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THE FEDERALIST ABROAD IN THE WORLD

by
Donald L. Horowitz

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The Federalist was and is, without doubt, an enormously influential work. It explained the rationale for a certain set of institutions, but it did much more. It argued in Number 1 that the array of governmental institutions ought to be a matter of “reflection and choice,” rather than a matter of mere fortuity or inheritance; implicitly, it underscored the need for a written constitution; it provided an exemplar of what might be called comparative constitutional engineering, making the incentives created by various governmental structures the touchstone of critical judgment in that new field;¹ and, of course, it advanced the case for the three great innovations of the Philadelphia Convention: a federal republic in a continental country, a separately elected executive, and judicial review.² Perhaps above all, *The Federalist* led the way in showing how institutions could harmonize the pursuit of self-interest with the common interest.

The Federalist also took some cracks in the Constitution that emerged from the Philadelphia Convention and filled them in. In Number 78, Hamilton gave judicial review a certainty it did not have in the explicit text of the document itself. Number 62 created a theoretical foundation for the divergent principles of bicameral representation that formed the basis of the Great Compromise that had rescued the failing Constitutional Convention and so made a continental republic possible. In Number 47, Madison made an eloquent case for the separation of powers; and in Numbers 70 and 71, Hamilton set out a strong justification for the presidency, an institution smuggled into the Constitution in committee deliberations, late in the summer of 1787, an institution of which most convention delegates were skeptical and to which a great many were opposed.³ *The Federalist*, then,

crystallized inchoate meanings, rationalized compromise, and took pains to cure the defects of doubtful parentage.

These are enduring contributions, all the more remarkable when one considers that, for the most part, the three authors of the papers worked independently of each other.⁴ Unwritten constitutions are now exceptional; the United Kingdom, New Zealand, and Israel are the leading, and now fragile, examples. The constitutions of those countries are subject to criticism and to various written limitations deriving from treaties or statutes. Constitutions are now adopted by deliberative processes, and expert advice is sought about how to construct constitutions and what structures to build into them. The likely incentives created by proposed governmental bodies and their interrelations are routinely assessed and adjusted in the process of constitutional adoption. Federalism, presidentialism, and judicial review are widely known and adopted, albeit in varying frequencies, around the world.

Measuring the ultimate influence of *The Federalist* is difficult. Some innovations for which *The Federalist* made strong arguments, notably federalism, have been adopted, but not nearly as widely as might be expected. Others, such as presidentialism, have often been adopted not to offset the excesses of popular majorities but to facilitate the ascendancy of a powerful person. Judicial review has been widely adopted, especially since World War II, but its popularity is at least as much attributable to growing rights consciousness as to inclinations to bolster an independent judiciary as such. Judicial review has proceeded simultaneously with declarations of rights. And rights consciousness is associated more with the Anti-Federalists than it is with *The Federalist*, although the Anti-Federalists were highly skeptical of judicial review.

The Federalist had a strong start. Published in a French edition as early as 1792 and widely read in Europe, the essays had a profound impact. An array of influential admirers overseas spread the message and urged its translation into practice. Institutions whose virtues *The Federalist* expounded were widely adopted in Europe and Latin America. Federalism proved particularly attractive in the first decades of the nineteenth century. In the second half of that century, however, the influence of *The Federalist* subsided, particularly among those with actual responsibility for designing democratic institutions in Europe.

With the proliferation of new states after the Second World War, and the subsequent democratization of old ones, *Federalist* ideas have not experienced the revival that might have been expected. Madisonian constitutional engineering has certainly been attractive to theorists seeking to craft institutions to safeguard democracy from intergroup conflict. Yet, despite conspicuous exceptions, structural measures to defeat “faction,” as conceived in *The Federalist*, have not had the appeal in new democracies that rights and bills of rights have had. And, in an interesting inversion, some American observers of the institutions celebrated by *The Federalist* have become disenchanted by their inefficiencies and unmajoritarian tendencies; but, just as *Federalist* thinking has had little impact in societies for which it has been recommended, the critique of that thinking has fallen on deaf ears among the American public.

There are reasons for the strong start but weak followup of *The Federalist*, for the gap between theory and practice, and for the differential attractiveness of structural engineering and rights consciousness. Overall, *The Federalist* has done well, but after World War II the Anti-Federalists have done even better. The aim of this essay is to elucidate and explain these trends.

I

At a time when democratic ideas were spreading rapidly across Europe, *The Federalist* had a large fan club. The essays arrived at an opportune time. The thirst for democratic examples was so great that not only *The Federalist* but the United States Constitution and the constitutions of many of the 13 states were translated into French and German in the late eighteenth and early nineteenth centuries. Jacques Vincent de la Croix offered a course on the American constitution in Paris in 1790.⁵ Talleyrand considered *The Federalist* to be required reading, and Guizot called it “the greatest work” extant on the practice of government.⁶ Through Ignaz Paul Vitalis Troxler in Switzerland and Robert von Mohl in Germany, Madison and Hamilton’s explanation of the utility of federal institutions found a receptive audience. Troxler was responsible for the adoption of bicameralism in Switzerland,⁷ which also, of course, opted for a federal system. Von Mohl, “Germany’s Tocqueville,”⁸ was that country’s most influential theorist of constitutional issues for three decades. A keen admirer of *The Federalist*, von Mohl disseminated its lessons far and wide.⁹ Under his influence, the Frankfurt Assembly of 1848-49 was in thrall to American ideas, and the 1849 draft constitution “bore a distinct American imprint.”¹⁰ Although the Frankfurt draft was ultimately rejected, its conceptions of federalism proved especially durable and were resurrected in the Bismarck constitutions of 1867 and 1871.¹¹ In contrast to what would happen a century later, American influence on individual rights was much weaker in the Frankfurt deliberations.¹²

There is somewhat less direct evidence of early influence of *The Federalist* in Latin America, where French authors—Constant and Montesquieu, especially—were more likely to be cited.¹³ Nevertheless, the papers circulated during the Wars of Independence,¹⁴ and enthusiasm for North American institutions followed quickly on adoption of the United States Constitution. The

Venezuelan constitution of 1811, Mexico's of 1824, the Central American Federation constitution of 1825, and Argentina's a year later were all directly modeled on the United States document.¹⁵ So great was the fervor to copy the institutions conceived in Philadelphia that Bolivar was moved to condemn the "craze for imitation."¹⁶ Yet the apparent craze continued. One Latin American country after another adopted judicial review in the nineteenth century, until nearly all had borrowed the institution.¹⁷ Chile's provincial leaders saw the federalism of North America as "an archetype and example,"¹⁸ while Ecuador's first constitution was described as a straightforward imitation of the United States model.¹⁹ Argentina had been similarly inspired in 1826, but there was a long authoritarian interlude from 1829 to 1852. A year later, under the influence of Juan Batista Alberdi, a self-described Hamiltonian who cited *The Federalist* in his own federalist treatise, Argentine delegates, consulting the original *Federalist* as well as Alberdi, produced a new and more durable federal constitution.²⁰

Federalism, judicial review, and a strong executive were not the only contributions deriving from the north. Latin Americans also borrowed the Electoral College, although it has now been replaced by other methods of electing the president. Argentina, for example, used the Electoral College for nearly a century and a half, from 1853 to 1995. (So strong was the impact of North American practice that the Electoral College even survived long periods of dictatorship, in Brazil, for instance.²¹) The nineteenth-century Argentine theorist Domingo Faustino Sarmiento rightly remarked that Argentina had not only borrowed the United States constitution but also its underlying doctrines.²²

Sarmiento's constitutional commentaries were unabashed in urging that *The Federalist* be used, in conjunction with the work of Joseph Story and John Marshall, to interpret the Argentine

constitution of 1853.²³ Sarmiento had borrowed Hamilton's vision of the republican executive and reinterpreted it to counteract monarchical tendencies in Argentina, and he likewise saw federalism as providing an effective central government to counter the corruption that threatened liberty in the provinces.²⁴ Sarmiento's views foreshadowed "approaches that the Argentine Supreme Court would come to take once it was established in 1863."²⁵ For the theorist and the court, there was great faith in the aptness of what was created at Philadelphia and in the incisiveness of the commentary.

While the enthusiasm of particular theorists and practitioners—and, as I have suggested, even of whole constitutional conventions in Germany and Argentina—was assuredly genuine, there were specific local reasons that propelled adoption of *Federalist* ideas. In Latin America, "federalism was used by regional social and economic groups in their efforts to try to break the political and economic monopolies of the capital cities. The displacement of colonial powers touched off struggles between outlying provinces and the metropolitan centers of economic and political power as well as competition between striving but socially peripheral elites and those entrenched in the administrative and economic centers."²⁶ Argentine federalism, Alberdi argued, was a straightforward solution to divisions among provinces that were more artificial than those among states in the United States, divisions that had been sustained mainly by rivalries among local *caudillos*.²⁷ In Venezuela, Chile, and Uruguay, there was a quest for provincial authority against the central city; in Mexico, the provinces had become *de facto* independent. But, in each case, federalism proved to be a means of satisfying regional interests and "giving political unity to nations that shared little geographic, economic, or social coherence."²⁸ *The Federalist* was attractive because it was pertinent to local problems that were somewhat different from those debated in Philadelphia in 1787.

After the middle of the nineteenth century, what might be called the contagion effect of *The Federalist* cooled, but American institutions continued sporadically to be influential. Federalism was a particularly useful device in managing disparate parts of the British Empire, and the framers of the Australian constitution in 1900 were said to have had a “hypnotic fascination”²⁹ with the United States Constitution. Although they combined federalism and judicial review with a parliamentary system, they opted for a bicameral legislature, followed American terminology in naming the two houses, and provided for equal representation of states in the Senate. In this they resembled the Swiss, who, confronted a half century earlier with a debate between proponents of representation by population and representation by cantons, had unanimously chosen the American bicameral compromise.

As the Age of Nationalism set in in Europe, the spread of *Federalist* ideas entered into a protracted period of dormancy there. Underpinned by the historical jurisprudence of Savigny, which argued that legal institutions flowed up from distinctive national experiences, cultural specificity eclipsed enthusiasm for natural law and for constitutional borrowing across national lines.³⁰ When borrowing resumed in earnest a century later, *The Federalist* would be much less influential.

II

As we have seen, there is ground to question even some of what seemed to be the direct influence of *The Federalist* in the first seven decades after 1787. Some of its apparent effects may simply have been effects of the example of the United States Constitution standing alone. When Poland adopted its constitution in 1791, *The Federalist* had not yet been translated. The Poles worked from the text of the United States Constitution.³¹ State constitutions were also influential in several countries.³² And there were other reasons for following the United States. Did Liberia

and the Philippines, both wards of the United States, really need *The Federalist* to know that American institutions would serve as the model for their own? Liberia's 1847 constitution was drafted by Harvard Law School professor Simon Greenleaf, and its 1983 revision was also modeled on the United States. The 1935 Philippine constitution was almost inevitably an American-style document.³³ While all the innovations of 1787 can be seen in various permutations and combinations around the world, it is difficult to establish whether some of these adoptions were influenced by *The Federalist*, or simply by the example of the United States unmediated by *The Federalist*, or by the example of countries in the neighborhood of the adopting state that received their institutions directly or remotely because of the influence of the United States.

Then, too, there were preexisting conditions that disposed some constitution makers toward receptivity to some of the *Federalist's* messages. Even without center-provincial struggles, the division of several South American countries into provinces under colonial rule might have made federalism seem a logical way to organize their polities. The colonial substructure was even more determinative in Canada, India, Nigeria, and Malaya (and later Malaysia). All are federations produced by uniting colonies formerly administered separately and often administered on separate principles as well. Princely states in India and all but three of the states of Malaya were administered by the technique of indirect rule later applied by Lord Lugard in northern Nigeria.³⁴ British residents or advisors tendered "advice" to local rulers—more advice in Malaya and Nigeria, less in India—which the rulers were, for the most part, bound to accept. Other units of these colonies were, however, directly administered by British officials. When greater centralization was deemed to be required, so that lack of uniformity did not impede the development of commerce, the federal form was inevitable, if only because British officials in the various units did not see eye to

eye and guarded the autonomy of their units as much as indigenous authorities did. In these cases, federalism was scarcely *chosen* at all—it was dictated by the exigencies of the situation—and American institutions apart from federalism, notably the presidency and judicial review, were not adopted at that point, just as the presidency was not adopted in federal Australia.³⁵ In short, once the American federal example was available for emulation, it could be followed for an array of local reasons, which may or may not have had much in common with American reasons and may have had little to do with *The Federalist* and its explanation for federalism.

The Federalist is still occasionally consulted by framers of constitutions. When, in 1978, after a dozen years of military rule, Nigeria returned to civilian rule under a new constitution, a Constituent Assembly sat for months scrutinizing and altering a draft set before it. With the prompting of the American Embassy, *The Federalist* was abundantly in evidence in Lagos, and the Nigerian delegates were particularly impressed by arguments about the separation of powers. They opted for a presidential regime, in order to provide a safeguard against the ethnic domination that, they knew from experience, could arise if one group managed to gain control of parliament.³⁶ There have been other sightings of *The Federalist* at constitutional deliberations, such as those of South Africa, but the impact of the work, if any, is obscure.³⁷ Most of the time, the effect of particular papers or *The Federalist* papers as a whole on specific constitutional deliberations cannot be demonstrated.

The causal problem is made more acute because the United States experience has been diffused by various expositors during various periods: in the first instance by *The Federalist*, after the 1830s by Tocqueville's *Democracy in America*, after the 1890s by Bryce's *American Commonwealth*, and at various times by a combination of authors. In some cases, constitutional deliberations were

replete with references to *The Federalist* but also to Kent, Story, and Tocqueville.³⁸ Was it the arguments of *The Federalist* that moved the drafters? Undoubtedly, they did, but it is impossible to specify by how much or what institutions would have been adopted had *The Federalist* been unknown to them. The arguments of *The Federalist*, which enjoyed a high reputation, were particularly convincing when they seemed to fit with felt needs and preexisting institutions, but they could be, and later were, less dispositive under other conditions.

III

A counter-model emerged in the wake of the 1787 Convention, the model propounded by the Anti-Federalists. The Anti-Federalists were not a homogeneous group, and they did not espouse a perfectly common platform, but their work as a whole gave rise to a different set of constitutional prescriptions. Localists and republicans, they were skeptical of one of *The Federalist's* principal claims—that federalism could make possible the extension of republican government to a continental country. They remained proponents of the small republic and preferred that power be kept at the state level.³⁹

Contemplating the strong central government created at Philadelphia and grasping the nationalist implications of the supremacy clause, the taxing power, and the necessary-and-proper clause, the Anti-Federalists sought to set clear limits to federal power. They seized on the principal omissions in the federal constitution, the most conspicuous of which was a bill of rights. Every state had had a bill of rights by 1787, but the draft Constitution failed to include an enumeration of rights and seemed, by implication, to abrogate some of those enumerated in state bills of rights, such as freedom from search and seizure, trial by jury, and freedom of speech and press.⁴⁰ A proposal to include a bill of rights was unanimously voted down at the Convention, on the ground that it would

be superfluous,⁴¹ and Hamilton wrote in *Federalist* Number 84 that an enumeration of rights might imply the existence of powers that were not even claimed to inhere in the Constitution. To the argument of Federalists that a bill of rights would be redundant in a Constitution of limited powers, the Anti-Federalists interposed powerful rejoinders,⁴² and by the autumn of 1788 even Madison had given up opposing the incorporation of a bill of rights.⁴³

The Anti-Federalists were not wholly mollified by the Bill of Rights.⁴⁴ Many of them doubted that a declaration of rights would be adequate to offset the extensive powers confided in vague and general language to the federal government. Those powers the Anti-Federalists had aimed to scale back in the interest of local democracy. Yet, in the end, Herbert Storing's judgment that "the legacy of the Anti-Federalists was the Bill of Rights" seems unassailable.⁴⁵

It is not necessary here to enter into the debate over whether the Federalist and Anti-Federalist positions constituted complementary or antagonistic theories.⁴⁶ The point is that, in the course of completing the American Constitution, the Anti-Federalists managed to put up a different and, in some ways, competing model to that advanced by *The Federalist*. Where *The Federalist* argued that differently composed structures produced an array of countervailing incentives and that authority confided to different branches or to different houses of the same legislative branch could check power with power,⁴⁷ the Anti-Federalists countered that it was not the horizontal distribution of power that concerned them but the movement of power vertically—that is, upward—that rendered the rights of citizens insecure.⁴⁸ Where *The Federalist* contended that the proliferation of factions in a large and "well-constructed Union" would have a "tendency to break and control the violence of faction,"⁴⁹ the Anti-Federalists saw the demise of "the small, self-governing community"⁵⁰

The Anti-Federalists were not merely concerned with rights. They thought the Constitution would produce a single, “consolidated” national government, not a truly federal one; they thought the presidency would become a monarchy; and they thought the courts would develop into an aristocratic element. With great prescience, they anticipated that the provisions relating to the federal courts would give rise to unprecedented judicial power.⁵¹ What they did not foresee was that this judicial power could be mobilized to enforce at least some of the rights they cherished.

The enduring contribution of the Anti-Federalists’ emphasis on rights allegedly lost in the draft Constitution was to bring rights consciousness to the fore of public consideration in debates on ratification. And so, as *The Federalist* gave rise to a model of constitutionalism based on structural engineering, the Anti-Federalists produced a model based on the reservation of rights against government. Not that rights consciousness had been absent until the Anti-Federalists produced their tracts. It was at the root of the War of Independence and lay in the background to the Constitution. But where the framers of that document were concerned to balance popular sovereignty with protections against what they saw as its excesses, the Anti-Federalists sought to set bounds to national power altogether, “to fix barriers against the encroachments of [the people’s] rulers.”⁵² The embodiment of those barriers would be a bill of rights.

The result was to plant firmly in the American constitutional experience two models for emulation, each a counterpoint to the other. One could be called Madisonian structural engineering; the other might be denominated rights consciousness and, later, rights enforcement. In a certain way, the difficult problem of direct causal attribution of the influence of *The Federalist* can be avoided by asking which, if either, model has proved influential with later constitution-makers. As we shall see, this question can give rise to new complications, for what looks like rights enforcement

may turn out to be yet another case of structural engineering to balance power with power. But, in the end, it will help to see these as alternatives.

IV

If the measure of the ultimate influence of *The Federalist* is to be taken by assessing adoptions of institutions reflecting the engineering techniques of the framers, some problems arise. We have already seen that the adoption of federalism may be merely a convenience for a state whose uniting entities each had an independent history. Under these conditions, the use of the federal form does not imply the recrudescence of the impulses animating the American framers and expressed in *The Federalist*—the more so if federalism is adopted without the separation of powers, without judicial review, and without a powerful upper house to represent the constituent entities. Daniel Ziblatt has suggested that the adoption of federalism in Germany at the time of unification, in contrast to the adoption of a unitary state in Italy at the time of unification, is attributable not to any greater regionalism prevailing in Germany, but to preexisting institutional capacity at the regional level in that country, but absent in Italy.⁵³ Whereas the constituent German states had constitutions, legislatures, and administrations, the Italian states generally did not; in Italy, there were no capable governments to which to devolve provincial power. A similar contrast in provincial capacities could be cited for Iraq, which adopted a federal (or perhaps confederal) constitution in 2005 and Afghanistan, which adopted a unitary constitution in 2003. There is, of course, more to each story than simply capacity and lack of capacity, but lack of preexisting capacity makes the adoption of the federal form far more difficult, especially in conditions of crisis that so often characterize periods of constitutional adoption.

To the extent that is so, then there is a constraint operating against federalism, even when constitution drafters entertain Madisonian motives. That environmental constraint, however, is the least of the inhibitions. There are several sources of bias against structural engineering, if by that term is meant the adoption of institutions to channel the exercise of power in ways that thwart the dominance of particular interests, whether those interests are “factions” in the original sense, or classes, or ethnic groups in divided societies, or religious sects or tendencies, or any other embodiment of exclusivism against heterogeneity.

Perhaps the most important bias against structural engineering derives from the ability of politicians to see in advance which way various structures will lean—or at least to think that they can, even if they later turn out to be wrong, as they sometimes are. A party or a group that anticipates its ability to gain majority power through parliamentary structures may very well disdain a separation of powers, just as a convention aiming to avoid the recurrence of such a possibility will almost surely choose a separation of powers, as the Nigerians did for just such reasons in 1978.

In this respect, the framers of the American Constitution were advantaged by the timing of the Philadelphia Convention. It was called before political parties had crystallized, and although its members responded to state interests and to some extent to commercial interests, they did not act as representatives of parties who could foresee the impact of alternative institutional choices on the fortunes of the parties with which they were affiliated. In Nigeria, too, there was great uncertainty about who might be the next potential hegemon and who might be the next victim of hegemony. In both cases, therefore, the institutional designers acted behind a veil of ignorance, and it is not surprising that both were inclined to the separation of powers, since both had reason to anticipate that anyone could be victimized in the future.

Declarations of rights or bills of rights may seem less threatening, at least in a direct way, to potential hegemon. There are likely to be fewer directly negative effects of such declarations for them; it is at least more difficult to envision how the provision of rights will bear upon their power, except in the most general way. So, just as there may be a bias against federalism and the separation of powers because politicians believe they can foresee their advantages and disadvantages, so there may be a bias in favor of rights declarations because their effects seem likely to be innocuous. Even if rights are to be enforced by judicial review, the judiciary, as Hamilton said in *Federalist* Number 78, is “the least dangerous” branch, possessing “no influence over either the sword or the purse” Partisan constitution makers may well concur with this assessment. As I shall note later, judicial review also has some positive appeal for certain particular interests.

V

It bears notice that *Federalist* Number 78 casts judicial review not principally in terms of the vindication of rights but in terms of the separation of powers. Hamilton begins Number 78 with a defense of life tenure for federal judges, which he sees as an “excellent barrier to the encroachments and oppressions of the representative body.” The courts, on this view, are “to be an intermediate body between the people and the legislature,” in order to keep the legislature “within the limits assigned to their authority.” Only pages later does Hamilton address the use of judicial independence to protect the rights of individuals and minorities, and even then he returns quickly to the role of a vigilant judiciary in deterring the passage of “unjust and partial laws.” The power of judicial review, in the end, forms part of the constitutional armor against faction. Understanding these structural assumptions, the Anti-Federalists feared the ability of courts to impede the popular will.

If, then, we are looking for indications of the prevalence of Federalist or Anti-Federalist thinking, it may not do to dichotomize constitutional innovations into federalism and the separation of powers as indicators of structural engineering, on one side, and declarations of rights and judicial review as indicators of rights consciousness, on the other. Judicial review may belong to both sides. This is precisely what Tom Ginsburg has argued in a book on constitutional courts in Asia.⁵⁴ While he concedes that constitutionalism and rights consciousness have great normative power and that judicial review has become part of the “script”—that is, the standard equipment—of the modern state, Ginsburg nevertheless suggests that judicial review is adopted as “an insurance policy for prospective losers in the electoral arena.”⁵⁵ The institution of judicial review is more likely to be adopted and access to judicial review is likely to be more broadly available when, at the date of adoption, political parties are more nearly balanced in strength than when one party is overwhelmingly dominant. In other words, self-interested politicians will design accessible institutions for judicial review when they are uncertain about their future hold on power, because political forces are diffused at the moment of institutional creation. If they are uncertain about the future balance of power, they will prefer judicial review as a way to limit the majoritarian power of their opponents, should those opponents replace them in the future.

The strong empirical evidence that Ginsburg adduces for what he calls the “insurance model of judicial review”⁵⁶ goes more to the particular terms of judicial review than to its incidence. He finds, for instance, an association between party dominance, on one side, and, on the other side, short judicial terms, fewer judges, and limited access to judicial review.⁵⁷ But since, as we shall see presently, judicial review is more or less ubiquitous in constitutions drafted in recent decades, the party configuration cannot explain its overall adoption.

The first postwar adoptions of judicial review, in Germany, Italy, and Japan, all occurred under American influence and were rather clearly connected to revulsion against fascism. That puts those cases of judicial review on the rights side of the ledger. Nevertheless, Martin Shapiro has argued that successful judicial review usually occurs first as a way of adjudicating disputes between branches of central governments or between central governments in federal states and their constituent units. Since there is a need to have such a conflict-resolution function, courts that perform it are later able to add on the rights-adjudication function, which governments will then tolerate as the price of making their division of powers work when boundary conflicts arise: eventually, “if you buy a separation of powers court, you get a rights court.”⁵⁸

In some cases, however, constitutional adjudication takes place even in the absence of serious division-of-powers disputes. Where that is true, judicial review entails adjudication of rights more or less exclusively.⁵⁹ Powerful proof of this trajectory consists in the decline of untrammelled parliamentary supremacy in Britain and France, its most prominent homes, not to mention all members of the Old Commonwealth, during the course of the last century or so.

The point is that, whether the progression is from judicial boundary policing to rights adjudication or straight to rights, the balance of judicial review has tipped; and, while judicial review may have originated on the structural engineering side, it is now firmly on the rights side with which the Anti-Federalists were concerned. Ironically enough, judicial review was an institution of which the Anti-Federalists disapproved. Furthermore, as I shall show, enthusiasm for the devices of structural engineering propagated by *The Federalist* has generally declined around the world, in contrast to the ubiquitous acceptance of rights discourses and mechanisms.

Declining enthusiasm for Madisonian safeguards is, in a limited way, even in evidence in the United States, where the protracted Watergate scandal that paralyzed the presidency induced some to rethink the fixed term and to prefer the parliamentary vote of no-confidence.⁶⁰ Geographic mobility and some constitutional changes have made federalism and one of its results, a malapportioned Senate, seem shopworn to some observers,⁶¹ while others deplore the life tenure of federal judges.⁶² In this analysis, what survives is a stronger majoritarianism, subject to the full panoply of rights. And so American skepticism of *The Federalist*, at least for the twenty-first century, although that skepticism is a minority strand confined to academics, proceeds simultaneously with a similar lack of enthusiasm in the actual constitutional practice of many countries, as we shall soon observe.

VI

We have already seen that there may be biases or preconceptions or environmental conditions favoring or disfavoring adoption of the institutions prescribed by *The Federalist*. Federalism may be favored when preexisting states or colonies unite but disfavored when the preexisting units have poorly developed governmental institutions. Presidentialism may be favored in order to accommodate the ambitions of a de Gaulle but disfavored when a parliamentary regime allows scope for a presidential-style prime ministership, as the British system has under Churchill, Thatcher, and Blair.⁶³ Widely accessible judicial review may be favored when political power is divided between or among parties and disfavored when one party is overwhelmingly dominant. Federalism, presidentialism, and judicial review may be favored by countries in proximity to the United States or its colonial influence and disfavored by other countries, *ceteris paribus*. It is tempting to suppose

that these and other countervailing forces might cancel each other out, but actually the incidence of adoption is highly variable among the three principal *Federalist* institutions.

If judicial review is a function of the desire for insurance, it is remarkable just how widespread the desire for that insurance is. In accordance with Ginsburg's predictions, provisions for access to effective judicial review—rules about jurisdiction, standing, and the scope of judicial power—vary widely among constitutional adjudicators, but the institution itself is becoming universal. In the aftermath of World War II, judicial review for constitutionality “really flourished in only three countries: the United States, Canada, and Australia.”⁶⁴ (Even then, in Canada and Australia, judicial review was not highly robust by current standards.) As of 2005, on the other hand, nearly four-fifths of the world's states had some form of judicial review enshrined in their constitutions.⁶⁵ This figure includes a good many countries with undemocratic regimes, in which the effectiveness of judicial review would be doubtful, but the vast majority of democratic countries also have some form of judicial review. While a growing number of new constitutions provide for judicial review in a supreme court, the stronger trend in new democracies has been to create separate constitutional courts. In 1978, only 26 percent of constitutions provided for a constitutional court,⁶⁶ while approximately 44 percent did by 2005, compared to only 32 percent of constitutions that located judicial review in a supreme court or other ordinary court.

There are regional variations in the relative popularity of the two types. Because the United States model was borrowed early on, supreme court review is more common than constitutional court review in Latin America and in the Western Hemisphere in general.⁶⁷ Elsewhere, the constitutional court model is prevalent. It is possible for constitutional drafters to defy the counsel of international advisors and monitors of democratic progress by choosing, as Afghanistan and Iraq

did, not to create constitutional courts. It is, however, exceedingly unusual to fail to provide for judicial review altogether. Both of those states did provide for it.

That the widespread adoption of judicial review and its nearly-universal adoption after 1989 may have something to do with the diffusion of rights consciousness is suggested by the growing incidence of ratification of Optional Protocol Number 1 to the International Covenant on Civil and Political Rights. Optional Protocol Number 1 is significant, because the United Nations Human Rights Committee that administers the protocol is required to bring complaints submitted to it to states against which the complaints are directed. Since 1990, the Committee, a body of independent experts, has monitored whether signatory-states have given effect to its decisions. Despite the many great flaws in the work of this U.N. body, the procedure has at least some degree of seriousness to it.⁶⁸ From 1968 through 1988, only 40 countries had ratified the protocol. Since 1989, the number of ratifying countries has nearly trebled, to 111.

It goes without saying that ratification of a treaty does not imply compliance with its terms. Democratic states are more likely to comply with human rights treaties than are undemocratic states, but the accession of both is significant—the former because rights consciousness is now part of majoritarian democracy, the latter because a commitment to human rights, even if habitually violated, enhances the legitimacy of the regime. In short, rights consciousness and rights enumeration, along with judicial review, are a uniform part of the democratic package.

Presidentialism, on the other hand, remains a minority taste. For a time in the 1980s and early 1990s, there seemed to be a surge toward the choice of presidential institutions.⁶⁹ None of the new democracies in Latin America or Asia (namely, Korea and the Philippines), and only three of approximately 25 countries in Eastern Europe and the former Soviet Union, chose a purely

parliamentary system. But this apparent trend was not a secular boost for presidentialism. In the case of Latin America, Korea, and the Philippines, the choice of presidentialism was not really a new choice at all. Latin America's institutions had long followed North American models, going back to the nineteenth century, while the Philippines had been a colony of the United States, and Korea had been under American protection for nearly a half century. In Eastern Europe, on the other hand, the choices were mixed, but none chose a purely presidential system; most opted for semi-presidentialism. In the former Soviet Union, democratic regimes are rare, regardless of their institutional form. Of the four FSU states rated "free" by Freedom House, the Baltic states have parliamentary institutions,⁷⁰ and Ukraine has semi-presidential, while in the remainder more states have semi-presidential than presidential regimes. Even so, the surge of the 1980s and early 1990s, as we shall see, was far from sufficient to overturn the popularity of parliamentarism.

To gauge the popularity of presidentialism, two methods were used. From multiple sources, regimes were assigned to the presidential, semi-presidential, and parliamentary categories and then grouped by Freedom House rankings. Because these data are sometimes imprecise, a check was performed by simply isolating separately elected presidents functioning as heads of government (the American model), based on two databases, the ACLP Dataset (n=135) and the Database of Political Institutions (DPI) (n=174), and again cross-tabulating using Freedom House rankings.⁷¹ Among states ranked "free" by Freedom House, only 24 percent have presidential regimes, while 15 percent have semi-presidential regimes (with a separately elected president who shares power with a prime minister), and 60 percent have parliamentary regimes. Adding the partly free category changes the results only slightly: 29 percent presidential, compared to 23 percent semi-presidential, and 47 percent parliamentary. Of course, there are important variations within the three general types, but

the overall tendency for parliamentary regimes to be far more common than presidential is unmistakable. A count using the ACLP and DPI databases reveals that, among states that are unequivocally democratic, parliamentary regimes are about twice as common as presidential regimes.⁷²

The claim of *The Federalist* that the fixed-term presidency affords energy, decisiveness, firmness, and responsibility, against the vagaries of popular opinion, has not persuaded most constitution makers, as it has not persuaded some passionate political scientists.⁷³ Even at times when presidents of the United States have been deeply unpopular, however, the American public has overwhelmingly attributed the failings of government to bad leadership, rather than to systemic defect, and shown itself to be deeply committed to the separation of powers and to interbranch checks and balances.⁷⁴ In the United States, but definitely not abroad, *The Federalist* case for the presidency has had a decisive victory.

A second legislative chamber, an institution elaborately justified in *Federalist* Numbers 62-64, both as a recognition of the sovereignty of the constituent units of a federation and as a check on the excesses of faction and popular enthusiasms alike, is, however, an innovation widely adopted. Some 48 countries (39 percent) in the Ginsburg-Elkins Comparative Constitutions dataset (n=120)⁷⁵ have upper houses possessing legislative power. Of these, however, only 10 are federal. (The percentages do not change appreciably if we count only countries designated “free” by Freedom House.) A few others, such as Indonesia, created an upper house to represent regions, even though their devolved powers do not give rise to an explicitly federal designation for the regime. Most countries on the list appear to have adopted a second chamber to represent interests apart from component territorial units, such as an aristocracy supportive of indigenous interests (Fiji), or to

coopt notable personalities or represent localities in explicitly unitary regimes (Afghanistan). Outside the federal states, it is difficult to avoid the conclusion that second chambers are not often adopted to serve the functions expounded in *The Federalist*.⁷⁶

Federalism itself is relatively unpopular. Many countries have seen the administrative and political advantages of some decentralization,⁷⁷ but the Forum of Federations lists only 24 states as federations. To this list a few others might be added (for example, Iraq and, more doubtfully, Indonesia). Several more states that are otherwise unitary have autonomous regions or asymmetrical federal relations with one or more, typically distant, territories, usually former colonies (such as Denmark with Greenland and the Faroe Islands). But, even so, the number is not impressive. Two-thirds of the 24 listed federations antedate the Third Wave of democratization, and even then three of the newer federations are island microstates. Clearly, most new democracies have not found federalism attractive, many because they fear that federalism may give a fillip to ethnic separatism. It is striking that federalism, so enthusiastically received in the First Wave of democratization, has been so poorly received in the Third.

In view of the original purposes of American federalism, the relatively small number of federal states is perhaps understandable. Federalism was conceived in *The Federalist* as a solution to the problem of scale: republican government could be extended over a considerable territory if the republic were federal, according to Madison in Number 14. As he also said in Number 10, the larger the republic, the greater the likelihood of controlling “the violence of faction.” But many countries have found it difficult to enlarge their scale using such techniques. Attempted federations consisting of states that attained independence separately—such as the East African Federation and the British West Indies Federation—have generally been prone to failure.⁷⁸ Virtually all the very large states

in the world that are democratic are also federal, and so, too, are large states that aspire to fully democratic rule, such as Nigeria. But most states are relatively small, and few small states conceived federal institutions to be a serious choice at independence or at the time of redemocratization. In many cases, this was a mistake, for a large number of small or medium-sized states are ethnically plural, and federalism is as appropriate a response to ethnic pluralism as it is to the problem of territorial scale. Even relatively small states, such as Sri Lanka, could have spared themselves great destruction and loss of life had they heeded early calls for a reasonable federal dispensation. The fact is, however, that most states in this position resist federalism, which is why there are relatively few federal regimes.

Moreover, even in those states that have adopted federalism, *The Federalist's* model of a relatively strong federal government has not been persuasive among federation creators in recent years. Belgium's federation was designed to loosen the bonds between Flanders and Wallonia.⁷⁹ The federation of Bosnia and Herzegovina created in the Dayton Accords of 1995 is a very weak federation, and Iraq's new federation (2005) is perhaps weaker still. The federation proposed for Cyprus in the Annan Plan of 2004, but rejected in a Greek-Cypriot referendum, would have embodied a weak and easily deadlocked central government, reliant on foreign judges to break policy stalemates. In these cases, federalism was conceived not as a way to balance factions but to allow factions, in all of the cases ethnically defined factions, to veto action by a central government that was not to have much capacity to act even in the best of circumstances. In none of these cases was there a manifest desire to add national capacity to the capacity of lower-level units, as in the United States. Rather, the aim of the federal arrangements in each was to protect the component units and peoples from any unwanted exercises of central-government power. There was no

necessary-and-proper clause in these constitutions (or proposals for Cyprus), no supremacy clause, no unlimited power to raise revenue, no implied powers, and no *Federalist* theory of the benefits of bicameralism. Second houses were usually created to provide a mechanism to enhance group vetoes. In Iraq, the second house was seen as a body so insignificant as not even to require specification of its parameters in the constitution itself.⁸⁰ Abroad, federalism is generally designed to weaken the control of central states. It is often proposed as a substitute for outright partition.

Underlying this contrast between contemporary federal institutions and *Federalist* institutional theory is a still deeper contrast. As Samuel P. Huntington has pointed out,⁸¹ the framers of the Constitution did not design the document with a view to the relation of particular American social forces to particular component institutions of the Constitution. *The Federalist* contains no speculation about who would be advantaged and who disadvantaged by any given feature of the Constitution. The design of particular institutions did, of course, proceed on the basis of a general sense of what needed simultaneously to be represented and controlled—faction, popular enthusiasm, state particularism, and so on—but the efforts of the authors of *The Federalist* were principally directed at examining the internal dynamics of how each governmental institution would function and relate to other institutions, what Number 51 called the “interior structure of the government.” For most contemporary states, this is not the way constitution making proceeds. For them, the relation of social forces to the state is a prominent ingredient of the constitutional recipe. Political parties and ethnic groups are sometimes mistaken in their forecasts of the effects of given institutions on their relative positions, but they make such forecasts all the time and act on them as they choose institutions. The American framers were less risk averse than contemporary framers are, more willing to live with uncertainty about exactly who might control which institution at any

given time. They were more concerned about how each institution would balance the others. It is also true, however, that they had to cope with fewer sharp ascriptively-defined cleavages, despite the considerable, and sometimes politicized, ethnic and religious heterogeneity of some of the colonies.⁸² The apprehensions that often accompany contemporary ascriptive differences limit the replicability of *The Federalist's* style of constitutional thought.

That is not to say that the American model never has appeal for democratizing states. On the contrary, states emerging from long bouts of authoritarianism certainly do see advantages to both the separation of powers and the entrenchment of rights, and sometimes they settle on some approximation of American-style institutions. Indonesia did this between 1998 and 2003, when it adopted a constitutional court that has already begun exercising the power of judicial review, direct election of a relatively powerful president, and a major devolution that amounts to something close to federalism, together with an elected upper house to represent the regions. (Indonesia is described sardonically as “a unitary state with federal characteristics.”) Without the United States example, this particular configuration of institutions would probably not have emerged, but *The Federalist* was not a major factor in producing the new regime. Elsewhere, such a fully American configuration is rare, for reasons that have much to do with the conditions in which constitutions are adopted.

VII

Constitutions are typically made at times of crisis. When the crisis is not acute, there is more time for reflection and deliberation, and it may also be possible at such times to pursue common interests, either because there is less visibility about who will be harmed or helped by the adoption of particular institutions or because it is easier to see the advantages of transcending what may be

ephemeral advantage and disadvantage. We have already seen the advantages that accrued to the Americans, who designed their constitution before parties could look to partisan advantage; to the Nigerians, who could not foresee the future incidence of benefits and costs; and to the Indonesians, who managed to stretch out their constitution making over several years, during which the crisis in which they began gave way to much greater tranquility.

Many constitutions are not designed but negotiated. If the negotiations are successful, the result is likely to be a series of compromises that produces an array of institutions rather than a plan based on a single model. Other forces push toward the same result. Some constitution makers are influenced disproportionately by colonial institutions. It is no accident that francophone countries often have semi-presidential systems and runoff elections and that anglophone countries often have parliamentary or presidential systems and plurality elections. In other cases, foreign advisors have brought their own biases, usually home-country biases, to the constitution-making process. Some constitutional drafters may wish to avoid a particular problem faced by their state in the past or to return to a previous institutional structure, in which case their choices will revolve around such a strategy. The choice of institutions, in other words, is by no means wholly free: it is heavily constrained by a politics of exchange, or a bias toward one preexisting model or another, or toward avoiding some historical problem or another.⁸³

If these are some of the forces at work in constitutional processes, it is scarcely surprising that the world is filled with idiosyncratic hybrids of generally recognizable institutions, rather than a few clear-cut models replicated faithfully across national boundaries. Consequently, Canada, Australia, and India all married federalism with parliamentary regimes and eventually with judicial review, while Latin America generally combined presidentialism with proportional electoral systems. Just

as very few countries have adopted the full United States configuration, very few have stayed with the original British version of unitary, parliamentary government without judicial review. Constitutionally, we live in a mix-and-match world, largely as a result of the international diffusion of institutions heavily modified by constitutional processes that give ample scope for the play of particular interests and biases.

Perhaps this helps explain why judicial review is so commonly adopted. It is assuredly an institution heavily supported by foreign advisors who find themselves dispensing constitutional prescriptions around the world. Furthermore, judicial review fits with parliamentary or presidential institutions, unitary or federal states, unicameral or bicameral legislatures. It is easy to create a single constitutional court and to graft it onto existing institutions. Once the institution is outlined, its content can be filled in down the road, as it was in the United States. Furthermore, many actors can anticipate advantages from the power of judicial review—not merely politicians seeking insurance against reversals of fortune, but judges and lawyers, human rights activists and minorities. Islamists would also like to use judicial review to declare secular-law provisions unconstitutional under clauses increasingly incorporated into constitutions of Muslim states that require that law not be repugnant to Islamic principles. Judicial review is popular because of the confluence of rights consciousness and a wide assortment of particular interests.

If rights have trumped structures in the incidence of their adoption, there may be another, overarching reason for the advantage enjoyed by the Anti-Federalist message. Constitutional engineering involves, perhaps, more arcane learning than is necessary to appreciate the appeal of enforceable rights, and of course the *Federalist* version of that learning is premised on a rather cynical view of human ambition that many constitution makers would prefer not to acknowledge

publicly. For all these reasons, the Anti-Federalist message has been heard more loudly around the world since 1974 than the message of *The Federalist*.

VIII

All of this has carried us a bit far from *The Federalist*—or has it? What we are really saying when we speak of a bias against federalism or presidentialism, for example, is that there are reasons why constitutional designers are not moved by *Federalist* principles. The constitutional process may afford too little deliberation, or too much (presumed) visibility of likely effects, or too much scope for the operation of preexisting preferences. Apprehensions concerning the possibilities afforded to potential separatists when they control their own federal units or about the supposed difficulty of achieving power-sharing among ethnic groups under presidentialism may be misplaced, but they may still be decisive in constitutional bodies. The message of *The Federalist* is vulnerable to slippage between theory and practice in a way that the Anti-Federalists' message of the need to entrench rights is not.

The Federalist is, however, at least as influential as the Anti-Federalists when it comes to the theory of constitutional design. The entire field of constitutional design is beholden to *The Federalist*. To be sure, there are various schools of thought—consociationalists and centripetalists, for example⁸⁴—but all are essentially Madisonian. They advocate comparative analysis to discern how institutions should be shaped; they aim to harmonize self-interest with common interests; and they attempt to marshal power and to control it. True, they are far more concerned with social forces, especially the disintegrative forces of ethnic conflict and, more recently, religious intolerance, but without the example of *The Federalist* it is difficult to imagine what the academic

field of constitutional design would look like or even if it could have been envisioned as a field at all.

The field now extends far beyond constitutions as such, into electoral systems and beyond. There are now analyses and prescriptions for regulation that might constrain ethnically-based political parties or that might achieve more majoritarian electoral outcomes to bolster government durability.⁸⁵ The field of electoral-systems theory and engineering has a long history, going back to Condorcet and Borda, among others, and it would be quite wrong to attribute its origins to *The Federalist*. Yet *The Federalist* provided the most practical example of electoral engineering for a variety of purposes when it analyzed the consequences of the various methods of election for representatives, senators, and presidents.

The pervasive influence of *Federalist* thinking on the field of constitutional design leads to an interesting observation on the comparative impact of *The Federalist*. If, as noted earlier, there is a decline among American academics in appreciation for the structures of the Constitution that balance power with power and so operate to limit the sway of majorities, but the American public is still wedded to those structures, the situation is the opposite in most countries in which constitutional engineering is being practiced. Theorists of constitutional design are, as indicated, nearly uniformly Madisonian, but their audience is less receptive to the *Federalist* message than the American public is.

Of course, these are broad generalizations, but there is some support for them. Consider the likely explanation. The excesses of popular majorities were seen by *The Federalist* to be a major problem, but those apprehensions have abated considerably in the United States in 200 years, perhaps because of the success of the very institutions adopted in 1787 to constrain those excesses.

Hence the diminished enthusiasm for protections against them. Yet, in the interval, the Constitution has become an element of the American identity, “so intimately welded with the national existence itself that the two have become inseparable.”⁸⁶ While scholarly elites may deplore unmajoritarian features of the Constitution, the public considers them integral parts of the document it venerates. On the other hand, in many democratizing countries—specifically, in the ones that are severely divided along ethnic or religious lines—the prospect of majority domination is a serious contemporary issue, and constitutional designers advocate efforts to design against that very problem. Many of those designs are seen to be unfamiliar and potentially dangerous to those who must adopt them, and the adopters are moved by a variety of biases and interests discussed previously that lead them to reject the designers’ proposals, or to accept some and reject others, thereby creating a variety of hybrid institutions. The result is that *The Federalist* fares very well among the American public and among constitutional design theorists (many of them Americans) working overseas but much less well among what could be called a new wave of constitutional reformers in the United States and among constitution drafters and their attentive publics abroad. And, to complete the paradox, this is true despite the fact that the American example had inspired so many late twentieth-century movements for democracy.⁸⁷

There is, however, a new horizon. With the growth of international institutions, *Federalist* thinking has a new sphere of pertinence. Those institutions operate on the basis of written constitutions, typically embodied in treaties. The principles of their design have been various, but their effects have been enormous, even on domestic constitutional regimes. The European Convention of Human Rights, for example, has been incorporated in the domestic law of the United Kingdom through the Human Rights Act 1998, which requires judicial enforcement of the

Convention.⁸⁸ In conjunction with other forces, the Convention has stimulated a wave of new thinking and action on a written bill of rights and judicial review in Britain, over and above the covert but limited judicial review that takes place there under the guise of statutory interpretation and the scrutiny of administrative action for conformity to principles of natural justice.⁸⁹ Again, rights are leading the way, but, in Britain at least, a more complex regime—not fully *Federalist*, to be sure, but no longer wholly unitary or parliamentary-supremacist—seems to be emerging.

The same goes for Europe. In creating a more tightly bonded Europe, *Federalist* thought also appears destined to be influential, because Europe will have to confront many of the same problems that concerned the framers of the American constitution: limiting the powers of majorities, representing historic territories rather than undifferentiated populations, and finding a formula for republican government on a continental scale. Rights will not carry the European project very far.

For the moment, though, we have seen that rights regimes are doing better than structural engineering within countries, and the Anti-Federalists are outpacing *The Federalist*. Is this a stable outcome? Are rights regimes and majoritarian institutions alone adequate to support freedom around the world? No doubt, in some countries with strong democratic traditions and relatively homogeneous populations, this combination may suffice. But most states govern divided societies and are likely to need something like the differentiated mix of institutions and the resulting countervailing incentives for which *The Federalist* made such strong arguments. After a short but stormy courtship, *The Federalist* and the Anti-Federalists were united in a more or less happy marriage in the United States. Elsewhere, as we have seen, the two have been divorced, but they may need to be remarried. For the checks and balances of *Federalist* structures make it harder to weaken or obliterate rights regimes. In the end, those who use Madisonian methods to create strong

institutions will be most likely to provide the stability and tranquility in which the rights so precious to the Anti-Federalists can be made secure.

Notes

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1. Cf. Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (2d ed.; New York: New York University Press, 1997).
 2. Here I deliberately elide the contentious issue of whether judicial review was actually embodied in original understandings of the Constitution itself. See Max Farrand, *The Framing of the Constitution of the United States* (New Haven: Yale University Press, 1913), pp. 120, 156-57; Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), pp. 15-16.
 3. See Charles C. Thach, Jr., *The Creation of the Presidency, 1775-1789* (2d ed.; Baltimore: Johns Hopkins University Press, 1969), p. 118. For a summary of the creation of the office, see Donald L. Horowitz, "Is the Presidency Failing?" *The Public Interest*, No. 88 (Summer 1987), pp. 3-27, at pp. 7-11.
 4. Bernard Bailyn, *To Begin the World Anew: The Genius and the Ambiguities of the American Founders* (New York: Alfred A. Knopf, 2003), pp. 101-02.
 5. Albert Blaustein, "On the Influence of the United States Constitution Abroad," paper

- prepared for the Berlin Conference on the Law of the World, July 21-26, 1985, World Peace Through Law Center, Washington, D.C., p. 24.
6. Bailyn, *To Begin the World Anew*, p. 100.
 7. George Athan Billias, "American Constitutionalism and Europe, 1776-1848," in Billias, ed., *American Constitutionalism Abroad* (New York: Greenwood Press, 1990), p. 32.
 8. Godfried Dietze, "Robert von Mohl, Germany's de Tocqueville," in Dietze, ed., *Essays on the American Constitution* (Englewood Cliffs, N.J.: Prentice-Hall, 1964), pp. 187-212.
 9. Helmut Steinberger, "American Constitutionalism and German Constitutional Development," in Louis Henkin and Albert J. Rosenthal, eds., *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990), p. 208.
 10. Billias, "American Constitutionalism and Europe," p. 28.
 11. Steinberger, "American Constitutionalism and German Constitutional Development," p. 205.
 12. Andrzej Rapaczynski, "Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad," in Henkin and Rosenthal, eds., *Constitutionalism and Rights*, p. 423.
 13. I am indebted to Drs. José Antonio Aguilar, Luis Barron, Gabriel Negretto, and Reuben Zahler for very helpful communications concerning the influence of *The Federalist* (and in

some cases lack of influence) in Latin America.

14. Gerald E. Fitzgerald, "Introduction" to Fitzgerald, ed., *The Constitutions of Latin America* (Chicago: Henry Regnery Co., 1968), p. xi. I am indebted to Jan Kleinheisterkamp for comments on *The Federalist's* impact on Latin America and for the references to Fitzgerald and to Clark and Miller in notes 17, 23, and 25, below.
15. Blaustein, "On the Influence of the United States Constitution Abroad," p. 5.
16. Quoted in Bailyn, *To Begin the World Anew*, p. 146.
17. David S. Clark, "Judicial Protection of the Constitution in Latin America," *Hastings Constitutional Law Quarterly*, Vol. 2 (1974-75), pp. 405-42, at pp. 418-19.
18. *Ibid.*
19. *Ibid.*
20. Robert J. Kolesar, "North American Constitutionalism and Spanish America," in Billias, ed., *American Constitutionalism Abroad*, pp. 53-54.
21. I am indebted to Mariela Szwarcberg of the University of Chicago for information about the Electoral College in Latin America and for pointing me to pertinent literature.
22. See José Carlos Chiaramonte and Pablo Buchbinder, "Provincias, Caudillos, Nación y la

- Historiografía Constitucionalista Argentina, 1853-1930,” unpublished paper, 2007. I am grateful to Federico de Archaval of Duke Law School for helping me to interpret this paper.
23. Jonathan M. Miller, “The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith,” *American University Law Review*, Vol. 46, no. 5 (June 1997), p. 1483-1572, at p. 1516.
 24. Natalio R. Botana, *La Tradición Republicana: Alberdi, Sarmiento y las ideas políticas de su tiempo* (Buenos Aires: Editorial Sudamericana, 1984), pp. 341-42. Sarmiento’s *Comentarios de la Constitución* (Buenos Aires: Universidad Nacional de la Matanza, 2001; originally published in 1853) is filed with references to *The Federalist* and other United States authorities and with enthusiasm for the U.S. model.
 25. Miller, “The Authority of a Foreign Talisman,” p. 1516.
 26. Kolesar, “North American Constitutionalism and Spanish America,” pp. 43-44.
 27. Chiamonte and Buchbinder, “Provincias, Caudillos, Nación y la Historiografía Constitucionalista Argentina, 1853-1930.”
 28. Kolesar, “North American Constitutionalism and Spanish America,” p. 44.
 29. Rapaczynski, “Bibliographical Essay,” in Henkin and Rosenthal, eds., *Constitutionalism and Rights*, p. 446. Robert Dahl’s suggestion that advanced democratic countries have rejected

the American constitutional system, because none has copied every American innovation, is misleading and contrary to the historical evidence. See Robert A. Dahl, *How Democratic Is the American Constitution?* 2d ed. (New Haven: Yale University Press, 2003), pp. 42-72. As I suggest below, American constitutional innovations have been influential, but we live in a mix-and-match world of idiosyncratic hybrids, rather than a world of carbon copies.

30. The point is well developed by Billias, "American Constitutionalism and Europe," pp. 34-35. For Savigny's historicism, see Friedrich Karl von Savigny. *On the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Hayward, trans.; London: Littlewood & Co., 1831).
31. Blaustein, "On the Influence of the United States Constitution Abroad," p. 9.
32. Bailyn, *To Begin the World Anew*, p. 133; Billias, "American Constitutionalism and Europe," pp. 21-22.
33. See Carmencita T. Aguilar, "U.S. Constitutional Principles and the Development of Philippine Constitutionalism," in J. Barton Starr, ed., *The United States Constitution: Its Birth, Growth, and Influence in Asia* (Hong Kong: Hong Kong University Press, 1988), pp. 247-58; Socorro L. Reyes, "The Influence of the American Political Tradition on the Philippine Constitutional System: Theory and Practice," in *ibid.*, p. 259-73.
34. See Rupert Emerson, *Malaysia: A Study in Direct and Indirect Rule* (New York: Macmillan 1937).

35. But judicial review was understood to be implied in the Australian constitution. See Brian Galligan, "Judicial Review in the Australian Federal System: Its Origin and Function," *Federal Law Review*, Vol. 10, no. 4 (December 1979), pp. 367-97.
36. See Donald L. Horowitz, "About-Face in Africa: The Return of Civilian Rule in Nigeria," *Yale Review*, Vol. 68, no. 2 (Winter 1979), pp. 192-206.
37. Extended treatments of the South African negotiations do not refer to any influence of *The Federalist*. See, e.g., Richard Spitz and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Oxford: Hart Publishing, 2000); Siri Gloppen, *South Africa: The Battle Over the Constitution* (Aldershot: Ashgate Publishing, 1997); Hassan Ebrahim, *The Soul of a Nation: Constitution-Making in the New South Africa* (Cape Town: Oxford University Press, 1998).
38. Carl J. Friedrich, *The Impact of American Constitutionalism Abroad* (Boston: Boston University Press, 1967), p. 53.
39. See Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981), pp. 15-23.
40. The possible abrogation of the civil jury was a particular grievance of the Anti-Federalists, who raised it again and again. See, e.g., "Centinel," Number 1 (October 5, 1787), reprinted in Ralph Ketcham, ed., *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: Mentor Books, 1986), pp. 227-37, at p. 228; "Federal Farmer,"

- Number 2 (October 9, 1787), in *ibid.*, pp. 264-69, at p. 266.
41. Farrand, *The Framing of the Constitution of the United States*, pp. 185-86.
 42. They argued that the presence of the prohibitions on bills of attainder and *ex post facto* laws in the draft Constitution implied that other prohibitions on governmental action, were they not spelled out, might be deemed to have been rejected.
 43. Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York: W.W. Norton, 1972), p. 542.
 44. Storing, *What the Anti-Federalists Were For*, p. 67.
 45. *Ibid.*, p. 65.
 46. Compare Herbert J. Storing, ed., *The Anti-Federalists* (Murray Dry, ed.; Chicago: University of Chicago Press, 1985), p. 4, with Christopher M. Duncan, *The Anti-Federalists and Early American Political Thought* (DeKalb, Illinois: Northern Illinois University Press, 1995), pp. 133-35.
 47. Especially in Number 51.
 48. See John D. Lewis, ed., *Anti-Federalists versus Federalists* (San Francisco: Chandler Pub. Co., 1967), pp. 1-28.

49. Number 10.
50. Storing, ed., *The Anti-Federalists*, p. 4.
51. Storing, *What the Anti-Federalists Were For*, p. 50.
52. “Brutus,” “To the Citizens of the State of New York,” in *ibid.*, pp. 117-22, at p. 119.
53. Daniel Ziblatt, *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism* (Princeton: Princeton University Press, 2006).
54. Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003).
55. *Ibid.*, p. 64.
56. *Ibid.*, p. 25.
57. *Ibid.*, pp. 60-64.
58. Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), p. 177. For the full discussion, see *ibid.*, pp. 149-83.
59. *Ibid.*, pp. 177-78.
60. James L. Sundquist, *Constitutional Reform and Effective Government* (Washington, D.C.:

- Brookings Institution, 1986); Sanford Levinson, *Our Undemocratic Constitution* (Oxford: Oxford University Press, 2006), pp. 116-21. The critique goes back to Woodrow Wilson, *Congressional Government* (Boston: Houghton Mifflin Co., 1885).
61. Levinson, *Our Undemocratic Constitution*, pp. 29-35. Levinson also criticizes several other features of the 1787 Constitution, including the president's policy veto, the difficult amendment process, the malapportionment of the Senate, and (like many others) the Electoral College—all on grounds that they impede majority will. The anti-majoritarian features of the Bill of Rights, however, are spared. See also Dahl, *How Democratic Is the American Constitution?*
 62. Paul Carrington and Roger Cramton, "Reforming the Supreme Court: An Introduction," in Cramton and Carrington, eds., *Reforming the Court: Term Limits for Supreme Court Justices* (Durham, N.C.: Carolina Academic Press, 2006), pp. 3-12.
 63. See Donald L. Horowitz, "Comparing Democratic Systems," *Journal of Democracy*, Vol. 1, no. 4 (Fall 1990), pp. 73-79.
 64. Shapiro and Stone Sweet, *On Law, Politics, and Judicialization*, p. 149.
 65. Here and elsewhere in the discussion of judicial review, I am drawing on Donald L. Horowitz, "Constitutional Courts: A Primer for Decision Makers," *Journal of Democracy*, Vol. 17, no. 4 (October 2006), pp. 126-37. Data on constitutional courts around the world, as well as some of the data on the incidence of federalism, presidentialism, and other

governmental features, derive from the Comparative Constitutions Project being conducted by Professors Tom Ginsburg and Zach Elkins of the University of Illinois. They kindly made the data available.

66. Ginsburg, *Judicial Review in New Democracies*, p. 9.
67. Patricio Navia and Julio Ríos-Figueroa, “The Constitutional Adjudication Mosaic of Latin America,” *Comparative Political Studies*, Vol. 38, no. 4 (March 2005), pp. 189-217.
68. See United Nations High Commissioner for Human Rights, “Civil and Political Rights: The Human Rights Committee,” Fact Sheet no. 15 (Rev. 1), United Nations, n.d. For contrasting views, compare Jeremy Rabkin, *Law without Nations: Why Constitutional Government Requires Sovereign States* (Princeton: Princeton University Press, 2005), pp. 170-71, with Jana von Stein, “Making Promises, Keeping Promises: Democracy, Ratification, and Compliance in International Human Rights Law,” paper presented at the American Political Science Association annual meeting, September 2004.
69. See Alfred Stepan and Cindy Skach, “Democratic Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism,” *World Politics*, Vol. 46 (October 1993), pp. 1-22.
70. There is some difference of opinion about Estonia. Some sources classify it as semi-presidential, some as parliamentary. But Latvia and Lithuania are uniformly categorized as parliamentary.

71. Adam Przeworski *et al.*, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990* (Cambridge: Cambridge University Press, 2000); Thorsten Beck *et al.*, “New Tools and New Tests in Comparative Political Economy—Database of Political Institutions,” World Bank Policy Research Working Paper no. 283, 2004. Stepan and Skach, “Constitutional Frameworks and Democratic Consolidation,” use a list of 83 countries that became independent between 1945 and 1979. They find 41 to be parliamentary, 36 presidential, three semi-presidential, and 13 monarchical. Their very low count of semi-presidential regimes appears attributable to an assessment of the power held by the prime minister and the accountability of that office to the president rather than to the legislature.
72. The ACLP dataset, however, ends in 1990.
73. See Juan L. Linz and Arturo Valenzuela, eds., *The Failure of Presidential Democracy* (Baltimore: Johns Hopkins University Press, 1994); Arend Lijphart, “Constitutional Choices for New Democracies,” in Larry Diamond and Marc F. Plattner, eds., *The Global Resurgence of Democracy* (2d ed.; Baltimore: Johns Hopkins University Press, 1993), pp. 162-74; Sundquist, *Constitutional Reform and Effective Government*. See also the “Debate—Presidents vs. Parliaments,” *Journal of Democracy*, Vol. 1, no. 4 (Fall 1990), pp. 73-91.
74. See Horowitz, “Is the Presidency Failing?” p. 23.
75. See note 65, above.

76. For an interesting discussion of bicameralism, see Sartori, *Comparative Constitutional Engineering*, pp. 183-89.
77. Of 75 developing countries with populations of more than five million, some 63 had adopted some form of decentralization by the early 1990s. See W. Dillinger, "Decentralization and Its Implications for Urban Service Delivery," World Bank Urban Management Program Series, no. 16, 1994. I am grateful to Anoop Sadanandan for this reference.
78. For the reasons for such failure, see Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 2000), pp. 592-96.
79. Similar impulses underlay federal arrangements for Ethiopia and Spain.
80. After 15 articles specifying the composition, duties, and immunities of the lower house, the Constitution of Iraq (2005) states in Article 62 that an upper house "will be established and will include representatives of regions and provinces that are not part of a region. The makeup of the council, the conditions for membership . . . and all things related to it will be organized by law passed by a majority of two-thirds of [the lower house]."
81. Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Cambridge: Harvard University Press, 1981), pp. 124-25.
82. See Janet Merrill Alger, "The Impact of Ethnicity and Religion on Social Development in Revolutionary America," in Wendell Bell and Walter Freeman, eds., *Ethnicity and Nation-*

Building (London: Sage Publications, 1974), pp. 327-39.

83. See Donald L. Horowitz, "Constitutional Design: An Oxymoron?" in Ian Shapiro and Stephen Macedo, eds., *Designing Democratic Institutions*, NOMOS XLII (New York: New York University Press, 2000), pp. 253-84; *idem.*, "Constitutional Design: Proposals versus Processes," in Andrew Reynolds, ed., *The Architecture of Democracy* (Oxford: Oxford University Press, 2002), pp. 15-36.
84. For representative works from each, see Reynolds, ed., *The Architecture of Democracy*.
85. See Benjamin Reilly, *Democracy and Diversity: Political Engineering in the Asia-Pacific* (Oxford: Oxford University Press, 2006), pp. 102-14; Ben Reilly, "Political Engineering and Party Politics in Conflict-Prone Societies," *Democratization*, Vol. 13, no. 5 (December 2006), pp. 811-27; *idem.*, "Political Engineering in the Asia-Pacific," *Journal of Democracy*, Vol. 18, no. 1 (January 2007), pp. 58-72.
86. Hans Kohn, *American Nationalism: An Interpretive Essay* (New York: Macmillan, 1957), p. 8.
87. See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, Okla.: University of Oklahoma Press, 1991), pp. 286-87.
88. See Robert Wintemute, "The Human Rights Act's First Five Years: Too Strong, Too Weak, or Just Right?" *King's College Law Journal*, Vol. 17, no. 2 (2006), pp. 209-28.

89. See Susan Sterret, *Creating Constitutionalism* (Ann Arbor: University of Michigan Press, 1997); Lori Ringhand, "Fig Leaves, Fairy Tales, and Constitutional Foundations," *Columbia Journal of Transnational Law*, Vol. 43, no. 3 (Spring 2005), pp. 865-904.