

Does Institutional Design Make a Difference?

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One of the greatest questions that hangs over political science and law is whether the institutional design of a constitutional democracy does or does not make a difference with respect to whether that democracy is a success. I believe quite firmly that institutional design does make an important difference, but others argue that the effects of institutional design are dwarfed by the effects of culture or of religion or of linguistic and/or racial and ethnic homogeneity or of poverty.

The chief skeptic of the institutional-design-makes-a-difference argument on the Northwestern Law faculty is my good friend and colleague Jide Nzelibe who is acutely aware of how little institutional design has contributed to good governance in some constitutional democracies around the world such as Nigeria. Nigeria has an American-style constitution with separation of powers and federalism, but those institutional features are dwarfed by the division of the country between Christians and Muslims and by problems of corruption. If the U.S. constitution is, as I think it is, an institutional success story, the Nigerian constitution stands as a reproach. The lack of cross-cutting cleavages in Nigeria seems to trump everything else.

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Two distinctive features of American constitutionalism that have been much copied abroad are the U.S. system of federalism and the U.S. system of a presidential separation of powers. The results have not been very encouraging. Federalism in otherwise stable western constitutional democracies such as Canada (Quebec), the United Kingdom (Scotland), and Spain (Catalonia and the Basque Region) has led to powerful separatist movements, and, as a result, the specter of secession hangs over those countries. The experience abroad with exports of U.S. style presidential separation of powers has been if anything even worse. Every presidential separation of powers democracy in Latin America has at some time or another degenerated into an authoritarian system of one-man presidential rule, and the same thing has also happened in Russia, Indonesia, the Philippines, and South Korea. As a result, political scientists and advisers to constitution writers today often weigh in against federal or separation of powers systems and in favor of unitary, parliamentary structures. Those structures too, however, have in the past degenerated into authoritarian rule as happened in the unitary, parliamentary regimes in Japan and Italy prior to World War II.

I want in this essay to identify two key features of U.S. constitutional design, which I think are integral to the success of U.S. federal and presidential, separation of powers, but which are not widely known and are therefore not widely copied when newly emerging democracies around the world choose to write a constitution. In Part I, I will focus on the fact that American federalism is characterized by a much larger number of state entities than exist in most federal regimes and on the fact that state boundary lines are drawn pretty arbitrarily and cross-cut regional and ethnic cleavages. In Part II, I will focus on five features of the U.S. system of presidential separation of powers, which make out presidents much weaker than the presidents of other countries with presidential systems such as France. I will argue here that the failure of presidential systems in other countries are largely due to the failure to copy the aspects of U.S. constitutionalism that constrain our presidents and keep them on a tight leash. I will focus my discussion in both parts on the experience in constitutional democracies that are members of the Group of Twenty Nations, which together produce 85% of the world's GDP. If we could explain better and understand the constitutional experience in the G-20 nations, we could probably do so all over the world.

I should be clear at the outset that I am starting with a very distinctive but controversial premise. I think the U.S. Constitution as it has been amended and has evolved is a spectacular success story from which there is an enormous amount to be learned. The United States is the third most populous country in the world, the fourth largest territorially, and it produces a higher GDP than does any other country in the world and an extraordinarily high GDP per capita. The U.S. is the world's only global super power and the runner-ups for that title such as China and Russia are really regional powers, at least for the moment, in comparison. The U.S. won three global struggles in the Twentieth Century: World War I, World War II, and the Cold War, but it is not a militaristic state at home, and it is, in fact, is very rights and liberties conscious in domestic governance. While the U.S. had a troubled history in the past due to slavery and race discrimination that history was decisively and permanently repudiated in the 1960's, and the U.S. today has fewer problems with race and ethnicity and religious discrimination than do most of the other G-20 countries.

For all of these reasons, I believe, as former President Ronald Reagan used to say that the United States is a Shining City Upon a Hill – a beacon of liberty and democracy which ought to inspire and be an example to the rest of the world¹. When my family fled Fascist Italy in September 1939 in part because they were of Jewish origin, my grandfather chose to come to the U.S. rather than going to Brazil or South Africa because of what America stood for in the world: liberty and democracy. I think my grandfather made the right decision. I want in this essay therefore to explain a key feature of American federalism and a key feature of American presidential separation of powers that make those systems work in the U.S. today. Other countries, which seek to emulate our success need a better understanding of the subtleties of institutional design, which undergird the success of the U.S. Constitution.

1 Steven G. Calabresi, "A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law". *Boston University Law Review*, n. 86, 2006, pp.1335-1416

1. The Number of States and the Economics of U.S. Federalism

A key feature of the U.S. Constitution is its federal structure². Our powerful national government is checked and balanced by fifty State governments, which are equally represented in the U.S. Senate, which in turn is the more important of the two Houses of Congress because of its role in picking federal judges, executive branch officials, and in making treaties. For 225 years, the Senate has protected State prerogatives, and it continues to do so today. As a result 95% of all the cases tried in court in the U.S. are tried in State and not in federal courts, and the substantive law of contract, property, torts, inheritance, family law, and criminal law are overwhelmingly State areas of law, which is not true in most other federations. Collectively, the States tax and spend about the same percentage of the nation's wealth as does the national government, which is another indicia of State co-equality with the national government. State governments in the U.S. have more constitutional power than in many other federations yet there is no talk at all of States ever considering seceding from the United States – an issue that was conclusively settled by the experience in the 1860's of the Civil War. Why is all of this the case?

To begin with, I want to make it clear up-front that I think federalism is wealth and happiness maximizing if it is constructed in the way it is in the U.S. today. U.S. federalism as it is practiced allows our national government to maintain the world's largest and most effective military force; it creates a domestic free trade zone which thanks to NAFTA extends across the whole of the continental United States; it creates a national government, which can stop air and water pollution in one State that might inflict negative externalities on other States; and it allows for national Bill of Rights rules and Civil Rights Acts that protect liberty and equality throughout the country.

At the same time, U.S. federalism leaves the States free to experiment and compete with respect to a wide range of issues including: overall levels of taxing and spending; the amount of wealth redistribution engaged in; gay marriage; the use of voucher systems and of Charter Schools in education; criminal law policy; assisted suicide; and marijuana and alcohol use. Americans deliberately choose to live in U.S. States that reflect their

² My full views the virtues of U.S. federalism are expressed in: Steven G. Calabresi & Lucy Bickford, "Federalism and Subsidiarity: Perspectives from Law", *Nomos* LV, New York: NYU Press, 2014, pp. 123-189.

values as is explained by Bill Bishop in *The Big Sort* (2009). Anyone who looks at presidential election maps knows that Blue State America and Red State America diverge on a whole range of cultural, religious, economic and other issues, and yet that divergence is peaceful and simply leads to different policies state-by-state. The U.S. seems to have all the military and free trade benefits of an empire, but it has very heterogeneous policies on many quite important issues thanks to federalism. Why does the U.S. system work so well?

To emphasize this question even further, compare U.S. federalism with the constitutional regimes among the G-20 nations that are democracies leaving out for the moment China, Russia, and Saudi Arabia because they all have authoritarian regimes. The U.S. has a stronger foreign policy and military presence by an overwhelming margin than does any other G-20 democracy. The U.S. led NAFTA free trade zone is almost as populous as is the European Union free trade zone, but it is not encumbered by any of the problems with debt-ridden members in need of being bailed out that face the EU. In addition, the U.S. has free trade agreement with many other countries outside of NAFTA and is an active member of GATT – the leading global free trade organization. And, the U.S. vigorously protects civil rights nationwide including religious liberties which is not true for example of the European Union or France or even the United Kingdom. In important respects, then, the U.S. national federal government is more powerful by far than are the federal governments of the European Union, Argentina, Brazil, Germany, India, Mexico, Canada, Australia, South Africa, and, since devolution, the United Kingdom. The U.S. federal government is also enormously more powerful than are the centralized, national governments of France, Japan, Italy, Turkey, Indonesia, and South Korea.

At the same time, the U.S. government is more thoroughly decentralized and leaves more matters to be decided at the State level than is the case in such federations as: Brazil, Argentina, Mexico, Australia, India, South Africa, and the U.K. By definition more power is devolved in the U.S. than in any of the unitary nation states such as: France, Japan, Italy, Turkey, Indonesia, and South Korea. The only two countries that come close to devolving as much power to their national sub-units as does the U.S. are Germany and Canada, but I unfortunately do not have space in this brief essay to discuss the subtle differences between U.S. federalism and German and Canadian federalism. Suffice it to say that Canada has a

population that is smaller than that of the State of California while Germany's population is less than the combined populations of California, Texas, and New York. These are very small scale federations compared to the U.S. federal system and are thus frankly much less important.

The federal system of the European Union, while it is a failure as to foreign policy and national defense powers has in fact succeeded in providing free trade among its 28 member nations while leaving a lot of power devolved to the member state national governments. The E.U. regime is, however, deeply unpopular in such leading nations as the U.K. and France, it suffers from a severe democracy deficit, and it is unable even to bail out Greece, which needs its help, much less other troubled economies such as those of Spain, Italy, and Portugal. The E.U. is obviously not nearly as successful today as is the federal system of the United States.

The success of U.S. federalism in providing simultaneously strong *and* decentralized government appears especially remarkable because the U.S. does not at the present moment face *any* serious secessionist movement unlike many of the other G-20 nations. In contrast, for example: 1) Canada faces constant secessionist pressure from Quebec; 2) the U.K. faces Secessionist pressure from Scotland; 3) the European Union itself faces secessionist pressure from the U.K.; 4) Italy faces secessionist pressure from the Northern League and from Venice; 5) France faces secessionist pressure from Corsica; 6) Spain faces secessionist pressure from Catalonia and the Basque regions; 7) Russia faces secessionist pressure from Chechnya; 8) Turkey faces secessionist pressure from the Kurds; and 9) China faces secessionist pressure from Tibet. Even tiny Belgium appears to be in the process of splitting into two or three new nation states. Why then is the U.S. federal government simultaneously so strong, so decentralized, and so free of credible threats of secession? The answer lies in what I have called in a prior law review article "The Number of States and the Economics of Federalism"³.

The United States is unique among the federations of the world in that: 1) it has a very large number of federal subunits; and 2) the boundaries of those federal subunits are drawn arbitrarily to cut across rather than reinforce regional, cultural, and religious cleavages. Let me discuss the significance of each of these points in turn.

³ Steven G. Calabresi & Nicholas Terrell, "The Number of States and the Economics of American Federalism". *Florida Law Review*, n. 63, 2011. pp 1-45.

First, the United States has 50 member States, which makes it unique among the G-20 federations. In contrast, the Federal Republic of Germany has 16 member states; Canada has 10 provinces; the United Kingdom has four entities with devolved power; Australia has 6 member states; the European Union has 28 member States; India has 28 member States and 7 territories; Brazil has 26 member States; Mexico has 31 member States; and Argentina has 23 member States. The United States has a federal system with a huge number of State subunits.

One consequence of this is that the division of the U.S. federation into fifty State subunits imposes huge costs on would be secessionists. All of the fifty United States with the possible exceptions of California and Texas are quite simply too small or lacking in population to imagine their existing as separate nations outside of the United States. As a result, the idea of secession does not even tend to arise and make its way onto the agenda of ordinary politics.

In theory a group of States in the U.S. could try collectively to secede as happened in 1860 and 1861 at the start of the Civil War, but the division of the U.S. federation into a very large number of federal subunits imposes huge collective action costs on such efforts at secession. The Civil War itself helps to illustrate this point. In 1861, there were thirty-four states fifteen of which were slave States. Only eleven of the fifteen slave States were able to agree to try to secede. Four slave States: Delaware, Maryland, Kentucky, and Missouri stayed in the Union, while a large number of the free counties of the slave State of Virginia seceded from that State to form the new free pro-Union State of West Virginia. The collective action costs of organizing slave State secession in 1860 and 1861 were prohibitively high. Only two-thirds of the slave States were able to organize themselves to secede and to join the constitution of the southern Confederacy.

This is the collective action problem that saved the Union. The Civil War was a close and hard-fought struggle in which more Americans died than in any other war that the U.S. has fought. As late as the summer of 1864, it appeared that the North was losing the Civil War and that President Lincoln would not be re-elected. Had the slave States of Maryland, Delaware, Kentucky, and Missouri all seceded forcing the relocation of the U.S. capital city to say New York or Philadelphia the North would probably have lost the Civil War. The slave States were done in by the collective action costs of getting 15 slave States to agree on a common course of action to preserve slavery.

Fast-forward to today and imagine a U.S. federal government with only four States instead of fifty: 1) the Northeast; 2) the South; 3) the Midwest; and 4) the West. Would there be serious secessionist pressures in such a four State federation? There is no way of course to know for sure, but my observation of American politics over the last forty-five years leaves me personally convinced that some regional subunit or other would secede from such a four State federation. The collective action costs of secession would be so low and the sense of regional identity would be so high that I personally think secession would become a real threat. Moreover, a four State federation would have a much weaker federal government than does the 50 State U.S. federation today because the States would be so much more powerful relative to the national government. Federations with only four States are not unheard of in the world by the way. Pakistan, for example, is a four State federation.

The second aspect of U.S. federalism that foils secession is the critically important fact that our State boundary lines are drawn arbitrarily to cut across regional and cultural divisions. Whereas a four State federation of the Northeast, the South, the Midwest, and the West would accentuate regional divisions, the 50 State U.S. federation today blurs them over. We have a lot of border States and swing States that blur over the regional and cultural fault lines that divided Americans from one another. Thus, border States like Maryland, Kentucky, Delaware, and Missouri are today joined by purple States like Virginia, North Carolina, Florida, New Hampshire, Ohio, Colorado, and Nevada. The effect is to minimize the salience of the division of the U.S. into Red and Blue state America rather than accentuating it. In a four State U.S. federation, regional and cultural cleavages would be accentuated and enhanced. This explains why a four State federal government in the U.S. might not last while a 50 State federal government is in contrast very stable.

This point can be illustrated by looking at our northern neighbor Canada, which is a small number of States federation having only ten provinces. The British, with a passion for neatness, divided Canada originally into a French-speaking and Catholic province of Quebec and an English-speaking and Protestant province of Ontario. Today, Canada has nine English-speaking, Protestant provinces and one French-speaking and Catholic province of Quebec. This federal structure is highly unstable. Quebec has twice come very close to seceding from Canada, and it looks as

if another secession attempt will be made quite soon. The collective action costs to French speakers of secession are very low. In contrast, if the British had divided Canada into 50 provinces instead of ten with many of them being bilingual, the collective action costs of organizing a secession would probably be prohibitively high. The error in institutional design of the Canadian federation is that it has too few federal subunits, and the borders of the federal subunits reinforce rather than cutting across the regional, cultural, linguistic, and religious cleavages in Canadian society.

The same problem is evident in the United Kingdom itself. The U.K. has devolved power to four regional subunits: 1) Scotland; 2) Wales; 3) Northern Ireland; and 4) the City of London. The Scots have planned a referendum on Scottish secession from the U.K. and the secessionist threat is quite serious. One cannot help but note that the federalism boundary lines of the U.K. accentuate rather than blurring over regional and ethnic differences.

The same problem is evident in Spain, which devolves power only to Catalonia and the Basque regions, and in Belgium, which devolves power to Flanders and Wallonia. A small number of regional subunits, with boundary lines drawn to reinforce rather than blur over deep-seated political cleavages, is a recipe for civil strife and threats of secession. Thus, early on, the British divided their empire in India into Hindu and Islamic constituencies out of a desire for neatness. It was no accident then that when British India became independent it immediately split into the separate nations of India and Pakistan. It may be that the gulf between Hindus and Muslims was so vast that even a fifty State federal structure with randomly drawn boundary lines could not have lasted, but it would certainly have had a better chance of lasting than the two constituency structure that the British used instead.

Consider here the example of Switzerland, which has been a huge success economically and in providing its citizens with a high quality of life even though it is divided among German, French, and Italian speakers and between Protestants and Catholics. It turns out that the cleavages in Swiss politics cross cut one another so that half the German speakers are Protestant and half are Catholic while half the French speakers are also Protestant and half are Catholic. Another big fault line in Swiss politics is urban versus rural voters and here German speakers are divided between urban and rural voters as are French speakers. On top of all of these cross cutting cleavages, the Swiss for historical reasons have adopted a federal

system with a large number of fairly small federal subunits. Switzerland has 26 cantons and half cantons even though the country has only about 8 million inhabitants making it similar in population to the State of Virginia. Switzerland is in territorial size half way between the U.S. States of West Virginia and Maryland, which makes its division into 26 federal subunits with great devolved powers all the more striking. In other words, Switzerland is a success because its linguistic, religious, and urban-rural cleavages all cross cut one another while its large number of federal subunits in a tiny territorial area raises the collective action costs of secession or regionalist political action. This is in contrast with Canada where all of the Catholics and French speakers are in Quebec while all of the Protestants and English speakers are in the other nine provinces. In Canada, there are no cross-cutting cleavages, and the cleavages that do exist all break along the same line.

So how is it then, historically, that the U.S. ended up with such a large number of federal subunits with arbitrarily drawn boundaries that cut across and suppress regional and cultural cleavages? To some extent, the U.S. phenomenon of a large number of federal sub-entities is a matter of good luck. The 13 original American colonies were founded by different groups of emigrants, many of them religious sects, that wanted their own religiously pure colonies. Massachusetts and Connecticut were founded and maintained by Puritan dissenters from the Church of England. Rhode Island was founded by Roger Williams on a principle of extending religious liberty to all its citizens unlike Puritan Massachusetts. Pennsylvania was founded by Quakers and Maryland by Catholics while in the southern colonies of Virginia, the Carolina, and Georgia, the established Church of England prevailed. Dutch-acquired New York State in turn had its own religious history. Efforts by England to merge New York and the New England colonies into one large Dominion of New England were bitterly and successfully resisted by the colonists. Thus, the original 13 U.S. colonies were small and had arbitrarily drawn borders largely as a matter of historical accident.

In the 1780's, U.S. leaders faced a critical decision about what to do with the vast Northwest Territory, which ultimately became the U.S. States of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota. Virginia and Connecticut had claims to this territory, but colonial leaders wisely recognized that American federalism would be unstable if one

State – Virginia – was asymmetrically much larger and more populous than the rest. The Founding generation wisely ceded the Northwest Territories to the Continental Congress under the Articles of Confederation, and, in 1787, the Continental Congress passed the Northwest Ordinance, which abolished slavery in the Northwest Territories and which provided for dividing the territory ultimately into a large number of States so that no one State would be too big or powerful. The Framers thus made a conscious choice with the Northwest Territory in favor of having a large number of small States.

A similar choice was thus made with the vast lands in the Louisiana Purchase whereby President Thomas Jefferson bought the vast area of the Western States from the French Emperor Napoleon for the bargain basement price of \$15 million. Ultimately, fifteen States were carved out of the Louisiana Territory and additional States were carved out of the Territory obtained as a result of the Lewis and Clark expedition and the Mexican-American war. In 1868, at the height of Reconstruction, the U.S. already had 37 States, and by 1912 eleven more had been added bringing the total number up to 48. The events of the Civil War must certainly have encourage national leaders between 1868 and 1912 to break up federal territories along arbitrary boundary lines into a large number of small States.

A similar choice was made by the French Revolutionaries after 1789 when they broke up the 34 traditional French Provinces, many of which had distinctive regional subcultures like Brittany's and Corsica's, into 96 Departments in the contiguous European territory of France. Since 1789, France has been a staunchly unitary nation State with no federalism overlay. The divided and conquer approach of the French Revolutionaries explains why French nationalism has been so dominant now for over 200 years.

Some federal nation States have maintained important and powerful federal subunits but have redrawn their States' boundary lines. The Allied powers after World War II broke up the huge German mega-state of Prussia, which had long had a distinct and militarist culture and which had 60% of the population of the Federal Republic of Germany into a large number of smaller German States. The Soviet Union divided the portions of Prussia in the former nation of East Germany into the States of Brandenburg, Saxony-Anhalt, and Mecklenburg-Vorpommern while the three Western Allied powers divided the portions of Prussia in West Germany among the new German States of North Rhine-Westphalia, Lower Sax-

ony, Hesse, Rhineland-Palatinate, and Schleswig-Holstein. German State borders were thus redrawn after World War II to create a larger 16 member State federation which no one State could dominate and which would therefore be more stable. Other federations as well, such as India, have redrawn State boundary lines for federal reasons.

The relevance of this to questions of institutional design is that U.S. small State federalism is highly successful because it gives the U.S. the advantages of decentralization and of competition and experimentation among 50 States while rendering the States too weak to throw their power around and to threaten credibly to secede. Federalism boundary lines in the U.S. cross-cut rather than reinforcing religious, linguistic, ethnic, racial, and cultural cleavages, which is a big part of the reason why U.S. federalism works. In other nations that have experimented with federalism or with confederations, central planners have foolishly drawn federalism boundary lines so they reinforce religious, linguistic, ethnic, racial, and cultural cleavages as in Canada with Quebec, in the U.K. with Scotland, and in Spain with Catalonia and the Basque regions. This is the height of folly as a matter of institutional design. Federalism can give a country a strong national government with foreign and military power heft and the benefits of substantial decentralization with competition and experimentation among States. But, federalism can only be sustained if there are a large number of federal subunits whose boundary lines cross-cut divisive social cleavages. This is an important lesson of institutional design, which constitution writers ignore at their peril. It should be noted in this regards that in some federations like Germany and India the federal government is empowered unilaterally to redraw state boundary lines. This is not allowed in the U.S.

My argument here again is that particular institutional structure can make a difference as to whether a regime functions well and produces high GDP per capita or whether it causes a democracy to fail either by reverting to dictatorship or by leading to impoverishment. The first such example concerns U.S. federalism and the fact that the U.S. federal contains a very large number of states -fifty. The second example, to which I turn in Part II below concerns five features of the U.S. separation of powers, which work in practice to prevent our presidential system from deteriorating into dictatorship as has happened in many foreign regimes, which have set up presidential, separation of powers systems. Put together, these two structural

federalism and separation of powers features of the U.S. Constitution have cause it to be a brilliant but misunderstood success. They help prove that correct institutional structures can indeed make a difference as to whether a regime succeeds or fails.

2. The U.S. Model of Constrained Presidentialism

A second feature of the U.S. Constitution that makes it noteworthy is that it creates a very strong and powerful executive figure in the form of the President of the United States. U.S. Presidents are Commanders in Chief of the U.S. armed forces, and they play a huge role in foreign policy and in national defense⁴. An age old problem of designing a constitutional democracy is how best to balance the need for order with the need for liberty. The U.S. Constitution protects liberty with its system of checks and balances, separation of powers, and federalism, but it protects order and maintains foreign policy heft thanks to the presidency. Alexander Hamilton famously wrote in *The Federalist Papers No 70* that:

THERE is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the

⁴ CALABRESI, Steven G; YOO, Christopher S. Yoo. *The Unitary Executive: Presidential Powers for Washington to Bush*. New Haven: Yale University Press, 2008.

existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

I personally think Hamilton was dead-on right about this. Energy in the executive IS a critical factor in producing good government. Thanks to our energetic presidential system we won the Civil War, World Wars I and II, the Cold War, and most recently the War on Terror as well as wars in Kuwait, Afghanistan, and Iraq.

As President Franklin D. Roosevelt proclaimed in 1940, the United States is the great “arsenal of democracy.” We are not only a democracy, but we are also the pre-eminent global super power – the leading military force throughout the World. It is U.S. military might that makes Russia hesitant about reconquering Eastern Europe and that keeps China from invading Taiwan or Japan. Thanks to our presidential system we are a military and foreign policy force all over the world. No parliamentary prime minister, dependent on a coalition to maintain his government, is in as strong a position in military and foreign affairs as is the President of the United States. Yale law professor Bruce Ackerman in *The New Separation of Powers* 113 Harv. L. Rev. 642 (2000) argues that Germany’s parliamentary system of government is better than is the U.S. separation of powers system, but he is wrong. Germany free rides on U.S. military and foreign policy. It does not and cannot defend itself! Without the U.S. presidential, separation of powers system Germany would never have been reunited. Its eastern zone would be run by the Russians, and its western zone would be intimidated and cowed by them. It is laughable to praise Germany’s parliamentary system of government and to denigrate the U.S. system.

It is true that Britain from 1867 until World War II had a parliamentary system and a strong foreign and military policy under leaders such as Sir Winston Churchill. It is thus not impossible for a parliamentary system of government to be a foreign policy and military success so long as its election laws give it a two party system rather than a multi-party system with weak coalition governments. Nonetheless, the fact remains that Britain lost

her Empire, appeased Adolf Hitler mistakenly in the 1930's, and would have lost World War II and possibly also World War I without American intervention. The power of the American presidency is thus a huge institutional design plus of the U.S. Constitution. My responses to Ackerman can be found in three law review articles cited in the margin⁵.

Nevertheless, the U.S. Constitution's creation of a powerful presidency carries with it severe risks – risks that have done in almost every country that has tried to copy the U.S. presidential, separation of powers system of government. The sad fact is that in almost every other democracy in the world that has sought to copy the U.S. presidential, separation of powers system, it has in almost every country degenerated into a presidential dictatorship. This is true of literally all of the countries of Latin America, of Indonesia, of the Philippines, of South Korea, and most recently of Russia. Efforts to export the U.S. presidential, separation of powers institutional design have been nothing short of catastrophic.

The reason for this is that foreign countries which have copied our presidential, separation of powers system rarely copy other features of our constitutional system, which are absolutely critical in checking and balancing presidential power. I want here to briefly discuss some of the critically important checks and balances that keep U.S. presidents from being able to stage coups d'état. These are all points that I originally made in my 2001 article defending the virtues of presidential government from Professor Ackerman's attack⁶.

First, American presidents are elected for only a four year term with a two term limit, and midterm elections must be held two years into a four year presidency and again six years into an eight year presidency. In those mid-term elections all of the House of Representatives and one-third of the Senate are up for re-election. The party out of power in the White House almost always wins the midterm elections usually crippling the president's initial ability to act on his own. Newly elected popular U.S. presidents

5 Steven G. Calabresi, "The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution" *Constitutional Commentary*, vol 18, n.1, 2001, pp. 51-104; Steven G. Calabresi & Nicholas Terrell, "The Fatally Flawed Theory of the Unitary Executive." *Minnesota Law Review* n. 93, 2009, pp.1696-1740; Steven G. Calabresi & Kyle Bady, "Is the Separation of Powers Exportable?" *Harvard Journal of Law and Public Policy*, N. 33, 2010, pp.5-16 (arguing for a popularly elected president of the European Union).

6 Calabresi, *The Virtues of Presidential Government*, supra, at 95-104.

like Ronald Reagan and Barack Obama are thus basically on a two-year leash. They can implement their program for two years until they lose the midterm election and after that their power is hugely constrained. Most countries that have copied the U.S. presidency have not copied our system of midterm elections. This is a big mistake. Midterm elections keep our presidents on a straight and narrow compromise path.

This is especially true because 39 out of 50 States elect their governors and State legislators during the midterm elections or in an off year election that does not coincide with presidential elections. The party out of power in the White House thus typically comes to control a majority of the nation's governorships as a result of the first midterm election. Jim Lindgren and I have documented this trend in *The President: Lightning Rod or King?* *Yale Law Journal*, vol. 115, n.9 (2006). A majority of the nations governors were Democrats during the Reagan years, Republicans during the Clinton years, Democrats during George W. Bush's presidency, and now Republicans during the Obama presidency. No president could stage a coup d'état when Congress and the State governments are controlled by their political foes. This is thus a critical institutional design feature of U.S. presidentialism that prevents presidents from becoming dictators.

A second critical institutional design feature of U.S. constitutionalism that constrains presidential power is our vigorous congressional system of oversight committees, armed with subpoena power, coupled with the President's need to get senatorial consent for his executive and judicial branch nominees. U.S. congressional committees are very powerful and very wired in to the parts of the executive branch they supervise. There are no term limits for congressional service on oversight committees so senators and congressmen can serve on those committees for decades long outlasting a president who serves for only eight years at most. Career civil servants given a choice between pleasing a member of an oversight committee and the president will often choose to please the former because the civil service laws effectively give civil servants life tenure and members of oversight committees are around forever while presidents are not.

The Senate's role in confirming presidential nominees is also not a feature of presidentialism that is copied in all foreign countries, and it too greatly constrains presidential power. Civil servants want to be promoted, and they know they may need Senate confirmation to get a promotion. Pleasing forces on Capital Hill is thus often as important as pleasing the President.

Third, U.S. presidents have no power to declare states of emergency or to propose national referenda, which in any event are not allowed. This makes the U.S. president weaker than, for example, the president of France who can do both of those things.

Fourth, U.S. presidents are subject to judicial review by a life tenured federal judiciary headed up by a Supreme Court whose members today serve on average 26 years in office! The Supreme Court is almost always dominated by the appointees of prior presidents, usually presidents of the opposite political party from the incumbent president. The Supreme Court enjoys very high favorability ratings, and it often acts vigorously to clip a President's wings. Foreign Supreme Court and Constitutional Court justices do not have life tenure and often serve short terms so they pose less of a check on presidential power. In some foreign countries, like Argentina, presidents have begun their terms by firing or impeaching and removing all the Supreme Court justices appointed by their predecessors. This is quite simply unthinkable in the U.S. Nor could U.S. Presidents emulate Vladimir Putin who in one of his first acts as President of Russia fired all the governors of the member States of the Russian federation. U.S. presidents are powerful, but they are subject to many meaningful checks and balances.

The bottom line is that there are many critically important checks and balances on the power of U.S. presidents, which make it impossible for them to turn themselves into leaders of a coup d'etat or of a dictatorship. The institutional design of the U.S. presidency makes our presidents very, very strong in foreign and military affairs, but pretty weaker with respect to domestic power. Presidents usually get only about two years out of eight within which they can accomplish a major domestic initiative and even then they must usually compromise a lot to get their initiative through two Houses of Congress and past a hostile Supreme Court. The countries that have tried to copy the U.S. presidential, separation of powers system have failed to copy the features of the U.S. constitution, which act formidably to check and balance presidential power. This is, in short, a failure of institutional design.

3. Conclusion

My goal in this paper has been to prove that institutional design matters – that racial, linguistic, cultural, and religious cleavages, as well as traditions of authoritarian rule, can be sometimes overcome by clever systems of institutional design. I have tried to identify one feature of American federalism and one feature of American presidentialism, which I think reveal cleverness in institutional design. These underappreciated features of the U.S. Constitution help explain why our democracy has prospered and expanded for 225 years, and why it is a Shining City Upon a Hill compared to the other nations of the world.

I am under no illusion that other federal, separation of powers systems could suddenly become peaceful and prosperous solely by emulating the features of American institutional design discussed in this short essay. Some countries like Nigeria face a daunting lack of cross-cutting cleavages that even the best institutional design might be unable to overcome. I do hope, however, that I have illuminated at least two features of the U.S. constitution's institutional design, as that document works in practice, which have contributed to the success of our constitutional system.

References

- ACKERMAN, Bruce. "The New Separation of Powers" *Harvard Law Review* vol 113, n.3, 200, pp. 633-725.
- CALABRESI, Steven G. "The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution" *Constitutional Commentary*, vol 18, n.1, 2001, pp. 51-104;
- _____. "A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law". *Boston University Law Review*, n. 86, 2006, pp.1335-1416;
- CALABRESI, Steven G; YOO, Christopher S. Yoo. *The Unitary Executive: Presidential Powers for Washington to Bush*. New Haven: Yale University Press, 2008;
- CALABRESI, Steven G; BICKFORD, Lucy. "Federalism and Subsidiarity: Perspectives from Law", *Nomos LV*, New York: NYU Press, 2014, pp. 123-189.

- CALABRESI, Steven G.; BADY, Kyle. “Is the Separation of Powers Exportable?” *Harvard Journal of Law and Public Policy*, N. 33, 2010, pp.5-16;
- CALABRESI, Steven G.; LINDGREN, James. “ The President: Lightning Rod or King?” *Yale Law Journal*, vol. 115, n. 9, 2006, pp.2611-2622
- CALABRESI, Steven G.; TERRELL, Nicholas, “The Fatally Flawed Theory of the Unitary Executive.” *Minnesota Law Review* n. 93, 2009, pp.1696-1740; _____ . “The Number of States and the Economics of American Federalism”. *Florida Law Review*, n. 63, 2011. pp 1-45
- HAMILTON, Alexander. *The Federalist Papers*, #70 [March 15, 1788]

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