPHY IN AN AGE OF PLURALISM: THE PHILOSOPHY OF CHARLES TAYLOR IN QUESTION (James Tully ed., 1994).

33. Various American states had established churches—different ones in different states—in the late eighteenth and early nineteenth centuries. *See* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 21 (1995).

Still, even federalism can sometimes appear as an enemy of pluralism rather than as its friend. In the United States, segregationist reliance on “states’ rights” meant that supporters of civil rights over the decades associated states’ prerogatives not with pluralism but with the all-too-uniform racial discrimination that once pervaded the South and much of the rest of the country. This piece of history is a considerable factor in the deep mistrust for state and local governments felt by many on the political left in America to this day. From their point of view, federalism may not be a boon to pluralism but rather a threat to progressive national legislation that backers hope will promote greater social tolerance, inclusiveness, and hence pluralism.

Moreover, federalism cannot always free a society from making difficult choices. The gay marriage debate is a good example. At first glance, it might seem a good, pluralist solution that gay marriage should be lawful in some states or provinces but not in others—at least unless there are very strong reasons, outweighing value pluralism, for it to be lawful in all, or in none. Richard Posner, among others, has suggested as much. “Let a state legislature or activist (but elected, and hence democratically responsive) state court adopt homosexual marriage as a policy in one state, and let the rest of the country learn from the results of its experiment.”³⁴

Things may be more complicated, alas, on closer consideration. There are many areas of law that lend themselves to different, even contradictory, treatment in different jurisdictions. Tax rates, as already suggested, can be higher in one state, lower in another; social welfare provision can be more or less generous; business regulation can be more or less onerous; one state can have the death penalty, another can abolish it. There will often be spillover effects even on these matters, to be sure: tax rates and business regulations can attract, or repel, people to or from a given state. But within reasonable limits, states have latitude to legislate on such subjects in ways that reflect value pluralism—different laws, reflecting diverse values, in different states.

State laws instituting gay marriage, however, may fit awkwardly, or not at all, into this framework. The problem, of course, is that people—and couples—are mobile. If I contract a gay marriage in one state, to what extent must it be recognised in other states? There is a

34. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 250 (1999) (footnote omitted).

constitutional question whether my marriage is entitled to “full faith and credit” in other states.³⁵ Even if the answer is no, it would be difficult or impossible for other states to ignore the marriage entirely. If I lawfully contract a gay marriage in one state, can I later contract a heterosexual marriage to someone else in a state that does not recognize gay marriage? What about child custody disputes, to the extent that state law takes marriage into account—which it sometimes does—in adjudicating such disputes?³⁶ What if the surviving partner to a gay marriage claims property in a no-gay-marriage state from the estate of the deceased spouse, on the basis of being the surviving spouse? Confining the legal effects of gay marriage to states that actually institute it would be difficult, and the prospects for conflict among the states, including conflicting court judgments, might be considerable. And beyond the strictly legal repercussions, gay marriage in one or more states might have important cultural consequences in other states, well beyond the ripple effects of tax or welfare laws, or even death penalty laws, that now differ from state to state.

Federalism, in short, is not a pluralist panacea. But the sorry history of racial segregation ought not to discredit federalism in principle. American states are far from being outcroppings of a regional racist monolith nowadays, and they do offer far more plurality of local decisionmaking than does the national government. In most contexts, federalism is very likely to promote value pluralism. Perhaps this is the best one could say for any institutional arrangement.

THE SPIRIT OF PLURALISM

If value pluralism can be invoked on conflicting sides of various public debates, sometimes even on questions of basic institutional arrangements, does value pluralism have any reliable implications for law and public policy? On a chastened but still optimistic view, value pluralism at least has clear implications for what not to do. Totalitarianism, political utopianism, radical illiberalism: all of these are plainly inconsistent with value pluralism. Resistance to them, in their Nazi and Communist forms among others, was the driving force behind

35. U.S. CONST. art. IV, § 1. Congress has enacted the Defense of Marriage Act (DOMA), which purports to permit states to refuse to recognise same-sex marriages from other states, if they so choose. The relevant portion of DOMA is at 28 U.S.C. § 1738C (2006).

36. *See, e.g., Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (refusing to treat a civil union as a marriage for purposes of interpreting a child visitation clause).

Isaiah Berlin's intellectual career.³⁷ Radical regimes thrived, sometimes nightmarishly, in the twentieth century, and illiberal and millennial politics have certainly not disappeared in the twenty-first. Whenever public policy forbids or substantially discourages a range of differing but potentially worthwhile ways of life, there is at least a heavy presumption that the policy is at odds with value pluralism.

Value pluralism thus not only precludes radical illiberalism, it also offers a framework for thinking about legal and policy questions. Does a given law or policy promote freedom and the coexistence of diverse values and ways of life, or the reverse? Conflicting answers might be couched in pluralist terms, but as such the answers may be more, or less, plausible; some will not be very persuasive, and some might be hard to maintain with a straight face.

Beyond this, however, value pluralism may be more a temperament or a spirit than a conclusive formula for law and legal thought. The kind of temperament, in fact the human face, one has in mind might ideally be that of Isaiah Berlin himself. Berlin was worldly, quick to take pleasure in a wide array of ideas and experiences, tolerant, humane, intellectually aristocratic—empathetic and eager to see the world through other eyes, even or especially through the eyes of people with very different world views.

The spirit of Berlin's value pluralism favours liberal institutions and laws because liberalism means respecting human autonomy and freedom to choose. With free choice, people will make differing and conflicting choices, which would be troubling if there were really only one good way of life, but not troubling at all if there are many and conflicting goods in the world. Value pluralism also implies the need for compromise and conciliation and an open market for ideas, just because many such ideas might be good, although conflicting. Without a certain spirit of value pluralism among the people concerned, liberal institutions are unlikely to be established or to endure. And just as the pluralist temperament favours liberal institutions, so liberal institutions in turn foster the pluralist spirit, or at least are the most likely institutions to provide a relatively safe and congenial home for people with a pluralist temper.

37. See GEORGE CROWDER, *ISAIAH BERLIN: LIBERTY AND PLURALISM* 5 (2004) (observing that Berlin's childhood exposure to the Russian Revolution "crystalliz[ed] his abiding fear of revolutionary violence and of political extremism in general").

Yet it is a sobering fact that value pluralism can be invoked in a variety of causes, including illiberal ones. A disheartening American example is Jim Crow segregation, which was defended in part, at least implicitly, on pluralist grounds. John Gray's nonliberal, if not illiberal, recasting of Isaiah Berlin might be another example.³⁸ In fact, it was one of Berlin's central insights that ideas, by subtle and perverse adaptations, can elide into drastically different shapes and even morph into something like their opposites. Positive liberty, for example, turns all too easily into an antithesis of liberty: into "true freedom," which means doing what you ought to do, in other words what I think you ought to do.³⁹ Enlightenment may carry the seeds of utopian totalitarianism, and romantic freedom the seeds of fascist barbarism.⁴⁰ Value pluralism, too, without the humane spirit that lay behind it for Isaiah Berlin, might be an uncertain guide to law, policy, or much else in life.

Alas, it is not only abstract ideas that can devolve in this way. Spirit and temperament are mutable as well. Positive liberty, for example, is not just an idea; it is an idea held by human beings who may start from a sincere belief in liberty before they veer off into coercive or even totalitarian politics under the banner of "true freedom." Enlightenment is a human ethos as well as an idea, and the ethos as well as the idea can sometimes transmogrify, if Berlin is right, into something tyrannical. Or for a more current and much homelier example, what could be more pluralist than "diversity"? Yet today's belief—and believers—in diversity sometimes seem to demand uniform thinking and conformity to political and ideological orthodoxy, both on campus and elsewhere. Who is to say that the enthusiasts for this orthodoxy did not start out with a genuine taste and disposition for diversity?

It is surely testimony to the attractiveness of value pluralism as an idea that it can be invoked in various and sometimes conflicting causes, on this side and on that side of the law. In one sense, this suggests the power of the idea. But in another sense, the idea's very adaptiveness suggests that value pluralism, in important ways, is fragile and uncertain.

38. See GRAY, ISAIAH BERLIN, *supra* note 31, at 2; GRAY, TWO FACES OF LIBERALISM, *supra* note 31, at 32.

39. See generally ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118 (1969) (Berlin's classic critique of "positive liberty").

40. George Crowder observed:
 Berlin's attitude to the Enlightenment and its opponents is complex. Although committed to the moral and political ideals of the French *philosophes*, he is hostile to what he sees as their characteristic scientism, which he links with Marx and ultimately with Soviet totalitarianism. The Counter-Enlightenment and romanticism, on the other hand, lead to another kind of totalitarianism, namely fascism
 CROWDER, *supra* note 37, at 95.

But then, so is the liberal civilisation that fosters the spirit of pluralism and is fostered by it. That, at least, is a thought that might have appealed ruefully to Isaiah Berlin.