

Symposium

DOES INSTITUTIONAL DESIGN MAKE A DIFFERENCE?

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ABSTRACT—This Essay argues that there are two unappreciated aspects of U.S. constitutional design that have contributed to our country’s success. The first is the fact that the United States is divided into fifty rather than four states. This greatly strengthens the national government and renders secession almost impossible. The second is the formidable set of checks and balances set up on presidential power that makes it impossible for U.S. presidents to become dictators. The fact that thirty-nine of the fifty state governors are elected in off-year or midterm elections, elections in which the incumbent president’s party almost always loses ground to the opposition, greatly limits U.S. presidential power.

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INTRODUCTION

One of the greatest questions that hangs over political science and the legal academy is whether the institutional design of a constitutional democracy affects its success. I firmly believe that institutional design makes an important difference. Others argue that the effects of institutional design are dwarfed by the effects of linguistic, racial, and ethnic homogeneity; culture; religion; or 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. Professor Nzelibe is acutely aware of how little institutional design has contributed to good governance in some constitutional democracies, such as Nigeria. Nigeria has an American-style constitution with separation of powers and federalism,¹ but those institutional features are dwarfed by the division between Christians and Muslims and problems of corruption.² 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 crosscutting cleavages in Nigeria seems to trump an otherwise successful constitutional design.

Two distinctive features of American constitutionalism that have been much copied abroad are the U.S. systems of federalism and presidential separation of powers.³ The results have not been very encouraging. In otherwise stable western constitutional democracies such as Canada, the United Kingdom, and Spain, federalism has led to powerful separatist

¹ CONSTITUTION OF NIGERIA (1999), available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> [<http://perma.cc/97G-52T3>].

² See John Campbell & Asch Harwood, *Why a Terrifying Religious Conflict Is Raging in Nigeria*, ATLANTIC (Jul. 10, 2013, 4:55 PM), <http://www.theatlantic.com/international/archive/2013/07/why-a-terrifying-religious-conflict-is-raging-in-nigeria/277690/> [<http://perma.cc/L39M-W6U2>]; Adam Nossiter, *Toll from Religious and Ethnic Violence in Nigeria Rises to 500*, N.Y. TIMES, Mar. 8, 2010, http://www.nytimes.com/2010/03/09/world/africa/09nigeria.html?_r=0 [<http://perma.cc/CCN9-92RX>].

³ See, e.g., CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] arts. 25, 84 (Braz.); S. AFR. CONST., 1996, ch. 3, § 40.

movements,⁴ 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. Many presidential separation of powers democracies in Latin America have at one time or another degenerated into an authoritarian system of one-man presidential rule,⁵ and the same thing has also happened in Russia, Indonesia, the Philippines, and South Korea.⁶ As a result, political scientists, advisers, and constitution writers today often weigh in against federal or separation of powers systems and in favor of unitary, parliamentary structures.⁷ Those unitary parliamentary structures, however, have also degenerated into authoritarian rule as in Japan and Italy prior to World War II.

In this Essay, I identify two key features of U.S. constitutional design that I think are integral to the success of U.S. federal and presidential separation of powers. These features, however, are not widely known and not widely copied when emerging democracies choose to write a constitution. In Part I, I focus on the facts that American federalism is characterized by a much larger number of state entities than exist in most federal regimes and that state boundary lines are drawn fairly arbitrarily, crosscutting regional, religious, and ethnic boundaries. In Part II, I

⁴ Québec in Canada, Scotland in the United Kingdom, and both Catalonia and the Basque Region in Spain have all had credible movements for secession. See Stephen Castle, *In Scotland, Avid Activists Fuel 'Yes' Campaign for Independence*, N.Y. TIMES, Sept. 17, 2014, <http://www.nytimes.com/2014/09/18/world/europe/scotland-referendum-on-independence.html> [<http://perma.cc/TM7J-D5T3>]; Andrew Cohen, *Is Canada Ready for the Return of Quebec Separatists?*, ATLANTIC (Sept. 5, 2012, 3:03 PM), <http://www.theatlantic.com/international/archive/2012/09/is-canada-ready-for-the-return-of-quebec-separatists/261994/> [<http://perma.cc/VNR4-2P6J>]; Raphael Minder, *Rallying Catalans to the Separatist Cause*, N.Y. TIMES, Nov. 7, 2014, <http://www.nytimes.com/2014/11/08/world/europe/carne-forcadell-barcelona-catalonia-spain.html> [<http://perma.cc/TFM2-66EM>].

⁵ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 645–46 (2000); see also Kurt Weyland, *Why Latin America Is Becoming Less Democratic*, ATLANTIC (Jul. 15, 2014, 3:04 PM), <http://www.theatlantic.com/international/archive/2013/07/why-latin-america-is-becoming-less-democratic/277803/> [<http://perma.cc/7FDK-GFD6>] (discussing Bolivia, Ecuador, Venezuela, and Argentina).

⁶ See, e.g., Tom Lantos, *Putting Democracy First in Relations with Russia*, 29 FLETCHER F. WORLD AFF. 13, 13 (2005) (“The record shows, however, that Russia has undergone numerous important reversals in human rights, the rule of law, and freedom of expression since Putin took power in 2000. The country has eliminated virtually all independent media, clamped down on political opposition, conducted seriously flawed parliamentary and presidential elections, jailed business leaders who were perceived to be hostile to the state, used dubious excuses to nationalize the largest private oil company, and, most recently, eliminated direct elections of regional governors and representatives.”).

⁷ See, e.g., John Gerring et al., *Are Parliamentary Systems Better?*, 42 COMP. POL. STUD. 327, 353 (2009) (“In an age of democratic transition, few questions have greater practical import than that of constitutional engineering. . . . The evidence presented here suggests that to the extent that the nature of the executive makes a difference, parliamentary systems offer significant advantages over presidential systems. In no case examined here does parliamentary rule seem to detract from good governance. In most policy areas, particularly in the areas of economic and human development, parliamentary systems are associated with superior governance.”).

highlight five features of the U.S. system of presidential separation of powers. These five features make American presidents much weaker than those in other presidential systems, such as France. The failures of presidential systems in other countries are largely due to their failure to copy aspects of U.S. constitutionalism that constrain our presidents. I focus my discussion in both parts on the experience of those countries with constitutional democracies that are members of the Group of Twenty (G20) nations, which together produce 85% of the world's gross domestic product (GDP).⁸ If we could better explain and understand the constitutional experience in the G20 nations, we could do so all over the world.

I should be clear at the outset that I am starting with a very distinctive and controversial premise. I think the U.S. Constitution, as it has been amended and evolved, is a spectacular success story from which there is an enormous amount to learn. The United States is the third most populous country in the world (excluding the European Union which is not a nation state), the fourth largest territorially, and produces the highest GDP and one of the highest GDPs per capita in the world.⁹ In fact, the United States is very conscious of its citizens' rights and liberties in its domestic governance. Although the United States had a troubled history in the past, due to slavery and race discrimination, that history was decisively and permanently repudiated in the 1960s,¹⁰ and the United States today has fewer problems with race, ethnicity, and religious discrimination than most of the G20 countries.¹¹ Finally, the U.S. Constitution is by far the oldest and longest-lasting constitution in the world. It has truly stood the test of time.

For all of these reasons, I believe, as former President Ronald Reagan used to say, that the United States is "A Shining City on a Hill"—a beacon of liberty and democracy, which ought to inspire and be an example to the rest of the world.¹² In this Essay I explain key features of institutional

⁸ G20, POLICY NOTE: A FORUM FOR THE 21ST CENTURY 1 (2014), available at <https://g20.org/wp-content/uploads/2014/12/0180-Policy-Note-Red-21st-Century-for-web-11.pdf> [<https://perma.cc/P8Q3-ELHW>].

⁹ Cent. Intelligence Agency, *United States*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> [<https://perma.cc/XW86-GTQT>].

¹⁰ See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *Loving v. Virginia*, 388 U.S. 1 (1967); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

¹¹ Max Fisher, *A Fascinating Map of the World's Most and Least Racially Tolerant Countries*, WASH. POST, May 15, 2013, <http://www.washingtonpost.com/blogs/worldviews/wp/2013/05/15/a-fascinating-map-of-the-worlds-most-and-least-racially-tolerant-countries/> [<http://perma.cc/SB73-CUFX>].

¹² Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1336 (2006).

design in American federalism and presidential separation of powers, which make American institutions work. Other countries that seek to emulate our success need a better understanding of the subtleties of institutional design that undergird the success of the U.S. Constitution.

I. U.S. FEDERALISM

A key feature of the U.S. Constitution is its federal structure.¹³ Our powerful national government is checked and balanced by fifty state governments, which are equally represented in the U.S. Senate. The Senate is the more important of the two houses of Congress due to its role in picking federal judges, confirming executive branch officials, and making treaties. For over 225 years, the Senate has protected state prerogatives, and it continues to do so today. As a result, 95% of all cases tried in American courts are tried in state and not federal courts.¹⁴ Additionally, the substantive law of contract, property, torts, inheritance, family law, and criminal law are overwhelmingly areas of state 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 the national government,¹⁵ another indicia of state coequality with the national government. State governments in the United States have more constitutional power than in many other federations, yet there is hardly any discussion of states considering secession from the United States—an issue that was conclusively settled by the experience of the Civil War. Why have states in the United States, which hold a great deal of constitutional power, managed to avoid discussion of secession while states and provinces in other federations, such as Canada, the United Kingdom, Spain, and Belgium, have not?

To begin, I think federalism as it is constructed in the United States today maximizes wealth and happiness. U.S. federalism 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 the North American Free Trade Agreement (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 may otherwise inflict negative

¹³ To read the author's full views on the virtues of American federalism, see Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, in *FEDERALISM AND SUBSIDIARITY: NOMOS LV 123* (James E. Fleming & Jacob T. Levy eds., 2014).

¹⁴ STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 280 (8th ed. 2012).

¹⁵ See *Revenue by Government Level 2000–2012*, TAX POL'Y CENTER, <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=328> [<http://perma.cc/D6VN-BC4G>].

externalities on other states; and it allows for a national bill of rights 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. A wide range of issues are tackled at the state level including: taxing and spending, the amount of wealth redistribution, the use of voucher systems and charter schools in education, criminal law policy, assisted suicide, and marijuana and alcohol use. Americans deliberately choose to live in states that reflect their values, as is explained by Bill Bishop in *The Big Sort*.¹⁶ Anyone who looks at presidential election maps knows that Democratic-blue-state America and Republican-red-state America diverge on a wide range of cultural, religious, economic, and other issues. Yet that divergence is peaceful and leads to different policies state by state. The United States has all the military and free trade benefits of an empire, all the while allowing for heterogeneous social policies on many important issues.

To emphasize the U.S. system's success, compare American federalism with constitutional regimes among the G20 democracies.¹⁷ The United States has a stronger foreign policy and military presence by an overwhelming margin than any other G20 democracy. The U.S.-led NAFTA free trade zone is almost as populous as the European Union free trade zone, but is not encumbered by the problem of debt-ridden members in need of bailouts that faces the European Union. Moreover, the United States has free trade agreements with many other countries outside of NAFTA and is an active member of the General Agreement on Tariffs and Trade (GATT)—the leading global free trade system.¹⁸ In addition to its demonstrated strengths in foreign policy and trade, the United States also vigorously protects the civil rights of individuals nationwide.¹⁹ The same cannot be said of, for example, the European Union, France, or even the United Kingdom. In important respects, the U.S. federal government is far

¹⁶ BILL BISHOP WITH ROBERT G. CUSHING, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2009).

¹⁷ This Article has intentionally excluded the G20 regimes in China, Russia, and Saudi Arabia from the current discussion because their authoritarian regimes do not allow for comparison.

¹⁸ GATT was first created in 1947 by the allied nations of World War II. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. The World Trade Organization (WTO) took over GATT functions and began operating in 1995. See Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 555-57 (1996); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 152 (2008).

¹⁹ See Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2173-74 (1999) (arguing that criticisms of the federal government's "disinclination to apply international human rights law to domestic officials . . . tend[s] to overlook the extraordinary human rights protections the United States offers through its domestic constitutional and democratic processes").

more powerful than 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 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 do federations such as Brazil, Argentina, Mexico, Australia, India, South Africa, the United Kingdom, and, arguably, the European Union. By definition, more power is devolved in the United States than in any of the G20 unitary nation states such as France, Japan, Italy, Turkey, Indonesia, and South Korea. The only two G20 countries that come close to devolving as much power to their national subunits are Germany and Canada. Unfortunately, I 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 smaller than the State of California,²⁰ whereas Germany's population is less than the combined populations of California, Texas, and New York.²¹ 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 considered by some to be a failure in foreign policy and national defense,²² has succeeded in providing free trade among its twenty-eight member nations while still devolving power to the member states' national governments. The European Union regime, however, is deeply unpopular in leading nations such as the United Kingdom and France.²³ It suffers from a severe

²⁰ Compare Cent. Intelligence Agency, *Canada*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html> [<https://perma.cc/9243-PHAX>] (stating that Canada's population is 34,834,841), with *California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> [<http://perma.cc/2SBK-2DK5>] (stating that California's population is 38,332,521).

²¹ Germany has a population of roughly 81 million compared to California, New York, and Texas's combined total population of around 84 million. Compare Cent. Intelligence Agency, *Germany*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html> [<https://perma.cc/E3UC-WJRQ>] (Germany's population is 80,996,685), with *California*, *supra* note 20 (stating that California's population is 38,332,521), *New York*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36000.html> [<http://perma.cc/T84S-43W6>] (stating that New York's population is 19,651,127), and *Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> [<http://perma.cc/BD6M-AXUH>] (stating that Texas's population is 26,448,193).

²² See Ian Ward, *The Challenges of European Union Foreign and Security Policy: Retrospective and Prospective*, 13 TUL. J. INT'L & COMP. L. 5, 5 (2005).

²³ Luke Baker & Anders Melin, *Most Europeans, Especially the French, Unhappy About EU*, REUTERS, June 5, 2013, available at <http://uk.reuters.com/article/2013/06/05/uk-eu-popularity-poll-idUKBRE9540F620130605> [<http://perma.cc/TL3D-7B8L>].

democracy deficit, and it is unable to bail out Greece, a greatly troubled economy deeply in need of help, much less other troubled economies such as Spain, Italy, Portugal, and France. The European Union is not nearly as successful today in either domestic or foreign policy as is the federal system of the United States.

The success of U.S. federalism in providing simultaneously strong *and* decentralized government is especially remarkable when one considers that the United States does not presently face any serious secessionist movement. The United States stands in sharp contrast to the many secessionist movements present in other G20 countries such as Canada, the United Kingdom, Spain, Italy, and France. Canada, for example, faces constant secessionist pressure from Québec,²⁴ the United Kingdom faces secessionist pressure from Scotland,²⁵ the European Union faces secessionist pressure from the United Kingdom,²⁶ Italy faces secessionist pressure from the Northern League and Venice,²⁷ France faces secessionist pressure from Corsica,²⁸ Spain faces secessionist pressure from Catalonia and the Basque regions,²⁹ Russia faces secessionist pressure from Chechnya,³⁰ and China faces secessionist pressure from Tibet.³¹ Even tiny Belgium appears the process of splitting into two or three new nation

²⁴ See L. Kinvin Wroth, *Quebec, Canada and the First Nations: The Problem of Secession*, 23 VT. L. REV. 709, 709–10 (1999).

²⁵ See Griff Witte & Karla Adam, *In Decisive Vote, Scotland Rejects Independence, Sticks with the U.K.*, WASH. POST, Sept. 19, 2014, http://www.washingtonpost.com/world/in-decisive-vote-scotland-rejects-independence-sticks-with-the-uk/2014/09/19/dd4505e0-e71e-45ae-aa8d-6fa4a8a1dbe1_story.html [<http://perma.cc/LX3Y-K58B>].

²⁶ See Laura Smith-Spark & Susannah Cullinane, *Cameron Promises Referendum on Britain's Place in Europe*, CNN (Jan. 23, 2013, 6:28 PM), <http://edition.cnn.com/2013/01/23/world/europe/uk-cameron-europe> [<http://perma.cc/KE8-PSHV>].

²⁷ See Matt Ford, *Europe's Latest Secession Movement: Venice?*, ATLANTIC (Mar. 24, 2014, 2:00 PM), <http://www.theatlantic.com/international/archive/2014/03/europes-latest-secession-movement-venice/284562/> [<http://perma.cc/49WD-HSAJ>].

²⁸ See JÉRÔME FOURQUET, ENQUÊTE SUR LA SITUATION EN CORSE [INVESTIGATION INTO THE SITUATION IN CORSICA] 12–16 (2008), available at <http://www.ifop.com/media/poll/situationcorse.pdf> [<http://perma.cc/JU6F-5237>] (finding that over 50% of respondents wanted more autonomy for Corsica, although only 10% of respondents wanted Corsica to be completely independent of France).

²⁹ See Raphael Minder, *With Eye on Scotland, Catalonia Hails Its Secession Bid*, N.Y. TIMES, Sept. 11, 2014, <http://www.nytimes.com/2014/09/12/world/europe/with-eye-on-scotland-catalonia-hails-its-secession-bid.html> [<http://perma.cc/FRF6-6RZ9>].

³⁰ See Mike Bowker, *Russia and Chechnya: The Issue of Secession*, 10 NATIONS & NATIONALISM 461, 462–65 (2004).

³¹ See Dan Levin, *Tibetan Student Burns Himself to Death in Protest*, N.Y. TIMES, Sept. 22, 2014, http://www.nytimes.com/2014/09/23/world/asia/tibetan-student-burns-himself-to-death-in-protest.html&_r=0 [<http://perma.cc/FY22-9M9L>].

states.³² Why then is the U.S. federal government simultaneously so strong, decentralized, and free of credible threats of secession? The answer lies in what I have called in a prior article: “The Number of States and the Economics of Federalism.”³³

A. *The Number of States and the Economics of Federalism*

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 to cut across—rather than reinforce—regional, cultural, and religious differences. The significance of each point is discussed below in turn.

First, the United States has fifty member States, which makes it unique among the G20 federations. In contrast, the Federal Republic of Germany has sixteen member states,³⁴ Canada has ten provinces,³⁵ the United Kingdom has four entities with devolved power,³⁶ Australia has six member states,³⁷ the European Union has twenty-eight member States,³⁸ India has twenty-eight member States and seven territories,³⁹ Brazil has twenty-six member States,⁴⁰ Mexico has thirty-one member States,⁴¹ and Argentina has twenty-three member States.⁴²

One consequence of the division of the U.S. federation into fifty subunits is that it 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 in geography or population to imagine existing

³² James Fontanella-Kahn, *Secessionist Wave Sweeps Belgium*, FIN. TIMES, Oct. 14, 2012, <http://www.ft.com/cms/s/0/70477188-1636-11e2-b6f1-00144feabdc0.html#axzz3QYfqQ8hl> [<http://perma.cc/72U2-TWEM>].

³³ Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 6–32 (2011).

³⁴ *Germany*, *supra* note 21.

³⁵ *Canada*, *supra* note 20.

³⁶ Cent. Intelligence Agency, *United Kingdom*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> [<http://perma.cc/P7F2-3W4F>].

³⁷ Cent. Intelligence Agency, *Australia*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/as.html> [<http://perma.cc/TN89-4K96>].

³⁸ Cent. Intelligence Agency, *European Union*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> [<http://perma.cc/4R9K-Q23D>].

³⁹ Cent. Intelligence Agency, *India*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> [<http://perma.cc/CXN5-3CSZ>].

⁴⁰ Cent. Intelligence Agency, *Brazil*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> [<http://perma.cc/54W4-KB2A>].

⁴¹ Cent. Intelligence Agency, *Mexico*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> [<http://perma.cc/YL7R-PC66>].

⁴² Cent. Intelligence Agency, *Argentina*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html> [<http://perma.cc/8MD3-TEQC>].

as separate nations. As a result, secession does not tend to make its way onto the agenda of ordinary politics.

In theory, a group of states could collectively try to secede, as happened in 1860 and 1861 at the start of the Civil War,⁴³ but the division of the U.S. federation into a very large number of federal subunits imposes huge collective action costs on such efforts. The Civil War helps to illustrate this point. In 1861, there were thirty-four states, fifteen of which were slave states.⁴⁴ Only eleven of the fifteen slave-states were successful in seceding. Four slave states—Delaware, Maryland, Kentucky, and Missouri—stayed in the Union, while a large number of free counties in the slave State of Virginia seceded from the State of Virginia to form the new, free, pro-Union State of West Virginia.⁴⁵ 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 join the constitution of the southern Confederacy.⁴⁶

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 the United States has fought. As late as the summer of 1864 it appeared that the North was losing the Civil War and President Lincoln would not be reelected. Had the slave states of Maryland, Delaware, Kentucky, and Missouri seceded, forcing the relocation of the capitol to New York or Philadelphia, the North would probably have lost the Civil War. The slave states ultimately failed in their movement due to the collective action costs of getting fifteen 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? Of course, there is no way to know for sure, but my observation of American politics over the last forty-five years leaves me 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

⁴³ JOHN SHARPE, *Secession*, in 4 AMERICAN CIVIL WAR: THE DEFINITIVE ENCYCLOPEDIA AND DOCUMENT COLLECTION 1728, 1728–29 (Spencer C. Tucker ed., 2013).

⁴⁴ *Results from the 1860 Census*, CIVIL WAR HOME PAGE, http://www.civil-war.net/pages/1860_census.html [<http://perma.cc/4R7V-XT8X>] (last updated 2009) (counting fifteen states that recorded the number of slaveholders).

⁴⁵ Amy Murrell Taylor, *The Border States*, NAT'L PARK SERV., <http://www.nps.gov/resources/story.htm?id=205> [<http://perma.cc/E3UR-2UYYP>] (last updated Apr. 2, 2015).

⁴⁶ *Id.*

think secession would become a real threat. Moreover, a four-state federation would have a much weaker federal government than the current fifty-state U.S. federation 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: Pakistan, for example, is a four-state federation.⁴⁷ There is, in my opinion, no way that the Northeast and the South could live together in a four-state U.S. federation. One or the other of these regions would inevitably secede, eliminating the free trade and foreign policy successes of the current fifty-state U.S. federation.

B. The Arbitrariness of State Boundary Lines

The second aspect of U.S. federalism that foils secession is that our state boundary lines are drawn arbitrarily and cut across regional and cultural divisions. Whereas a four-state federation of the Northeast, South, Midwest, and West would accentuate regional divisions, the fifty-state U.S. federation blurs them. The United States has many border and swing states that blur over the regional and cultural fault lines that divide Americans from one another. Thus, border states like Maryland, Kentucky, Delaware, and Missouri are joined by purple swing states like Virginia, North Carolina, Florida, New Hampshire, Ohio, Colorado, Nevada, and Wisconsin. The effect is to hide and minimize the fairly sharp division of the United States into Red- and Blue-state America rather than accentuate it. In a four-state federation, regional and cultural cleavages would be accentuated and enhanced. This explains why a four-state federal government in the United States might not last whereas a fifty-state federal government is very stable.

This point can be illustrated by looking at the United States' northern neighbor, Canada, a federation with only ten provinces. The British, with a passion for neatness, originally divided Canada into the French-speaking, Catholic province of Québec and the English-speaking, Protestant province of Ontario.⁴⁸ Today, Canada has nine English-speaking, Protestant provinces and one French-speaking, Catholic province.⁴⁹ This federal structure is highly unstable. Québec 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 fifty provinces,

⁴⁷ Cent. Intelligence Agency, *Pakistan*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html> [<http://perma.cc/GV6Y-REEZ>].

⁴⁸ See generally JOHN G. BOURINOT, *CANADA UNDER BRITISH RULE 1760–1900* (G.W. Prothero ed., 1900).

⁴⁹ *Canada*, *supra* note 20.

instead of ten, with many of them being bilingual, the collective action costs of organizing a secession would likely 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 cut across the regional, cultural, linguistic, and religious differences in Canadian society.

The same problem is evident in the United Kingdom. The United Kingdom has devolved power to four regional subunits: Scotland, Wales, Northern Ireland, and the City of London. The Scots have just held a referendum on secession from the United Kingdom, and 45% of those voting favored secession.⁵⁰ The country was held together only after the three main party leaders in London pledged a massive increase in the amount of power devolved to the Scottish parliament.⁵¹ One cannot help but note that the federalism boundary lines of the four nations within the United Kingdom accentuate rather than blur 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 only to Flanders and Wallonia.⁵² Having a small number of regional subunits, with boundary lines drawn to reinforce, rather than blur, deep-seated political cleavages, is a recipe for civil strife and threats of secession. Early on, the British divided their empire in India into Hindu and Islamic constituencies out of a desire for neatness.⁵³ It was no accident then that when British India became independent, it immediately split into the separate nations of India and Pakistan.⁵⁴ 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 have certainly had a better chance of lasting than the two constituency structure that the British used instead.

⁵⁰ See Witte & Adam, *supra* note 25.

⁵¹ *Id.*

⁵² See *Devolution in Spain: A Nationality, Not a Nation*, ECONOMIST (July 1, 2010), <http://www.economist.com/node/16490065> [<http://perma.cc/H6ZT-L26U>]; *Belgium's New Government: Separatism Revised*, ECONOMIST, (Oct. 11, 2014), <http://www.economist.com/news/europe/21623750-flemish-nationalists-get-first-taste-government-uncertain-results-separatism> [<http://perma.cc/TR6Q-AR8J>].

⁵³ See Paul R. Brass, *The Partition of India and Retributive Genocide in the Punjab, 1946–47: Means, Methods, and Purposes*, 5 J. GENOCIDE RES. 71, 73 (2003).

⁵⁴ See *Pakistan*, *supra* note 47.

Consider Switzerland, which has been a huge success economically and in providing its citizens with a high quality of life⁵⁵ even though it is sharply divided among German, French, and Italian speakers and between Protestants and Catholics.⁵⁶ It turns out that the cleavages in Swiss politics crosscut one another so that the German speakers are divided among Protestants and Catholics, which is also the case for the French speakers.⁵⁷ Another big fault line in Swiss politics is urban versus rural voters.⁵⁸ But, as with religious cleavages, both German and French speakers are divided between urban and rural voters. On top of all of these crosscutting cleavages, the Swiss, for historical reasons, have adopted a federal system with a large number of fairly small federal subunits. Switzerland has twenty-six cantons and half cantons⁵⁹ even though the country has roughly only eight million inhabitants,⁶⁰ making it similar in population to the State of Virginia.⁶¹ Switzerland's small territorial size makes its division into twenty-six federal subunits, complete with greatly devolved powers, all the more striking. In other words, Switzerland is a success because its linguistic, religious, and urban–rural cleavages all crosscut one another while its large number of federal subunits raises the collective action costs of secession or regionalist political action. This is in contrast to Canada, where about 75% of the Catholics and 80% of the French speakers live in the province of Québec and most of the Protestants and English speakers live in the other nine provinces.⁶² In Canada, there are no crosscutting cleavages, and the cleavages that exist break along the same line.

⁵⁵ *Switzerland*, OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/countries/switzerland/> [<http://perma.cc/L85B-ZZ9F>] (finding that Switzerland ranks highly in many quality-of-life indices).

⁵⁶ Cent. Intelligence Agency, *Switzerland*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html> [<http://perma.cc/NRU5-4KWQ>].

⁵⁷ Kurt B. Mayer, *The Jura Problem: Ethnic Conflict in Switzerland*, 35 SOC. RES. 707, 714–15 (1968). *But see* CAROL L. SCHMID, CONFLICT AND CONSENSUS IN SWITZERLAND 148–49 (1981) (arguing that crosscutting “seems insufficient to explain Swiss coexistence,” because “[c]ross-cutting cleavages do not eliminate polar-opposite groups, but merely reduce their size relative to groups . . . in between”).

⁵⁸ The urban–rural divide in Swiss politics has been particularly pronounced on the issue of immigration. *See, e.g.*, Catherine Bosley, *Swiss Brace for Sour EU Relations After Immigration Vote*, BLOOMBERG (Feb. 9, 2014, 5:01 PM), <http://www.bloomberg.com/news/2014-02-09/swiss-brace-for-sour-eu-relations-after-immigration-vote.html> [<http://perma.cc/JNF9-2K72>].

⁵⁹ *Switzerland*, *supra* note 56.

⁶⁰ *Id.*

⁶¹ *Virginia*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/51000.html> [<http://perma.cc/Y6HC-MWM6>].

⁶² Approximately 80% of French-speaking Canadians live in Québec, and approximately 79% of Québec residents are French speakers. *Population by Reported Mother Tongues, Canada, 2006 and 2011*, STAT. CAN., <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/2011001/tbl/tbl3-eng.cfm> [<http://perma.cc/7S9C-E3RT>] (last modified Jan. 24, 2013). Approximately 45% of

So how is it then, historically, that the United States 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 subentities is a matter of good luck. The thirteen 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 and established the Congregational Church as their official church well into the nineteenth century.⁶³ Rhode Island was founded by Roger Williams, on the principle of extending religious liberty to all its citizens.⁶⁴ Pennsylvania was founded by Quakers,⁶⁵ Maryland by Catholics,⁶⁶ and the Episcopal Church prevailed in the southern colonies of Virginia, the Carolinas, and Georgia.⁶⁷ Dutch-acquired New York State, in turn, had its own religious history.⁶⁸ Efforts by England to merge New York and the New England colonies into one large “Dominion of New England” in the 1680s were bitterly and successfully resisted by the colonists.⁶⁹ Thus, the original thirteen U.S. colonies were small and had arbitrarily drawn borders largely as a matter of historical accident.

In the 1780s, U.S. leaders faced a critical decision about what to do with the vast Northwest Territory, which ultimately became the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.⁷⁰ Both

Canadian Catholics live in Québec, and approximately 75% of Québec residents are Catholics. *Compare NHS Profile, Quebec, 2011*, STAT. CAN., <http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/prof/details/Page.cfm?Lang=E&Geo1=PR&Code1=24&Data=Count&SearchText=Quebec&SearchType=Begins&SearchPR=01&A1=All&B1=All&GeoLevel=PR&GeoCode=24> [http://perma.cc/WA8H-PPJ4] (last modified Apr. 28, 2014), with *NHS Profile, Canada, 2011*, STAT. CAN., <http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/prof/details/page.cfm?Lang=E&Geo1=PR&Code1=01&Data=Count&SearchText=Canada&SearchType=Begins&SearchPR=01&A1=All&B1=All&Custom=&TABID=1> [http://perma.cc/Q43B-S39G] (last modified Apr. 28, 2014).

⁶³ Richard Albert, *Religion in the New Republic*, 67 LA. L. REV. 1, 34, 36–37 (2006).

⁶⁴ *Id.* at 37–39; see also SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 166 (2d ed. 2004).

⁶⁵ AHLSTROM, *supra* note 64, at 207–08.

⁶⁶ *Id.* at 331.

⁶⁷ *Id.* at 184 (Virginia); *id.* at 197–98 (North and South Carolina); *id.* at 134 (Georgia).

⁶⁸ See *id.* at 252–53 (describing New York State’s rich Dutch Lutheran and German Lutheran heritage).

⁶⁹ RICHARD D. BROWN & JACK TAGER, *MASSACHUSETTS: A CONCISE HISTORY* 47–49 (rev. ed. 2000).

⁷⁰ Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L. J. 1820, 1843 (2011).

Virginia and Connecticut had claims to this territory,⁷¹ 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. To assuage their fearful neighbors and enable the passage of the Articles of Confederation, Virginia and others agreed to cede their claims to the United States. The founding generation thus wisely ceded the Northwest Territories to the Continental Congress under the Articles of Confederation,⁷² and, in 1787, the Continental Congress passed the Northwest Ordinance, which abolished slavery in the Northwest Territories and divided the territory into a large number of prospective future states so no one state would be too big or powerful.⁷³ 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 also made with respect to the Louisiana Purchase—the vast area of the western states—which President Thomas Jefferson bought from the French Emperor Napoleon for the bargain-basement price of \$15 million.⁷⁴ Ultimately, fifteen states were carved out of the Louisiana Territory.⁷⁵ Additional states were carved out of the territory obtained as a result of the Lewis and Clark expedition and the Mexican–American War.⁷⁶ In 1868, at the height of Reconstruction, the United States already had thirty-seven states, and by 1912 eleven more had been added, bringing the total number to forty-eight.⁷⁷ The events of the Civil War may have encouraged 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 thirty-four traditional French Provinces, many of which had distinctive regional subcultures, such as Brittany’s and Corsica’s, into eighty-one departments in the contiguous European territory

⁷¹ Calabresi & Terrell, *supra* note 33, at 3–4; see also Bartholomew H. Sparrow, *Empires External and Internal: Territories, Government Lands, and Federalism in the United States*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 1803–1898*, at 231, 231–32 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

⁷² John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 *CHAP. L. REV.* 63, 72–73 (2001).

⁷³ An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 *Stat.* 50, 51 n.(a) (1789).

⁷⁴ THOMAS FLEMING, *THE LOUISIANA PURCHASE* 136 (2003).

⁷⁵ Calabresi & Terrell, *supra* note 33, at 4.

⁷⁶ *Id.*

⁷⁷ Ronald D. Rotunda, *The Aftermath of Thornton*, 13 *CONST. COMMENT.* 201, 207 (1996).

of France.⁷⁸ Since 1789, France has been a staunchly unitary nation-state with no federalism overlay.⁷⁹ The divide 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. After World War II the Allied powers broke up the German megastate of Prussia—which had a long-standing, distinct militarist culture and 60% of the population of the Federal Republic of Germany⁸⁰—into a large number of smaller German states.⁸¹ 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 the former nation of West Germany into the new German states of North Rhine-Westphalia, Lower Saxony, Hesse, Rhineland-Palatinate, and Schleswig-Holstein.⁸² German state borders were thus redrawn after World War II to create a larger, sixteen-member state federation in which no one state could dominate and which would therefore be more stable. Other federations, such as India, have also redrawn state boundary lines for federal reasons.⁸³ These efforts have proved to be very successful.

The relevance of these examples to questions of institutional design is that American small-state federalism is highly successful because it gives the United States the advantages of decentralization, competition, and experimentation among fifty states while rendering the states too weak to credibly threaten to secede. Federalism boundary lines in the United States cut across—rather than reinforce—religious, linguistic, ethnic, racial, and cultural cleavages. This blurring of boundary lines is a large part of the reason why American federalism works. In other nations that have experimented with federalism or confederations, such as Canada, the United Kingdom, and Spain, central planners have foolishly drawn

⁷⁸ FRANÇOIS FURET, *REVOLUTIONARY FRANCE 1770–1880*, at 87–88 (Antonia Nevill trans., 1992).

⁷⁹ David Fontana, *Relational Federalism: An Essay in Honor of Heather Gerken*, 48 *TULSA L. REV.* 503, 506 (2013).

⁸⁰ CHRISTOPHER CLARK, *IRON KINGDOM: THE RISE AND DOWNFALL OF PRUSSIA, 1600–1947*, at 672 (2006) (describing the Allied powers' perception of a militaristic, absolutist "Prussianism").

⁸¹ *Id.* at xii.

⁸² Carl J. Friedrich, *The Peace Settlement with Germany—Political and Military*, 257 *ANNALS AM. ACAD. POL. & SOC. SCI.* 119, 119 (1948).

⁸³ See, e.g., RAJASHRI CHAKRABARTI & JOYDEEP ROY, *FED. RESERVE BANK OF N.Y., EFFECT OF REDRAWING OF POLITICAL BOUNDARIES ON VOTING PATTERNS: EVIDENCE FROM STATE REORGANIZATION IN INDIA 1* (2007), available at http://www.newyorkfed.org/research/staff_reports/sr301.pdf [<http://perma.cc/8H9N-YFZZ>].

federalism boundary lines so that they reinforce religious, linguistic, ethnic, racial, and cultural cleavages. As a matter of institutional design, this is the height of folly. Federalism can give a country a strong national government with foreign and military power while retaining the benefits of substantial decentralization—competition and experimentation among states. But, federalism can only be sustained if there is a large number of federal subunits whose boundary lines crosscut divisive social cleavages. This is an important lesson of institutional design, which constitution writers ignore at their own peril. It should be noted in this regard that in some federations, such as Germany and India, the federal government has the express power to unilaterally initiate a change in state boundaries. In India, the federal government may effect such changes unilaterally.⁸⁴ In Germany, the federal government may unilaterally propose such changes, which take effect only on approval by referendum held in the affected states.⁸⁵ This is not allowed in the United States.

Institutional structure affects 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 leading to impoverishment.⁸⁶ The first such example concerns U.S. federalism and the large number of states within the United States.⁸⁷ I turn next to dictatorship and impoverishment

⁸⁴ INDIA CONST. art. 3 (providing that Parliament has power to increase or diminish the area of a state, to alter the boundaries of a state, and to create new states from the territory of existing states).

⁸⁵ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 29, § 2 (Ger.) (providing that the federal government may enact laws altering state boundaries, which must be approved by referendum held in the affected territories to take effect).

⁸⁶ Roger B. Myerson, *Democratic Decentralization and Economic Development*, in THE OXFORD HANDBOOK OF AFRICA AND ECONOMICS 756, 756–57 (Célestin Monga & Justin Yifu Lin eds., 2015).

⁸⁷ A critic might note that when the Ottoman Empire was broken up after World War I into the nation states of Turkey, Syria, Iraq, Lebanon, Israel, Jordan, Saudi Arabia, and the other nation states of the Arabian peninsula, the World War I victors drew arbitrary “lines in the sand” between Syria, Iraq, Lebanon, Israel, and Jordan, and that this has worked out quite badly. Sunni and Shiite Muslims have fought constant civil wars in Syria, Iraq, and Lebanon, while the Israeli–Palestinian dispute has been nothing short of catastrophic. This is exactly the outcome readers of this essay should expect because only seven new nation states, and not fifty, were forged out of the Ottoman Empire (if one ignores the small emirates on the Arabian Peninsula) between 1918 and 1922. What should have happened, in my opinion, is that the Ottoman Empire should have been retained as a free trade area and as a foreign policy entity with an imperial guarantee for civil and religious rights. The Empire should then have been arbitrarily chopped up into fifty smaller pieces, each of which could elect two senators to an imperial senate with an Ottoman president elected using an American-style electoral college. Such an arrangement would have worked much better than did the creation of the nation states of Turkey, Syria, Iraq, Israel, Jordan, and Saudi Arabia, with the Kurds left homeless. I believe there would have been a *Federalist No. 10*-style imperial protection of minority rights in such a large, heterogeneous regime and there would have been no Sunni–Shiite or Israeli–Palestinian civil wars. THE FEDERALIST NO. 10, at 75, 78 (James Madison) (Clinton Rossiter ed., 1961) (arguing that a federalist republican form of government, encompassing a “variety of parties and interests” makes it difficult to coordinate oppression of a minority by the national government).

in Part II, which discusses five features of the U.S. separation of powers that work to prevent our presidential system from deteriorating into dictatorship, as has happened in many foreign regimes. Those foreign regimes falling victim to dictatorships have set up presidential, separation of powers systems. Together, these two features, structural federalism and separation of powers, have caused the U.S. Constitution 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.

II. THE U.S. MODEL OF CONSTRAINED PRESIDENTIALISM

A second noteworthy feature of the U.S. Constitution is that it creates a very strong and powerful executive figure in the President of the United States. U.S. Presidents are Commanders in Chief of the U.S. armed forces and play a huge role in foreign policy and national defense.⁸⁸ 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* 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 history 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 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

⁸⁸ U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”). See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWERS FROM WASHINGTON TO BUSH* (2008).

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.⁸⁹

I think Hamilton was 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 wars in Kuwait, Afghanistan, and Iraq.

As President Franklin D. Roosevelt proclaimed in 1940, the United States is the “great arsenal of democracy.”⁹⁰ We are not only a democracy, but we are also the preeminent global superpower—the leading military force throughout the world.⁹¹ It is U.S. military might that makes Russia hesitant about reconquering Eastern Europe and that keeps China from invading Taiwan or Japan. No parliamentary prime minister, dependent on a coalition to maintain his government, is in as strong a position in military and foreign affairs as the President of the United States. Yale professor Bruce Ackerman believes that Germany’s parliamentary system of government is better than the U.S. separation of powers system,⁹² 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. My further responses to Professor Ackerman can be found in three law review articles.⁹³

It is true that Britain from 1867 until World War II had a parliamentary system and a strong foreign and military policy under such leaders as Benjamin Disraeli, William Gladstone, and Sir Winston Churchill. Thus, it is 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

⁸⁹ THE FEDERALIST NO. 70, *supra* note 87, at 421–22 (Alexander Hamilton).

⁹⁰ Franklin D. Roosevelt, Fireside Chat on National Security (Dec. 29, 1940), in 1940 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 633, 643 (Samuel I. Rosenman ed., 1941).

⁹¹ Daniel W. Drezner, *Military Primacy Doesn’t Pay (Nearly as Much as You Think)*, 38 INT’L SECURITY 52, 55–56 (2013).

⁹² Ackerman, *supra* note 5.

⁹³ Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001) [hereinafter Calabresi, *The Virtues of Presidential Government*]; Steven G. Calabresi & Kyle Bady, *Is the Separation of Powers Exportable?*, 33 HARV. J.L. & PUB. POL’Y 5 (2010) (arguing for a popularly elected president of the European Union); Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696 (2009); *see also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

lost her Empire, mistakenly appeased Adolf Hitler in the 1930's, and would have lost World War II without American intervention. Moreover, Britain today is at best a regional power, whereas the United States is the preeminent global superpower. The military and foreign policy power of the American presidency is thus a hugely important institutional design of the U.S. Constitution.

Nevertheless, the U.S. Constitution's creation of a powerful presidency carries with it severe risks—risks that have become a dismal reality in almost every country that has tried to copy the U.S. presidential, separation of powers system.⁹⁴ The sad fact is that almost every other democracy in the world that sought to copy the U.S. presidential system has degenerated at some point or another into a presidential dictatorship. This is true of every country in Latin America,⁹⁵ as well as in Indonesia,⁹⁶ the Philippines,⁹⁷ South Korea,⁹⁸ and most recently Russia.⁹⁹ Efforts to export the U.S. presidential system of institutional design have been nothing short of catastrophic.

The reason for this catastrophe is that foreign countries that have copied our presidential system have often experienced presidential dictatorships because they have rarely copied other critical features of our constitutional system that check and balance presidential power. I will briefly discuss some of the critical checks and balances that keep U.S. presidents from being able to stage coups d'état.¹⁰⁰

First, American presidents are elected for only a four-year term with a two-term limit,¹⁰¹ and midterm elections must be held two years into a four-

⁹⁴ See Ackerman, *supra* note 5, at 642–88; see also Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 3, 3–6 (Juan J. Linz & Arturo Valenzuela eds., 1994).

⁹⁵ See Javier Corrales, *Hugo Boss*, *FOREIGN POL'Y*, Jan.–Feb. 2006, at 32–40 (discussing the autocratic government of Hugo Chavez while noting the general decline in Latin American dictatorships).

⁹⁶ See MICHAEL R.J. VATIKIOTIS, *INDONESIAN POLITICS UNDER SUHARTO: THE RISE AND FALL OF THE NEW ORDER* 1–5 (3d ed. 1998).

⁹⁷ William H. Overholt, *The Rise and Fall of Ferdinand Marcos*, 26 *ASIAN SURV.* 1137, 1137–39 (1986).

⁹⁸ See Yong Cheol Kim et al., *Political Leadership and Civilian Supremacy in Third Wave Democracies: Comparing South Korea and Indonesia*, 79 *PAC. AFF.* 247, 249–50 (2006) (discussing the Chun government and the transition to democracy).

⁹⁹ Michael McFaul & Kathryn Stoner-Weiss, *The Myth of the Authoritarian Model: How Putin's Crackdown Holds Russia Back*, *FOREIGN AFF.*, Jan.–Feb. 2008, at 68, 70 (“Although the formal institutional contours of the Russian political system have not changed markedly under Putin, the actual democratic content has eroded considerably.”).

¹⁰⁰ These are all points that were originally made in the author's 2001 article defending the virtues of presidential government from Professor Ackerman's attack. Calabresi, *The Virtues of Presidential Government*, *supra* note 93, at 95–104.

¹⁰¹ U.S. CONST. amend. XXII, § 1.

year presidency and again six years into an eight-year presidency. In those midterm elections, all of the House of Representatives and one-third of the Senate are up for reelection.¹⁰² The party not in control of the White House almost always wins the midterm elections, usually crippling the President's ability to act on his own.¹⁰³ Newly elected, popular U.S. presidents like Ronald Reagan and Barack Obama thus had essentially two years to accomplish their domestic political agenda. Presidents can implement their program for two years until their respective parties lose the midterm election. After that their power is hugely constrained, and presidents tend then to turn their attention to foreign policy where they can often act without Congress's consent. Most countries that have copied the U.S. presidency have not copied our system of midterm elections. This has proved to be a huge mistake. Midterm elections keep our presidents on a straight and narrow path to compromise.

This is especially true because thirty-nine of the fifty states elect their governors and state legislators during the midterm elections or during a year that does not coincide with presidential elections.¹⁰⁴ Thus, the party out of power in the White House typically comes to control a majority of the nation's governorships after the first midterm election.¹⁰⁵ A majority of the nation's 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.¹⁰⁶ No president could stage a coup d'état when Congress and the state governments are controlled by their political foes. This is 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. Congress is armed with subpoena power¹⁰⁷ and has the power to

¹⁰² U.S. CONST. art. I, § 2, cl. 1; *id.* art. I, § 3, cl. 2.

¹⁰³ Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611, 2612 (2006).

¹⁰⁴ See 2014 *Gubernatorial Election Information*, NAT'L GOVERNORS ASS'N (Nov. 5, 2014), <http://www.nga.org/cms/2014Elections> [<http://perma.cc/T9RN-E58M>] (illustrating the number of gubernatorial elections to be held during the 2014 midterm elections).

¹⁰⁵ Jim Lindgren and I documented this trend in Calabresi & Lindgren, *supra* note 103, at 2612.

¹⁰⁶ NAT'L GOVERNORS ASS'N, GOVERNORS' PARTY AFFILIATIONS, 1900–2014 (2014), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/GOVPARTYAFFILIATION.PDF> [<http://perma.cc/8KAD-Y9PV>]. The exception to this general rule is the first seven years of George W. Bush's presidency; Democrats did not gain a majority of governorships until 2007. *Id.*

¹⁰⁷ *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) (“Indeed, the Necessary and Proper Clause gives rise to Congress’s implied right to issue and enforce subpoenas found in Article I”); see also 2 U.S.C. § 190m (2012).

confirm or reject the President's executive and judicial branch nominees.¹⁰⁸ U.S. congressional committees are very powerful and concerned with the parts of the executive branch they supervise.¹⁰⁹ 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 four-to-eight years. Career civil servants given a choice between pleasing an oversight committee member or the president will often choose to please the former because the civil service laws effectively give civil servants life tenure.¹¹⁰ Thus, it is of greater benefit to please those with significantly longer tenure—e.g., congressmen—than those with a fixed term—e.g., the President.

The Senate's role in confirming presidential nominees is another feature of presidentialism that greatly constrains presidential power. This feature, however, is not copied in all foreign countries. Just as civil servants seek to please those with greater tenure, they also want to be promoted and know they may need Senate confirmation to get a promotion. Thus, pleasing forces on Capitol Hill is often equally—or more—important as pleasing the President.

Third, U.S. presidents have no power to declare states of emergency or to propose national referenda. This makes the U.S. president weaker than, for example, the president of France who can do both of those things.¹¹¹ It also avoids one of the many flaws in the German constitution of the Weimar Republic, during which presidents declared countless states of emergency,¹¹² thus paving the road for Adolf Hitler to come to power.

Fourth, U.S. presidents are subject to judicial review by a life-tenured federal judiciary headed by the Supreme Court whose members today serve an average of twenty-six years in office.¹¹³ The Supreme Court is almost always dominated by the appointees of prior presidents that often belonged to the opposite political party from the incumbent president. The Supreme Court enjoys relatively high favorability ratings¹¹⁴ and often acts vigorously

¹⁰⁸ U.S. CONST. art. II, § 2, cl. 2.

¹⁰⁹ See generally Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987) (explaining why congressional committees are powerful).

¹¹⁰ 5 C.F.R. § 315.401(a)–(b) (2015).

¹¹¹ 1958 CONST. arts. 11, 16 (Fr.).

¹¹² Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 YALE L.J. 1341, 1362 (2004).

¹¹³ Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 771 (2006).

¹¹⁴ See *Job Approval: Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> [<http://perma.cc/9VLU-9Y79>]; *Opinions of the Supreme Court*, N.Y. TIMES, June 7, 2012,

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.¹¹⁵ In some foreign countries, such as Argentina, presidents have begun their terms by firing or impeaching and removing all the supreme court justices appointed by their predecessors.¹¹⁶ This is unthinkable in the United States, and similarly, a U.S. president cannot remove state governors, a power granted to the president of Russia less than a year into Vladimir Putin's presidency.¹¹⁷ U.S. presidents are powerful, but they are subject to many meaningful checks and balances.

In conclusion, there are many critical checks and balances on the power of U.S. presidents, which make it impossible for them to turn themselves into the leaders of a coup d'état or dictatorship. The institutional design of the U.S. presidency makes our presidents very strong in foreign and military affairs, but fairly weak with respect to domestic power. Often, U.S. presidents only get two years out of a potential eight to accomplish a major domestic initiative, and even then, they must usually compromise to get their initiative through two houses of Congress and past a hostile Supreme Court. Those countries that have tried to copy the U.S. presidential, separation of powers system have failed to copy the institutional design features of the U.S. Constitution, which act formidably to check and balance presidential power.

CONCLUSION

This Essay's goal has been to prove that racial, linguistic, cultural, and religious cleavages, as well as traditions of authoritarian rule, can sometimes be overcome by clever systems of institutional design. I have tried to identify one feature of American federalism and five features of American presidentialism that 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 truly a "Shining City on a Hill" compared to the other nations of the world.

<http://www.nytimes.com/interactive/2012/06/08/us/politics/opinions-of-the-supreme-court.html?ref=politics> [<http://perma.cc/DZ9S-SUAM>].

¹¹⁵ See, e.g., *About the Judges*, SUP. CT. CAN., <http://www.scc-csc.gc.ca/court-cour/judges-juges/about-apropos-eng.aspx> [<http://perma.cc/4FCT-K3QT>] (last modified Aug. 9, 2012) (noting requirement that Supreme Court justices retire at seventy-five-years old); *How Judges Are Appointed*, CONST. CT. S. AFR., <http://www.constitutionalcourt.org.za/site/judges/howjudgesareappointed.htm> [<http://perma.cc/MU4A-7CZ2>] (justices on the Constitutional Court serve between twelve and fifteen years).

¹¹⁶ See Matías Iaryczower et al., *Judicial Independence in Unstable Environments, Argentina 1935–1998*, 46 AM. J. POL. SCI. 699, 702 (2002).

¹¹⁷ McFaul & Stoner-Weiss, *supra* note 99, at 71.

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, such as Nigeria, face a daunting lack of crosscutting cleavages that even the best institutional design might be unable to overcome. I do hope, however, that this Essay has illuminated at least two features of the U.S. Constitution's institutional design that have contributed to the success of the American constitutional system.