

Federalism and the Subnational Separation of Powers

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Most of the literature on federalism has emphasized the relationship between national and subnational governments but overlooked the organization of subnational powers. Likewise, the debate on the separation of powers in presidential and parliamentary systems has neglected the role of federalism in bolstering the separation of powers. We argue that a federal polity is a constitutional arrangement that creates executive, legislative, and judicial branches of government in its constituent units. This definition is applied to all countries that are classified as federations, federacies, or unions to show that it yields a more homogeneous set of cases for comparison. Finally, we review the implications of our definition through an analysis of Latin American federations and highlight the institutional mechanisms that either promote or hinder the separation of powers and democracy.

“The twentieth century will open the age of federations, or else humanity will undergo another purgatory of a thousand years.”¹ This prediction by Pierre-Joseph Proudhon appears to have come true: 40 percent of the world’s population lives in countries that can be considered or claim to be federal.² As Edward Gibson says, “We live in an increasingly federalized world.”³ In the mid-nineteenth century, Proudhon defined federalism as a social doctrine, a philosophy, and a global view of society, that is, an *ism* like liberalism or socialism. Before him, Immanuel Kant had elaborated upon the idea of a federation within his theory of law and politics. According to Kant, an international federation could safeguard

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¹Pierre-Joseph Proudhon, *The Principle of Federation and the Need to Reconstitute the Party of Revolution* (Toronto: University of Toronto Press, 1863), pp. 68–69.

²Ronald Watts, “The Relevance Today of the Federal Idea” (paper presented at the International Conference on Federalism 2002, Saint Gallen, Switzerland, 2002); <http://www.forumfed.org/federalism/Watts.asp?langn>, accessed 8 June 2005.

³Edward L. Gibson, ed., *Federalism and Democracy in Latin America* (Baltimore, MD: The Johns Hopkins University Press, 2004).

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international peace. In the twentieth century, however, the focus of the scholarly federalism literature shifted from the international to the national arena.⁴ The Constitution of the United States became the implicit or explicit point of reference.⁵ We address the study of federalism within nation-states, specifically the constituent states, provinces, Länder, cantons, or what in general has been called the “meso-level” that exists between the national government and local governments.

We argue that federalism may be defined as a constitutional political system that creates separate executive, legislative, and judicial branches of government at the subnational level.⁶ This definition has important implications for the literatures on federalism and the separation of powers, two themes that are often treated in isolation. First, it directs the attention of students of federalism to the neglected subject of the separation of powers at the subnational level. Most of the literature on federalism has emphasized the relationship between the national government and subnational units but has overlooked the organization of power at the subnational level. Second, it directs the attention of students of the constitutional separation of powers to the issue of federalism. Most of the debate on the separation of powers in presidential, parliamentary, and mixed systems has neglected the role of federalism in bolstering the separation of powers.

The intuition behind our definition is that the separation of powers is an essential feature of constitutional government. Our purpose is to elucidate the constitutional underpinnings of a federal polity. An inherent feature of constitutional government is the capacity to legislate and adjudicate. For a subnational unit to claim to represent the sovereign will of its citizens—a claim separate from that of the national government—it must have its own constitutional institutions. Together with a subnational executive, there should be a subnational legislature that, within the capacities granted in the national constitution, makes the laws that affect the subnational territory. There must also be a judiciary that enforces the laws enacted by the subnational legislature.

In what follows, we examine the meaning of the separation of powers and then review definitions of federalism, finding that most focus on the division of sovereignty between the federation and the member units while overlooking the separation of powers within both levels of government. We

⁴Exceptions are recent studies on the European Union. For example, see Tanja A. Börzel and Madeleine O. Hosli, “Brussels between Bern and Berlin: Comparative Federalism Meets the European Union,” *Governance—An International Journal of Policy and Administration* 16 (April 2003): 179–202; Thomas O. Hueglin, “From Constitutional to Treaty Federalism: A Comparative Perspective,” *Publius: The Journal of Federalism* 30 (Fall 2000): 137–153; and David McKay, “On the Origins of Political Unions: The European Case,” *Journal of Theoretical Politics* 9 (July 1997): 279–296.

⁵For a good example, see Kenneth C. Wheare, *Federal Government*, 4th ed. (New York: Oxford University Press, 1964).

⁶Although the term “subnational” refers in general to all levels of government below the central level, in this article we use it to refer exclusively to the *intermediate* level of government. Therefore, we exclude local or municipal government.

examine intermediate governments in all political systems classified as federal according to conventional usage, and show how our concept redefines the universe of federal and nonfederal systems, resulting in a more homogeneous set of units for comparison.⁷ We then review the implications of our definition, which are applied to four Latin American federations.

SEPARATION OF POWERS

Federalism and the separation of powers both imply constitutional limits on state power, through either the functional or territorial division of governmental roles and offices.⁸ The separation of powers makes it nearly impossible for one faction to speak unequivocally—or, one might say, univocally—on behalf of “We The People.”⁹ Likewise, the division of powers between the center and the subnational units creates offices with competing territorial claims to speak on behalf of the demos. The constitutional autonomy of the subnational units is guaranteed by the existence of legislative bodies and a system of courts. Federalism is not just similar to the separation of powers: the two terms are mutually constitutive.

Constitutions, for our purposes, refer to conventions and laws that establish the arrangement of public roles and offices, including the executive, legislative, and judicial branches of government. Unlike ordinary laws that forbid or enjoin actions under penalty of sanction, constitutions confer legal powers to legislate or judge.¹⁰ Since the seventeenth century, constitutions have always specified the role of legislatures (bodies that monopolize the production of laws), the role of judiciaries (bodies that monopolize the interpretation of laws and their application to particular cases), and the role of executives (bodies that monopolize the legitimate use of coercion within a given territory).¹¹ The presence of three branches of government, each with offices in which individuals have specific roles, is what Max Weber called the functionally specific division of powers.¹² The legal-rational administration of the affairs

⁷See Gerardo L. Munck, “Tools for Qualitative Research,” *Rethinking Social Inquiry: Diverse Tools, Shared Standards*, eds. Henry E. Brady and David Collier (Lanham, MD: Rowman and Littlefield, 2004), pp. 107–112.

⁸The distinction between functional and territorial division of powers is based on Stein Rokkan. See Peter Flora, ed. *State Formation, Nation-Building, and Mass Politics in Europe: The Theory of Stein Rokkan* (Oxford: Oxford University Press, 1999), pp. 5–7.

⁹Bruce A. Ackerman, “Neo-federalism?” *Constitutionalism and Democracy*, eds. J. Elster and R. Slagstad (Cambridge: Cambridge University Press, 1993), p. 170.

¹⁰H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), p. 79. The distinction between laws and constitutions can be traced to Aristotle, *The Politics* (Middlesex, UK: Penguin, 1962), p. 151.

¹¹An earlier literature in political science attempted to use Montesquieu’s separation of powers but eliminate its doctrinaire elements. For example, Gabriel Almond argued that rule making, rule application, and rule adjudication are features of all political systems. See his “Introduction: A Functional Approach to Comparative Politics,” *The Politics of Developing Areas*, ed. Gabriel A. Almond and James S. Coleman (Princeton: Princeton University Press, 1960), p. 17. The generalization that all constitutions have deliberative, executive, and judicial elements was first made by Aristotle, *Politics*, p. 179.

¹²Max Weber, *Economy and Society*, Vol. 1, eds. G. Roth and C. Wittich (Berkeley and Los Angeles: University of California Press, 1978), p. 282.

of state requires a functionally specific division of powers, and a constitution that does not create separate governmental offices and roles is really no constitution at all.¹³

A critical distinction can be made between the specification of offices with defined roles and the arrangement of these offices according to alternative principles. Whereas the specification of relatively fixed offices and roles makes a system constitutional, the type of constitution depends on the principles governing how offices are arranged. Federalism is one such constitutional principle. It specifies a type of constitution in which there are usually two levels of government: national and subnational. For subnational government to have full constitutional standing—that is, the autonomy to make rules, apply them to particular cases, and govern itself under the rule of law—it must have its own legislature, executive, and judiciary.¹⁴

It follows that federalism has three dimensions that can be conceptually disaggregated, even though they exhibit a powerful elective affinity. First, the vertical division of executive power may be regarded as a primary attribute of federalism; all federal systems vertically divide executive power and thereby create subnational executives. We would classify a political system that divided only executive power as executive federalism. Second, the horizontal separation of a subnational legislature creates legislative federalism. Nearly all federal systems create subnational legislatures as well as executives. Because a constituent unit of a federation that could not pass its own laws would be a constitutional nullity, subnational legislatures are a critical secondary attribute of the overall concept. Third, judicial federalism refers to the creation of subnational courts. A subnational government that could not interpret and enforce its own legislation would be legally and politically reliant on the independence of the central judiciary.

We use the term “federalism” without adjectives for the complete institutional package—by which we mean fully operational national and subnational constitutional systems. This nomenclature achieves two results. First, by raising the definitional bar slightly on the use of the term “federalism” (without adjectives) we encompass a slightly smaller set of cases but also include some new ones in a more coherent and homogeneous typology of federal systems. Second, by disaggregating the concept, we offer a parsimonious, internally differentiated concept of federalism that highlights a range of, albeit diminished, subtypes.

Many scholars have hinted at the connection between federalism and the separation of powers, but none has insisted the two are mutually

¹³The Declaration of the Rights of Man and the Citizen, Article 16, states, “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.”

¹⁴As Kant put it, the three elements of a constitution—*legislatoria, vectoria, judiciaria*—complement each other to complete the constitution of the state and ensure its autonomy. Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, transl. W. Hastie (Edinburgh: T&T Clark, 1887), p. 170.

constitutive. This is due to two misconceptions about the separation of powers that must be dispelled before giving further precision to the meaning of federalism. First, the separation of powers has come to denote a constitutional doctrine historically specific to Anglo-Saxon countries. Second, scholars have conflated presidentialism and the separation of powers, leading to a presumption that any attempt to link federalism and the separation of powers necessarily implies advocacy of the U.S. model.¹⁵

The doctrine—or, rather, the myth—of the separation of powers is aptly summarized by M. J. C. Vile: “It is essential for the establishment and maintenance of liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial.”¹⁶ This succinct statement captures the functionally specific division of powers and is unobjectionable. However, Vile attaches two problematic conditions to the doctrine: “Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.”¹⁷ It is the latter part of this doctrine that has two serious problems. First, there are no expositors of this view; second, it has no empirical referent.

The doctrine of the separation of powers, as outlined by Vile, cannot be attributed to Montesquieu, nor to John Locke, James Madison, Kant, or any other major thinker. It is mythical in the sense that nowhere in the canons of constitutional thought has a serious constitutional theorist ever advocated the watertight separation of the branches of government.¹⁸ Madison was the first person to detect the misreading of Montesquieu that gave rise to the myth. In *Federalist* 47, Madison insisted that the separation of powers had been “totally misconceived and misapplied” by opponents of the proposed U.S. Constitution. They misread Montesquieu and the British constitution that served as his model. He noted that “the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other” in Britain. The executive is part of the legislature and appoints and dismisses members of the judiciary, and one part of the

¹⁵The point that the U.S. model is not necessarily the best for all countries is well made by Alfred Stepan, “Federalism and Democracy: Beyond the US Model” *Federalism and Territorial Cleavages*, ed. Ugo M. Amoretti and Nancy Bermeo (Baltimore: Johns Hopkins University Press, 2004).

¹⁶M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis, IN: Liberty Fund, 1998), p. 14.

¹⁷Vile, *Constitutionalism*, p. 14. See also Bernard Manin, “Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787,” *The Invention of the Modern Republic*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1994), pp. 27–62.

¹⁸Diverse critics have made this point. See Louis Althusser, *Montesquieu, Rousseau, Marx: Politics and History* (London: Verso, 1982) and Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945).

legislature serves judicial and constitutional functions. One cannot infer from Montesquieu's work that the branches of government should have "no *partial agency* in, or no *control* over, the acts of each other."¹⁹ Rather, Montesquieu must have meant "where the *whole* power of one department is exercised by the same hands that possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."²⁰ Montesquieu's target was, of course, the absolutist state, not parliamentarism. Madison then described the essence of British parliamentarism and insisted that it was consistent with Montesquieu's maxim:

The magistrate in who the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.²¹

A more lucid understanding of nineteenth-century British parliamentarism is hard to find, and Madison recognized that this was Montesquieu's model. He reinforced this by pointing to the three outcomes Montesquieu feared most: that a monarch might enact tyrannical laws and enforce them tyrannically, that a judge might act as legislator, or that a judge might serve the executive and become oppressive. The British constitution avoided such outcomes. In spite of Madison's definitive exegesis, the mythic doctrine has been habitually evoked as a straw man for the purposes of disqualifying parliamentarism as a system based on the separation of powers, and has fostered the misperception that the separation of powers applies only to presidentialism.

Leaving aside mixed systems,²² the key difference between pure presidentialism and pure parliamentarism lies not in the separation of powers per se, but in the additional checks and balances inherent in the separate election of the executive and legislature for fixed terms of office

¹⁹Alexander Hamilton, James Madison, and John Jay, *The Federalist: A Commentary on the Constitution of the United States of America, Being a Collection of Essays Written in Support of the Constitution Agreed upon September 17, 1787, by the Federal Convention* (New York: The Modern Library, 1941), p. 314, italics in original.

²⁰*Ibid.*, 314-315, italics in original.

²¹*Ibid.*, 315.

²²There are many varieties of parliamentary and presidential systems, as well as systems that combine features of both. We focus on the Westminster model only because it is the crucial point of reference for the argument that parliamentarism is inimical to the separation of powers.

under presidentialism. This contrasts with the greater “mutual dependence” of executive and legislative bodies in parliamentary systems,²³ owing to the selection of the executive by the legislative majority, the power of the prime minister to dissolve the legislature, and the ability of the legislature to bring down the government by a vote of nonconfidence.

It is false to claim that parliamentary systems “are distinguished from presidential systems by their abandonment of the idea of the separation of powers.”²⁴ The difference between the two systems lies more in the extent of checks and balances. To use Stephan Haggard and Mathew D. McCubbins’s terms, presidential systems are typically characterized by a greater “separation of purpose.” Whereas the different parts of government are more likely to work in unison in parliamentary systems, in presidential systems they are more “motivated to seek different goals.”²⁵

Neither system separates the branches of government into watertight compartments. In a pure presidential system, for example, the presidential veto gives the executive partial control of the legislative agenda. Impeachment gives the U.S. Congress the right to remove the executive from office. In a pure parliamentary system, the cabinet exercises both executive and legislative powers, with the prime minister at the apex of both branches. As long as the legislature monopolizes legislation and the executive obeys the law, however, the functionally specific division of powers remains intact in both systems. Presidentialism and parliamentarism are thus subtypes of constitutional government and, like all constitutional governments, they are both based on the separation of powers.

It is true that parliamentary systems centralize power in the office of the prime minister, and that cabinet government partially fuses legislative and executive branches of government; political realities such as party discipline and prime ministerial control over patronage and appointments work to assure strong executive dominance. Moreover, the strength of the executive may depend more on the functioning of parties and the party system than on constitutional provisions.²⁶ In the British parliamentary tradition in particular, where parties are strong and disciplined and the prime minister has extensive influence over patronage and career paths, the executive has enormous powers to set the legislative agenda and shape

²³This term is from Alfred Stepan and Cindy Skach, “Presidentialism and Parliamentarism in Comparative Perspective,” *The Failure of Presidential Democracy: Comparative Perspectives*, Vol. 1, eds. Juan J. Linz and Arturo Valenzuela (Baltimore, MD: Johns Hopkins University Press, 1994), pp. 119–136.

²⁴Peter C. Ordeshook, “Some Rules of Constitutional Design,” *Social Philosophy and Policy* 10 (July 1993): 226–227.

²⁵Stephan Haggard and Mathew D. McCubbins, “Introduction: Political Institutions and the Determinants of Public Policy,” *Presidents, Parliaments, and Policy*, eds. Stephan Haggard and Mathew D. McCubbins (Cambridge: Cambridge University Press, 2001), p. 3.

²⁶Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (New York: John Wiley and Sons, Inc., 1963), p. 393.

policy outcomes. Even the cabinet has seen its influence wane relative to the office of the prime minister.²⁷

Yet it is an error to conclude that control over the legislative and policy agendas leads to the sort of abuses of power that, according to Montesquieu and Madison, occur when the whole power of various departments of government is concentrated in so few hands that the lines are blurred between making, executing, and applying laws. As long as the legislature makes the laws, the judiciary interprets and applies the laws in particular cases, and the executive operates within the rule of law, there is no reason to eliminate parliamentary governments from the set of constitutional systems as defined here. The fact that there is partially overlapping membership in the executive and legislature does not mean the executive itself makes laws or that the legislature is a rubber stamp for the executive, much less that the judiciary is not independent.

If the mutual dependence of legislative and executive powers does not nullify the separation of powers, what would? The separation of powers would be violated if, for example, prime ministerial decisions had the force of statutory law regardless of legislative approval. Such a prime minister would be analogous to the monarch feared by Montesquieu who enacts and enforces tyrannical laws. Such a prospect might seem like a rather abstract theoretical possibility in the United Kingdom, but it is a reality in post-Soviet Russia, to take but one example. Similarly—and this was Montesquieu's second fear—if a judge imposed a sentence based on the preference of the executive rather than on the merits of the case in light of the law, tolerance for such actions would strike at the heart of constitutional government. Yet there is no reason to believe that judges are more likely to act as agents of the executive or as legislators—Montesquieu's third fear—in parliamentary than in presidential systems. Finally, prime ministers may have strong legislative agenda-setting powers, but they cannot bypass parliament. A parliament is no less a bulwark against an autocratic or illegal executive than a congress in a presidential system. In short, highly concentrated executive decision making can occur within the rule of law. What matters most for the separation of powers is whether any one branch of government can violate the constitution with impunity, and hence replace the rule of law with the rule of a single governmental agency, group, or individual.

Ironically, from the perspective of those who conflate the separation of powers and presidentialism, the record of parliamentary systems is considerably better than that of presidentialism in avoiding constitutional crises and the breakdown of democratic regimes. A major reason for the greater stability of parliamentary systems is that they also exhibit more

²⁷See John P. Mackintosh, *The British Cabinet*, 3rd ed. (London: Stevens and Sons Ltd., 1977), pp. 628–631.

respect for the rule of law than presidential ones,²⁸ and this belies the facile assumption that parliamentary systems are “elective dictatorships.”²⁹ The presidential model seems especially prone to produce precisely the outcomes Montesquieu and Madison sought to avoid, especially, but not exclusively, outside of the United States. Presidentialism checks executive power, but divided government and fixed terms can generate legislative-executive gridlock and invite constitutional crisis and unconstitutional solutions such as the abuse of rule by decree or extraconstitutional efforts to remove the executive. Whereas parliamentary constitutions provide a ready-made solution to the problem of lack of control over the legislature (a vote of nonconfidence followed by elections), presidentialism has no comparable impasse-breaking device.³⁰ Thus, although separate elections for the legislature and the executive create checks and balances, it is unclear whether this invites or prevents overweening and arbitrary behavior by the executive branch.

Our position clashes with the conventional wisdom on the British constitution from Walter Bagehot and Albert Venn Dicey to contemporary neoinstitutionalists. The oft-cited seminal text that supports the view of no separation in the Westminster model is Bagehot’s *The English Constitution*. Yet Bagehot succeeds only in demonstrating that the myth of the separation of powers does not apply to England. He repeatedly refers to “the principle” that “the legislative, executive, and the judicial powers are divided—that each is entrusted to a separate person or set of persons—that no one of these can at all interfere with the work of the others.”³¹ He never offers a source for this principle, and given that it describes no known political system, it is easy to show that it does not accurately describe the English constitution.

Contrary to Bagehot, the Westminster system exemplifies the separation of powers because it establishes a rule of law in which the distinctive roles and offices associated with the various branches of government work to sustain constitutional government.³² Although Bagehot was surely right to stress the weakness of checks and balances in England relative to the United States, he was too hasty in concluding that there is no separation

²⁸There is an extensive literature on this, some of which questions whether the superior record of regime survival in parliamentary constitutions can be attributed to intrinsic differences between parliamentarism and presidentialism. For a review of this debate, see José Antonio Cheibub and Fernando Limongi, “Democratic Institutions and Regime Survival: Parliamentary and Presidential Democracies Reconsidered,” *Annual Review of Political Science* 5 (2002): 151–179. On the lower level of rule of law in presidential democracies, see Josephine T. Andrews and Gabriella R. Montinola, “Veto Players and the Rule of Law in Emerging Democracies,” *Comparative Political Studies* 37 (February 2004): 81–82.

²⁹Lord Hailsham, *Elective Dictatorship: The Richard Dimbleby Lecture* (London: British Broadcasting Corporation, 1976).

³⁰Stepan and Skach, “Presidentialism and Parliamentarism,” pp. 128–129.

³¹Walter Bagehot, *English Constitution* (Oxford: Oxford University Press, 1949), p. 59.

³²Bagehot, *English Constitution*, and Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1959).

of powers. In his elegant critique of Bagehot, Ferdinand Mount concluded that

the rule of law fortifies the traditional and highly desirable separation of powers between legislature, executive and judiciary. Each power in the land—the Crown and its Ministers, the law-makers in Parliament, the judges—enjoys a separate and distinct authority under the law. And the separation and distinctness reinforce our liberty, because no power can go very far in oppressing us without running into the equally potent authority of some other power.³³

Confusion over what constitutes the separation of powers, its conflation with presidential systems, and failure to distinguish it from checks and balances hinder our understanding of federalism. An extreme example is provided by Dicey, who was compelled to conclude that Canada was more like the presidential system in the United States than the Westminster system of the United Kingdom because it had a federal constitution.³⁴ Peter C. Ordeshook is less categorical, but he sees a presidential system “as an essential component of a stable federal government” and suggests parliamentary systems are more appropriate for “small homogeneous states.”³⁵ In fact, there are more parliamentary than presidential federal systems.

In yet another example of confusion arising from the conflation of presidentialism and the separation of powers, Kenneth C. Wheare, in his study of federalism, takes Bagehot’s mythological separation of powers as his point of departure to arrive at the erroneous conclusion that the “separation of legislature, executive, and judiciary in the general government or their overlapping or complete fusion does not conflict with or connect with the federal principle.” “The doctrine of the separation of powers,” he says, “holds that good government is ensured if the functions of legislation, administration and adjudication in a state are not placed in the hands of one body or person but are distributed to a greater or less degree among distinct or separate bodies or persons.”³⁶ Wheare acknowledges that “the absolute and exclusive separation has never been advocated.”³⁷ However, he says, it is approximated—albeit imperfectly—in the presidential system of the United States. Wheare concludes from this that although federal government may work better if thus organized according to the separation of powers, this is not essential. The federal principle implies no rules about how the general government is organized,

³³Ferdinand Mount, *The British Constitution Now: Recovery of Decline?* (London: Heinemann, 1992), p. 86. Mount offers a trenchant rebuke to Dicey and Bagehot.

³⁴Dicey, *Introduction*, pp. 165–168.

³⁵Ordeshook, “Some Rules,” 226–227.

³⁶Wheare, *Federal Government*, p. 80.

³⁷*Ibid.*

provided that the federal and subnational governments “are co-ordinate, each supreme in its own sphere.”³⁸

Ware notes one exception to this claim. The independence of the judiciary in the federal government “is important if it is the tribunal which decides disputes about the division of powers” between the levels of government.³⁹ This is a significant concession. Judicial independence is important because federalism creates two levels of government, both of which have standing under the constitution. Each level has offices with specific roles that are part of the constitution. The independence of the judiciary is essential to ensure that the federal government cannot encroach upon the jurisdiction of the subnational government.⁴⁰ Other scholars of federalism have followed Ware in acknowledging the importance of judicial independence. According to Ronald Watts,

While a dual judiciary would seem to be the logical corollary of the dual polity inherent in the federal principle as traditionally formulated, a number of federal systems have concluded that a fully dual system of courts is not necessary as long as the independence of the judiciary from the executives and legislatures of both levels of government can be assured.⁴¹

Similarly, John Kincaid suggests, “Ordinarily, a federal system has an umpire, usually a high court, that can resolve intergovernmental and interjurisdictional disputes.”⁴²

Once the myth of the separation of powers as a doctrine of watertight separation of branches of government is dispensed with, Ware’s analysis can be pushed further. The ultimate achievement of the separation of powers, understood as the specific division of governmental functions, is the rule of law; this, in turn, is the best institutional guarantee against the encroachment on subnational government by the center. The rule of law requires not only an independent judiciary, but also legislatures that legislate and executives that abide by the law at the subnational level. The vertical division of executive powers is less secure, both legally and politically, in legislative and executive federations that lack subnational courts.

Under executive federalism, and in the absence of an independent judiciary, a national executive might divide up the administration of government any way it wished. It could create subnational governments

³⁸Ibid., 81.

³⁹Ibid.

⁴⁰The independence of the judiciary means that judges are impartial and decide cases based on the law not political pressures. See Christopher M. Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,” *American Journal of Comparative Law*, 44 (1996): 611.

⁴¹Ronald Watts, “Provinces, States, *Länder* and Cantons: Content and Variations Among Subnational Constitutions of the World” (paper presented at a conference on Subnational Constitutional Governance, Rietveldam, Pretoria, 16–18 March 1999), p. 18; <http://www.kas.org.za/Publications/SeminarReports/SubnatlConstGovernance/Subnationa.asp>, accessed 8 June 2005.

⁴²John Kincaid, “Introduction,” *Handbook of Federal Countries*, 2002, eds. Ann L. Griffiths and Karl Nerenberg (Montreal and Kingston: McGill/Queen’s University Press, 2002), pp. 8–9.

and dissolve them at will. Such subnational governments have no special status and are relatively unimportant in characterizing the regime. The system may be formally federal, just as formal power may be vested in the supreme legislative organ. However, if real power is in the hands of, say, a party, the bureaucracy, or a military junta, then the regime is better characterized in terms of the realities of party, bureaucratic, or military rule than the formalities of the constitutional document. For example, Mexico's Constitution of 1917 is federal and presidential, but these features were partially neutralized by hegemonic party rule for most of the twentieth century. We say "partially" advisedly, because there were important constitutional principles (such as no presidential reelection) that were well respected by the ruling elite, and federal features of the constitution fostered democratization that, in turn, reestablished the separation of powers.⁴³

To sum up, conventional wisdom holds that the doctrine of the separation of powers underpins presidential systems because the legislature and executive are formed directly in separate elections, whereas parliamentary government is based on the centralized sovereignty of parliament. According to this view, Montesquieu misread the English constitution, failing to see how cabinet government fused legislative and executive functions. As we argue, the conventional wisdom misinterprets English constitutional history, misreads both Montesquieu and Madison, exaggerates the importance of legislative-executive relations to the detriment of the independence of the judiciary, and fails to distinguish between the doctrine of the separation of powers and checks and balances. It has the further consequence of obscuring the close association between federalism and the separation of powers.

Federal systems can be either presidential or parliamentary. To qualify as federal, a constitution must create subnational executive, legislative, and judicial branches of government, and this can be done, in ways that may approximate or diverge from the doctrine of the separation of powers, in either presidential or parliamentary systems. Yet, as we see in the next section, the literature on federalism has focused on the vertical division of powers rather than on the horizontal separation of powers at the subnational level.

FEDERALISM

Most comparative studies on federalism classify countries as being federal or not according to the constitutional division of jurisdictions between the national and intermediate levels of government. In every definition, the

⁴³See Enrique Ochoa-Reza, "Multiple Arenas of Struggle: Federalism and Mexico's Transition to Democracy," *Federalism and Democracy in Latin America*, ed. Edward L. Gibson, pp. 255–296; Caroline Beer, "Assessing the Consequences of Electoral Democracy: Subnational Legislative Change in Mexico," *Comparative Politics* 33 (July 2001): 421–440.

presence of constitutional government is assumed. Robert A. Dahl defines federalism as a system of dual sovereignty “in which some matters are exclusively *within* the competence of certain local units—cantons, states, provinces—and are constitutionally *beyond* the scope of the authority of the national government, and where certain other matters are constitutionally outside the scope of the authority of the smaller units.”⁴⁴

In a similar vein, albeit adding the issues of shared government and independent constituencies, Watts asserts, “Federalism provides a technique of constitutional organization that permits action by a shared government for certain common purposes, together with autonomous action by constituent units of government for purposes that relate to maintaining their distinctiveness, with each level directly responsible to its own electorate.”⁴⁵ Likewise, Daniel J. Elazar defined federalism as “a polity with a strong overarching general government whose constitution is recognized as the supreme law of the land and which is able to relate directly to the individuals who are dual citizens in both the federation and their constituent states. The position and autonomy of the latter are constitutionally protected.”⁴⁶ Although Elazar emphasized the wide variety of structures that embody the federal principle, he also insisted that

federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the process of common policy-making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities. Federal systems do this by constitutionally distributing power among general and constituent governing bodies in a manner designed to protect the existence and authority of all.⁴⁷

Kincaid defines federalism as

both a structure and a process of governance that establishes unity on the basis of consent while preserving diversity by constitutionally uniting separate political communities into a limited, but encompassing, polity. Powers are divided and shared between constituent governments and a general government . . . The constituent units also have broad local responsibilities and sufficiently autonomous self-government to carry out their responsibilities on behalf of their own people in concert with the whole people of the federal polity.⁴⁸

These definitions of federalism place a strong emphasis on its constitutional features.

⁴⁴Robert Dahl, “Federalism and the Democratic Process,” *Democracy, Liberty, and Equality* (Oslo, Denmark: Norwegian University Press, 1986), p. 114.

⁴⁵Watts, “Federalism Today.”

⁴⁶Daniel J. Elazar, “Introduction,” *Federal Systems of the World: A Handbook of Federal, Confederal, and Autonomy Arrangements*, 2nd ed., ed. Daniel J. Elazar (Essex, UK: Longman, 1994), p. xv.

⁴⁷*Ibid.*, xv.

⁴⁸Kincaid, “Introduction,” p. 7.

Wheare classifies countries as federal or not, not only on the basis of their constitutions, but also on the basis of their governmental practices and the degree of centralization of authority of the national executive. He states that although Canada has a quasi-federal constitution (the British North America Act of 1867), in practice the government is federal, and therefore must be classified as such. Mexico, on the other hand, has a federal constitution (adopted in 1857 and reenacted in 1917), but, as we have previously noted, government power was centralized in the national executive under single-party hegemony. Therefore, Wheare argues, different periods should be distinguished in Mexico: those when federalism was at work and those when it was not. The same, he maintains, can be said of Venezuela.⁴⁹

Whether the national-level definitions of federalism take into consideration the constitution alone or government practices as well, they all focus on the division of sovereignty and power between the center and the states. They say little or nothing about the constitutional features of the constituent subnational units, except that these units must be constitutional. By our definition, that means they must have courts and legislatures. Unlike previous definitions, our conceptualization focuses on the construction and reinforcement of the vertical division of powers through the separation of powers at the subnational level. Valerie Bunce comes closer to our view of federalism and the separation of powers by implying that federalism must create subnational representative bodies. As summarized by Nancy Bermeo, Bunce argues that “a federal system exists when there is a layer of institutions between a state’s center and its localities, when this layer of institutions features its own leaders and representative bodies, and when those leaders and bodies share decision-making power with the center.”⁵⁰ This is precisely the layer of institutions we focus on when defining federalism as a constitutional arrangement that creates executive, legislative, and judicial branches of government at the subnational level. This definition helps draw lines between federal and unitary systems that largely correspond to our traditional intuitions and conventions on which countries correspond to each category. However, it also allows for a sharper distinction to be made between federal and unitary systems, not only according to the letter of their constitutions, but more importantly according to the political institutions and practices that are in place in each case.

To assess our argument, we examine all political systems classified as federal in standard texts on the subject, as well as a number of systems classified as nonfederal that have strongly federal features. Empirically,

⁴⁹Wheare, *Federal Government*.

⁵⁰Nancy Bermeo, “The Importance of Institutions: A New Look at Federalism,” *Journal of Democracy* 13 (April 2002): 98.

Table 1
Classification of cases of federalism by separation of powers at the subnational level

Federalism	Argentina Australia Austria Belgium Bosnia Herzegovina Brazil Canada Ethiopia Germany Mexico Micronesia Nigeria Pakistan South Africa Spain Sri Lanka Switzerland United Kingdom United States of America Venezuela Yugoslavia (Serbia and Montenegro)
Legislative and executive federalism	Comoros India Malaysia Russia St. Kitts and Nevis
Executive federalism	United Arab Emirates

Sources: Cases were selected and information on subnational institutions taken from Ann Griffiths, ed. *The Handbook of Federal Countries* (Montreal: McGill University Press, 2002). Information on judicial institutions is taken from Daniel Elazar, ed. *Federal Systems of the World: A Handbook of Federal, Confederal, and Autonomy Arrangements*, 2nd ed. (Harlow, UK: Longman Current Affairs, 1994). Also consulted: Robert L. Hardgrave, Jr., *India: Government and Politics in a Developing Nation*, 3rd ed. (New York: Harcourt, Brace, Jovanovich, Inc., 1980), pp. 76, 88; Kenneth C. Wheare, *Federal Government*, 4th ed. (New York: A Galaxy Book, Oxford University Press, 1964); Ronald Watts, "Provinces, States, *Länder* and Cantons: Content and Variations among Subnational Constitutions of the World" (paper presented at the conference on Subnational Constitutional Governance, Rietveldam, Pretoria, March 1999); Arthur S. Banks et al., *Political Handbook of the World 2000–2002* (New York: McGraw-Hill, 2004).

most established cases of federalism exhibit the institutional outlines of a subnational separation of powers. Table 1 lists twenty-seven federations, twenty-one of which create subnational courts and legislatures. Five cases exemplify executive and legislative federalism (they lack subnational judiciaries) and one is a case of executive federalism (it lacks both subnational legislatures and courts).

Table 1 includes all the cases defined as federal in the most authoritative text available on the topic, *The Handbook of Federal Countries*. Each case is

Table 2
The separation of powers at the subnational level in twenty-five federal constitutions

Country	Subnational legislatures	Subnational courts
Argentina ^a	Yes	Yes
Australia	Yes	Yes
Austria	Yes	Yes
Belgium ^b	Yes	Yes
Bosnia Herzegovina ^c	Yes	Yes
Brazil	Yes	Yes
Canada	Yes	Yes
Comoros	Yes	No
Ethiopia	Yes	Yes
Germany	Yes	Yes
India ^d	Yes	No
Malaysia ^e	Yes	No
Mexico	Yes	Yes
Micronesia	Yes	Yes
Nigeria ^f	Yes	Yes
Pakistan	Yes	Yes
Russia ^g	Yes	No
South Africa ^h	Yes	Yes
St. Kitts and Nevis ⁱ	Yes	No
Spain ^j	Yes	Yes
Switzerland	Yes	Yes
The United Arab Emirates ^k	No	No
United States of America	Yes	Yes
Venezuela	Yes	Yes
Yugoslavia	Yes	Yes

^aThe federal government can “intervene” in the three provincial powers with congressional approval.

^bThere is a single judicial system, with five regions. Regional laws have the same hierarchy as federal law, and the judicial system is organized according to region, district, and canton.

^cThere are assemblies for both the Bosniak/Croat Federation and the Republika Srpska's.

^dFederal parliament has the power to alter or abolish a state by ordinary legislation without constitutional amendment. India utilizes a single, integrated judicial system with the Supreme Court of India at its apex.

^eThe court system is almost unitary. States have their own constitutions and high courts.

^fEach state has a high court. There are also customary courts that administer traditional Muslim laws and customs and Shari'a courts in Muslim-majority states.

^gThe judiciary is under federal control.

^hOrdinances passed by provincial governments are subject to federal veto. The Supreme Court is divided into provincial divisions.

ⁱNevis has its own legislature; St. Kitts does not. Justice is administered by the East Caribbean Supreme Court based in St. Lucia.

^jEach region has a high court that is subordinate to the Supreme Court.

^kEach emirate is under the power of a sheik who rules through traditional family networks. At the local level, legal matters are resolved by the ruling family or Kadi.

reviewed to determine the presence or absence of subnational courts and legislatures (see Table 2). Both sets of institutions are missing at the subnational level only in the United Arab Emirates, where the constituent emirates are each subject to patrimonial rule by a sheik without a constitutionally specified legislative body or judiciary. Kincaid aptly calls

the country “a federal-type alliance of chieftains.”⁵¹ We call it an executive federation.

There are five cases of executive and legislative federalism. India, Russia, and Malaysia are treated as quasi-federal in the literature, largely because of the asymmetrical powers of the center. In each of these cases, the subnational units have limited institutional autonomy; their very existence depends on the restraint of the central government, as enforced by the judiciary. The Union of the Comoros is another federal-type alliance of chieftains, except that it has subnational legislatures. St. Kitts and Nevis are an asymmetrical federation; Nevis has a legislature but St. Kitts does not, and the system of justice is based on the East Caribbean Supreme Court in a third island nation, St. Lucia.

Table 1 also includes two cases not found in *The Handbook of Federal Countries*: the United Kingdom since the devolution of Scotland and Sri Lanka. To determine whether our definition of federalism might lead us to classify cases regarded as nonfederal as federal, we review Elazar’s *Federal Systems of the World*, which includes federal, confederal, and other autonomy arrangements such as unions (see Table 3). We exclude federacies because these are best understood as arrangements between separate countries. As we would anticipate, federacies tend to exhibit the separation of powers among branches of government that would be anticipated in any collection of sovereign constitutional governments. Similarly, we exclude supranational arrangements such as the European Union. Although the case for treating the European Union as a federation rests on the construction of quasi-constitutional features such as the European Court of Justice and the European Parliament, the European Union is an arrangement among nation-states that cannot be regarded as subnational units until the union is fully consummated.⁵² The United Kingdom and Sri Lanka do, however, meet our criteria—certainly better than most of the cases that fall within the diminished subtypes of federalism.

The United Kingdom should be regarded as a federation because Scotland, Northern Ireland, and Wales all have their own legislatures and, whereas England and Wales have a unified system of law, Scotland has its own judicial system that is not subject to review by the House of Lords, and Northern Ireland has its own court system.⁵³ Since the creation of a Scottish Parliament, the objection to classifying the United Kingdom as federal rests on a formality: the Scottish parliament cannot amend its own constitution without the consent of the British Parliament. The same argument would exclude India from the set of federal countries. The

⁵¹Kincaid, “Introduction,” p. 5.

⁵²Heidrun Abromeit, “Contours of a European Federation,” *Regional and Federal Studies* 12 (Spring 2002): 8–10.

⁵³Elazar, “Introduction,” p. 271.

Table 3
The separation of powers at the subunit level in federacies and unions

Country	Subunit legislatures	Subunit courts
Federacies ^a		
Denmark: <i>Faroe Islands</i>	Yes	Yes
Denmark: <i>Greenland</i>	Yes	Yes
Portugal: <i>Azores and Madeira Islands</i>	Yes	Yes
United Kingdom: <i>Isle of Man</i>	Yes	Yes
United Kingdom: <i>Guernsey and Jersey</i>	Yes	Yes
United States: <i>Northern Marianas</i>	Yes	Yes
Finland: <i>Aaland Islands</i>	Yes	No
Netherlands: <i>Aruba</i>	Yes	Yes
Unions ^b		
Antigua-Barbuda	No	No
Japan	Yes	No
Solomon Islands	Yes	No
Vanuatu	Yes	No
Italy	Yes	No
Sri Lanka	Yes	Yes
Sudan (military rule)	Suspended	No
Tanzania	No	No
United Kingdom	Yes	Yes
Burma (military rule)	No	No
China	No	No
Equatorial Guinea	No	Yes
Georgia	No	Yes
Netherlands	Yes	No
Papua New Guinea	Yes	No
Ukraine	No	Yes
Afghanistan	Transitional	Yes
Israel	No	No
Lebanon	No	No
Namibia	No	No

^aA larger power and a smaller polity are linked asymmetrically in a federal relationship in which the latter has substantial autonomy and in return has a minimal role in the governance of the larger power. Resembling a federation, the relationship between them can only be resolved by mutual agreement.

^bA polity compounded in such a way that its constituent entities preserve their respective integrities primarily or exclusively through the common organs of the general government rather than through dual government structures.

Source: Daniel J. Elazar, ed. *Federal Systems of the World: A Handbook of Federal, Confederal, and Autonomy Arrangements*, 2nd ed. (Essex, UK: Longman, 1994). Definitions from p. xvi.

emerging consensus is that the United Kingdom is moving toward a de facto federal system.⁵⁴

⁵⁴See Vernon Bogdanor, "Devolution: Decentralization or Disintegration?" *Political Quarterly* 70 (April-June 1999): 185-194; Michael Keating, "What's Wrong with Asymmetrical Government?" *Regional and Federal Studies* 8 (Spring 1998): 195-218; Robert Hazell and David Sinclair, "The British Constitution in 1997-1998: Labour's Constitutional Revolution," *Parliamentary Affairs* 52 (April 1999): 161-178; Bernard Crick, "Ambushes and Advances: The [UK] Scottish Act 1998," *Political Quarterly* 66 (October-December 1995): 237-249; B. Guy Peters, "The United Kingdom Becomes the United Kingdom? Is Federalism Imminent or Even Possible?" *British Journal of Politics and International Relations* 3 (April 2001): 71-83; James G. Kellas, "The Constitutional Options for Scotland," *Parliamentary Affairs*

Sri Lanka is typically classified as unitary, despite the presence of subnational courts and legislatures.⁵⁵ This is because the Sri Lankan Constitution vests enormous prerogatives in the national executive to the detriment of subnational autonomy. Although there are elected provincial councils that can enact statutes applicable within their provinces, and there are high courts, district courts, and magistrates courts in the provinces, as Robert C. Oberst argues, “If the president believes that the [provincial] council cannot operate effectively, the president can take over the position of the governor and Parliament will act as the provincial council.”⁵⁶ The presidentially appointed governor can also refuse assent to the statutes passed by council, in which case the final decision rests with the Supreme Court. Hence, as Elazar notes, “ultimate provincial authority and power resides in the provincial executive, or presidentially appointed Governor.”⁵⁷ Yet, as Oberst acknowledges, if the provincial councils are left to exercise power without interference, the system operates as a federation.⁵⁸

Evidence of institutions such as courts and legislatures at two levels of government in most systems currently classified as federal, as well as the absence of such institutions in most systems classified as unions, reinforces the contention that federalism creates subnational separations of powers. At the same time, the specification of diminished subtypes and the discussion of cases on the border between union and federation demonstrate that the presence of courts and legislatures is only half the story. Although an assessment of the extent to which subnational institutions exercise an effective monopoly within their jurisdiction in each case is beyond the scope of this study, in the next section we explore interventions by one level of government into the competence of another branch at a different level of government in four federal Latin American countries.

EMPIRICAL IMPLICATIONS

What are the implications of our definition of federalism for comparative research? Definitions of federalism based solely on the vertical division of authority between the central government and the states have mainly led to the study of intergovernmental dynamics. In most of these studies, the underlying assumption is that the center and states compete in a zero-sum game. As Peter C. Ordeshook and Olga Shvetsova write, federalism is “an

43 (October 1990): 426–434; Juliet Berger, “Bye-Bye Britain? Devolution and the United Kingdom” *SAIS Review* 20 (Summer–Fall 2000): 145–157; Martin Laffin and Alys Thomas, “The United Kingdom: Federalism in Denial?” *Publius: The Journal of Federalism* 29 (Summer 1999): 89–108.

⁵⁵K. M. De-Silva, “Sri Lanka: Ethnic Conflict and the Search for a Durable Peace, 1978–1999,” *Ethnic Studies Report* 17 (July 1999): 338.

⁵⁶Robert C. Oberst, “Federalism and Ethnic Conflict in Sri Lanka,” *Publius: The Journal of Federalism* 18 (Summer 1988): 189.

⁵⁷Elazar, “Introduction,” p. 239.

⁵⁸Oberst, “Federalism,” 189.

' $N + 1$ participant interaction' between and among the N federal subjects and the national government—an interaction in which federal subjects and the national government are adversaries who must compete for power and resources through bargaining, strategic maneuvering, coalition formation, and deception."⁵⁹ On the basis of this type of conceptualization, three main problems have been pointed out in the comparative analysis of how federal systems work. The first problem is the encroachment on the states by the center. The second problem is the encroachment on the center by the states. The third problem is the encroachment on the political majority by regional minorities.

Since the early days of the U.S. constitution, scholars of federalism have been concerned with safeguarding the states against the transgressions of the center. According to these scholars, federalism must grant minimal powers to the center and all residual powers to the states. As Lucio Levi writes, "[T]he constitutional principle of the federal state is a plurality of coordinated sovereign centers of powers, such that a minimum quantity of powers . . . is conferred to the federal government that rules upon the whole territory of the federation, while the [subnational] states, each one competent upon its own territory, are assigned the residual powers."⁶⁰

The same idea lies behind the more recent conceptualization of "market-preserving federalism." The central thesis of this theory is that by guaranteeing political decentralization to the constituent units, federalism is a political mechanism that limits what otherwise would be the center's natural tendency to confiscate wealth from its constituent parts.⁶¹ In fact, the threat of secession is the ultimate guarantee that states have against the tyranny of the central government.

On the other hand, since the early days of the U.S. confederation, there have also been concerns about the encroachment on the center by the states. In *Federalist* 45, Madison writes,

Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal Government will by degrees prove fatal to the State Governments. The more I revolve the subject the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the last than of the first scale.⁶²

According to Madison, the granting of exclusive spheres of authority to the federal government was a safeguard against this second type of encroachment.

⁵⁹Peter C. Ordeshook and Olga Shvetsova, "Federalism and Constitutional Design," *Journal of Democracy* 8 (January 1997): 29.

⁶⁰Lucio Levi, "Federalismo," *Dizionario Di Politica*, eds. Norberto Bobbio and Nicola Matteucci (Torino: U.T.E.T., 1976), p. 392, our translation.

⁶¹Barry Weingast, "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development," *Journal of Law, Economics, and Organization* 11 (April 1995): 1–31.

⁶²Hamilton et al. *The Federalist*, p. 299.

Finally, there is a third group of works that is concerned with the biases of power produced by federalism. By assigning an equal number of seats to each constituent unit in the senate, for example, federalism can grant veto power to minorities that are regionally concentrated. In other words, a biased distribution of power along territorial lines may encroach the will of the political majority. In such cases, federalism becomes “demos-constraining,” contradicting the majority-rule principle of democratic regimes.⁶³

These three problems of federalism are important; however, our definition shifts the focus of analysis from the vertical division of jurisdiction to the horizontal separation of powers, particularly at the subnational level. Such an analytical shift makes us aware of a new set of threats to the functioning of a federal arrangement. Hence, we complement the scholarly work on the shortcomings of federal arrangements by presenting new situations that jeopardize federalism.

In practice, two scenarios arise that pose problems to the workings of subnational separations of powers. First, despite the existence of a federal constitution, there could be an effective separation of powers at the national level but not at the subnational level or—as a subset of this problem—the subnational separation of powers could be overridden by the central government in some of the constituent units.⁶⁴ Second, a constitutionally federal country could have a separation of powers at the subnational level but not at the national level.

Latin American federations meet several conditions that make them appropriate cases to study the subnational separation of powers. First, the four Latin American federations—Argentina, Brazil, Mexico, and Venezuela—have presidential systems, which, according to the conventional wisdom, should better preserve the separation of powers than parliamentary systems. Although we have already challenged this wisdom from a theoretical point of view, we show in this section that even in presidential federations, the separation of powers cannot be taken for granted. Second, the four Latin American federations are cases of “coming together” federalism.⁶⁵ Their federal constitutions date back to the nineteenth century, when federalist factions in each of these countries defeated the advocates of unitary constitutions. Third, unlike newer presidential federations that are multinational (such as the Comoros, Micronesia, Nigeria, Pakistan, and Russia), Latin American federations do

⁶³Dahl, “Federalism and Democratic Process”; Alfred Stepan, “Toward a New Comparative Politics of Federalism, Multinationalism, and Democracy,” *Federalism and Democracy*, ed. Gibson, pp. 29–84.

⁶⁴Notice that this is related to, albeit different from, the “encroachment on the states by the center” approach. We are not making a general claim about the powers of the national government vis-à-vis the subnational governments, but rather slicing a very specific aspect of this problem. Here, we are concerned only with one type of national power: the ability to dissolve the separation of powers at the subnational level.

⁶⁵Alfred Stepan, “New Comparative Politics of Federalism.”

not confront ethnic conflicts or territorial claims. In all these three regards—system of government, age, and territorial makeup—Latin American federations are comparable to the United States. However, unlike the United States' federalism, which has been widely studied, Latin American federations have received little scholarly attention.⁶⁶ Finally, the separation of powers in Latin American constitutions is often violated in practice, which provides an opportunity to observe the interaction between the workings of federal systems and the practices that foment or hinder the separation of powers at the national and subnational levels of government.

Two of the four Latin American federations, Venezuela and Argentina, illustrate the first problem: lack of separation of powers at the subnational level. According to its national constitution, Venezuela is a federal country. Under a presidential model, Venezuela established the separation of powers at the national level. However, until recently, a fully fledged system of separation of powers did not exist at the subnational level, making Venezuela a case of executive and legislative federalism. The centralization of the judicial system at the national level in 1948 weakened one of the fundamental powers of the states. Although departmental and municipal courts continued to exist during the remainder of the twentieth century, they were subnational dependencies of the federal Supreme Court.⁶⁷ Moreover, since the Juan V. Gómez Constitution of 1925, Venezuelan presidents have appointed the governors. This authority was ratified in the 1961 Constitution (reformed in 1983), which in Article 21 stipulated that governors were "representatives of the national executive in the states." Not only did this feature of governorships subordinate a key office of subnational government to the national executive, but it also limited the ability of state assemblies to check the power of the governors. In a country that was characterized by strong parties,⁶⁸ state legislators could not realistically check the power of governors who represented (and were appointed by) the president. The situation changed after 1988, when an electoral reform introduced the popular election of the governors. This reform, ratified by the 1999 Constitution (Art. 160), strengthened democracy and also reinforced the subnational separation of powers by reducing the dependence of governors on presidents.

Another example of the violation of subnational separation of powers is found in the enactment of one of the political institutions that defined the Argentine federal arrangement after 1853. Unlike Venezuela, Argentina

⁶⁶A notable exception is Edward L. Gibson's recent edited volume *Federalism and Democracy in Latin America*.

⁶⁷Leo B. Lott, "The Nationalization of Justice in Venezuela," *Inter-American Economic Affairs* 13 (Summer 1959): 3–19.

⁶⁸Michael Coppedge, *Strong Parties and Lame Ducks: Presidential Partyarchy and Factionalism in Venezuela* (Stanford, CA: Stanford University Press, 1994).

has national and subnational executives, legislatures, and judiciaries. However, the national constitution grants the federal government the authority to intervene in the provinces. The federal government can intervene in the executive branch, the legislature, the courts, or any combination of the three branches of provincial government. The national executive is allowed to use provincial interventions in order to “guarantee the republican form of government” (Art. 6). Historically, this has meant that the federal government has a blank check to intervene in the provinces. Based on this constitutional article, national governments have deposed provincial authorities and installed new provincial governments. From the enactment of the national constitution in 1853 until the present (and taking into consideration only periods of civilian rule), there have been 163 federal interventions into the provinces in Argentina.⁶⁹ Two-thirds of these interventions were enacted by presidential decree and only one-third by law (with Congress’s approval). In these interventions one, two, or the three branches of provincial powers were affected, eliminating *de facto* the subnational separation of powers.

The use of federal interventions poses a serious threat to the practice of federalism, as well as to the separation of powers. If widely used, federal interventions may *de facto* change the constitutional character of the country, which comes to be ruled as a unitary country. Furthermore, because during an intervention the president appoints those who replace the provincial authorities, the people’s right to choose their representatives is suspended until new elections are held, which in some cases may take several years. Finally, if the provincial judiciary is affected, the executive representative of the national government in the province appoints the new judges, who—because they have lifetime appointments—remain in power once the new provincial authorities are elected. In this way, the justice system becomes largely bound up with the political interests of the national executive (and its political party). In fact, the political use of federal interventions constitutes a threat not only to federalism but also to democratic rule.⁷⁰

The second scenario that puts federalism at risk, as defined here, arises when there is respect for the separation of powers at the subnational level, but it is partially abrogated at the national level. Two situations illustrate this scenario: first, the intervention of a military government at the national level and, second, a single-party regime that, while keeping tight control of

⁶⁹Tulia Falletti, “Federalism and Decentralization in Argentina. Historical Background and New Intergovernmental Relations,” *Decentralization and Democratic Governance in Latin America*, Woodrow Wilson Center Report on the Americas 12, eds. Joseph S. Tulchin and Andrew Selee (Washington, DC: Woodrow Wilson International Center for Scholars, 2004), pp. 67–100.

⁷⁰This problem was addressed in Jenna Bednar, “Crisis in Argentina: How Interventions Intertwine Federalism, Democracy, and Economic Stability,” (unpublished manuscript, Ann Arbor, MI, 2002).

the branches of the national government, cannot impede competition at the subnational level. The two other Latin American federations, Brazil and Mexico, illustrate these situations.

Three years after the military intervened in Brazil in 1964, elections for governors became indirect, reducing the autonomy governors had traditionally enjoyed since the inception of the federal republic at the end of the nineteenth century. However, the subnational (and national) separation of powers was not erased. Citizens continued to vote for state assemblies, federal deputies, and senators, as well as mayors and city-council members.⁷¹ Although these elections were not free and fair, because they were tightly controlled by the military, owing to the tradition of patronage politics (operated from the office of the governor) and the maintenance of elections at various levels, governors remained important players throughout the military government. As Elazar says, "In Brazil the existence of federalism preserved a modicum of free government, even during the military dictatorship, through the state governors who could retain power and have limited elections because of their military and political strength."⁷²

Direct elections for governors were held in 1982. In 1985, governors commanded the largest public protest movement against the military regime: the campaign for "Direct [Presidential] Elections Now." The campaign was unsuccessful but paved the way for the transition to democracy and, ultimately, for the separation of powers at the national level.⁷³ The case of Brazil reveals that the separation of powers at the subnational level was instrumental in achieving the separation of powers at the national level.

Similar to the case in Brazil, the subnational separation of powers in Mexico fostered the national separation of powers, which ultimately led to the breakdown of the single-party regime of the Partido Revolucionario Institucional (PRI) and the process of democratization.⁷⁴ Although the separation of powers, both at the national and subnational levels, was included in the Mexican Constitution (in the third and fifth titles, respectively), the metaconstitutional powers of the presidency and the single-party system partially neutralized both the separation of powers and federalism. This is succinctly depicted in a phrase attributed to former President Adolfo Ruiz Cortínez (1952–8): "The chambers [of Congress] and the governors' offices belong to the president; the state

⁷¹David Samuels and Fernando Luiz Abrucio, "Federalism and Democratic Transitions: The 'New' Politics of the Governors in Brazil," *Publius: The Journal of Federalism* 30 (Spring 2000): 49.

⁷²Daniel J. Elazar, "From Statism to Federalism—A Paradigm Shift," *International Political Science Review* 17 (1996): 426.

⁷³Samuels and Abrucio, "Federalism and Democratic Transitions," 56.

⁷⁴See Ochoa-Reza, "Multiple Arenas of Struggle."

chambers belong to the governors; and the city halls belong to the people.”⁷⁵

Thus, when in the early 1980s it was necessary to release the social and political pressures generated by the economic crisis and the mobilization against political fraud, the ruling party allowed political openness at the level of government that was less costly to the regime, the municipal level. By 1982, forty municipalities were ruled by opposition parties, and in 1983 a constitutional amendment was passed by Congress that gave more political autonomy to municipalities. Although, in relative terms, the number of municipalities ruled by the opposition was small (there were more than 2,300 municipalities in Mexico at the time), it included large cities and state capitals (such as Merida and Guanajuato). This allowed opposition parties to build electoral support based on the experience of municipal government. In 1989, the opposition won the first governorship (Baja California), and with a divided state legislature, the separation of powers at the subnational level started to take shape.⁷⁶ By 1997, opposition executives ruled in six states and in Mexico City. In four of these states, the state legislatures were divided, and in only three states did the governor’s party have a simple majority in the state legislature.⁷⁷ Hence, the notion of separation of powers became a reality at the subnational level, with state legislatures and courts actively checking and balancing the power of the governors.⁷⁸ This process of political contestation from the bottom up (from the municipalities to the states and from the states to the federation) led to a divided national Congress in 1997—which started to operate more in line with the principles of the separation of powers—and finally to an opposition president in 2000.

CONCLUSION

Our definition of federalism has several advantages and implications. First, we offer a minimalist, institutional definition that is easy to operationalize and consistent with the vast majority of cases encompassed by the scholarly literature. Moreover, it resolves a number of anomalies in that literature with regard to specific cases, and avoids the problem of excluding and including cases on the basis of their score on a host of different,

⁷⁵Jorge V. Alcocer, “Recent Electoral Reforms in Mexico: Prospects for a Real Multiparty Democracy,” *The Challenge of Institutional Reform in Mexico*, ed. Riordan Roett (Boulder and London: Lynne Rienner Publishers, 1995), pp. 57–75, at 70.

⁷⁶Yemile Mizrahi, “Democracia, eficiencia y participación: los dilemas de los gobiernos de oposición en México,” *Política y Gobierno II* (Segundo Semestre 1995), pp. 177–205.

⁷⁷In 1997, the states with opposition governors and divided state legislatures were Guanajuato, Chihuahua, Querétaro, and the government of Mexico City. Those with opposition governors and simple majorities in the state legislatures were Baja California, Jalisco, and Nuevo León.

⁷⁸Alonso Lujambio, *El Poder Compartido. Un Ensayo Sobre La Democratización Mexicana [Shared Power. An Essay on Mexico’s Democratization]* (Mexico: Editorial Oceano de Mexico, 2000).

loosely associated dimensions rather than a single, consistent definitional standard.

Second, our definition offers ways of thinking about the boundary cases and varieties of federalism within a coherent framework. Our definition does not rest on normative assessments, but asks observers to check whether there is separation of powers at the national and subnational levels. Because our definition includes two secondary attributes, we do not generate just two types of cases—federal and nonfederal—but two intermediate categories where one or more secondary attribute is missing.

Third, although a variety of mechanisms to decentralize power within a unitary constitution are conceivable, we argue that none of these systems can be considered federal unless there is a subnational legislative and enforcement capacity. For example, our conceptualization of federalism may call into question those studies that have classified as federal systems countries that have a high degree of fiscal decentralization but do not necessarily have self-governing subnational units.⁷⁹

Finally, our approach gets away from the conceptual murkiness of conflating federalism and democracy. Most federal systems are democratic. If federalism creates national and subnational separations of powers, most of the countries that qualify as federal will classify as democratic as well. This is because the separation of powers can exist only when at least some degree of freedom and autonomy is conferred on each branch of government. However, democracy is not a prerequisite of federalism, as our definition does not say anything about how the members of the three branches of government are selected. Although federal governments do not have to be democratic, they must be constitutional—and therein lies a source of confusion. Federal states would have to be democratic if only democratic regimes were constitutional. However, many nondemocratic governments (such as monarchies) are perfectly constitutional. Analytically, constitutions are prior to and give rise to regimes—that is, systems of government or rule involving the manner of access to and the exercise of public roles and offices. Nondemocratic regimes may be constitutional as long as they clearly specify the roles and offices of legislative, executive, and judicial branches of government.⁸⁰ If, in practice, federal constitutions and democratic regimes tend to go hand in hand, this is not because the separation of powers is inherently democratic. Indeed, Montesquieu and Madison promoted their respective versions of the separation of powers precisely as a bulwark against what they perceived as the dangers inherent

⁷⁹For examples of both types of studies, see John Gerring, Strom C. Thacker, and Carola Moreno, "Good Government: A Centripetal Theory of Democratic Governance," *American Political Science Review* (Forthcoming), and Weingast, "The Economic Role."

⁸⁰Robert Barros makes a compelling case that not all dictatorships rule unlawfully or arbitrarily, and even the harshest forms of military rule may respect certain key features of the constitutional separation of powers. See his *Constitutionalism and Dictatorship* (Cambridge: Cambridge University Press, 2002).

in the rising power of legislatures. As long as there are courts and legislatures that monopolize their respective functions at the subnational level, we are prepared to classify a constitution as federal regardless of how their members are selected.

Although our definition does not conflate federalism and democracy, our analysis has important implications for the study of democracy. We reinforce Jonathan Fox's insistence on the importance of studying democratization at the subnational level.⁸¹ The same is true of the separation of powers. This encompasses the rule of law, the autonomy and initiative of legislatures, and whether executive officials act within the law, all issues that need to be addressed at the subnational level.

We also return to the concerns of the American Federalists. The problem of checking ambition and abuses of power by office-holders is one aspect of the Federalists' concern. However, the founders of the American republic also understood that the separation of powers could provide the basis for a federal system that would generate more power than the confederacy: "Clearly, the true objective of the American Constitution was not to limit power but to create more power."⁸² Constitutions give rise to and help stabilize political regimes by strengthening the legal-rational administration of the state and supporting the rule of law. By giving subnational governments constitutional standing, federalism has the potential to reinforce both regime stability and the rule of law.

If we are right in emphasizing the connection between federalism and the subnational separation of powers, a host of empirical questions and research problems arise. For example, if the extent of the separation of powers varies across subnational units within the same country, how do we address this problem in cross-national comparisons? Following Richard Snyder's advice, the answers to these questions lie on a comparative research agenda that takes the subnational governments as units of analysis and studies the separation of powers at that level, as well as the interaction with national politics.⁸³ Such a methodology would afford a better understanding of how federalism really works and its relationship to democracy.

In summary, when assessing whether a constitution is federal, we should direct our attention to the existence of legislative and judicial institutions at the subnational level; when assessing whether a constitution upholds the doctrine of the separation of powers, we should direct our attention to whether the institutions of self-government are in operation at the subnational level as well the national level.

⁸¹Jonathan Fox, "The Difficult Transition from Clientelism to Citizenship: Lessons from Mexico," *World Politics* 46 (January 1994): 151-184.

⁸²Hannah Arendt, *On Revolution* (New York: Viking Press, 1965), p. 153.

⁸³Richard Snyder, "Scaling Down: The Subnational Comparative Method," *Studies in Comparative International Development* 36 (Spring 2001): 93-110.