

2001

# The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution

Steven G. Calabresi

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

---

## Recommended Citation

Calabresi, Steven G., "The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution" (2001). *Constitutional Commentary*. 1042.  
<https://scholarship.law.umn.edu/concomm/1042>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# THE VIRTUES OF PRESIDENTIAL GOVERNMENT:

## WHY PROFESSOR ACKERMAN IS WRONG TO PREFER THE GERMAN TO THE U.S. CONSTITUTION

*Steven G. Calabresi\**

### I. INTRODUCTION

America is a world power, but does it have the strength to understand itself? Is it content, even now, to remain an intellectual colony, borrowing European categories to decode the meaning of its national identity? . . . When America was a military and economic weakling on the European fringe, it was at the forefront of constitutional thought; as it transformed itself into the powerhouse of the West, its leading constitutionalists became increasingly derivative.<sup>1</sup>

My message is different. I reject Westminster as well as Washington as my guide and proffer the model of constrained parliamentarianism as the most promising framework for future development of the separation of powers. . . . [T]he success of the German Constitution has inspired other countries, most notably Spain, to use it as a reference point in their own transitions from authoritarianism. Constrained parliamentarianism, then, is a rising force in the world, and there is

---

\* George C. Dix Professor of Constitutional Law, Northwestern University. I am grateful to Bruce Ackerman, Akhil Reed Amar, Robert W. Bennett, Guido Calabresi, Andrew Koppelman, Gary S. Lawson, James Lindgren, Thomas W. Merrill, Henry Smith, and to the participants at the University of Virginia's Faculty Conference on Comparative Constitutional Law for their helpful comments and suggestions and to Scott Stone for his helpful work as my research assistant. I am pleased to dedicate this Article to my former teachers Bruce Ackerman and Juan Linz from whose work I have learned so much over many, many years.

1. Bruce Ackerman, *We the People: Foundations* 3 (Harvard U. Press, 1991).

much to be learned from its practical operation over the past half-century.<sup>2</sup>

Yale Law Professor Bruce Ackerman is a self-proclaimed fan of the United States' unique contribution to global constitutional thought. The very same Bruce Ackerman is also now the most outspoken proponent of the superiority of German style parliamentary government to our American system of the presidential separation of powers.<sup>3</sup> How can this be? How could the most able American constitutional law professor of his generation turn his back on the central design feature of the U.S. Constitution? Are we Americans to become again an "intellectual colony" this time ruled by Berlin instead of London? Must we hang our heads in shame when we travel overseas, apologizing to all concerned for our untrendy system of separation of powers governance?

No, a thousand times no! The existence of presidentialism and of the separation of powers in our Constitution is a praiseworthy feature of the document that should be emulated abroad. We should be proud of the fact that "in the 1980s and 1990s, all the new aspirant democracies in Latin America and Asia (Korea and the Philippines) have chosen pure presidentialism [and that of] the approximately twenty-five countries that now constitute Eastern Europe and the former Soviet Union, only three—Hungary, the new Czech Republic, and Slovakia—have chosen pure parliamentarianism."<sup>4</sup> American style presidentialism and

2. Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 640 (2000).

3. In *The New Separation of Powers*, 113 Harv. L. Rev. 633, Professor Ackerman urges newly emerging democracies to copy the German constrained parliamentary government model in place of the U.S. system of presidentialism and the separation of powers. (Professor Ackerman also argues in his Article for a number of interesting innovations in the separation of powers, such as the creation of separate branches to promote democracy, integrity, regulation, and distributive justice, all of which concern subjects beyond the scope of my reply).

In arguing that newly emerging democracies would do better to copy the German over the U.S. Constitution, Professor Ackerman relies on the superb work of his Yale colleague, Juan J. Linz, who is Sterling Professor of Political and Social Science. Juan J. Linz and Arturo Valenzuela, eds., 1 & 2 *The Failure of Presidential Democracy* (Johns Hopkins U. Press, 1994). Professor Linz's seminal work is mentioned throughout Professor Ackerman's recent Article, and thus this reply must be in part a response to Professor Linz as well as Professor Ackerman.

I should note that I was privileged to be a student of Professor Linz's during my undergraduate years in Yale College. I regret that I must disagree with him in this Article, but I take solace from the fact that my disagreements are prompted by concerns that he first brought to my attention almost 25 years ago in his course on the crisis and breakdown of democratic regimes.

4. Alfred Stepan and Cindy Skach, *Presidentialism and Parliamentarianism in*

separation of powers is today, as Woodrow Wilson might ruefully say, "the world's fashion."<sup>5</sup>

Ever since France switched to a form of presidential government in 1958<sup>6</sup> more and more new democracies have chosen presidentialism. In recent times, several parliamentary democracies including France and Israel have moved to presidentialist direct election of the Chief Executive, but no originally presidentialist regime has made the switch in the other direction. Bruce Ackerman is absolutely right to say that presidentialism is now the toast of the world.<sup>7</sup> It has joined such other American public law exports as written constitutions, judicial review, and federalism, all of which are among the United States of America's chief contributions to world thought. The U.S. may run a balance of trade deficit in many areas, but when it comes to the war of ideas we are running a big surplus as exporters of public law.<sup>8</sup> Former enemies like Russia, Germany, and Japan are all now governed under Constitutions that owe much to American thinking. So why is Professor Ackerman so sad? Why is this leading voice of American constitutionalism not joyful over our triumph in the war of ideas?

---

*Comparative Perspective*, in 1 *The Failure of Presidential Democracy* 119, 120 (cited in note 3).

5. Woodrow Wilson was a leading admirer of parliamentary government who urged its adoption in the United States and who described it in the 1880's as then being "the world's fashion." See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* 10 (Yale U. Press, 1999) (quoting Wilson).

6. The French form of presidential government may technically involve an alternation between presidential and parliamentary phases. Arend Lijphart argues that "the Fifth Republic is, instead of semipresidential, usually presidential and only occasionally parliamentary." Arend Lijphart, *Presidentialism and Majoritarian Democracy: Theoretical Observations*, in 1 *The Failure of Presidential Democracy* 91, 95 (cited in note 3). He believes, following Maurice Duverger, that the Fifth Republic has the dynamic of a presidential system when one party controls both the presidency and a majority in parliament and the dynamic of a parliamentary system when there is divided party control or "cohabitation" as the French call it.

7. Ackerman, 113 *Harv. L. Rev.* at 636 (cited in note 2). As this article went to press, Israel had just ended its experimentation with direct election of the prime minister but pro-reform forces in Japan were powerfully advocating a move to direct election of the prime minister.

8. In fairness, it should be noted that the U.S. legal system lags behind other Western countries in some important respects, especially because of its overly brutal system of criminal law enforcement, which relies excessively on the death penalty and on the highest rates of incarceration per capita of any advanced Western nation. Ironically, our rates of criminal incarceration would be lower today if our Supreme Court had adhered more stringently to the separation of powers when it wrongly upheld the constitutionality of the U.S. Sentencing Commission. See *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

The answer is that to some extent Ackerman is joyful.<sup>9</sup> In fact, he thinks the U.S. succeeded so well in assisting with the design of the German Constitution that we actually helped produce something better than the document that still governs us. Bruce Ackerman is *not* merely another in the long line of American progressives who, from Woodrow Wilson's time on, have preferred British-style parliamentary government to our home-spun American separation of powers. No, Ackerman likes the German system of parliamentary government precisely because it has some separation of powers but not as much as the U.S. has. Germany has a powerful constitutional court, which exercises judicial review—and states with real power—but it fuses the executive and legislature together into one entity, and Ackerman thinks this end result is better than either the U.S. or the British Westminster model.<sup>10</sup> Ackerman calls the German system constrained parliamentary government, and he prefers it to the British model because it does not give one party total power for winning just one election.<sup>11</sup> He prefers it to the American model because it produces less gridlock, fewer pathologies, and a more ideological system of governance.<sup>12</sup>

I think Professor Ackerman's preference for German style constrained parliamentary government is misplaced. While I prefer parliamentary government with judicial review and federalism to the monism of the British Westminster form, I much prefer the American separation of powers model to both the Berlin and London alternatives. And, I think it is high time that we Americans appreciated our homegrown system of the separation of powers and sang its praises more loudly. That is what I propose to do in this Article. I want unabashedly to discuss ten reasons why our form of constitutional design is a good form worthy of the emulation it has been receiving from other, newly-emerging democracies.

In doing this I shall conflate the term "presidentialism" with the term "separation of powers" because all presidential regimes, as the term is generally understood, have a separately

---

9. In all seriousness, I should note that Ackerman is exceptionally open-minded to consider the possibility that a Constitution other than the one he was born under might be the best in the world. Too few individuals possess this degree of open-mindedness, and I admire Ackerman for his cosmopolitan outlook even though I disagree with his conclusions.

10. Ackerman, 113 Harv. L. Rev. at 639 (cited in note 2).

11. *Id.* at 639-40.

12. *Id.* at 643-64.

elected executive and legislature, hence the phrase the separation of powers. I shall distinguish presidential regimes here from parliamentary regimes with the operative definition being that in a parliamentary regime the head of government (who I shall generically refer to as the Prime Minister)<sup>13</sup> is responsible to the legislature in the sense that he is dependent on the legislature's confidence and can be dismissed from office by a legislative vote of no confidence. In contrast, in a presidential system the president and the legislature are elected separately and the President holds his office for a fixed term of years.<sup>14</sup>

So why, then, is presidentialism and the separation of powers a good thing when compared with a constrained parliamentary regime subject to judicial review and with constitutional federalism guarantees to boot? Why are we Americans right to think that the libertarian, capitalist world order that we have helped to form over the last fifty years is well served by a regime-type designed 200 years ago in a very different world? I will proceed in answering those questions herein by contrasting my views with the differing views of Professor Ackerman and of his Yale colleague Juan Linz, on whom Ackerman significantly relies. Both Professors Ackerman and Linz can now be counted as being among the chief exponents of the virtues of German-style constrained parliamentary government for newly emerging democratic regimes. Professors Ackerman and Linz are among the ablest champions parliamentarianism has ever had, so I feel confident that in replying to their arguments, I am giving my intellectual opponents all that is their due.

---

13. In reality, many parliamentary regimes use other titles such as Premier, Chancellor, Minister-President, and Taoiseach (in Ireland). Lijphart, *Patterns of Democracy* at 117 (cited in note 5).

14. These two definitional criteria are used by Arend Lijphart and seem to me to capture the essential difference between the two regime types. Lijphart, *Patterns of Democracy* at 117-18 (cited in note 5). While there is much discussion in the political science literature about classificatory criteria, I am content with the two bare bones criteria listed simply because they most help us capture the essential differences between parliamentary and presidential forms. That being said, there are other differences of interest, particularly the fact as Lijphart notes in his third criteria of differentiation that parliamentary systems usually have a collegial executive while presidential systems typically have a hierarchical or unitary executive. *Id.* at 118. This difference is important as will be discussed later.

## II. PRESIDENTIAL GOVERNMENT IS SUPERIOR TO PARLIAMENTARY GOVERNMENT

The case for presidential government over parliamentary government includes both arguments for the former and against the latter. I want to begin with a discussion of the case for presidential government and then explain why I think Bruce Ackerman and Juan Linz are wrong to fear that U.S. style presidentialism will break down into dictatorship if it is exported to newly emerging democratic regimes.

### A. TEN ARGUMENTS FOR PRESIDENTIAL GOVERNMENT

The case for presidential government is usefully summarized into ten arguments supporting that type of regime. Cumulatively, these ten concerns suggest that presidentialism is: more democratic, more stable, less ideological, more protective of judicial review, and more libertarian than will be parliamentary regimes, all else being equal. These ten arguments by no means suggest that currently existing parliamentary regimes should abandon their Constitutions and immediately switch to presidentialism. But, they do suggest reasons for preferring presidentialism when drafting new Constitutions and for considering a change over to presidentialism when a countries' parliamentary institutions are not functioning well. Presidentialism thus is to be preferred only when all else remains equal, which of course is rarely the case in the real world.

#### 1. Sampling the Popular Will

A first argument favoring the American system of separation of powers over the German system of constrained parliamentary government is quite simply that the American system is more democratic and more sophisticated in its mechanism for sampling the Popular Will. In Ackerman's terms, the American system best answers the question: "How many elections should a political movement win before gaining how much lawmaking authority?"<sup>15</sup>

In a German-style constrained parliamentary regime, one national victory will give a party or a coalition of parties great power to nationalize or privatize, regulate or deregulate huge sectors of the economy. Only the constitutional court, and state

---

15. Ackerman, 113 Harv. L. Rev. at 643 (cited in note 2).

governments if any exist, could potentially stand in the way of a newly elected government with 51% of the vote in a constrained parliamentary regime. And, even the Constitutional Court could offer less of a check than would the Supreme Court in this country. Basically, German-style constrained parliamentary government gives a whole lot of power to a party for winning just one election by the narrowest margin, and, it is not even an election in which you get to vote differently as a citizen of the nation and as a member of a legislative district. One choice on one ballot<sup>16</sup> and that is it for the next four or five years.

This result reflects an inadequate sampling of public opinion. A countries' electoral regime ought to be able to distinguish between narrow and landslide majorities for particular positions and between positions that are held widely across the whole of a geographically diverse country and those that are held with great intensity only in some sections or regions. Similarly, a country's electoral regime ought to be able to distinguish the intensity with which particular positions are held. The electoral regime of the typical German-style constrained parliamentary government cannot make *any* of these finer distinctions. It offers great power to the narrow sectional majoritarian victor and to the landslide victor alike.

In contrast, the familiar dualistic American system—so famously described by Professor Ackerman himself in *We The People*<sup>17</sup>—looks much more constrained. A political movement has to win a whole lot of elections in very differently described constituencies for a much longer period of time before it can wield total lawmaking power. Our Madisonian system of staggered elections every two years for the House of Representatives, every four years for the presidency, and every six years for one third of the Senate is a much more sophisticated way of sampling the popular will than that offered by the German system. It gauges and recalibrates not only the geographical spread of particular viewpoints but also the intensity with which opinions are held. A political movement cannot sweep just one region of our geographically diverse country and prevail under our system. Nor will a political movement prevail if the issues giving rise to it lose their fire after two or even four years. The Madisonian electoral system provides for a kind of rolling and continuous sampling of public opinion over a full six year election

---

16. *Id.* at 643.

17. Ackerman, *We the People* (cited in note 1).



cycle with ten years or more of dominance required before a political movement can hope to appoint five or six of the nine justices on the U.S. Supreme Court.<sup>18</sup>

Moreover, the elections held in the U.S. system are qualitatively different in two vital ways from those held under a German constrained parliamentary system. First, they are held at arbitrary times and not at the beck and call of the current in-house elite, which in a parliamentary system can try to time elections to ensure a favorable result.<sup>19</sup> And second, U.S. elections are held in three carefully and differently defined geographical units: the congressional district which elects a Representative; the State, which elects a Senator in two cycles out of every three; and the nation which elects the president and vice president through the federalizing filter of the Electoral College. By continuously sampling these three very different geographical units over a rolling six year cycle, the American system is bound to track public opinion more closely than will a constrained parliamentary system in which fewer samples are taken in only one unit with only one choice offered to the voters. Americans have the luxury of splitting their tickets so that they can, for example, elect a conservative President who is hawkish on foreign policy issues and tough on crime while electing liberal Congresses to build up the social safety net. Germans have no such luxury, having only one ballot to cast with one choice where we typically have three. If they want a conservative foreign policy they have to accept a conservative domestic policy in the legislature because the system has bundled the issues together and gives them only one vote for Chancellor and for Representative. This bundling together means fewer choices for German voters than we Americans typically enjoy and therefore less democracy.

The American system is bound to do a better job of sampling the popular will for exactly the same reason a sophisticated daily tracking poll will be superior to a weekly or monthly poll that can miss a sudden sea change in public sentiments. Both the American system and a tracking poll take more samples of public opinion in more units and in both cases better information leads to a more accurate result. If one truly wants democratic governance, more elections in more units clearly offers more

---

18. "All in all, the American system sometimes requires a political movement to keep on winning elections for ten years or more before it can assume full control over all key institutions . . ." Ackerman, 113 Harv. L. Rev. at 650 (cited in note 2).

19. *Id.* at 644.

democracy. Obviously, there are other important principles at stake besides and, accordingly, I would not agree with those colonial Americans who thought that "where annual elections end, tyranny begins."<sup>20</sup> But I also would not give up on our practice of having mid-term elections every two years to check the party that last won the presidency, as we often do. A two year blank check proved to be quite enough to voters in 1994 when they took away some of the power they had given Bill Clinton in 1992. And, the same thing happened again in 1982 when the voters took away some of the power they had given Ronald Reagan in 1980. A German style constrained parliamentary system would offer no mid-term opportunity to rein in the hubris and over-reaching of recent political winners and recent history in the United States suggests that could prove to be a costly loss of democratic power in many, many instances. The first advantage of the American system of separation of powers is that it more accurately samples the popular will.

## 2. Guaranteeing Stability

A second argument favoring the American separation of powers regime over a German constrained parliamentary regime is that the American system offers more stability than the German system.<sup>21</sup> Just as it is vital for a democracy to take many accurate soundings of public opinion, so too is it vital that the winners be empowered to act once the elections have been held. Powerful individual and corporate economic actors need political stability if they are to be able to make the long-range investment decisions that modern capitalism absolutely requires. Sadly, parliamentary government has all too often degenerated into a spectacle of instability as happened in France under the Third and Fourth Republics with its weak *régimes d'assemblée* governments or more recently in Italy, which has had more than 50 governments since World War II, or in Israel or Japan. All of these regimes degenerated into or experienced weak revolving-

---

20. Federalist 53 (Madison) in Isaac Framnick, ed., *The Federalist Papers* 326, 326 (Penguin Books, 1987).

21. Juan Linz implicitly concedes this point and views it as the single biggest advantage of American style presidential government. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference*, in 1 *The Failure of Presidential Democracy* 3, 65 (cited in note 3) ("I have to admit that government instability has been one of the strong arguments against parliamentarism and in favor of presidentialism."). See also Arend Lijphart, ed., *Parliamentary Versus Presidential Government* 11 (Oxford U. Press, 1992) ("The first advantage of presidential government, executive stability, is based on the president's fixed term of office").

door Cabinets that could not persist in office for long enough to govern. No sooner would a Cabinet Government be formed than one of the coalition parties necessary to its formation would drop out. The result typically is constant government crisis with the bureaucracy running every thing on autopilot while democratic politicians squabble. In the best of circumstances, this leads, as it has done in modern Italy, to public disenchantment and the irrelevance of democratic institutions. In the worst of circumstances, in Weimar Germany, revolving door Cabinets paved the way for the success of anti-democratic forces led by Hitler and the Communist opposition. Indeed, Hitler and the Communists at times pooled their forces in the Weimar Republic to produce chaos-causing votes of no confidence with their infamous red-brown anti-democratic coalitions.

Instability can be fatal to a democracy as it was to the Weimar Republic and to the French Third and Fourth Republics because people conclude elections are meaningless if the governments they produce always collapse before the Ministers can do anything. Democracy requires that elections generate clear winners and losers who can either govern or head up the loyal opposition and many parliamentary governments have clearly failed even in the present era to achieve that most basic end. It is for this reason that Israel recently experimented with direct popular election of the prime minister—a major step toward presidential government<sup>22</sup>—and that Italy is also debating whether to move to direct election of the prime minister. Both of these countries have tired of the weakness and instability of *régime d'assemblée* governments and, encouraged by the presidentialist example of France's Fifth Republic, they have considered moving toward or in Israel's case have moved toward presidentialism.

In Israel, the weakness and instability of the majority coalition governments often gave great power to small fringe parties. Because Israel has a very extreme form of proportional representation, small and extreme religious parties in the Knesset with only one or two seats sometimes ended up holding enormous

---

22. Leading political scientist Arend Lijphart classifies Israel as having been a presidential democracy since that country's adoption in 1996 of direct election of the Prime Minister. Lijphart, *Patterns of Democracy* at 123-24 (cited in note 5). As this article went to press, Israel had just ended its experimentation with direct election because that system turned out to be incompatible with the proportional representation used to select members of the Israeli Knesset. In other countries like Japan, however, the newly empowered reform Prime Minister is advocating a move to direct election of the prime minister.

power to make or break a coalition government. Many observers concluded that the Israeli electoral system gave these fringe parties way too much power, which they could use to extract policy concessions that a clear majority of the Israeli people rejected. A good electoral system should result in the generation of a government and a loyal opposition that reflect the public's major bodies of opinion without turning oddball fringe elements into the king-makers of national politics. Parliamentary coalition governments that are dependent on very small parties for their continuation in office are always at the mercy of the demands of those small parties, which may demand policy concessions that are resented by large national majorities.

Presidential government solves the problem of stability by guaranteeing that the executive and legislative officers will serve for a fixed term of years regardless of subsequent events and regardless of the extreme demands of a few of the government's supporters. Even when an election produces an indeterminate compromise outcome by, for example, producing divided party control of the presidency and the legislature, the compromise result is a stable one for a fixed term of years. For example, in the U.S. today President Bush and his Democratic opponents in the Senate and the House are firmly empowered for the next year and one-half without regard to any sea change in public opinion that could occur. The approval ratings of the President or the Congress could plunge tomorrow and the President and Congress would still serve out their terms until January 2003 or 2005. Since democracies need stability and since modern capitalism rewards political regimes that offer a stable investment climate, the fact that presidential government can offer such stability is a big plus. It definitely makes presidential government superior to a *régime d'assemblée* type of weak, revolving-door Cabinets of the kind that is sometimes generated in parliamentary regimes.

Professor Ackerman believes the problem of instability in parliamentary regimes has been solved by two features of the German constrained parliamentary model which have been widely emulated. These features are: first, the 5% threshold which parties must meet to be represented in parliament; and second, the requirement that only constructive votes of no confidence can succeed.<sup>23</sup>

---

23. Ackerman, 113 Harv. L. Rev. at 654-55 (cited in note 2).

These provisions DO represent great improvements and merit some discussion. The 5% threshold as it works in Germany prevents any party that receives less than 5% of the vote from being represented in the legislature under proportional representation. The threshold is supposed to eliminate fringe parties and extremist groups while still permitting important or mainstream third and fourth parties to be proportionally represented. In Germany, which also has a constitutional ban on some anti-regime parties, the 5% threshold does seem to have produced *for the moment* a pretty stable multi-party system with no serious anti-regime elements currently represented in the German Parliament. The Christian and Social Democrats in Germany have had to deal with only a moderate Free Democratic (classical liberal) Party, with an environmentalist party, the Greens, and with the democratic successor to the East German Communist Party. To date, the various neo-Nazi parties, undemocratic Leftist parties, and anti-immigrant groups have gone mostly unrepresented.

The operative phrase here is “to date”. It is quite easy to imagine any of those more extreme groups meeting the 5% threshold in the future, particularly if they pool their resources. Consider the case of Germany’s next-door neighbor Austria. In Austria, a hateful anti-immigrant bigot Jörg Haider has for years been represented in the Austrian parliament under that country’s system of proportional representation. Initially, the moderate right-of-center party and the Socialists formed a pro-democratic grand coalition government to keep Haider out of office. This grand coalition was necessary because the Socialists, even with a substantial plurality of the vote that would have given them victory under U.S. electoral rules, could not clear 51% of the vote in the legislature as needed under proportional representation to survive a vote of no confidence. The Socialist/Conservative Grand Coalition Government in Austria persisted for many years united in the desire to keep Jörg Haider out of power. With every passing election, the Coalition lost strength, and Jörg Haider’s anti-immigrant forces gained strength, in part because Haider was the only opposition anyone could vote for, there being no “Loyal” opposition. Eventually Haider’s party became the second biggest of the three, winning well over 20% of the vote in Austria’s most recent national elections and at that point the Conservatives, now in third place, dropped out of their coalition government with the Socialists

and formed a coalition with Haider, thereby letting a hatefully racist group assume national power.

This development is distressing in and of itself, but it is doubly distressing because it looks eerily like the political developments that helped to destabilize the Weimar Republic and that opened the door to Hitler's rise to power in Weimar, Germany. In both cases, proportional representation gave Hitler and Haider an initial position in the legislature, which was divided between democratic forces in the government and anti-democratic forces in opposition to the government. In both cases, years of attrition and normal wear and tear shrank the size of the pro-democratic forces in the government and swelled the ranks of the anti-government "disloyal" opposition. Finally, a breakthrough occurs whereby Hitler and Haider are suddenly deemed not *that* unacceptable, and they make it into the Cabinet. The final stage, which has yet to occur in Austria and which I hope will never occur, is for the leader of the anti-regime forces to take over as Chancellor or Prime Minister.

The recent Austrian developments suggest to me that reliance on a 5% threshold to keep anti-democratic extremists out of the legislature is insufficient. Racist and other extremist parties in many western countries have easily cleared 5% support in many public opinion polls at many times in the last 50 years. Jean Marie Le Pen, the racist anti-immigrant leader in France has often polled over 10% of the vote in that country and neo-Nazi's have hovered near 5% of the vote in Germany for many years.<sup>24</sup> Stalinist parties often cleared the 5% hurdle in France and Italy for a time after World War II. Even in the United States, George Wallace received well over 5% of the vote in his 1968 bid for the U.S. presidency. A 5% threshold is simply too low to keep virulently racist and anti-democratic parties out of the legislature and out of a position where they can play king-maker in parliamentary coalition politics.

A 5% threshold is surely better than no such threshold, and it has to date worked well in Germany in part because of divisions among neo-Nazi elements. But, it is all too easy for me to imagine the Jörg Haider phenomenon succeeding in present day Germany, much as it did in Austria. It is vitally important that

---

24. The French Fifth Republic reintroduced proportional representation in 1986. France currently has a 12% threshold. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 *The Failure of Presidential Democracy* 3, 65 (cited in note 3).

the Government face a loyal opposition that is always ready and able to take over from it if the economy falters or if there is an unexpected foreign policy setback. Proportional representation reduces the likelihood of there being a stable government and a stable opposition that is loyal and that can govern on its own. If the pro-regime parties have to form a grand coalition to prevent wacky racist or religious or stalinist parties from making extreme demands, then it will only be a matter of time before that coalition disintegrates and some anti-regime elements get welcomed into the Cabinet. Better two moderate right- and left-of-center coalitions than a Cabinet with openly anti-regime parties represented.

Professor Ackerman might respond by suggesting raising the threshold from 5% to 10%, or by suggesting abolition of proportional representation altogether. I would heartily endorse either move for reasons that I discuss further below. But for now let it suffice to note that raising the threshold even to 10% would not stop Haider or Le Pen. They clear 10% in most opinion polls quite easily. A stable democratic government or a loyal opposition cannot by definition be reliant on the votes of racist, anti-immigrant, or violence-condoning political parties. It is a great weakness of parliamentary democracy that it often empowers these anti-regime fringe elements.

Well, what about the constructive vote of no confidence? This is a rule that prevents future red-brown coalitions by providing that a vote of no confidence can only succeed if it is a vote *for* a new government and not merely a vote *against* a current government. Like the 5% threshold, this too is a good idea which I whole-heartedly endorse. The constructive vote of no confidence prevents anti-regime parties from ganging up on the pro-regime parties when they have no common agenda. It prevents, in other words, the Nazis and the Communists from voting out of office a Centrist Government when they themselves share no common program.<sup>25</sup>

The problem with the constructive vote of no confidence is that it cannot prevent a red-brown coalition in the legislature from voting down the government's bills. Such a coalition, if it includes a majority of the legislature, can prevent passage of a

---

25. As Linz explains, "This constitutional device gives the prime minister in parliamentary systems a strong position; he or she cannot be overthrown by a purely negative majority, as happened in the Weimar Republic when Nazis and Communists made stable government impossible but were unable to provide an alternative one." *Id.* at 66.

budget, of foreign policy bills, indeed of all legislation. The only thing such a negative 51% coalition cannot do is elect a Chancellor or Prime Minister. The constructive vote of no confidence, like the 5% threshold, is an improvement over the rules of Weimar Germany, but it is no substitute for a stable two party system with a moderate left and right both of which can alternate in government. Both the constructive vote of no confidence and the 5% threshold allow anti-regime parties to play a destabilizing role in legislative politics, including in the election of the government. Stability is important to a democracy, and presidential government is more stable than is parliamentary government because it is less likely to find itself beholden to extremist elements.

There is one final argument about presidentialism and stability which needs to be addressed, and that is Juan Linz's point that in the U.S. our presidents may reliably serve for four or eight year terms but our Cabinet Secretaries and Assistant Secretaries tend to stay in office for much briefer periods of time.<sup>26</sup> Linz points out that U.S. Cabinet Secretaries actually typically serve for less long than do Cabinet Secretaries in the overwhelming majority of parliamentary regimes.<sup>27</sup> Ministerial duration is short in America, and Linz rightly asks if this may not counteract any gain in stability at the level of the chief executive officer.<sup>28</sup> I do not think it does.

---

26. Ackerman notes that the "median tenure of a political appointee has been going down for some time and is now about two years. One third serve for less than one and a half years!" Ackerman, 113 Harv. L. Rev. at 706-07 (cited in note 2) (footnote omitted).

27. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 *The Failure of Presidential Democracy* 31, 65 (cited in note 3). Linz quotes Jean Blondel as claiming that "[m]inisterial duration is short in America: among Atlantic countries only Finland, Portugal and Greece had a shorter duration of ministers than the U.S.—which, on the other hand, with ministers lasting an average just over three years, scores only a little more than the bulk of the Latin American countries, and is precisely at almost the same point as Costa Rica. Constitutional presidentialism does therefore lead, even where it has operated effectively and without hindrance, to a low ministerial duration . . . ." Id. at 31; see also, Alfred Stepan and Cindy Skach, *Presidentialism and Parliamentarism in Comparative Perspective*, in 1 *The Failure of Presidential Democracy* 119, 127 (cited in note 3) ("the average duration of a minister in any one appointment is almost twice as long in parliamentary democracies as it is in presidential democracies").

28. Linz observes that "Government instability has been one of the strongest arguments against parliamentarism and in favor of presidentialism. In making that argument, it has been forgotten that there is considerable cabinet instability in presidential systems . . ." Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 *The Failure of Presidential Democracy* 3, 65 (cited in note 3). Ackerman also argues that the rapid turnover in political appointees in the U.S. is a problem. Ackerman, 113 Harv. L. Rev. at 706-09 (cited in note 2).



Cabinet Secretaries in the U.S. administer their departments in conjunction with a life-tenured civil service bureaucracy and with the congressional oversight committees and subcommittees that are responsible for their departments. The congressional committees and subcommittees are in essence quasi-parliamentary executive structures that but for the Incompatibility Clause of Article I, Section 6 would long ago have wrested the Cabinet Departments away from presidential control.<sup>29</sup> These quasi-parliamentary executive committee structures have very stable memberships that change little over time and that provide some of the stability that might otherwise be lacking because of the rapid turnover in presidentially appointed Cabinet Secretaries and Assistant Secretaries. To pick just one example, the Senate Judiciary Committee has essentially been dominated for the last 25 years by only four men: Senators Edward M. Kennedy, Orrin Hatch, Joseph Biden, and Strom Thurmond. These four men have outlasted six Attorneys General and perhaps several hundred junior level Justice Department employees. No account of the stability of the personnel involved in U.S. Justice Department policy would be complete without accounting for the influence of Senators Kennedy, Hatch, Biden, and Thurmond. Indeed, a case could be made that these four men have each been more important to that policy than were any one of the six Attorneys General who have held office in the last quarter century.

The United States makes up for its lack of ministerial stability in presidential appointees with an astonishing degree of stability in its oversight congressional committee personnel and with great stability in the top ranks of the bureaucracy as well. Stability of executive structures is thus a strong point of the U.S. system and provides a solid reason for preferring U.S. style presidentialism to the revolving door Cabinets of Italy or Japan or Israel before 1996.

### 3. Democratic Legitimacy: the Prime Minister

A third and related advantage of U.S.-style presidential government over German-style constrained parliamentary government is that under the U.S. system the Chief Executive Officer is picked indirectly by the people in an open election rather

---

29. This complicated argument and relationship is developed at greater length in Steven G. Calabresi and Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045 (1994).

than being picked by legislative political elites in a back room.<sup>30</sup> This is a great advantage of presidential systems since there is a significant loss of democratic legitimacy when important party leaders and potential Chancellors like Helmut Kohl and Gerhard Schroeder are picked by legislative elites behind closed doors. The selection of a nation's Chief Executive is one of the most important decisions any democracy has to make. To have the two or three leading candidates for such a post be picked by party leaders, instead of in open primaries, inevitably lessens popular control of the government. For many readers this advantage of presidentialism over parliamentarianism may be dispositive just by itself. The people of a country ought to be able to pick directly their most important public official.<sup>31</sup>

Defenders of parliamentary government might note that the people do get a final choice in a parliamentary regime when they chose between the leading party-chosen candidates. This is true but the selection of who those candidates ought to be and therefore the range of the final choice available to the voters is not democratically made in a parliamentary system. American voters know well the advantages of our system of primary elections for selecting presidential candidates. American primaries winnow the field and frequently tell us a great deal about the character, the beliefs, and the flaws in our presidential candidates. Even candidates who are favored by party leaders like George W. Bush and Al Gore are forced to build a popular base if they are to succeed in getting a party's presidential nomination.<sup>32</sup>

30. Lijphart, *Parliamentary Versus Presidential Government* at 12-14 (cited in note 21) ("The second major advantage of presidential government is that its popular election of the chief executive can be regarded as more democratic than the indirect 'election'—formal or informal—of the executive in parliamentary systems.")

31. Of course in the U.S. the choice is technically indirect because of the existence of the Electoral College but in reality the choice is direct since for over 100 years prior to the 2000 election and for most of our history before that the popular vote winner and the Electoral College vote winner have been the same person.

32. The proposition that primary voters are better at selecting leaders than are members of the legislature can actually be empirically tested by comparing the post-1960 presidential and vice presidential candidates in the United States. The former were selected in significant part by electorates of primary voters while the latter were selected by the ultimate elite figure in each party—the presidential nominee. The vice presidential nominees in this period include seven strong candidates: Hubert Humphrey, Walter Mondale, George H.W. Bush, Lloyd Bentsen, Al Gore, Dick Cheney, and Joseph Lieberman—two of whom were picked in the current electoral cycle. The six weak vice presidential nominees during this period include William Miller, Spiro Agnew, Robert Dole, Geraldine Ferraro, Dan Quayle, and Jack Kemp. (Dan Quayle, for whom I briefly worked and whom I admire, was unfairly but indelibly classified as being a weak candidate). Seven strong vice presidential candidates and six weak ones suggests something approaching a 50% failure rate when it comes to elite selection of vice presidents. In

This need for popular legitimation of presidential candidates is a very good feature of the American system of selecting Chief Executives, which is lacking in parliamentary regimes. It should not be sufficient to win a national nomination for a leader to have the backing only of party insiders and not of the rank and file voters. Building a popular base, first in one's party, and then among the electorate at large, qualifies a candidate to govern. Candidates for Chief Executive ought to be forced to build such a popular base rather than being merely able to win among the party's more elite legislative members.

Once nominated, candidates in a presidential system face the people in an election that they must win on their own and not by being carried into office by the popularity of their political party or its issue positions. In some parliamentary regimes, like Italy's until recently, the nominee of the biggest party was bound to become prime minister even if he was not the best man for the job. Presidential candidates cannot coast on their parties' reputations, platforms, or credentials but must prove themselves to be the best Chief Executive on the merits. This, too, is an advantage of presidential systems.

There is no reason to believe that legislators are better than the people themselves at picking chief executive officers. The talents that make someone a good legislator or policy-maker are not necessarily ones that would carry over into being a good judge of government personnel. Legislators may pick Prime Ministers not because an individual is the best for the job but in order to facilitate the passage of some bill that is important to their state and district. Tying together the job of the legislator

---

contrast, the presidential candidates during this period, selected in part by primary voters, were much stronger. Strong candidates in my opinion included nine individuals: Lyndon Johnson, Hubert Humphrey, Gerald Ford, Ronald Reagan, Walter Mondale, Michael Dukakis, George H.W. Bush, Al Gore, and George W. Bush. Two more, Richard Nixon and Bill Clinton could be ranked as brilliant but warped. Weak candidates included four individuals: Barry Goldwater, George McGovern, Jimmy Carter, and Robert Dole, and even they were not without their strengths.

By my evaluation, at least nine out of fifteen presidential candidates selected by presidential primary electorates during the last thirty-six years were strong candidates who were well qualified to hold the top office. In contrast, only fifty percent of the vice presidential candidates picked through an elite process during the same period of time were comparably strong. I submit this record provides empirical support for the intuition that democratic selection of a nation's top officials through a process of primary elections is valuable, if not indispensable. It is, of course, possible that elites would do a better job of picking the top candidate on a two person ticket than they have done at picking the number two candidate, but this seems unlikely to me and, in any event, could not explain all of what I perceive as being a large gap in the quality of presidential as opposed to vice presidential candidates.

and the job of selecting the chief executive is thus a bad idea. It guarantees that the localist, pork barrel perspective of a Representative will play some role in picking a person whose function is to be chief executive of the nation. This is a serious mistake.

Relatedly, there is a noticeable difference between the kinds of politicians who become Prime Ministers in parliamentary systems and the kinds of politicians who become presidents in presidential systems. Prime Ministers, especially in multi-party regimes like Italy and Japan tend to be colorless, machine politicians who are bland compromise figures acceptable to all the party bosses because they will not rock any boats. They often lack the charisma and the ability to speak on television to the nation that presidents have, and they are unlikely to inspire young people the way a John F. Kennedy or a Ronald Reagan could. The typical legislative leader is a figure like former House Speakers Carl Albert or Tip O'Neill or current House Speaker Dennis Hastert. These individuals may make great log-rollers, but they are not the kind of people to lead a nation into a war, either on poverty or against Iraq. Young people in Italy and Japan faced with Prime Ministers like Carl Albert and Denis Hastert are bound to become disenchanted with or at least uninterested in democracy. This has in fact occurred historically, as colorless, machine politicians picked by elites have hurt the democratic cause in France before 1958, in Italy, in Japan, in Israel, and in India.

Direct election by the people is essential today for legitimacy and even the strongest parliamentary regimes like Germany and Spain have suffered because they have lacked leaders picked directly by the people. Germany, for example, was governed for years by the uncharismatic Helmut Kohl, an individual who is in many ways typical of the logrolling leader who tends to get picked when legislators select the Chief Executive. Kohl, like virtually all the recent Prime Ministers of Italy and of Japan, was a compromise figure whose main talent was in assembling a party caucus majority by appeasing different party factions rather than in appealing to voters. Like many of his recent Italian and Japanese counterparts, Kohl was an uninspiring figure who was a typical career politician and log-roller. Even as he presided over major historic events like the reunification of Germany and the expansion of the European Union, Kohl was viewed as a stolid and stable figure but not a great inspirational leader. He ultimately, like many of the logrolling Prime Ministers of Italy and Japan, was enmeshed in scandal, although in

Kohl's case not until after he had left office. Helmut Kohl was by far the longest serving and most successful of the non-British Prime Ministers of recent years, and yet even he showed signs of the leadership flaws that typified Prime Ministers in Italy, Japan, and other weaker parliamentary democracies.

To be sure, there have been exceptions to the general rule described above. Prime Ministers Felipe Gonzales of Spain and Margaret Thatcher of Great Britain are certainly charismatic figures with a genuine popular following in their home countries. Great Britain, however, is unlike most constrained parliamentary democracies in that it does not require proportional representation and so has a vigorous two party system. This two party system in turn produces strong Prime Ministers who are not beholden to minor party members of a legislative coalition. Spain under Felipe Gonzales was a newly emerged democracy that still elicited great public support from those who remembered and feared a return of Franco-style fascism. It remains to be seen whether Gonzales' successors will be as charismatic and will generate as much public support as he unquestionably did.

My point here is not that all parliamentary leaders are uncharismatic, stolid logrolling figures like Tip O'Neil but merely that parliamentary leaders tend to be like that compared with Presidents. It is a bad and dangerous thing for a democracy to be always personified by figures that lack charismatic appeal, because the foes of democracy often attack it for putting compromise and logrolling ahead of principle. In fact, it is a great strength of democracy that it usually puts compromise and logrolling ahead of principle because this is a reason democracy leads to stability and prevents violence. But, it may be desirable for a democracy to showcase leaders who have a little more popular appeal rather than showcasing the leaders who do the compromising. Presidential government does this by putting charismatic leaders in the presidency and compromise leaders in less visible but quite vital positions in the legislature. This protects democracy by giving it charismatic leaders who can fulfill the public's longing for that type of leadership, thus foreclosing the emergence of fascistic or communistic leaders who can campaign as charismatic alternatives to compromising democratic politicians.

## 4. Democratic Legitimacy: the Cabinet and the Bureaucracy

A fourth advantage of American-style presidential government over German-style constrained parliamentary government is that it leads to enhanced democratic control of the Cabinet and of the bureaucracy. Just as popular control of the Prime Minister or CEO is important to democratic legitimacy, so too is popular control of these other lesser but critically important executive offices. Several features of parliamentary government cause reduced popular control over the Cabinet and the bureaucracy in my opinion.

Beginning with the Cabinet, it is important to note a point emphasized by political scientist Arend Lijphart who argues that one of the three key distinctions between presidential and parliamentary regimes is whether they have a unitary leader, as presidential systems have, or a collegial executive, as parliamentary systems have.<sup>33</sup> Lijphart argues that presidential executive structures are hierarchical, with the president firmly in charge, whereas Prime Ministerial executive structures are collegial with the Prime Minister usually only the first among equals.<sup>34</sup> I agree with Lijphart that this is a key distinction between presidential and parliamentary governments. In parliamentary governments, Prime Ministers often have to cede whole Cabinet Ministries and their policy portfolios to powerful factions in their ruling coalition. For example, the powerful former German Prime Minister Helmut Kohl ceded the foreign ministry for many years to his Free Democratic Party coalition partners. In Italy and Japan, and in Israel until it temporarily adopted a form of presidential government in 1996, powerful ministries were routinely divvied up among the multiple party coalition partners who formed every government. The problem with this system is one that we Americans have learned to call "Agency Capture", except that in these instances what is usually being captured is a whole Cabinet Ministry. Cabinet or Agency Capture occurs when the individuals who are most interested in the policy decision of a Ministry or Agency devote all their political capital to capturing that Ministry or Agency and turning it to their own purposes. The problem with Agency Capture is that it puts the foxes in charge of the chicken house, as it were. Those who are supposed to be regulated by an agency become instead the masters of it.

---

33. Arend Lijphart, *Presidentialism and Majoritarian Democracy: Theoretical Observations*, in 1 *The Failure of Presidential Democracy* 91, 93 (cited in note 3).

34. *Id.*

Agency and Cabinet Capture are a genuine problem in the United States. Agencies like the Federal Trade Commission and Cabinet Departments, like the Commerce and Labor Departments, are all too often captured by those whom they are supposed to regulate. A key check against Capture according to most scholars is America's unitary executive. The President, who is alone vested with all of the executive power<sup>35</sup> and is elected by all of the people, can be lobbied to rein in special interests in his electoral coalition. He can be urged to prevent special interest groups or ideologues from diverting public policy into immoderate or non-public-interested directions. And, any President who fails to do this may be punished (or see his heir apparent punished) in the next electoral cycle. Voters in the United States expect a President to fight against special interest capture and they will reward or punish him for the caliber of his Cabinet appointments.

In a parliamentary democracy, on the other hand, Cabinet or Agency Capture is foreordained to be a major problem. Ministries are typically given out to leading figures in parties who are vital members of the coalition, and key ministries often go to leading factions within even one party. Whereas in the United States only the less important agencies and Departments are given away, in parliamentary democracies it is not uncommon for vital ministries like Foreign Affairs and the Treasury and the Interior Ministry to be handed out as key plums to factional or minor party coalition leaders. A Prime Minister may not only emerge as a first among equals, he may have little power at all to check what his coalition partners do in their own Cabinet fiefdoms. Since the Prime Minister may have to depend on his coalition partners for support in the event of a no confidence vote, he may well find himself in a very weak bargaining position overall. Fringe parties like Jörg Haider's in Austria or the small religious parties in Israel may capture vital Cabinet Ministries that particularly interest them, and they may divert national policy in their domains away from moderate left or right of center positions to suit their own partisan ends.

In the United States, we must constantly wrestle with the problem of Agency or Cabinet Capture and the President is always our most reliable backstop against it because of his electoral incentives toward moderation. In a parliamentary regime,

---

35. See *Myers v. United States*, 272 U.S. 52, 138-39 (1926); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

the Prime Minister's incentives are very different from those faced by our Presidents. Instead of worrying about moderate swing voters, Prime Ministers have to worry about appeasing fringe parties and factions which are able to bring down their government. The result is that policy gets made to appease fringe groups instead of centrists and so Cabinet Capture is a key part of the dynamic in parliamentary regimes.

This phenomenon feeds into the general dissatisfaction that the public may experience with parliamentary government in weak, multi-party systems. The public dislikes the power that fringe groups like Haider's or the Israeli religious parties wield in very fragmented multiparty regimes. Having extreme parties wield great power over key Cabinet Ministries like Foreign Affairs or Treasury or Interior is frightening and disillusioning at the same time. It causes centrist voters to lose faith in democracy and opens the door for populist appeals by anti-democratic forces in the military and elsewhere who condemn the bickering and bartering of party leaders always out to divide the spoils of high government office. Presidential Government helps avoid Cabinet and Agency Capture because the President is empowered hierarchically to rein in his coalition partners and to assert the preferences of the moderate swing voter. Parliamentary Government on the other hand institutionalizes Cabinet and Agency Capture, because it is by this mechanism that legislative majority coalitions get put together.

When one looks below the Cabinet level at other posts in the bureaucracy much the same dynamic can be seen. In a presidential system like ours, subordinate executive positions get filled with about 4,000 or so supporters of the President and his agenda who get appointed to the so-called exempt or schedule C political spots that constitute the Clinton Administration or Reagan Administration. A great feature of our system is that every four to eight years the whole upper range of the executive branch is reinvented from scratch as new presidents bring in talented outsiders from business, academia, and law firms to fill the 4,000 or so positions that constitute the new administration. This infusion of fresh blood helps maintain civilian control over the bureaucracy by exposing the life-tenured non-policymaking bureaucrats to a regular stream of "in-and-outers"—political appointees who serve in government for a few years and then return to the private sector.<sup>36</sup> It is good for life-tenured

---

36. For more discussion, see Steven G. Calabresi, *The President, the Supreme Court*



bureaucrats to be exposed to and supervised by civilians in this way, even though they often do not much like it. Popular control of the government would be less meaningful if it did not reach down into the depths of the bureaucracy where many policy decisions in fact get made.

Professor Ackerman criticizes the American system for its lack of professionalism, and he suggests the more careerist bureaucracies in many parliamentary regimes are more likely to follow Rule of Law values and to implement policies consistently over time.<sup>37</sup> Ackerman especially dislikes the tug of war that often goes on between presidential political appointees and congressional committee staffs for the allegiance of the professional bureaucrats who must sometimes take direction from both the President's appointees and the legislative leaders of an opposition political party in Congress.<sup>38</sup>

Ackerman is probably right that there is some loss of consistency and Rule of Law values inherent in the American system,<sup>39</sup> but he overlooks an enormous gain in democratic legitimacy that is accomplished by forcing career bureaucrats to always engage in dialogue with presidential appointees and congressional committee staffs. This constant exposure of professional decision-makers to civilian superiors is democratizing in exactly the same way as the system of trial by jury is democratizing. There is probably some cost in terms of the Rule of Law (as there surely is with jury trials) but the desirability of decentralization and the threat of tyranny outweighs that for me (as it does also with trial by jury). There is great value in intermingling professional and civilian decision-makers as each can learn from exposure to the other. The American system does this in a very clever fashion, which should not be underestimated even if it has yet to be romanticized in the way jury trial has been.

Moreover, there are other benefits to the American system that are analogous to those that flow from the jury system as well. It is often mentioned that an advantage of trial by jury is that it educates the citizenry in the American system of govern-

---

*and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 *Law & Contemporary Problems* 61 (Winter, 1998); see also Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 *Law & Contemporary Problems* 83 (Spring, 1998) (making the case for less reliance on presidentially appointed "in-and-outers" and more reliance on civil service protected personnel).

37. Ackerman, 113 *Harv. L. Rev.* at 690-92, 712-14 (cited in note 2).

38. *Id.*

39. *Id.*

ment and imparts to them important values that make democracy work better. The same I submit is true of our system of selecting congressional and junior Administration staffers to hold key political positions in an Administration. It is democratizing to control the bureaucracy through several thousand junior level Administration and congressional staffers because those staffers become better educated as to how our system of government really works. Raising such junior level staffers up to positions of power and then regularly cutting them down again when an Administration ends is democratizing of the whole social order. It creates a large cadre of former executive and junior level congressional staffers who can be drawn on by future Administrations and who feel a special loyalty to the departments and institutions of the U.S. government. Citizens who are former jurors make better citizens and citizens with Capital Hill or Administration experience will be better citizens.

##### 5. Two Party Systems and Presidential Government

A fifth advantage of U.S.-style presidential government over German-style parliamentary government is that presidentialism leads to two party systems and two party systems are stable and democracy-enhancing. Both of these points require elaboration, and I will start with the last point first.

The advantage of a two party system is that it tends to result in a high degree of moderation in a political system. When there are only two political parties competing with each other both parties tend to compete for and focus their attention on the centrist voter. The two parties are usually moderately left of center and moderately right of center and both resemble large coalitions with a variety of very different factional elements. In a regime with a two party system, the factions must be brought together in one of the two coalitions before any voting takes place. The voters then get to choose between the two coalitions and the centrist voter is often most empowered. Both party coalitions have an incentive to submerge and/or tame their most extreme elements to win over centrist voters and extremists, understanding this, will grudgingly comply. The whole system tends to revolve around the needs and preferences of the middle 20% of the electorate. The right-most 40% and the left-most 40% are de-emphasized except to the extent that they agree with one another. Because coalitions are formed before any voting takes place both parties are constantly trying to put on a moderate image aimed at appealing to the critical swing voter. The parties

thus have an incentive to keep their rhetoric and public images as reasonable as possible.

In multi-party regimes on the other hand with proportional representation, the parties compete publicly and visibly for definable niches on the political spectrum. There is an incentive to exploit racial, ethnic, linguistic, and religious differences to try to win a place on the political spectrum. Once represented in the legislature, a party will bargain to secure the maximum amount of policy leverage for its position on the issues its members care most about. The politics of such a regime are far more fragmented than those of a two-party regime and coalitions tend to get put together after elections are held rather than before as in an American style two party system.

The advantage of the two-party system is that it is much less likely to lead to democratic breakdown than is the multi-party system, and it is much more likely to lead to moderate politics and rhetoric in politics. For individuals who are cautious and who fear democratic breakdowns, which have historically led to warfare, ethnic cleansing, and violent persecution, the advantages of a stable two-party system seem very clear. As the child and grandchild of World War II refugees, I personally cannot imagine gambling on a multi-party regime over a more moderate two-party regime if I had any choice in the matter. The costs of democratic breakdown are so high and the comparative benefits of a multi-party system so low that I cannot imagine the risk being worth taking. Change in democracies is best managed incrementally and moderate two party systems are well suited to make incremental changes. Cumulatively, those changes can be quite considerable as citizens of the U.S. learned during the New Deal or Great Society eras. There is simply no need for a multi-party system in order to accomplish fundamental change in a democracy. Those changes will happen anyway under a two party system if they have majority support.

Assuming that a two party system is desirable, as I believe it is, what evidence can be adduced to suggest that presidentialism is likely to lead to the emergence of a two party system? To begin with, the experience in France since 1958 tends to confirm that it is likely to lead to a two party system according to political scientists Juan Linz,<sup>40</sup> Arend Lijphart,<sup>41</sup> Giovanni Sartori,<sup>42</sup>

---

40. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 *The Failure of Presidential Democracy* 3, 34, 51, 80 n.47 (cited in note 3). Linz observes that "[s]everal authors have noted that most stable presidential democracies

Alfred Stepan and Cindy Skach,<sup>43</sup> and Ezra Suleiman.<sup>44</sup> They all agree that France under the Fifth Republic has moved toward a more stable and moderate two party regime. France suffered from severely fragmented party politics under the Third and Fourth Republics, but since 1958 there has emerged what appears to be a pattern of two alternating centrist coalitions—one on the right and the other on the left—both of which have successfully and responsibly controlled either the presidency or the parliament and both of which have cohabited with the other. This sudden move from one of the world's most fractious and unstable party systems to one that looks to me to be more functional than any outside of the U.S. or the U.K. is striking. Professor Suleiman describes the transition as follows:

The institution of the presidency and the election of the president by popular vote have formed alliances within the Left and within the Right. Conquering the highest office has stimulated a restructuring of the parties—at least of the parties who wished to share power—because without alliances obtaining a majority is extremely difficult. The presidential system has bipolarized elections, so that the system is one that has “two principal poles, each composed of several separate parties forced to cooperate with each other in order to win the presidential election and to govern with a parliamentary majority which reflects that cooperation.”<sup>45</sup>

---

approach the two-party system according to the Laakso-Taagepera index, while many stable parliamentary systems are multiparty systems.” *Id.* at 34 (footnote omitted).

41. Arend Lijphart, *Presidentialism and Majoritarian Democracy: Theoretical Observations*, in 1 *The Failure of Presidential Democracy* 91, 98 (cited in note 3) (“[T]he pressures toward a two-party system exerted by presidentialism are also likely to make the left-right dimension dominant and to squeeze out all other issue dimensions”).

42. Giovanni Sartori, *Neither Presidentialism nor Parliamentarism*, in 1 *The Failure of Presidential Democracy* 106, 115 (cited in note 3) (“It should furthermore be acknowledged that in the French formula the direct election of the president has played an important and positive role in that it has ‘presidentialized’ the party system, forcing it into a bipolar mold. This is not a fortuitous outcome. Since the presidential office is a nondivisible win, presidentialism counters ‘proportional politics.’”) (footnote omitted).

43. Alfred Stepan and Cindy Skach, *Presidentialism and Parliamentarism in Comparative Perspective*, in 1 *The Failure of Presidential Democracy* 119, 212 (cited in note 3) (Of thirty-four parliamentary democracies they studied, “eleven had between three and seven effective political parties. Both of the semipresidential democracies in this universe had between three and four effective political parties. However, no pure presidential democracy had more than 2.6 effective political parties. These data indicate that consolidated parliamentary and semipresidential democracies can be associated with a large number of parties in their legislatures, whereas consolidated presidential democracies are not . . . .”) (footnote omitted).

44. Ezra N. Suleiman, *Presidentialism and Political Stability in France*, in 1 *The Failure of Presidential Democracy* 137, 138, 140, 147 (cited in note 3).

45. *Id.* at 147.

Professor Suleiman goes on to say that “[t]he bipolar tendency of the party system since 1962 has considerably reduced the weight of the center and extremist parties [and has] engendered a similar restructuring on the Left and the Right.”<sup>46</sup> He concludes that a “fleeting familiarity with American presidentialism would have indicated to the drafters of the 1958 constitutional text that the American two-party system is a derivative of the presidential form of government.”<sup>47</sup> It is indeed the case that America’s two party system did not exist in the 1780s before we had presidential government and it emerged in the 1790s almost immediately after the incentive system created by the existence of the presidency had been put in place.

Presidentialism has given France a two-party system, as it did the U.S., and I think this is a wonderful development that protects against democratic breakdown. I seriously doubt whether the Left and Right are as well equipped to alternate in power in countries like Japan, Italy or even Germany as they are in France, where are a pro-regime coalition of the “ins” (the Court Party) is always arrayed against an anti-regime coalition of the “outs” (the Country Party). Forcing the extreme right or left to submerge itself in and be tamed by one of two centrist parties is important to preventing a re-emergence of the political dynamics of the 1920’s and 1930’s, as Professor Linz’s own work once persuaded me when I was his student. Two-party systems help save democracy, and presidentialism tends to produce two party systems. That being said, Professor Ackerman is plainly right that it is a disastrous error to combine presidential democracy with proportional representation for the legislature, since a fragmented legislature could invite a presidential coup and proportional representation tends to lead to fragmentation.<sup>48</sup>

#### 6. Presidentialism is Anti-Ideological

A sixth advantage of presidential government over constrained parliamentary regimes is that the former tends to be anti-ideological while the latter tends to be highly ideological. I see this as an advantage for the same reason as I see two-party systems as an advantage. Non-ideological regimes are less likely to break down as a result of violence or of racial, linguistic, ethnic, or religious tensions. Given the huge costs of democratic

---

46. *Id.* (footnote omitted).

47. *Id.*

48. Ackerman, 113 *Harv. L. Rev.* at 656 (cited in note 2).

breakdown in loss of human rights and of life itself, this feature of presidentialism inclines me to strongly favor presidential separation-of-powers-regimes.

Let us begin consideration of the non-ideological nature of presidentialism with the point with which we ended the last section: presidentialism is inconsistent with the use of proportional representation in legislative elections. I agree with Professor Ackerman that this is the case. The reason is quite simply because proportional representation leads to multi-party systems and it would weaken and fragment the legislative leadership.<sup>49</sup> Consider how such a system might play out if it were implemented in the U.S.

At the end of his term in office, President Clinton confronted at least five very strong legislative leaders: Tom DeLay, Dick Armey, Dick Gephardt, Trent Lott, and Tom Daschle. These five men powerfully limited the actions President Clinton could take and restrained the power of his presidency. Now imagine that we had proportional representation in the House of Representatives. Instead of facing a powerful Republican and Democratic Party leader, President Clinton might have faced a House with a leader from: the Christian Coalition, the Libertarian Party, an African-American Party, the Social-Democratic Party, the Business Roundtable Party, the Ku Klux Klan Party, the Green Party, and the Labor Party. Such a fragmented party leadership would carry little leverage with President Clinton and so the presidency would have become incomparably more powerful. This is the dynamic that in fact plays out now in many Latin American countries that combine presidentialism with proportional representation, and it is a dynamic that has contributed to democratic breakdown through presidentially-led coups in some of those countries. Presidents must be confronted by muscular legislative leadership and that means presidentialism is incompatible with proportional representation. Professor Ackerman is right to emphasize this point<sup>50</sup> and to note that it casts doubt on efforts like Lani Guinier's to move the U.S. to-

---

49. For discussion of the hazards of combining proportional representation and presidentialism, see Alfred Stepan and Cindy Skach, *Presidentialism and Parliamentarism in Comparative Perspective*, in 1 *The Failure of Presidential Democracy* 119, 131 (cited in note 3); Carlos Santiago Nino, *Hyperpresidentialism and Constitutional Reform in Argentina*, in Arend Lijphart and Carlos H. Waisman, eds., *Institutional Design in New Democracies: Eastern Europe and Latin America* 161, 167 (Westview Press, 1996).

50. Ackerman, 113 Harv. L. Rev. at 656 (cited in note 2).

ward proportional representation without changing from a presidential to a parliamentary system of government.<sup>51</sup>

The incompatibility of presidentialism with proportional representation and its tendency to encourage a moderate two-party system of politics means that presidential government is anti-ideological—a point that Professor Ackerman makes but which he sees as a disadvantage of presidentialism and not an advantage.<sup>52</sup> Professor Ackerman's interest in democratic dialogue and his optimism about government law making causes him to be considerably less risk averse than I am. I remain more concerned about the danger of fascistic and communistic breakdowns in democracy over the course of the last century with attendant threats to human life and liberty.

Presidential government is anti-ideological in two other important ways, in addition to its being incompatible with proportional representation. First, as Ackerman notes, presidentialism tends to encourage a politics of personality particularly at the presidential level.<sup>53</sup> Presidential elections are often personality contests to a considerable degree. Voters weigh non-ideological factors like George W. Bush's likeability against Al Gore's national policy experience and make their decisions for decidedly non-ideological reasons. This happens to some extent in parliamentary regimes but much less so than in presidential systems of government where the personal characteristics of the President become tremendously important once he is elected to office.

The personalities of incumbent presidents also matter greatly in presidential systems of government. President Clinton's personal foibles occupied a great deal of the time and energy of America's political elites, as Professor Ackerman points out,<sup>54</sup> and in the 1980's President Reagan's forgetfulness and inattentiveness with respect to Iran-Contra was also the object of massive elite attention. Professor Ackerman decries this enormous out-pouring of energy devoted to personality rather than the issues, but I applaud it. In a democracy the people should pay great attention to watching those who govern them and it is healthy to have people discuss issues other than the very divisive issues of religion, class, and race or ethnicity that divide all democratic polities. The politics of personality gives voters a

---

51. *Id.* at 657 n.53.

52. *Id.* at 657-64.

53. *Id.* at 657-64.

54. *Id.* at 659.

source of entertainment and something to talk about that brings the country together instead of emphasizing the ways in which people disagree or differ. This is very healthy in a democracy, and it tends to reduce the likelihood of class warfare or religious or ethnic strife. Everyone can have an opinion on President Clinton's or President Reagan's personal foibles and those opinions will cut across the lines of division that might otherwise divide the polity, which is all to the good. The politics of personality, which accompanies presidential systems, is thus a good thing, which deserves our praise, and not a flaw as Professor Ackerman argues.

This raises, in turn, a second more general point about the way in which presidential systems are non-ideological which grows out of their arbitrary carving-up of time and space into arbitrary electoral units. We have already discussed how U.S.-style presidential systems reject proportional representation in favor of single member geographic legislative districts in a way that is non-ideological and even anti-ideological. The basic point is that the fundamental unit of democratic representation is a *geographic entity* and not *an ideological point on the political spectrum*, so geographic districting tends to cut across ideology and to de-emphasize it. U.S.-style presidential regimes thus use geography or space to make ideology matter less. They produce a blander, more moderate, and safer brand of politics.

U.S.-style presidential systems also use arbitrary divisions of time to do much the same thing. The timing of elections in the U.S. constitutional system strike the advocates of parliamentary government as pointless and arbitrary because elections occur every two, four, or six years without any regard for what is happening at that time in the political world. Advocates of parliamentary government like Juan Linz find this bizarre and prefer that elections be called when there is something important to decide, as usually happens in countries with parliamentary regimes.<sup>55</sup> Linz finds it odd that our rigid time schedules for holding presidential elections might keep in office a Jimmy Carter, who has lost public favor, while forcing re-election bids on a Franklin Roosevelt, who is wildly popular. He decries this arbitrary division of electoral time in U.S.-style presidential regimes as senseless, and thinks it prevents the people from making deci-

---

55. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 *The Failure of Presidential Democracy* 3, 9-10 (cited in note 3).



sions through elections when it is important that those decisions be made.

I disagree with Linz that the U.S. system is senseless and much prefer the arbitrary division of time into two, four, and six year increments over letting powerful elites decide themselves when to hold elections, as occurs in parliamentary regimes. The arbitrary timing of elections in presidential democracies, like the arbitrary drawing of geographical district lines, tends to blur over and de-emphasize ideological fault lines in the body politic. This is a good thing because latent social conflicts, be they ideological, religious, ethnic, or class-based, are often potentially explosive. It is desirable to have arbitrary lines of geographic districting or election timing that may cut across the latent but potentially explosive social cleavages that all democracies must contain. Presidentialism does this, in my judgment, while parliamentarianism is less likely to.

The point is well illustrated by a brief reference to the politics of Switzerland, a so-called consociational democracy which Arend Lijphart ably studied and described earlier in his career.<sup>56</sup> Switzerland is an intriguing puzzle for political scientists because its politics works so smoothly notwithstanding its division into three language groups: German speakers, French speakers, and Italian speakers. Why does Swiss democracy work so well with such ethnic and linguistic division when other multi-lingual, multi-ethnic democracies like Canada's have experienced such strife? The answer, according to Lijphart, is, in part, that the Swiss cleavages of language and ethnicity are cross-cut by other cleavages like religion and the urban-rural split.<sup>57</sup> Put more concretely, half of all Swiss Germans and French are catholic and half are protestant. And, half of all Swiss Germans and French live in primarily urban Cantons while half live in primarily rural ones. The linguistic ethnic cleavage in Switzerland is thus cross cut by the religious and urban-rural cleavage, which means that the same groups of people are not always confronting each other across the same lines of division. In Canada, in contrast, the English speakers are predominantly protestant and the French speakers are predominantly catholic, so cleavages of religion re-

---

56. Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* 71-81, 119-29 (Yale U. Press, 1977). See also Arend Lijphart, 2 *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (U. of California Press, 1968); Arend Lijphart, ed., *Conflict and Coexistence in Belgium: Dynamics of a Culturally Divided Society* (Institute of International Studies, 1981).

57. Lijphart, *Democracy in Plural Societies* at 71-81, 119-29 (cited in note 56).

inforce cleavages of ethnicity and language instead of cutting across them. This helps explain why the Quebecois in Canada feel like a disadvantaged minority while French speakers in Switzerland do not. Citizens of Quebec literally may have less in common with citizens of Ontario than do German and French speaking Swiss citizens. Swiss democracy works because social cleavages cross cut, and Canadian democracy works less well because social cleavages are reinforcing.

The relevance of this to arbitrary timing and geography for election rules is that arbitrarily drawn election lines and dates for holding elections can artificially create cross-cutting cleavages that will make democracies work better. In the United States, for example, we have major regional divisions among the Northeast, the South, the West, and the Middle West that are greatly de-emphasized by the arbitrary division of the country into 50 States and 435 congressional districts. The arbitrary drawing of these geographical State and district lines has helped blur over differences and makes U.S. citizens less aware of them.<sup>58</sup> Similarly, arbitrary timing for the holding of elections also de-emphasizes social cleavages of race and class in the U.S. Elections are not held in the wake of riots or depressions or recessions, at the calling of political elites, but are rather held on an arbitrary schedule every two, four, or six years. The end result is that U.S.-style presidentialism has constructed arbitrary cross-cutting lines of geography and timing which perform some of the beneficial functions that naturally cross-cutting cleavages perform in Switzerland. Such cross-cutting cleavages are vital to the emergence of stable multi-ethnic democracies because they guarantee that all citizens have at least some things in common with one another. It is a great benefit of U.S.-style presidentialism that it can produce anti-ideological politics and cross-cutting cleavages of the kind that are necessary to guarantee stable democracy.

This leads me to another point of disagreement with Professor Ackerman concerning his claim that presidentialism produces odd lurchings of policy because it creates a chance, when one party controls all the levers of power, to entrench decisions and policies in ways that may prove very hard for ordinary majorities to reverse.<sup>59</sup> The basic assumption is that Democrats or

---

58. Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In *Defense of United States v. Lopez*, 94 Mich. L. Rev. 752, 765-69 (1995).

59. Ackerman, 113 Harv. L. Rev. at 650-53 (cited in note 2).

Republicans in the U.S. wait for a moment when their party dominates the White House and the Congress and then they rush in and pass a whole lot of laws that they merely dreamt of during the preceding 20 years of divided government. Under this model the supply of certain kinds of legislation is radically different depending on whether one party controls the White House and the Congress or whether there is divided control. When there is one-party control Professor Ackerman predicts sweeping legislation, when there is divided control he implicitly predicts some degree of gridlock and less important legislation being passed.

Professor Ackerman's model is to some extent contradicted by the facts. Consider the brilliant work of his Yale colleague, Professor David Mayhew, who argues in *Divided We Govern* that the supply of legislation is *not* affected by whether one party controls all the levers of power or whether there is divided government.<sup>60</sup> Mayhew studies all major legislation passed in the post World War II era between 1946 and 1990 and finds essentially no difference between periods of one party control and periods of divided control in the pace of lawmaking.<sup>61</sup> He notes that major bills like the Taft-Hartley Act, the Marshall Plan of 1948, the Civil Rights Act of 1957, the Clean Air Act of 1970, the Occupational Health and Safety Act of 1970, the War Powers Act of 1973, and the Tax Reform Act of 1986 all passed during periods of divided party control of the White House and the Congress.<sup>62</sup> Professor Mayhew does note that major bills are slightly more likely to pass in the first two years of a presidential term than in the last two years,<sup>63</sup> and he does identify periods of ideological surge, including one that ran from roughly 1964 to 1974 and that favored expansion of government.<sup>64</sup> But, Professor Mayhew sees no correlation whatsoever between the passage of major legislation or even the holding of important oversight hearings and the existence of one party or divided government. The fact is that Congress produces legislation, and it conducts oversight investigations, according to its own incentives and needs and not with reference to which party is sitting in the

---

60. David R. Mayhew, *Divided We Govern: Party, Control, Lawmaking, and Investigations, 1946-1990* (Yale U. Press, 1992). Professor Ackerman cites Professor Mayhew's work, see Ackerman, 113 Harv. L. Rev. at 645 n.18 (cited in note 2), but seems not to take as much comfort from it as I do.

61. *Id.* at 175-99.

62. *Id.* at 51-99.

63. *Id.* at 118.

64. *Id.* at 142-45.

White House. If the public wants legislation and investigations the Congress produces them. If the public wants a quiescent Congress that is what the public gets. It is simply not the case that political elites sit around Washington, DC and say: "Now we have one party control of Congress and the White House. Good. Let's entrench some laws." The supply of legislation is independent of whether or not there is one party control of the White House and the Congress or not. In this respect, too, the American system of government is fundamentally non-ideological. American political elites do not try to entrench laws in the self-conscious fashion that Professor Ackerman suggests.

### 7. Presidentialism Leads to Judicial Review

A seventh advantage of presidential separation of powers systems of government over parliamentary systems is that the former are potentially more compatible with the existence of a strong system of judicial review. This is because a Constitutional Court that faces a divided Executive-Legislative policy-making apparatus may often be able to enlist either one or the other to support its controversial rulings. A Court facing a fused parliamentary government on the other hand may in some circumstances be intimidated into behaving more cautiously. It is striking in this regard that the emergence of presidential government in France after 1958 coincided with and led to the creation of a system of judicial review in that country which had traditionally been hostile to judicial review. And, just as separation of powers horizontally led to judicial review in France, separation of powers vertically—a.k.a. Federalism—helped give rise to judicial review in the United States and Australia. Playing the Umpire between the President and the Assembly, as in France, or between the Nation and the States, as in the U.S., strengthens constitutional courts.

In a recent book comparing the legal systems of the United States and the United Kingdom, Chief Judge Richard Posner openly speculates that perhaps the U.S. system's separation of powers has given our courts more political freedom to be active and make policy than the British courts had faced, as they are by a unified parliamentary government.<sup>65</sup> Chief Judge Posner's point is very logical and is well taken. A court system that can navigate between Congress and the President and between the

---

65. Richard A. Posner, *Law and Legal Theory in England and America* 33-35 (Clarendon Press, 1996).

Nation and the States will have more political latitude than will a court system that confronts a unified and fused Executive-Legislative policy making apparatus. At a bare minimum, a Court system in a separation of powers regime is less likely to see its interpretations of statutes displaced by the re-passing of the statute in revised or re-written form. This is the case because it is harder for Congress and the President to agree on how to overturn a judicial construction of a statute than it would be for a parliamentary majority to do that. The separation of powers and federalism strengthens Constitutional Courts and gives them an important umpiring role to play. Court watchers in the United States have observed this phenomenon first-hand in recent years as the U.S. Supreme Court has greatly accelerated its review of laws on structural constitutional grounds. That increased review has augmented the national judicial power and has led to more invalidations of Acts of Congress per Term than has been seen in many years in the U.S.

Professor Ackerman might reply at this point by noting that the constrained parliamentary democracy of Germany has a very powerful Constitutional Court that has not been impaired at all by the existence of a fused Executive-Legislative majority, which it must confront. This is clearly true, and the German exception obviously means that judicial review can flourish in a parliamentary setting.<sup>66</sup> Nonetheless, notwithstanding Germany, it is probably the case, that all other things being equal, separation of powers and federalism are helpful in facilitating the growth of judicial review in a setting where it previously did not exist for the reasons set out above. It is perhaps worth noting in this regard that Germany is a Federation and that the Federalist Upper House of its legislature plays an important role in selecting Constitutional Court judges. Moreover, that Court, once seated, devotes half its personnel—one of two senates<sup>67</sup>—to the task of policing separation of powers and federalism boundary lines in the German Basic Law (or Constitution). I certainly would not claim that parliamentary government is incompatible with judicial review, but I do think the existence of a constitutional sepa-

---

66. See Ackerman, 113 Harv. L. Rev. at 668-70 (cited in note 2) (discussing the importance of separation of powers for judicial review).

67. The German Constitutional Court has sixteen members who sit in two senates or chambers of eight members each. One senate hears predominantly structural constitutional cases and the other mostly individual rights cases. For a brief history and description, see David P. Currie, *The Constitution of the Federal Republic of Germany* 1-32 (U. of Chicago Press, 1994).

ration of powers or of federalism is helpful to getting judicial review established. Once established as an Umpire among jurisdictions a Constitutional Court may later turn its attention to policing Bills of Rights much as happened in the U.S. during the course of the last 100 years.

#### 8. Presidentialism, Bicameralism, and Federalism

The eighth advantage presidential government has over parliamentary government is that the former is more compatible with bicameralism and a federal system than is the latter.<sup>68</sup> Professor Ackerman in a fine discussion demonstrates, I think conclusively, that once a country has two fully co-equal Houses in a legislature it absolutely must have a separately elected President rather than a Prime Minister selected by one of the two Houses.<sup>69</sup> The reason for this is evident as a matter of common sense. The two Houses of a legislature cannot be truly co-equal if one gets to elect the Cabinet and the Prime Minister and the other does not. Nor is it possible for both of two Houses of a bicameral legislature to elect the government. One would need a tie-breaking rule, and it is difficult to imagine what that rule would be. For this reason, every parliamentary regime with a bicameral legislature has always embraced a system where the lower House, which elects the government, is quite a bit more powerful than is the Upper House. Professor Ackerman calls this the one and one-half House solution,<sup>70</sup> and he praises it at some length.

I have major reservations about the one and one-half House solution on its own merits, at least for countries where federalism is an important part of the constitutional fabric as it is in the United States. In a true federalist regime, it is important that laws be supported both by a majority of the people and by a majority of the people in the States or Provinces. Otherwise national majorities might be tempted to enact laws that are wildly unpopular in some regions of the federation, with seriously destabilizing results. The U.S. bicameral solution of two fully co-equal Houses protects against such sectional law making much

---

68. Linz notes that "[I]t is sometimes argued that presidentialism is particularly appropriate for federal republics because the president can serve as a unifying symbol, especially in the absence of a monarchy, and can represent the nation as a totality in a way a parliament cannot." Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 *The Failure of Presidential Democracy* 3, 42 (cited in note 3).

69. Ackerman, 113 *Harv. L. Rev.* at 671-83 (cited in note 2).

70. *Id.* at 635, 636, 671-87.

better than does a one and one-half House solution, and I thus think it is worthy of emulation by newly emergent federalist regimes.

This point is important, as Professor Ackerman implicitly acknowledges, because federalist regimes are likely to be very much in vogue as the nations of the earth continue to become more interdependent and need to cooperate more without losing their identities. Federal and Confederal structures like the European Union, NATO, NAFTA, the WTO, and GATT are all probably harbingers of new and more powerful global coalitions to come.<sup>71</sup> If federalism represents the wave of the future, as I believe, and if federalism requires bicameralism, then we have a powerful additional argument for presidential government since only presidential government can work with two fully co-equal houses in the national legislature. The key question is, does federalism really require two fully co-equal Houses or can the one and one-half House solution be made to work? Let us consider this critical issue a bit more closely.

To begin with, we might ask what assurances powerful nation States are likely to seek before surrendering power to a future global federation. Consider here say the cases of Britain surrendering power to the European Union or the U.S. surrendering power to a NAFTA-like North American confederation. Both of these cases presently strain credibility almost to the breaking-point because it is inconceivable that Britain and the U.S. would surrender sovereignty to those entities today. But, let us consider them anyway just as hypotheticals. It seems to me that it would be highly likely that *at a minimum* the U.S. and Britain in this situation would demand that there be one fully co-equal body in the legislature where nation states were equally represented and had a chance to veto majoritarian but anti-federalist initiatives and laws. That is what happened historically in the United States with the Great Compromise that led to the creation of our bi-cameral Congress, and it is consistent with what happened in the Swiss federation where the two chambers are fully co-equal.

Professor Ackerman responds by pointing to the Canadian and Indian Federations as parliamentary democracies, which have followed the one and one-half House solution,<sup>72</sup> but these

---

71. For additional discussion, see Calabresi, 94 Mich. L. Rev. at 756-73 (cited in note 58).

72. Ackerman, 113 Harv. L. Rev. at 672 (cited in note 2).

countries are hardly models of federalist harmony in part because regional interests in both Canada and India feel terribly insecure. Canada, of course, faces a very serious separatist challenge in Quebec because the citizens of that French Speaking Roman Catholic Province do not feel assured that their interests will be adequately protected by the Canadian Parliament. And, in India, separatist movements have engaged in violence and even assassination because of their dissatisfaction with the safeguards they are afforded under Indian constitutional law. It would be excessive to claim that fully co-equal bicameralism would alone solve the Canadian and Indian separatist problems, but it seems to me equally excessive to hold out Canada and India as paragons of federalistic harmony and good feeling! Surely the U.S. and Switzerland come closer to the mark in succeeding as federations with their two co-equal houses, Great Compromise solution.

Professor Ackerman wisely notes that American federalists pay a price for having the Senate which is that they have to accept with it the great nationalizing institution of the Presidency. On this point Ackerman is squarely right. Having a Senate fully co-equal to the House does mean Americans had to accept presidential government, and in doing that they certainly bought into a very nationalizing institution. The U.S. Presidency is clearly one of the great nationalizing forces in the American constitutional order.

But having a nationalizing presidency opposite a federalistic Senate is a good thing, both in the U.S. and as a matter of abstract constitutional design. It means that both the national majority and a majority of the people in a majority of the States find a voice to represent them in Washington, D.C., which is highly desirable. The U.S. presidency thus goes hand in hand with the Senate in a very positive way. Even as the Senate induced the States to come into the Union and surrender some of their sovereignty, the Presidency began making us all think of ourselves as Americans first and citizens of our respective states second. Presidential elections produce Presidents and the thousands of "Officers of the United States" whom they bring into office with them who think of themselves as Americans first. In this way our Presidential systems has truly helped us become one nation.

Imagine the effect if the European Union could tomorrow elect a President who would appoint 4000 "Officers of the European Union" for a four year term. Federalism in the EU would



be greatly advanced by such a structure. Is this too high a price for a federalist to pay to get the veto that comes with co-equality of the two Houses of the legislature. No. Not at all. Where federalism is desirable and even inevitable it is a good thing to have the people cement their new political identity by voting together en masse for the top office. It helps build those mystic bonds of union that forge new nations and bring peoples permanently together who once were enemies.

To sum up, it is my strong instinct that: 1) federalism represents the wave of the future; 2) that federalism will only succeed if there are fully co-equal bicameral legislatures instituted in the new federations; and that 3) this bicameralism will lead to and will require the adoption of a presidential separation of powers system of government.

### 9. Presidentialism and the War Power

A ninth advantage of presidential systems of government over parliamentary systems is that presidential systems may be better at fighting and winning wars than are parliamentary systems. In a time of war, democracies need and benefit from the stability that presidential systems can offer. The United States, for example, has produced some very formidable wartime leaders including: George Washington, Andrew Jackson, Abraham Lincoln, Theodore Roosevelt, Woodrow Wilson, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John F. Kennedy, Lyndon Johnson, Ronald Reagan, and George Herbert Walker Bush. Every one of the twelve above listed men—one-quarter of all the men who have held the high office—was either a military hero himself or led the nation in a dramatic way in time of war. That is quite a record for building leadership, and it helps explain why the U.S. is today the world's only remaining superpower. American presidents over two hundred years have been able to rally the public and the Congress, assert control over the military, and win.<sup>73</sup> This is no mean accomplishment for a democracy, since democracies tend to be peace-loving regimes that err on the side of weakness rather than fortitude in international relations.

---

73. Linz notes that “[o]ne argument used sometimes in favor of presidentialism is that it provides the political system with a personalized leadership that the armed forces can identify with as their supreme commander; it would be more difficult to identify with a prime minister.” Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 *The Failure of Presidential Democracy* 3, 45 (cited in note 3).

Professor Ackerman makes much of the point that the U.S. as a victor in World War II encouraged its defeated opponents, Germany, Japan, and Italy, to adopt parliamentary regimes.<sup>74</sup> Yet he never stops to ask if that was a disinterested preference on our part? Of course it was not. We did not want Germany, Japan, and Italy to have strong executive structures because we did not want them to be able to engage in future warfare. We knowingly pushed them toward constitutional structures that have kept them weak in the sphere of military and foreign policy matters because we did not fully trust them after 1945. One of those weakening structures was parliamentary government, which generates less stable executives and cabinets than does presidential government.

Professor Ackerman might respond by pointing to the great British War Cabinets led by men and women like Winston Churchill, Lloyd George, and Margaret Thatcher, but Britain is an atypically stable parliamentary regime. Britain differs from almost all other parliamentary regimes in that it effectively has a two party system, and so it produces stable governments led entirely by either the Tory or the Labour Party's parliamentary leader. In most parliamentary regimes, France under the Third and Fourth republic<sup>75</sup> or Japan or Germany today, the government in power represents a coalition of parties. Such coalition governments are bound to be more fragile than are presidential cabinets. It is interesting to note in this regard that the British had to suspend holding elections during World War II whereas we Americans have never had to do that. Even during the brutal Civil War and during World War II, we honored our quadrennial cycle and sent voters to the polls even as our troops were deployed in battle.<sup>76</sup>

The most recent parliamentary democracy to make the switch to presidentialism is Israel,<sup>77</sup> which is interesting given the unusual military and foreign policy problems that nation faces. It seems likely that the greater stability of presidentialism would

---

74. Ackerman, 113 Harv. L. Rev. at 634-36 (cited in note 2).

75. It is perhaps striking that the French Third Republic fell to Nazi invaders, while the Fourth Republic fell to the Algerian crisis. Ezra N. Suleiman, *Presidentialism and Political Stability in France*, in 1 *The Failure of Presidential Democracy* 137, 142 (cited in note 3).

76. I owe this point to Akhil Amar who rightly argues that President Lincoln's willingness to hold elections in 1864 deserves the same respect as is accorded President John Adams' willingness to cede power to Jefferson after Adams lost the election of 1800. Conversation with Akhil Amar, November 1999.

77. Lijphart, *Patterns of Democracy* at 123-24 (cited in note 5).

prove desirable to a country like Israel beset with serious foreign policy problems. Obviously, presidentialism is not necessary for a democracy to have a potent military force, but I think it is, all else being equal, quite helpful. Presidential democracies have a capacity in time of war to go into a mode of what might be called Executive "Full Authority" to borrow a useful term from Ackerman,<sup>78</sup> and they then typically revert back to a mode of lesser authority in peacetime. This flexibility and adaptability in constitutional arrangements is a valuable feature of presidential systems of government, which is thus able to tailor the degree and extent of executive power to somewhat fit the situation. Obviously, wartime prime ministers, like Churchill, with a solid majority in parliament can sometimes prove very successful but on balance the stability of presidentialism seems likely to give it a distinct advantage in time of war.

One way of posing the question is to ask ourselves what executive system we would prefer if we could design a Constitution for a future hypothetical European Union or NAFTA Constitution. I personally would want the advantage of presidential leadership in time of war for any democracy that I was a citizen of, so long as the legislature had the war declaring power. However, if I were designing the Constitution of Germany or Japan or some democracy, which I was not a citizen of, the parliamentary form would surely look better. Presidents are dangerous to a countries' enemies as America's adversaries have had occasion to learn. No parliamentary democracy other than Britain has yet been a major military and diplomatic player on the World stage, whereas the United States has time and again proved itself to be the Arsenal of the Democracies. Future democratic federations should think long and hard before giving up the capacity for presidential leadership in time of war that now exists in the United States. It has proved itself quite valuable over the last 200 years.

#### 10. Preserving Liberty; Entrenching the Status Quo

The tenth and final advantage of presidential systems of government, which I wish to discuss is their greater capacity to preserve liberty and the status quo as compared to parliamen-

---

78. Ackerman powerfully describes what he calls the American systems mode of Full Authority when one party controls the presidency and both Houses of Congress. Ackerman, 113 Harv. L. Rev. at 648 (cited in note 2).

tary systems.<sup>79</sup> As one who is more skeptical of (though not entirely hostile to) government intervention in the economy, I count it as a big benefit of presidential systems that they make government actions and interventions more difficult to undertake. The stability and entrenchment of legal rules that presidentialism helps create is an enormous boon to individual and corporate economic actors because it greatly facilitates long-range economic planning. Separation of powers systems are simply much less likely to fall for hare-brained regulatory schemes than are parliamentary systems. I think it is no accident, thus, that the parliamentary democracy of Great Britain nationalized and privatized more industries than did the United States during the same periods of time. Our constitutional structures led to that because it is simply easier to get a government-supported Bill approved by a majority in the House of Commons than it is to get it approved by a majority of the House of Representatives, the Senate, and signed by the President.

My libertarian preference for inaction is, of course, ideological and may not be shared by many of my readers, but I should note that all forms of liberty—personal liberties as well as economic liberties—are preserved by the American structure of checks and balances. Bicameralism and presentment in the U.S. act as an obstacle to all efforts to change the law, whether those efforts come from the Christian Coalition or from the AFL-CIO. The U.S. has had an excellent civil rights record when one compares it with other multi-racial and multi-ethnic democracies around the world, and our system of checks and balances is probably part of the reason. We have an onerous, consensus-requiring law-making process that makes minorities feel secure and that protects civil liberties. Change under this system may at times be frustratingly slow, but that is better than having it be too fast.

The U.S. system of checks and balances does lead, as Professor Ackerman notes, to more entrenchment of legal rules under the U.S. system than occurs in parliamentary systems.<sup>80</sup> Put another way the status quo is more entrenched in the U.S. system because an emerging electoral coalition has to win more elections to get its changes enacted than it would under a parliamentary regime. Some ordinary statutory laws in the U.S.—

---

79. For Ackerman's contrary position, see Ackerman, 113 *Harv. L. Rev.* at 722-23 (cited in note 2).

80. *Id.* at 650-53.

those enacted during the New Deal or the Great Society years for example—are effectively entrenched under the American system because an extraordinary or unusual majority would have to be elected to repeal them.

Professor Ackerman implies that there is too much entrenchment under the U.S. system, but I submit the evidence of this is sorely lacking. Much of the entrenchment in the U.S. today is the result of the public's distinct preference for Divided Government—for splitting control of the White House and control of the Congress between the two major political parties. Professor Morris Fiorina argues that Divided Government in the U.S. in substantial measure reflects the public's indecision about ideological matters, and its affirmative preference therefore for only small, incremental changes in the status quo.<sup>81</sup> If Fiorina is right, then much of what Ackerman describes as entrenchment reflects simply a public preference that Ackerman does not share. Ackerman would prefer—as would I—that there be one party control of the House of Representatives, the Senate and the White House (we disagree on which party), but the public prefers inaction, so Divided Government results. This entrenchment of the status quo is one both Ackerman and I dislike (for different reasons), but it is a democratic result democratically arrived at. It simply means change will happen more slowly in the U.S. than in parliamentary democracies because the status quo will always be a little more entrenched.

The fact is that entrenchment, whether in a Constitution or in some hard-to-repeal statute, is empowering as well as restricting. Entrenchment creates, as constitutionalism creates, the opportunity for inter-generational lawmaking. One generation gets to bind another and in exchange is bound by its predecessors with the result that some things can be done that could not be done before. Without credible entrenchment of freedom of the press or protection of property rights, who would dare to write a book or build a factory that could become the basis for hostile government action in 20 years? Without credible entrenchment of statutes protecting the right to unionize or forbidding discrimination, can we be sure that we would have had the levels of labor and racial peace that we have had? Entrenchment, like a contractual obligation, causes us to give up a short term freedom

---

81. Morris Fiorina, *2 Divided Government* (Allyn and Bacon, 1996). Professor Ackerman cites Fiorina's work, see Ackerman, 113 Harv. L. Rev. at 645 n.18 (cited in note 2), but he does not take the same degree of comfort in it that I do.

to breach in exchange for the power to bind ourselves and those we bargain with in mutually beneficial ways over the long term. Some forms of entrenchment can go too far (the Articles of Confederation), and Ackerman, unlike the Westminster crowd, is more than willing to accept some entrenchment as good. But what evidence is there that there is too much entrenchment in the U.S. system as it now works? The voters do not think so as evidenced by their deliberate and repeated reinforcing of the constitutional separation of powers through divided party government.

The United States protects liberty and the status quo with more bulwarks to law-making than are imposed by any other G-8 economic power, and yet the U.S. has a faster rate of economic growth, a larger per capita GNP, a lower unemployment rate, and a younger and faster-growing population than the great parliamentary democracies of the world—at the same time as it pays most of the military cost of keeping the democratic world free. Obviously, there are many causal factors behind America's economic and social success, but I do think constitutional structure and culture is part of the explanation. Presidential separation-of-powers systems protect liberty and encourage economic growth better than do parliamentary regimes. The partisans of liberty and growth should be partisans of presidentialism and of the separation of powers, as well.

#### B. PRESIDENTIAL GOVERNMENT AND DEMOCRATIC BREAKDOWN: THE LATIN AMERICAN EXPERIENCE

I turn now to rebutting Professor Ackerman's strongest argument against U.S.-style presidentialism, which is his suggestion that it has proved peculiarly liable to democratic breakdown when exported to under-developed countries. The damaging fact here is that every single Latin American presidential regime has suffered at least one democratic breakdown during the course of its history.<sup>82</sup>

---

82. Ackerman, 113 Harv. L. Rev. at 646 (cited in note 2). Giovanni Sartori explains, "On these criteria we come up, today, with some thirty presidential countries, mostly concentrated in Latin America. With the sole exception of the United States, all presidential systems have been intermittent . . . . Most . . . Latin American countries (notably Argentina, Uruguay, Brazil, Chile) reestablished presidential democracies only in the 1980's. . . . All in all, then, the record of the presidentially governed countries is—aside from the United States—quite dismal and prompts us to wonder whether their political problem might not be presidentialism itself." Giovanni Sartori, *Neither Presidentialism nor Parliamentarism*, in 1 *The Failure of Presidential Democracy* 106, 107 (cited in note 3) (footnote omitted).

To begin with, this disturbing record does not by itself establish that presidential government is more prone to breakdown than is parliamentary government. Political Scientists Matthew Soberg Shugart and John M. Carey reviewed the history of democratic breakdowns during the Twentieth Century and discovered that “there have been two waves of breakdowns of democracy in this century,” one between World War I and World War II and the other in the 1960’s. The first wave, they argue, “claimed mostly parliamentary regimes (and no true presidential regimes). The second claimed mostly, but not exclusively, presidential systems.”<sup>83</sup> Among the pure parliamentary regimes they count as having broken down are *eight European regimes*: Estonia (1934), Greece (1936), Greece (1967), Italy (1922), Latvia (1934), Lithuania (1926), Portugal (1926), and Spain (1936); and *thirteen Third World cases*: Burma (1962), Fiji (1988), Guyana (1978), Kenya (1969), Nigeria (1966), Pakistan (1954), Pakistan (1977), Sierra Leone (1967), Singapore (1972), Somalia (1969), Surinam (1982), Thailand (1976), and Turkey (1980). Mixed parliamentary-presidential regimes also broke down in six additional cases including: Austria (1933), Ecuador (1962), Germany (1933), Korea (1961), Peru (1968), and Sri Lanka (1982).<sup>84</sup>

Cumulatively, Shugart and Carey conclude that presidential government is NOT more likely to break down than is parliamentary government. “[W]e find no justification for the claim of Linz and others that presidentialism is inherently more prone to crises that lead to breakdown.”<sup>85</sup> Even when considering only Third World cases of democratic breakdown Shugart and Carey “find that just over half (52.2%) of the presidential regimes in the less developed countries have broken down, while a higher percentage (59.1%) of the parliamentary regimes have.”<sup>86</sup> All but one of the twelve presidential breakdowns they identify occurred before 1975, more than twenty-five years ago.<sup>87</sup> And, as of August 2000, all of the four major Latin American economic powers: Brazil, Argentina, Chile, and, for the first time, Mexico, appear to be firmly embarked on a committed pro-democratic

---

83. Matthew Soberg Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* 39 (Cambridge U. Press, 1992).

84. *Id.* at 40.

85. *Id.* at 42.

86. *Id.* at 41.

87. Argentina (1930), Bolivia (1964), Brazil (1964), Chile (1973), Columbia (1953), Cuba (1954), Guatamala (1954), Korea (1972), Panama (1968), Philippines (1972), Uruguay (1973). The lone recent presidential breakdown was Nigeria (1983). *Id.* at 40.

course. Indeed, in the six years since Linz published *The Failure of Presidential Democracy* the four most powerful Latin American countries have done quite well, as have almost all of the newly emerged presidential democracies in Russia, Eastern Europe, and in South Korea and the Philippines. While many of these countries still have a long way to go, there is no evidence six years after Linz published his book that we are about to see a wave of democratic presidential breakdowns.

The most important recent developments of interest to the fans of presidentialism are the decision of Israel to move to a unique constitutional system that Arend Lijphart classifies as being presidential,<sup>88</sup> the rejection of parliamentary government in the Brazilian referendum on whether that country should switch governmental forms, and the open discussion in Italy of direct election there of the Prime Minister. These developments fit in with the fact that while no presidential regime has ever abandoned presidentialism to become a parliamentary democracy, several countries have followed France's example and moved in a presidentialist direction. There seems to be simply no question that most of the world does not see presidentialism as being an inherently risky governmental form, and for good reason. In the last 25 years, presidentialism has not been *clearly and uniquely* prone to new democratic breakdowns.<sup>89</sup>

It is the case that several very poor Latin American countries, particularly Peru, Ecuador, and Venezuela, as well as the very poor Eastern European country of Belarus, have experienced severe political disruption recently, but there is no clear, overall trend away from democracy either in the presidential regimes of Latin America or in the newly established presidential regimes in other parts of the world. One must note that it is only in the last 50 years, with U.S. troops stationed in much of the World that democracy has truly taken off around the globe. Before 1945 both Western Europe and Latin America faced a tough struggle in maintaining democracy outside of the United Kingdom and since 1945 Western Europe has gotten a lot more help in that respect than Latin America has from us. Accordingly, it seems to me a little precipitous to draw from the Latin American data the conclusion that presidentialism outside the

---

88. Lijphart, *Patterns of Democracy* at 123-24 (cited in note 5).

89. Several Latin American countries that did not experience new breakdowns within the last 25 years were nonetheless still recovering from older Cold War era breakdowns and were thus under authoritarian rule.



U.S. is bound to lead to Caudillos, just as it would be precipitous to conclude that parliamentary government outside the U.K. was bound to end as did the French Third or Fourth Republics. Plainly there is a danger to be guarded against that presidencies may deteriorate into tyrannies, and it is for this reason that it is important to always keep one's impeachment gun powder dry.<sup>90</sup> But it would be an over-reaction to conclude from the Latin American experience during the height of the Cold War<sup>91</sup> that a regime type that serves the United States and France well is unsuited today to Russia, Brazil, Israel, and Italy.

It must also be noted, as Professor Ackerman observes, that there are *critically important differences* between U.S. presidentialism, as it has been defended by me in this essay, and other forms of presidentialism that go by the same name. We cannot let the classificatory system of political scientists overwhelm these distinctions, just as Professor Ackerman wisely refuses to let the constrained parliamentarianism of Germany be lumped together with the quite different form of parliamentary government of the British Westminster regime.

The U.S. presidential system creates a much weaker presidency than is created by many foreign Constitutions in at least five critically important ways. It is essential that we consider these five fundamental differences between U.S. style presidentialism and other forms of presidentialism in order to highlight some unique factors that may be important to making our system of presidential work. First, American presidents differ from elected presidents in France, Russia, and many other countries in that they have no formal constitutionally guaranteed power to engage in decree lawmaking<sup>92</sup> or to invoke states of emergency.<sup>93</sup>

---

90. It is perhaps somewhat ironic that Bruce Ackerman, one of the most public opponents of presidential impeachment two years ago, should subsequently become concerned that presidential government can deteriorate into tyranny! For Ackerman's reconciliation of his impeachment testimony with his fears of presidential tyranny, see Ackerman, 113 Harv. L. Rev. at 659 (cited in note 2).

91. The Cold War at times impaired the struggle for presidential democracy in Latin America because both Latin American elites and some U.S. policymakers unfortunately let their fear of Communism push them into supporting some rather hideous anti-democratic regimes. With the end of the Cold War ten years ago, this period of history is fortunately closed and the pressure for democracy in Latin America as well as elsewhere around the World is as strong as it ever has been which should in theory make future democratic breakdowns far less likely.

92. Ackerman, 113 Harv. L. Rev. at 647 (cited in note 2). The leading text on decree lawmaking power classifies the U.S. presidency as having much less decree lawmaking authority than do other presidential regimes. John M. Carey and Matthew Soberg Shugart, eds., *Institutional Design and Executive Decree*, in *Executive Decree Authority* 274, 279 (Cambridge U. Press, 1998). The U.S. is ranked as having no constitutionally

While U.S. Presidents do issue many Executive Orders and have in Abraham Lincoln's case proclaimed a state of emergency, it would be a mistake to conflate the practice in the U.S. with that in other countries either in degree or in kind. Important law-making truly is confined in the U.S. to the onerous process of bicameralism and presentment, and this differentiates our presidential system from others that go by the same name. This may be one feature of our system that should be advertised vigorously overseas so that transplantation of presidentialism does not occur there through a process of bad translation.

A second difference between U.S.-style and foreign presidentialism is that American Presidents typically face very strong legislative leaders because of the senatorial requirement of advice and consent for all Cabinet appointments, which is unusual and makes our Senate uncommonly strong relative to the President,<sup>94</sup> and because of the absence of proportional representation in our legislative elections. As we have already seen, proportional representation weakens legislatures seriously and may render them too weak to successfully oppose the strong executives that presidentialism creates.<sup>95</sup> American legislative leaders are also made strong by the very powerful system of congressional committees and staffers which we have set up. Presidents in the United States and their Cabinets confront a virtual legislative government on Capitol Hill when they venture up to Congress to testify before legislative Committees and Sub-

---

delegated decree law making authority and relatively little legislatively delegated decree lawmaking authority and most of that is in the area of foreign affairs. Brian R. Sala, *In Search of the Administrative President: Presidential "Decree" Power and Policy Implementation in the United States*, in id. at 254. For valuable case studies of the arguably excessive use of decree law making in Brazil and Argentina, two major Latin American democracies, see Timothy J. Power, *The Pen is Mightier than the Congress: Presidential Decree Power in Brazil*, in id. at 197 and Delia Ferreira Rubio and Matteo Goretti, *When the President Governs Alone: The Decretazo in Argentina, 1989-93*, in id. at 33. The country which Carey and Shugart find makes the most use of decree law-making is Russia, as is indicated in their comparative chart in Carey and Shugart, eds., *Institutional Design and Executive Decree*, in id. at 274, 279.

93. Carlos Santiago Nino, *Hyperpresidentialism and Constitutional Reform in Argentina*, in Lijphart and Waisman, *Institutional Design in New Democracies* at 165 (cited in note 49).

94. Linz points out that the United States' requirement of senatorial advice and consent for presidential nominations is "the exception rather than the rule" among presidential regimes. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 *The Failure of Presidential Democracy* 3, 31 (cited in note 3). Linz observes that "[i]n the vast majority of presidential systems the president appoints his cabinet without congressional input, and the same is true for dismissal of cabinet members." Id. at 30 (footnote omitted).

95. See text at notes 50-54

Committees, which fund and oversee their every action and must pass on all appointments not only to the Cabinet but to many sub-Cabinet positions as well. This powerful quasi-parliamentary government of congressional committees and staffers undoubtedly keeps U.S. Presidents and their staffs on a much shorter leash than is common in other presidential democracies. It may be noteworthy in this regard that the number of congressional staffers on Capital Hill greatly exceeds the 4000 or so staffers who work for the President as political appointees. We really have a quasi-parliamentary shadow government of congressional Committees, and this, too, may be a feature of American presidentialism which has not traveled well overseas, but which is of vital importance to maintaining a true balance of power between the President and the Congress.<sup>96</sup>

Congressional staffs are empowered relative to the 4,000 or so presidential political appointees because the millions of federal employees who constitute the federal bureaucracy are protected by Civil Service laws, which, since the 1880s have prevented the existence of a partisan spoils system in the United States. In some foreign countries with presidential systems, like France, presidential spoils systems are apparently a problem. This too is an important feature of American presidentialism, which must not be lost sight of.<sup>97</sup>

A third feature of the American system, which differentiates it from foreign presidential systems is that our Constitution makes no provision for national initiatives and referenda unlike many foreign Constitutions. This eliminates one tool that presidents might use to move a country toward dictatorship and so again contributes to the stability of U.S. style presidentialism.

---

96. Arend Lijphart explains the importance of the congressional committees by noting that: "presidentialism spells not only concentration of (especially executive) power but, by definition, also separation of power; if the separate legislative branch is effectively organized, particularly by a specialized and well-staffed committee structure, separation of power can mean an approximate balance of power between president and legislature and a presidency that is less than all-powerful. This reasoning applies well to the exceptional American case of presidentialism. Fred W. Riggs . . . calls the committee structure of the U.S. Congress one of the 'para-constitutional practices' that accounts for the survival and success of presidential government in the United States . . ." Arend Lijphart, *Presidentialism and Majoritarian Democracy: Theoretical Observations*, in 1 *The Failure of Presidential Democracy* 91, 101 (cited in note 3).

97. Ezra Sulciman notes that France, unlike the U.S. today, has a serious problem with an over-politicized presidential spoils system. Ezra N. Sulciman, *Presidential and Political Stability in France*, in 1 *The Failure of Presidential Democracy* 137, 152-53 (cited in note 3).

Fourth, the U.S. Constitution limits the President to two four-year terms in office, a limit that has a substantial basis in tradition as well as in formal constitutional law. Many but not all foreign presidential regimes have also opted for such term limits,<sup>98</sup> and this may be yet a fourth way of keeping presidents in check that some countries should consider adding to their Constitutions. Many foreign nations have six or seven year terms for their presidents instead of the shorter and more appropriate term of four years that the U.S. Constitution specifies. This too is a difference, which could be important in preventing the breakdown of presidentialism into dictatorship.

Moreover, the U.S. Constitution in addition to guaranteeing the President a four-year term also guarantees that Senators and Representatives shall themselves serve fixed terms in office. And, it tellingly denies to the President any power to dismiss Congress and call for early congressional elections. Astonishingly, some foreign presidents, including the Presidents of France and of Russia, are empowered by their countries' constitutions to dismiss the legislature and call for early elections. The denial of this power to the President of the United States is surely an additional feature of our constitutional tradition that protects against a degeneration into Caesarism.

Fifth, and lastly we have an electoral system that tends to guarantee divided party control of the Presidency and the Congress with the congressional party usually getting majority power in the States. Presidential victories in 1980 and 1992, for example were followed by midterm elections in 1982 and 1994 in which the party not holding the White House picked up major gains both in Congress and in the nation's state houses. It is striking in this regard that throughout the Reaganite 1980s, Democrats controlled a majority of the nation's governorships, while during the Clinton era of the 1990s, Republicans have mostly controlled a majority of the nation's governorships.

This trend may be more than just an accidental one. A majority of the States, including virtually all of the most important States, now elect governors during the off year mid-term cycle. Going back to the Nineteenth Century, the party not controlling the White House almost always does well and gains seats in the mid-term elections. If this pattern carries over to gubernatorial elections, as I suspect it may, the U.S. system may be set up to

---

98. Ackerman, 113 *Harv. L. Rev.* at 662 (cited in note 2).

guarantee opposite or divided party control of the presidency on the one hand and of a majority of the nation's governorships on the other. This development, if it proves to be permanent, would certainly make presidential coups very hard to contemplate in the U.S., since it would be hard to lead a coup against a majority of the other party's governors. This, then, may be a fifth feature of U.S.-style presidentialism, which renders it less prone to democratic breakdown than have been the presidential systems of other countries.

In conclusion, I do not think the experience of democratic breakdown of presidential regimes in Latin America more than 25 years ago suffices to condemn U.S.-style presidentialism today. U.S.-style weak or consensus oriented presidentialism is at least as superior to full throated Latin American presidentialism as German style constrained parliamentary government is superior to British style Westminster parliamentary government. Americans need not be ashamed but should instead be proud of their unique constitutional heritage, and should feel free to tout its virtues to others, with due concern for varying national circumstances.

### III. CONCLUSION

Democracy has spread all over the world in the last twenty years, and there are today more fully functioning democracies in Latin America, Eastern Europe, and Asia than ever before in human history. This global triumph of the democracies is cause for great joy, but it has raised anew age-old questions of institutional design and of comparative constitutional law. Newly emerging democracies in Eastern Europe, and re-emerging democracies elsewhere, need help and advice, and they have on many occasions received such help and advice from American law professors and lawyers.<sup>99</sup> One question that inevitably arises is, should a newly emerged democracy hold direct elections for its chief executive leader or should that person be elected by the legislature? Bruce Ackerman has an answer to that question. His answer is wrong.

---

99. "Especially since 1989, American jurists have become big boosters of the American Way at constitutional conventions everywhere. When they arrive at the scene, however, their intellectual preeminence is by no means assured. To the contrary, American jurists regularly encounter vigorous competition from French and German constitutionalists, who also operate as cheerleaders for their native constitutional traditions." Ackerman, 113 Harv. L. Rev. at 636-37 (cited in note 2) (footnote omitted).

U.S.-style presidential government is better than the form of German-style constrained parliamentary government defended by Ackerman. It is more democratic, more stable, less ideological, and more compatible with economic growth, federalism, and judicial review than is parliamentary government. It is critically important, however, that the presidential system conform to the U.S. model in a whole host of details, rather than deviating into what might be called the hyper-presidentialism of many Latin American democracies.<sup>100</sup> Both of these two points are of equal importance. The presidentialism that I have vigorously defended is unfortunately not the kind that many foreign countries have adopted. I share Ackerman's concern that foreign presidential systems may have borrowed so powerful a model of the presidency that they are in danger of backsliding into authoritarianism. I hope this Article will help point the way to avoid such backsliding by shedding light on the features of presidentialism that can cause it to succeed or fail. We owe it to the citizens of newly emerged democracies everywhere to share our learning on these matters, which has been acquired over two centuries of American experience.

The virtues of the American presidential system are important to us in another way, which is as a guidepost in assessing the Supreme Court's ever evolving separation-of-powers caselaw. I have previously argued in defense of Justice Scalia's lone dissents in *Morrison v. Olson*<sup>101</sup> and in *Mistretta v. United States*<sup>102</sup> that his vision of the separation of powers is essential to prevent us from backsliding into a form of parliamentary government where congressional committees manipulating so-called "independent" agencies become the norm in the United States instead of the exception.<sup>103</sup> I hope this Article helps shed light on what is at stake in that debate over whether or not our Constitution creates a unitary executive. The virtues of presidential separation-of-powers government must be continuously defended in the United States as well as explained to interested observers from overseas.

---

100. Carlos Santiago Nino, *Hyperpresidentialism and Constitutional Reform in Argentina*, in Lijphart and Waisman, *Institutional Design in New Democracies* at 161 (cited in note 49).

101. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

102. 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

103. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23 (1995).

In making this defense of the virtues of presidential government I want to emphasize that although the advantages of presidentialism far outweigh the disadvantages for me in the abstract, I am well aware that these regime choices are never made in the abstract. I willingly and happily concede that there may be many situations where picking or staying with a constrained German-style parliamentary regime is the wiser course. Constrained parliamentary government is a *big* improvement over the pure British Westminster model, at least so long as proportional representation is totally eschewed. Similarly, U.S.-style presidential government *is* much better than are many other things that go by the name of presidentialism. There is much to be gained from thinking about and identifying the things that have made particular presidential or parliamentary governments succeed or fail. Bruce Ackerman and Juan Linz are surely right that structure matters a lot even if they are wrong in my opinion to prefer constrained parliamentary government to a presidentialist separation-of-powers.