

DEMOS CREATION, RELIGION, AND FEDERALISM IN THE G-20 CONSTITUTIONAL DEMOCRACIES

*Steven G. Calabresi**

Abstract

The article supplements Professor Ackerman's account of the role of Mass Popular Movements in his book "Revolutionary Constitutions" by arguing that these movements did more than simply constitutionalize their charisma. In the Author's view, they also created the demos or nation state, which became a constitutional democracy. Before one can have a nation state or a constitutional democracy one must have a nation or a demos. Strikingly, in four of the nation states, which Professor Ackerman studies Mass Popular Movements created the demos or nation state, which then became a constitutional democracy. The Mass Popular Movements, which Professor Ackerman studies thus engaged in nation-state creation as well as in the constitutionalization of their charism. In the course of discussing this process of demos creation, the Author will also explain why some constitutional democracies emerge as genuine nation states and others emerge as truly federal regimes.

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1. Introduction

Professor Bruce Ackerman's new book, "Revolutionary Constitution" ¹ provides a brilliant account, relying on extensive

* Clayton J. & Henry R. Barber Professor, Northwestern Pritzker School of Law.

¹ B. Ackerman, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law* (2019).

original research, of the rise to power of Mass Popular Movements in a series of western democracies and of their effective decision to constitutionalize their charisma in a lasting written constitution with working systems of checks and balances and with judicial review of the constitutionality of legislation. This book offers the only English-language treatment of the emergence of constitutional democracy in many of these countries. Professor Ackerman's account in Volume I will ultimately be supplemented by the emergence of new democratic constitutions as a result of an Elite driven process in Volume II and as a result of an Evolutionary process in Volume III. Professor Ackerman's three book series will be the leading university press monograph in the nascent field of Comparative Constitutional Law.

My comments herein supplement Professor Ackerman's account of the role of Mass Popular Movements in Volume I by arguing that these movements did more than simply constitutionalize their charisma. In my view, they also created the demos or nation state, which became a constitutional democracy. Before one can have a nation state or a constitutional democracy one must have a nation or a demos. Strikingly, in four of the nation states, which Professor Ackerman studies Mass Popular Movements created the demos or nation state, which then became a constitutional democracy. The Mass Popular Movements, which Professor Ackerman studies thus engaged in nation-state creation as well as in the constitutionalization of their charism. In the course of discussing this process of demos creation, I will also explain why I think some constitutional democracies emerge as genuine nation states and others emerge as truly federal regimes.

Two political scientists have written about the problem of demos creation recognizing that before one can have majority rule in a democracy one must know what the size of the relevant democratic unit is. Robert A. Dahl & Edward A. Tufte, *Size and Democracy* (1973); Alberto Alesina & Enrico Spolaore, *The Size of Nations* (2003). I have previously written about this issue in: Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from Law*, 1;-/23-189 in *Nomos LV Federalism and Subsidiarity* (James E. Fleming & Jacob T. Levy eds. 2014) and in Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism* 63 *Florida L. Rev.* 1 to 45 (2011). It is absolutely essential that one establish what the demos is before one can have majority rule within it in a constitutional

democracy. Four of Professor Ackerman's Mass Popular Movements engaged in demos creation, as well as in constitutionalizing their charisma in a written constitution and Bill of Rights enforceable by a working system of checks and balances with judicial review of the constitutionality of federal and state legislation and executive acts.

Part I below discusses the process of demos creation in the countries, which Professor Ackerman studies. In Part II, I will discuss the process of demos creation in the remaining G-20 constitutional democracies, which Professor Ackerman does not discuss in "Revolutionary Constitutions". I seek here to explain why some constitutional democracies emerge as genuinely federal regimes and others emerge as genuinely unitary regimes. Finally, in Part III I will offer some thoughts about what is normatively desirable in demos creation and in the creation of meaningful federal regimes.

2. Demos Creation in the Regimes Discussed in: "Revolutionary Constitutions. Charismatic Leadership and the Rule of Law "

In his volume on Revolutionary Constitutions, Professor Ackerman persuasively argues that Mass Popular Movements constitutionalized their charisma in: India; South Africa; Italy; France; Poland; and Iran. I totally agree with Professor Ackerman's thesis but think these Mass Popular Movements also engaged in demos or nation-state creation. I will briefly discuss this process in the countries Professor Ackerman's new book discusses to show how powerful the Mass Popular Movements were that he describes. In doing this, I will discuss each country in the order in which Professor Ackerman discusses it.

A. India

Imperial British India consisted of what are today four independent nation states: 1) the Republic of India; 2) the nation of Pakistan; 3) the nation of Bangladesh; and 4) the nation of Myanmar. British India contained, in addition to a very large number of states, 555 Princely Kingdoms, in which a hereditary Indian Prince governed

domestic affairs while the British Empire governed foreign affairs.² The Princely States occupied the territory of approximately 48% of British India, which also had huge Hindu and Muslim populations living for the most part peacefully side-by-side.

Professor Ackerman describes admirably how the Mass Popular Movement of the Indian Congress Party, led first by Mahatma Gandhi and then in 1947 by Jawaharlal Nehru, created the nation of India in 1947. What I want to stress here is that the Congress Party not only constitutionalized its charisma, as Professor Ackerman proves, but it also created modern boundaries of the Republic of India within British India, while not including the areas of British India that ultimately became the separate nations of Pakistan, Bangladesh, and Myanmar. The Mass Popular Movement of the Congress Party that created the predominantly Hindu nation of the Republic of India in 1947 found itself in competition at that time with another Mass Popular Movement, the All-India Muslim League, led by Muhammed Ali Jinnah, which founded the Islamic countries of West and East Pakistan in 1947, with East Pakistan eventually becoming its own independent nation state, Bangladesh.³

It is important to note that the process of demos creation of India and Pakistan in 1947 led to a war between those two countries with huge casualties and with huge numbers of Hindus leaving Pakistan to move to India and huge numbers of Muslims leaving India to move to Pakistan. An estimated 11 million refugees moved from India to Pakistan or vice versa in 1947 and possibly 1 million people died in the Indo-Pakistani war of 1947.⁴ Demos creation by the Mass Popular Movement of the Congress Party of India was a very bloody affair, but it was necessary to create the constitutional democracy of India, which exists today.

Because India was born in the dire emergency of a war it has a stronger central government and weaker states than do most federations.⁵ It is best described as being a quasi-federal regime.⁶ One of the earliest steps, which the Congress Party took was to abolish

²A. K. Thiruvengadam, *The Constitution of India: A Contextual Analysis* (2017).

³S. Aziz, *The Constitution of Pakistan: A Contextual Analysis* (2018).

⁴Thiruvengadam, *supra* note 2 at 30.

⁵*Id.*, at 77-81.

⁶K.C. Wheare, *Federal Government* (1946).

those of the 555 Princely States, occupying 48% of the country, which ended up on the Indian side of the India-Pakistan international border.⁷ The abolition of these Princely States was yet another act of demos creation by the Indian Congress Party. The Congress Party redrew all of the Indian state boundary lines, trying to put separate language groups in separate states of India, and India today has 29 states and 11 union territories. India, today, is not plagued by any serious separatist movement so the act of demos creation in 1947 was highly successful. India does experience religious strife between its huge Hindu majority and its small Muslim minority, and I will address that topic in Part III below.

The Indian government is usually describe as being quasi-federal because it has a strong central government born during the Indo-Pakistani War of 1947 and weak states. Since the year 2000, the Indian states have been steadily gaining power making India more federal than it once was. India today is 79.8% Hindu; 14.2% Islamic; 2.3 % Christian; 1.7% Sikh; and .7% Buddhist. There are also small Jain and Zoroastrian communities in India. Because India's Hindu population is so large, real federalism has never been an imperative in India.

The bottom line on India, then, is that the Mass Popular Movement, which constitutionalized its charisma after Independence in 1947, also engaged in demos creation by: 1) separating India from Pakistan in a very bloody war in 1947; and 2) by abolishing the 555 Princely States, which had existed under the British Empire, but which ceased to exist in independent India.

B. South Africa

The Mass Popular Movement of the African National Congress Party (ANC) led by Nelson Mandela constitutionalized its charisma in the democratic constitution of South Africa.⁸ But, before that could happen, the ANC faced two demos creation issues. The first issue was whether the white South African community should have its own small predominantly white nation state centered perhaps around Cape Town, while the rest of what had once been Imperial British South Africa became an all-black African nation state. The second issue was

⁷Thiruvengadam, *supra* note 2, at 52; 74-79.

⁸H. Klug, *The Constitution of South Africa: A Contextual Analysis* (2010).

whether the Zulu nation, which had its own Bantustan under the apartheid regime, which had governed South Africa from 1948 to 1992, should be either an independent Zulu nation state or at least a highly autonomous province.⁹

Nelson Mandela, and the ANC, were opposed to either of these sub-divisions of South Africa and wanted to create one multi-racial South African demos. They prevailed in doing so over the opposition of the Zulus, and today's South Africa is: 80.2% Black; 8.8% Colored; 8.4% White; and 2.5% Asian. Happily, and thanks largely to Nelson Mandela's heroic leadership, the multi-racial republic of South Africa came into existence in 1996 with no loss of life due to civil war and no migration of minority communities. Over the last twenty-two years, however, a significant number of White South Africans have emigrated to the United States and to other White nations that were once part of the British Empire. There have been no significant separatist movements in South Africa since 1996 so the ANC's act of demos creation was a huge success.

The South African Constitution does set up a quasi-federal regime with an all-powerful national government. The country is often referred to as "The Rainbow Republic" because of its racial and ethnic pluralism. South Africa has nine Provinces, which each send ten delegates to the National Council of Provinces, which is the weak upper house of the South African bicameral legislature.¹⁰ South Africa is: 73.2% Protestant; 14.9% secular; 7.4% Catholic; 1.7% Muslim; 1.1% Hindu; and 1.7% of other faiths. There are thus no significant religious divisions in the country.

The Mass Popular Movement of the ANC led by Nelson Mandela not only constitutionalized its charisma in South Africa; it also created the demos of South Africa within its British colonial borders. Separate White or Zulu nations could in theory have been created in the 1990's, but this subdivision of colonial South Africa did not occur.

C. Italy

⁹*Id.*, at 8, 17, 101, and 188.

¹⁰Klug, *supra* note 8, at 153-186.

As Professor Ackerman explains, the Mass Popular Movements of the Italian resistance against fascism created the Post-World War II Constitution of the Republic of Italy.¹¹ Since Italy had lost World War II, Italian claims on Italian speaking portions of Austria; Croatia; and Switzerland were a non-starter. Moreover, Italy is today: 91.5% ethnically Italian; and only 8.5% others. Italy has been a nation state since the Unification of Italy in the mid-Nineteenth Century. Thus, superficially the issue of demos creation was not on the table when the current Italian Constitution was written after World War II.

If one looks more deeply, however, at the Italian nation state, it becomes apparent that Italy, like Germany, has many regions, which for a very long time were governed independently of one another and which have a rich and storied history. These regions include: 1) Venice, which was an independent republic for a thousand years from 697 A.D. until 1797 A.D. when Napoleon disbanded it;¹² 2) Piedmont Savoy, which was for centuries a self-governing state; 3) the so-called Kingdom of the Two Sicilies, which included southern Italy and the Island of Sicily and which was independent from 1815 until 1860; 4) the Republic of Florence, which was for a time an independent republic between 1115 A.D. and 1532 A.D.; and 5) the area from Rome to Bologna and Ferrara, which was a part of the Papal State before that entity was confined to the Vatican and to St. Peter's Cathedral. These independent Italian city states had at least as long and as glorious a history as independent entities as did the independent German states of the Nineteenth Century like: Bavaria, Saxony, Hanover, and Prussia. The Republic of Venice for example controlled most of the Greek Islands and kept the Turks out of Europe, while the Republic of Florence was the home of the Renaissance.

German constitutions from the Imperial Constitution of 1871 to the Weimar Constitution to the Basic Law of 1949 all set up federal systems of government that recognized that the German demos included many state demoi that required independent and real powers.¹³ Italian Constitutions from the *Statuto Albertino*, under which

¹¹Valerio Onida, et al., *Constitutional Law in Italy* (2013); James L. Newell, *The Politics of Italy* (2010); Vittoria Barsotti, et. al, *Italian Constitutional Justice in Global Context* (2015).

¹²W.H. McNeill, *Venice: The Hinge of Europe, 1081-1794* (1974).

¹³W. Heun, *The Constitution of Germany: A Contextual Analysis* 1-24 (2011).

Italy unified in the 1860's, to the post-World War II Constitution of Italy have all in contrast created all-powerful national governments with no meaningful system of federalism at all. Italian unification and German unification were both liberal, anti-feudalist political movements of the Nineteenth Century, and yet Germany has today, and has always had a federal regime of many *demos* within a larger federal *demos*, while Italy has today, and has always had, an all-powerful national government, even though it contains entities like Venice, which were independent republics for one thousand years. What explains this difference between Italy and Germany?

Daniel Ziblatt, *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism* (2008) argues that the key difference between the 19th Century German states and their Italian counterparts is that the former had much more developed state apparatuses and bureaucracies than did the latter. Ziblatt makes a persuasive case on this point, but I think there is more at work here than he realizes

For reasons I will set forth in the remainder of this essay, I think the reason Italy is a unified national state *demos* and Germany is a federal republic *demos* with many state *demos* has to do with religion in the two countries and the more entrenched state bureaucracies in the German *Länder* as compared to the Italian regions. Italy is: 74.4% Catholic; 22.6% irreligious; and 3% other. Germany, in contrast, is 59.3% Christian, but the Christian majority is divided into roughly equal groups of: 1) Lutheran and Calvinist Protestants united in the Evangelical Church of Germany; and 2) Roman Catholics. In addition, Germany is: 34.4% irreligious; 5.5% Islamic; and .8% other religions. The big difference then between Germany and Italy is that Germany is very pluralistic with respect to the religious beliefs of its people whereas Italy is monolithically Catholic or secular.

These differences are deeply rooted in the histories of Italy and of Germany. The Italian City states prior to the liberal, anti-feudal unification of Italy in the Nineteenth Century were all Catholic or secular. The German states, however, which made up the Holy Roman Empire were all either Catholic, like Bavaria, or Protestant, like Prussia. Under the famous Peace of Augsburg, in 1555, which ended the Thirty Year War in Continental Europe between Protestants and Catholics, a rule was adopted of *cuius regio, eius religio*. This rule

meant that the religion of the Prince of a German state determined the religion of that prince's subjects.¹⁴ This was the first of a series of settlements of Catholic-Protestant wars in Europe, which only came to a final end with the Peace of Westphalia in 1648.

In other words, when Germany and Italy unified in a classical liberal, anti-feudal nationalist revolution in the mid-Nineteenth Century, Germany maintained federalism because some of its states were Protestant and others were Catholic whereas Italy did not maintain federalism because all of Italy was either Catholic or secular. It was in part the need to accommodate religious pluralism, which led to federalism in Germany and to a unitary nation state in Italy. I will defend this proposition further below. Constitution writers in Germany and Italy after World War II opted for federalism in Germany and a unitary government in Italy because this had been the pre-World War II practice in those respective countries.

The Allied powers made Germany totally redraw its state boundary lines chopping the militaristic mega-state of Prussia into small pieces, but it retained the historical German preference for federalism.¹⁵ Italy acknowledged the existence of its various regions after World War II, but it gave them no power at all as *demos* within a larger *demos* because they had not had power under the pre-World War II *Statuto Albertino*. In addition, the Allied victors in World War II pushed for federalism in Germany, which country they feared, but not in Italy, which country they did not fear.

The Italian Mass Popular Movement described by Professor Ackerman thus pushed for a unitary nation state *demos* in Italy, and that is what Italy today has. Italy has a political party, the Northern League, which has pushed for real federalism, and at times for the secession of the Po Valley area, for thirty years now, but the Northern League has not come remotely close to realizing its objectives.

D. France

¹⁴W. Heun, *The Constitution of Germany: A Contextual Analysis* (2011).

¹⁵Martin Kitchen, *A History of Modern Germany: 1800 to the Present* (2006); Gen. Lucius D. Clay, *Decision in Germany: A Personal Report on the Four Crucial Years that Set the Course of Future World History* (1950). For an account of modern German constitutional law on federalism, see Donald P. Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed. 2012).

Professor Ackerman describes how a Mass Popular Movement of fighters in the resistance against the Nazis formed the French Fourth Republic and sadly that Republic did face a demos definition issue, which strained it quite badly followed by a second demos definition issue, which destroyed the Fourth Republic and ushered in the Fifth Republic.¹⁶ Demos definition issues arise for a constitutional democracy because one has to know what the demos of the constitutional democracy is within which a majority of the people can elect a government.

The first demos definition issue, which the French Fourth Republic had to address was a drive for national independence in the French colonies of Indo-China and most especially in Vietnam. The Labour government of Clement Atlee of the United Kingdom of Great Britain and Northern Ireland deliberately abandoned the Imperial Regime of British India in 1947 without a fight. Prime Minister Atlee disapproved of British colonialism on moral grounds, and he wanted to spend British taxpayer funds on a new National Health Care plan and not on fighting colonial wars half way across the world. When India asked for its independence after World War II, Atlee granted independence to India and Pakistan so fast that a war between those two countries ensued over where the border between them lay.

The French Fourth Republic, however, did not follow this approach at all with respect to the French colonial holdings in Indo-China and a long war of independence in that area began. The French military forces were defeated in this war in a decisive battle at Dien Ben Phu between March and May of 1954, and the French were compelled to surrender and withdraw their forces from Vietnam. The war was expensive, long, and unpopular in France, especially after the French lost. This military defeat stained the reputation of the government of the Fourth Republic.

A far more serious demos definition issue then around in French colonized Algeria, which had been part of France since the early 19th Century. Nearly, 2 million French citizens lived in Algeria, and there

¹⁶Sophie Boyron, *The Constitution of France: A Contextual Analysis* (2013); Martin A. Rogoff, *French Constitutional Law: Cases and Materials* (2010); John A. Rohr, *Founding Republics in France and America: A Study of Constitutional Governance* (1995); John S. Bell, *French Constitutional Law* (1992).

were many additional Algerians of partial French descent. Abandoning Algeria was politically a wrenching process because so many French citizens lived there along with people of mixed French and Algerian heritage. By early 1958, the Algerian rebels, who sought independence for their country, had so overwhelmed the French military that it began to look as if French forces would be driven into the sea.

There were so many French Algerians and Algerians of partial French descent who wanted Algeria to remain French that the conflict was in essence a civil war as well as a revolutionary war. French Algeria sent representatives to the French parliament and leading French military officers in Algeria threatened to revolt and topple the Fourth Republic unless retired World War II hero Charles De Gaulle was brought in to run the French government. The rebellious French Algerian military officers seized the island of Corsica and were threatening to seize Paris when, on May 29, 1958, De Gaulle agreed to take over the government so long as he could write a new presidential, separation of powers Constitution for France.

De Gaulle assumed power and the Algerian crisis abated as the French military swore loyalty to him. As Professor Ackerman explains, De Gaulle came to power, and built while he was in power, a Mass Popular Movement of Gaullists, who were committed to constitutional change and to the creation of a strong presidency. A new Constitution of the Fifth Republic of France, with a very strong presidency, was approved by 80% of all those who voted on it in a referendum held on September 28, 1958. The new Constitution, which was the result of a crisis over the scope of the French demos went into effect on October 4, 1958. On October 28, 1962, France held a referendum on whether the President of France should be separately and directly elected by the voters of France. This referendum was approved by 62.3% of those voting in an election in which 77% of French voters participated.

Struggle over the Algerian civil war continued into the 1960's, and there was a brief attempt to topple De Gaulle in a coup d'état, which resulted in De Gaulle declaring a constitutional state of emergency. Ultimately, Algeria achieved independence from France in 1962, but only after one million Europeans fled to France, two million Algerians resettled or were displaced, and hundreds of thousands of people lost their lives. De Gaulle remained as President from 1958 to

1969, and he presided over the messy civil war that ultimately ended French control of Algeria. De Gaulle's personal charisma, and his Mass Popular Movement of Gaullists ended up having to accept the French loss of control over the demos of Algeria.

The French Fifth Republic was thus born out of a demos definition crisis during a civil war over French control of Algeria. The French lost that war, but they accepted their defeat because of De Gaulle's enormous popularity and charisma and the power of his Mass Popular Movement. Just as India's Congress Party had to acknowledge the independence of Pakistan, so too did the French Gaullists had to reconcile themselves to Algerian independence. Between four and five million Algerian refugees fled Algeria to live in France in 1962 and after. A significant majority of them were Muslims, which made France a partially Catholic and partially Muslim country with substantial long term ramifications. France today is 51% Catholic; 40% irreligious; 6% Muslim; and 1% Jewish. Many recent emigrants to France have also been Muslims.

France has an all-powerful unitary national government because the French Revolutionaries of 1789 hated the provincial nobility and the Catholic religion, and so they thoroughly rooted out and eliminated the traditional French regions, which once had a strong subculture. These regions once included: Brittany; Normandy; Ile de France; Pays de la Loire; Nouvelle Aquitaine; Provence; and Corsica. The French Revolutionaries destroyed these regions as *demos* and created in their place one national French *demos*, with 101 territorial departments. This fragmenting of regional power from 19 into 101 units made the only relevant *demos* in France the nation state *demos*. See, e.g., Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism* 63 Florida L. Rev. 1 to 45 (2011). Recently, France has begun to decentralize some power,¹⁷ but it is, along with Japan, one of the two most unitary of the fifteen constitutional democracies that are also members of the G-20 group of nations.

¹⁷V. A. Schmidt, *Democratizing France: The Political and Administrative History of Decentralization* (1990).

A key historical factor that explains the absence of federalism in France is King Louis XIV's Revocation of the Edict of Nantes expelling the French Huguenots or Protestants from France in 1685. As many as 400,000 French Protestants left France after 1685 relocating in Great Britain, Prussia, the Dutch Republic, Switzerland, South Africa, and Thirteen British North American colonies. These individuals included many of the best businessmen and minds of France, and their exile sent France into a long term decline. Most important of all, the expulsion of all French Protestants in 1685 has meant that France from 1789 to 2018 is either Catholic or secular but has no Protestant minority. This difference between France and Germany helps explain why Germany has maintained federalism and France has not.

In France, as in India and South Africa, one can see an Ackermanian Mass Popular Movement engaging in demos creation as well as constitutionalizing charisma.

3. Demos Creation in the G-20 Constitutional Democracies Beyond those Which Professor Ackerman Discusses

I will now briefly discuss the demos creation and federalism issues in those of the G-20 Nations, which Professor Ackerman does not address in *The Rise of World Constitutionalism, Volume I* (forthcoming 2018). In Part III, I will discuss normative issues raised by demos creation and by the creation of federal systems with demoi.

A. The United States

When the thirteen British North American colonies declared independence on July 4, 1776, many wondered whether French-speaking Quebec or the British colonies in the Caribbean would follow suit and join the rebellion against British rule. They did not do so. The British had, in 1774, guaranteed Quebec the freedom to be Catholic; the freedom to follow the civil law rather than the common law; and some freedom of self-government. As a result, Quebec remained in the British Empire and did not join the United States.

The Declaration of Independence and the Articles of Confederation both recognized the sovereignty and independence of each of the thirteen original colonies, which became thirteen demoi. When the federal Constitution was written in 1787, it created a federal U.S. demos, but it was originally understood as being a federal

government of limited and enumerated powers with huge powers remaining in the states as *demos* until the Constitutional Revolution of 1937. As Justice Kennedy has written, the Framers of the Constitution split the atom of sovereignty between the national *demos* and the state *demos*.¹⁸ As a result, a new sort of federal sovereignty came into existence when a Mass Popular Movement of Federalists narrowly secured the ratification of the Constitution by popularly elected conventions in the thirteen original states.

Among the many reasons that the Framers set up a federal system under the Constitution of 1787 with many powers in the state *demos* was that the thirteen original states sharply differed from one another on matters of religion. The New England colonies had been founded by Puritans and were all Congregationalist in the 1780's. All of the New England colonies, except Rhode Island, had established churches in the 1780's, and Massachusetts did not legalize the celebration of Christmas Day until the 1830's. In contrast, Virginia, the Carolinas, and Georgia were all Anglican/Episcopal states in the 1780's. Southerners worshiped in the Church of England, which the Puritans had abandoned because they thought it was too Catholic. Among the middle colonies: 1) Maryland had a significant number of Catholics; 2) Pennsylvania had significant numbers of Quakers and Lutherans; 3) New York had members of the Dutch Reformed Church, Anglicans, and Lutherans; and 4) Rhode Island had a huge number of Quakers,¹⁹ as well as Anabaptists, Anglicans, and a Jewish community. In short, the thirteen American states were all English-speaking and the colonists in those states were all of English descent, but there were sharp religious differences among the thirteen original states.

American federalism in 1791 was reflected in the first clause of the Bill of Rights, which provides that: "Congress shall make no law respecting an Establishment of Religion." This Clause was meant to ensure that the federal government could not impose on the states with their very diverse religious beliefs a federally established church or religion. As in Germany, and unlike the situation in Italy, state disagreements about religion led to the establishments of a federal

¹⁸*U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

¹⁹M. N. Rothbard, *The First Executions for Religion on American Soil* in *Conceived in Liberty*, Chapter 29.

government with meaningful power reserved to the states. An American demos was created, but within it were thirteen demoi. The American Framers chose to split the atom of sovereignty between the federal government and the states. Yet another cause of American federalism was disagreement between the North and the South about slavery. This, too, led to the creation of only a limited national government.

The demos/demoi issue was further addressed by the Northwest Ordinance of 1787, by which Virginia and the other original states ceded their land claims to an area that became the free states of: Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota. This action guaranteed that the U.S. would be a union of lots of small state demoi and no large state like Virginia plus the Northwest Territories. After 1791, the U.S. acquired and incorporated into the American demos: 1) the lands west of the Mississippi acquired in 1803 by the Louisiana Purchase; 2) Florida; 3) the lands conquered from Mexico in the Mexican-American War plus the independent state of Texas; 4) Alaska, which was bought from the Russians, and 5) the state of Hawaii, which was militarily annexed. Territories, which were acquired but which have not been annexed as states include: 1) the Philippines; 2) Guam; 3) Puerto Rico; and 4) the U.S. Virgin Islands.

The key demos/demoi test faced by the U.S. was the attempted secession of 11 Confederate slave states in 1861, which attempt was defeated in the U.S. Civil War. In 1861, there were fifteen slave states, but four did not secede from the Union: 1) Maryland; 2) Delaware; 3) Kentucky; and 4) Missouri. In addition, part of Virginia seceded from Virginia during the Civil War and became the free state of West Virginia. The Civil War was barely won by the North, and it is quite possible that it would not have won if all 15 slave states had seceded. The collective action problem of organizing a secession in a Union with only 11 of the 15 slave states out of the 34 states in the Union in 1861 is quite possibly the collective action problem that doom the southern slavery secession.²⁰

One final word about the U.S. demos. The Articles of Confederation specifically provided that Canada had an automatic

²⁰Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 Florida L. Rev. 1 to 45 (2011).

right to join the United States, and a principle unaccomplished goal of the U.S. in the War of 1812 was to annex Canada. Why did Canada remain independent of the U.S.? To begin with, the British offered Quebec the freedom to practice Catholicism and the right to follow the civil law and not the common law, and Quebec might not have gotten this good a deal if it had joined the U.S. In addition, Ontario and English speaking Canada was settled by U.S. Tories who liked the English monarchy and had no desire to live in a republic. Moreover, in the wake of the American Revolutionary War, the English-speaking population of North America sorted itself out into two halves with Whigs moving from Canada to the U.S. and Tories moving from the U.S. to Canada. Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (1996). It is for these reasons that English-speaking North America is vided between the United States and Canada.

B. Germany

As mentioned above, German federalism with a demos/demoi arrangement is a consequence of the historical divisions among Protestant and Catholic states, which dates back to the 1500's and 1600's.²¹ No such division is evident in Italy where all the regions were always Catholic, which is why Italy today is a unitary nation state even though it has, and has always had, profound regional differences. The other great demos problem faced by Germany was what to do when the East German communist regime collapsed. The German Basic Law of 1949 had said it was provisional pending a reunification of East and West Germany. When that reunification occurred, East Germany simply acceded to the Basic Law as six additional states and so reunited Germany is today one demos with sixteen state demoi. German federalism remains alive and kicking today in 2018. Steven Gow Calabresi et al., *The U.S. Constitution and Comparative Constitutional Law: Texts, Cases, and Materials* 598-620 (2016)

C. Japan

Japan is, today, a unitary nation state with minimal decentralization and with territorial claims to a few historically

²¹W. Heun, *The Constitution of Germany: A Contextual Analysis* (2011).

Japanese islands seized by Russia at the end of World War II. The Japanese demos consists of a cluster of ethnically and linguistically identical people living on two main islands and some smaller islands nearby. The people of Japan are: 51.82% Shinto; 34.9% Buddhist; 4% Shinto sects; and 2.3% Christian. There are no sharp religious disagreements among the Japanese people, which I will argue is part of the reason why federalism has never taken root in Japan.²²

D. Canada

The great demos/demoi issue in Canada is the status of Quebec Province as an historically Catholic and French-speaking jurisdiction in a country where the other nine Provinces are English-speaking and Protestant. Canada has now survived two Quebec secession referenda, and it has become a militantly bi-lingual country since Pierre Trudeau served as Prime Minister in the 1970's and 1980's. Canada does have, however, a strongly federal constitution, and the Canadian provinces retain many important powers.²³ The Canadian Supreme Court, for example, ruled in 2011 that the Canadian national government lacked the power to adopt an analogue to the U.S. Securities and Exchange Act. Canadian federalism is thus alive and well in 2018. Steven Gow Calabresi et al., *The U.S. Constitution and Comparative Constitutional Law: Texts, Cases, and Materials* 641-662 (2016).

E. Australia

Australia is a federal republic with six states as part of the federal Commonwealth government but support for federalism is so low today in Australia that one could easily imagine it being abolished.²⁴ Australian federalism is essentially dead whereas U.S. and Canadian federalism are very much alive. I think this is due to religious difference in the United States among 1) evangelical Christians; 2) followers of mainline Protestant denominations; 3) Catholics; 4) Jewish groups; and 5) non-believers. I think Canadian federalism remains alive because culturally Quebec is Catholic whereas the rest of Canada is Protestant and while most Canadians are

²²S. Matsui, *The Constitution of Japan: A Contextual Analysis* (2011).

²³J. Weber, *The Constitution of Canada: A Contextual Analysis* (2015).

²⁴C. Saunders, *The Constitution of Australia: A Contextual Analysis* (2011).

pretty secular the religious cultural and linguistic difference still matter.

Australians are: 30.1% non-believers; 22.6% Catholic; 18.7% General Protestant; 13.3% Anglican; and 2.6% Islamic. No one is very ardent about any of these faiths in Australia, and so there is no underpinning for a religion-based federal system. This explains why Australian federalism is now dead. There have been no other significant demos issues in Australian history.

F. South Korea

South Korea is a unitary nation state whose only demos issue is a desire to be reunited with North Korea someday – a union that is very unlikely to happen anytime soon. The religion of South Koreans is: 56.9% unknown; 19.7% Protestant; 7.9% Catholic; and 15.5% Korean Buddhist. Religion is not an important force in South Korea, which has no federal structure. This fits with what I believe is a global pattern of demos creation issues resulting from religious differences, as happened with India and Pakistan, or with religious differences manifesting themselves in strongly federal systems, as I argues has happened in the U.S.; Germany; and Canada.

G. Brazil

Brazil has had a federal structure to its Constitution since the 1820's, but the Brazilian states have never been remotely as power as the states are in the United States. The explanation for this, as Keith Rosenn points out in a brilliant law review article, which has heavily shaped my thinking, is that the Brazilian states were all founded by Portuguese speaking Catholics, and so Brazil has never had or needed a strongly federal constitutional structure.²⁵ See Calabresi, *supra* et al. at 669-675. In contrast again, the thirteen original American states differed sharply from one another with respect to religion (as Rosenn points out) as did the provinces in Canada and the lander in Germany. Brazil's strongly unitary form of federalism reflects the fact that, until quite recently, Brazil has been an overwhelmingly Catholic country. The power of the Brazilian states is also undermined by the recognition its constitution gives to the rights of municipal governments. This

²⁵K. S. Rosenn, *Federalism in Brazil*, 43 Duq. L. Rev. 577 (2005).

weakens the states by allowing the national government to all with the municipal governments.

H. Indonesia

Indonesia has moved to a decentralized government, but it does not have a federal system.²⁶ This reflects the fact that the country is: 87.2% Islamic; 7% Protestant; 2.9% Catholic; and 1.7% Hindu. Indonesia is essentially uniform with respect to religion, which eliminates the need for German or U.S. or Canadian style federalism. It has no other demos determination issues now that East Timor has gained its independence from Indonesia.

I. Mexico

Until the revolutionary changes ushered in around the year 2000, the main Mexican demos issue was the country's loss of a huge amount of territory to the United States in the Mexican-American War of the 1840's. A huge number of Mexicans have either emigrated to the United States or work in the United States and remit funds to their families in Mexico. The number of Mexican and Hispanic emigrants to the U.S. is sometimes referred to by Mexican intellectuals as being in effect a *reconquista* of that which was lost in the 1840's in the Mexican-American War.

Mexico has historically been a federation with much weaker states than the states of the U.S. or the provinces of Canada or the lander of Germany.²⁷ The population of Mexico is 83% Catholic; 10% Protestant; .2% other religion; and 5% no religion. Mexico is thus another federal regime, which is overwhelmingly of one religion. It is thus not surprising that the Mexican states have not historically been very autonomous. This may now be changing as Mexico has liberalized and democratized its culture.

J. The United Kingdom of Great Britain and Northern Ireland

²⁶S. Butt & T. Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (2012).

²⁷Jose Maria Serna de la Garza, *The Constitution of Mexico: A Contextual Analysis* (2013).

The U.K. presents some of the most fascinating demos definition problems gracing the front pages of our newspapers and newsmagazines today.²⁸ It is almost hard to know where to begin except by observing that the demos upon which the sun never set and which occupied one quarter of the world in 1914 may soon be reduced to include on England. The American Revolution of 1776; the Irish Revolution; the Statute of Westminster 1931; the Indian Declaration of Independence; the Israeli Declaration of Independence; the Canadian Constitution Act 1982; and the Devolutions of Power to Scotland, Wales, Northern Ireland, and the City of London in 1997 and 1999 had a revolutionary effect on the British Empire.

We have already discussed the U.S.; Indian; Canadian; and Australian devolutions, so we will begin here by observing that Catholic Ireland rebelled against the Anglican United Kingdom, and the Irish Free State Constitution Act 1922 recognized that most of Ireland was a free sovereign country independent of the U.K. with a population that was almost exclusively Catholic. The cause of the creation of an Irish demos, which was separate from the U.K. demos, was almost entirely due to religious differences was the case with the separation of India and Pakistan in 1947 and of Jordan and Israel in 1946 to 1948. The U.K. retained control after 1922 over Northern Ireland, which was two-thirds Protestant Scots-Irish and one-third Catholic. U.K. control continued over Northern Ireland to protect Scots-Irish Protestants from being a minority in a unified country of Ireland.

This arrangement was not satisfactory to many Northern Irish Catholics or to their supporters in Ireland, and, after decades of Irish Republican Army terrorism, Northern Ireland was given home rule in the late 1990's under a consociational power-sharing plan designed to protect the rights of the Catholic minority in Northern Ireland. Thus, the creation of the Irish Free State demos, and the recognition of a separate Protestant demos with a powerful Catholic minority in Northern Ireland, are all indicators of how religion leads uniquely to demos definition issues.

²⁸P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (2nd ed. 2012).

Another demos definition issue has arisen in the modern U.K. as a result of the decision of Tony Blair's New Labor Government, which acquired the power to make constitutional changes in the U.K. after winning only 43% of the vote in the 1997 parliamentary election was the devolution of power to Scotland, Wales, and the City of London. This development led to the emergence of a very popular Scottish Independence Party known as the Scottish Nationalist Party or SNP. The SNP pushed the Conservative government of David Cameron to hold a referendum on Scottish independence from the U.K., which Cameron foolishly agreed to hold. Cameron then foolishly agreed to allow all EU residents in Scotland to vote on Scottish independence, he agreed to lower the voting age for this referendum to 16, and he inexplicably disenfranchised Scots who happened to be working or living in England at the time the referendum was held from voting in the referendum. The end result was a surprisingly close vote of 55% of Scots against independence and 45% in favor of it. This was a good enough showing to allow the issue of whether Scotland should be a separate demos from the U.K. to fester for the foreseeable future.

Scots differ from the English in that they are largely of Celtic or Viking descent whereas the English are mostly descending from pre-Roman inhabitants of Britain, from Anglo-Saxon Germans, from French Normans, and from the Vikings instead. Historically, Scotland was Presbyterian and English was Anglican, but, in modern day Scotland, only 54% of the population calls itself Christian while 37% report not having a religion. The Presbyterian Church of Scotland has 7.5% of the population as members, while 27.8% say they are followers of the Church of Scotland. In contrast, in England 59.4% of the population calls itself Christian; 24.7% say they have no religion; 5% are Muslims; and 3.7% belong to other faiths. The largest group by far of English Christians belong to the Church of England; the next largest group practice the Latin rite and are English Catholics; and the third largest group are Methodists. A small minority of the population practices ancient Pagan rites.

There are thus some religious differences between England and Scotland and some ethnic differences, which explains why the issue of whether there should be a separate Scottish demos or a federal structure to the U.K. government is presently open for debate. The existence of the European Union, and the belief of many Scots that they

could join it as a co-equal member and get all the free trade and national defense benefits they now receive from the U.K. keeps the issue of Scottish independence very much alive. This is especially so since the United Kingdom voted 51.9% to 48.1% to leave the European Union in an all U.K. referendum held by Prime Minister David Cameron on June 23, 2016 with 72.2% of the electorate turning out to vote.

Brexit, or the United Kingdom's decision to leave the European Union (EU), was itself a major demos definition issue because the EU government is turning into a real federal government with more powers than the U.S. federal government had under the Articles of Confederation. The EU is itself a demos for free trade and movement of labor issues; it is also a regulatory state; and it aspires one day to have a common foreign policy and perhaps even a common defense. The 28 member nations of the EU are, however, sovereign demoi as well, because they regulate cultural and religious issues; their internal economies; and for now, at least, their budgetary taxing and spending policies; their foreign policies; and their defense policies. The U.K. stumbled into foolishly voting for Brexit because David Cameron, who is surely the worst Prime Minister the U.K. has had since Lord North, made the idiotic decision to hold a popular referendum on a highly complex and intricate issue in which the only choices were: leave or remain.

I think Brexit is a disaster for the U.K., which must be undone as soon as possible. The U.K. is too small in population and GDP to go it alone against economies as big as those of the U.S.; the EU; and China. Yes, the U.K. is for cultural, historic, and religious reasons a separate demos from the EU, but it cannot prosper economically or have an effective voice in foreign or defense policy without being also a member of the EU demos. The sooner the people of the U.K. realize this basic fact the better.

In sum, the U.K.'s history over the past 100 years has been rife with demos definition matters, and such matters remain at the forefront of the agenda in British politics.

K. The European Union

The European Union (EU) is the fifteenth member of the G-20 group of nations with the world's most advanced economies, and, as

my comments above suggest, it is now a real federal government, which counts as a demos on its own. The 28 member nations of the EU are, however, *demos* themselves who have retained sovereignty; control over taxing and spending; control over foreign policy; and control over defense policy. The EU may gradually grow to take on all of these functions, but it may not due to friction between the mostly Protestant northern EU nations and 2) the mostly Catholic or Greek Orthodox southern EU nations. We have seen by now that religion is a powerful factor in determining whether a country splits apart or unites and whether it has a federal structure or a unitary structure. The EU is characterized by sharp religious differences and hard-working German Calvinists do not want to subsidize what they perceive as being lazy southerners of a different faith.

The EU faces an additional very serious problem with a religious dimension, which is threatening to tear it apart. This problem concerns the huge immigration of impoverished Muslim refugees from Syria, Libya, Turkey, and North Africa into the EU countries. The overwhelmingly Christian EU nation of Hungary has barred its doors to these immigrants for religious reasons and recent power shifts in Italy, and in the last few weeks in Germany, make it unlikely that more Muslim immigration will be allowed. This is a highly fraught religious controversy, which is tearing through the EU like a hurricane.

For reasons I will explain below, I think the EU is a wonderful proto-government, and I would dearly like for it to succeed. Whether it can succeed or not remains uncertain at this time.

4. Size and Democracy: Normative Considerations

There is a body of scholarly literature on the optimal size of a democracy. Robert A. Dahl & Edward A. Tufte, *Size and Democracy* (1973); Alberto Alesina & Enrico Spolaore, *The Size of Nations* (2003). I have previously written about this issue in: Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from Law*, 1;/23-189 in *Nomos LV Federalism and Subsidiarity* (James E. Fleming & Jacob T. Levy eds. 2014) and in Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism* 63 *Florida L. Rev.* 1 to 45 (2011). I will not repeat what this literature says, but I will draw on it to offer some suggestions as to what is the optimal

size of a democracy and a federation is appropriate rather than merely good neighborly relationships.

A. Federalism and Religion

Religious differences are often a reason for forming a separate or new demos because, for whatever reason, very religious people often want to encounter only people who agree with them on matters of religion. Keith S. Rosenn relies on such differences between the U.S. and Brazil to explain different federalism structures in those two federations.²⁹ I personally as an Anglican who attended and was greatly influenced by a Quaker school think that this is regrettable and mistaken, but the experience of the countries discussed in this book makes it clear that differences in religion often require different demoi. British India, for example, had to be partitioned into Hindu India and Islamic Pakistan; Ireland had to be partitioned into the Catholic Free State and a mostly Protestant Northern Ireland; and British Palestine had to be partitioned into a Jordan Islamic State and the Jewish State of Israel. France, to its great detriment, converted itself into an entirely Catholic country in 1685 by expelling the Protestant French Huguenots. Catholic France also, to its great detriment, had to separate from Islamic Algeria. The gulf between these two religions was too great to bridge. Britain, to its great detriment, forced its Puritans to emigrate to New England where they helped found the United States in the battles of Lexington, Concord, and Bunkers' Hill.

Sometimes, however, people of different religions can learn to live together in a federation where religious matters are handled at the state level and free trade, foreign policy, and defense are handled at the federal level. This is essentially the way German federalism has worked out, and it also explains why Swiss federalism has been a huge success in a country with large numbers of both Protestants and Catholics, as well as speakers of four separate languages. U.S. federalism has also always allowed different religious groups to transcend their disagreements and cooperate on free trade, foreign policy, and defense. This was true in 1791 when Puritan New England joined in a Union with the Anglican south, and it remains true today. The biggest differences between the almost evenly matched Blue states

²⁹K.S. Rosenn, *Federalism in Brazil*, 43 Duq. L. Rev. 577 (2005).

and Red states in the U.S. are due to differences on religion. Blue states are more secular, or are in line with main line Protestant thinking; red states are more likely to have mobilized groups of evangelical and devout Catholic voters. I think the U.S. federal system is working well at suppressing and containing a religious war, as I will explain further below.

One striking fact that is revealed by Professor Ackerman's new book is that even countries with huge subracial and ethnic minorities and with large numbers of language groups can coalesce in a federation so long as the problem of religious differences is solved. Thus, Hindu India flourishes even though it has 17 languages in addition to the official languages of Hindi and English and even though it has at least nineteen different ethnic groups with different skin colors, facial features, and of different castes. The Republic of South Africa flourishes even though it has 11 languages and four racial groups: Blacks, Whites; Coloured, and Asians with Black South Africans being of eight ethnicities including Khoisan, Bantu-speaking, Khoikoi, Zulu, Xhosa, Swazi, Ndebele, Sotho-Tswanal, Shangan-Tsonga origin.

Italy flourishes even though it is a centralized nation state with 20 regions each with distinguished and separate histories like the 1000 year history of the Republic of Venice. There are ethnic tensions among Italians especially between northern Italians and southern Italians, but the country holds together as a unitary nation state with some bickering simply because all Italians are either secular or Catholic except for the tiny 40,000 member Italian Jewish community from which I descend.

The first normative point then on size and democracy is that federations can successfully bridge over racial, ethnic, and linguistic differences, but they have much more trouble bridging over religious differences. This is an argument for being cautious about the exercise of national power in the U.S. or EU power in the European Union.

B. Federalism and Secession

The second normative conclusion I would offer is that if one is going to set up a federation for a religiously divided society, a large

number of federal subunits is preferable to a small number.³⁰ Thus, the United States, which is locked in a culture war between secular voters and evangelical Christians is quite lucky that it is chopped up into 50 states rather than 4. Imagine a United States with the following four states: the Northeast; the Midwest; the South; and the West. I doubt such a four state federation would last more than a couple of years before the Northeast seceded from the South or vice versa. And then all the benefits of free trade; a common defense; and a common foreign policy would go down the drain.

The 50 U.S. states include at least 25 that are some shade of Purple rather than being Red or Blue. Moreover, different voters participate in presidential elections, mid-term elections, and elections in odd numbered years. We elect 39 of the 50 state governors in mid-term or odd numbered year elections when the party in power in the White House usually loses.³¹ Thus, our Democratic presidents like Obama usually face off against Republican governors, and I predict our Republican President Trump will face off after election day this year against Democratic governors.

Consider now two federations with only a small number of federal subunits: Canada with ten provinces and the United Kingdom with four entities with devolved power. Quebec and Scottish separatism are only viable because neither Canada nor the U.K. has 50 federal subunits. When 11 of the 15 slave states tried to secede from the U.S. in 1861 they could not quite pull it off, although they came close. The collective action problem of organizing Confederate secession was too great to pull off in a federation that in 1861 had 34 states and 15 slave states. Similarly, the French speaking provinces in a Canada with 50 provinces would never be able to negotiate a secession. Nor would Scotts in a 50 devolved entity U.K. be able to secede. The larger the number of federal subunits the greater are the collective action costs of negotiating and pulling off a successful secession.

³⁰Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 Florida L. Rev. 1 to 45 (2011).

³¹Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?* 115 Yale Law Journal 2611 (2006).

I think the U.K. will find its Brexit attempt to secede from the 28 member European Union to be as hard to pull off as was southern secession in the 1860's. Brexit may occur, but if it does the U.K.'s economy will crash and the U.K. will beg to be readmitted to the EU. Similarly, Greece's thoughts of EU secession were tamped down once leaders realized the reality of the pickle Greece was in. An EU with 28 members is here to stay, and any country that secedes will end up begging to be readmitted.

C. Federalism and Subsidiarity

A critic might object at this point that I am a fanatical federalist who favors federal regimes or quasi-federal regimes from India to Germany to the United States to Canada to the European Union. I plead guilty as charged. Federalism promotes human happiness and flourishing so long as the principle of subsidiarity is followed. Subsidiarity is a principle of social organization that holds that social and political issues should be dealt with at the lowest level of government that competent to resolve them. As the Bedford Resolution, which was passed in 1787 at the U.S. Constitutional Convention, put it: The federal government should have the power to act when the states separately are incompetent to act and to promote the harmony of the federal union. What then should states or demos do in a federation and what should a national government or demos do in such a federation?

First, states should legislate as to matters of culture, taste moral preference, or physical conditions that differ from state to state. It makes no sense to have a national speed limit of 55 miles per hour as we once did when circumstances in Montana and Alaska make it perfectly safe to drive at 90 miles per hour in those states. More people will be happy if we let states set speed limits and not the federal government.

Second, states should be free to compete with each other in offering an optimal bundle of public goods so long as they are not engaged in a race to the bottom to prevent the necessary redistribution of wealth. Just as competition in the free market is better than having an oligopoly so is fifty state competition to attract businesses and new state citizens of talent a good thing in a democracy.

Third, states should be free to experiment with new ideas like same sex marriage, legalization of marijuana, and restriction of sex-selective abortions. With 50 states competing and experimenting in the United States or 28 doing so in the European Union, one can imagine that some of these experiments will succeed and be applied nationwide as has happened in the U.S. with the legalization of marijuana.

Finally, matters should presumptively be handled at the state level because voters are in much closer physical proximity and contact with state politicians than they are with federal politicians. This lowers a voter's agency costs in monitoring what government is up to. For all of these reasons, there should be a presumption defeasible by 51% evidence that a matter ought to be handled at the state level unless one of the four following arguments for handling matters at the national level applies.

The first argument for handling matter at the national rather than the state level is that there may be economies of scale from having one national space program rather than 50 or one federal interstate highway plan rather than fifty.

Second, the 50 states will face huge collective action problems in acting jointly and they may be unable to stop a race to the bottom to allow child labor or to deny persons a minimum wage. Federal power is necessary to stop such races to the bottom and to do the lion's share of the work in redistributing wealth. The states simply cannot effectively redistribute wealth because businesses and people will move to low tax states in such situations.

Third, federal power is needed when a state's policies result in negative externalities for people living in other states. Dirty air and water crossing state boundary line are classic examples of why we need federal clean air and water acts even if dirty air and water is not technically commerce among the states.

Fourth, and finally, for the reasons James Madison advanced in the Federalist No. 10, the national government will always be more protective of minority rights than the state governments. There are infinitely more factions at the federal level than there are in any one of the fifty states so the likelihood of a self-interested over-bearing stable majority is lower in Congress than it is in a state legislature. Two-hundred-twenty five years of history have proven this point. Federal governments must have the power to protect civil rights.

In sum, a federal government practicing subsidiarity in the way I have just described is most likely to lead to human flourishing both economically and educationally and spiritually. Federal structures not only split the atom of the sovereign demos; they produce as in the U.S. and in the EU greater levels of well-being in every way. A federal demos with as many state demoi as possible is optimal for human flourishing.

5. Conclusion

This essay has proven that the Mass Popular Movements, which Professor Bruce Ackerman has described as having constitutionalized their charisma also created the very nation states to which their written constitutions would apply. I believe I have shown how national leaders did or did not create demos or demoi in the countries, which Professor Ackerman studies in *The Rise of World Constitutionalism, Volume I* (2018). In Part II, I extend the analysis greatly and discuss the process of demos creation in the remaining G-20 constitutional democracies, which Professor Ackerman does not discuss in *The Rise of World Constitutionalism, Volume I* (forthcoming 2018). I sought here to explain why some constitutional democracies emerged as genuinely federal regimes and others emerge as genuinely unitary regimes. Finally, Part III I offered some thoughts about what is normatively desirable in demos creation and in the creation of meaningful federal regimes with subunit demoi.