STILL AGAINST DESIGN: A Response to Steven Calabresi, Sanford Levinson, and Vernon Smith

Caryn Devins, Roger Koppl, Stuart Kauffman & Teppo Felin*

Our argument in *Against Design* may seem new, challenging, or even bizarre. One commenter, Levinson, questions whether we really mean what we say: "I presume that the authors cannot really be arguing that *all* design is impossible."[1] Given our admittedly unorthodox and perhaps radical challenge to common notions of design, we appreciate the thoughtful attention to our views given by our commenters Vernon Smith, Sanford Levinson and Steven G. Calabresi. Even when disagreeing with us, they have responded to *Against Design* with open minds.

But we must take responsibility for any misunderstandings. In particular, it seems we were not clear enough in explaining that constitional design will fail not because constitutional provisions will fall away. They may well endure as Levinson and Calabresi both note.[2] What changes in unknowable, unimaginable, and unprestateable ways are the *affordances* of any constitutional clause, mechanism, amendment, language, passage, provision, or principle. The uses to which they will be put change in ways that often confound the intentions of those who put them there in the first place. Levinson and Calabresi both cite the two-senators rule as counterexample to our claims.[3] But that rule now *functions* much differently than Hamilton imagined when he argued in *Federalist 27* that the Senate would tamp the "spirit of faction."[4] The two-senator rule, for example, now supports "special interest legislation" directing a disproportionate share of federal government spending to small states—a result that neither the Constitution's framers, nor supporters of the Seventeenth Amendment, would have desired.[5] The rule now functions to make the Senate *contribute* to the "spirit of faction." The

---

* J.D. 2013, Duke University of Law; Professor of Finance, Whitman School of Management of Syracuse University; Institute for Systems Biology, Seattle; Professor of Strategy, Saïd Business School, University of Oxford.

1. Sanford Levinson, *On the Inevitability of "Constitutional Design"*, 48 ARIZ. ST. L.J. 249, 256 (2016).

2. *See* Steven G. Calabresi, *Friedrich A. Hayek, the U.S. Constitution, and Institutional Design*, 48 ARIZ. ST. L.J. 231, 239 (2016); Levinson, *supra* note 1, at 252–53.

3. Calabresi, *supra* note 2, at 236; Levinson, *supra* note 1, at 251.

4. THE FEDERALIST NO. 27 (Alexander Hamilton).

5. Rosalind Dixon, *Updating Constitutional Rules* 319, 325 (Chi. Pub. Law & Legal Theory, Working Paper No. 344, 2011).

rule is the same but functions differently than the designers expected. And this crisis for would-be designers, we have argued, cannot be averted. There is no fix. To paraphrase Frederick Douglass: We are in the horrible epistemic pit with no ladder upon which to get out.

Vernon Smith reiterates important points related to problems associated with economic rationalism and central planning.[6] We have indeed drawn in part on F. A. Hayek, who excoriated "Cartesian rationalism."[7] Vernon Smith's arguments, along with Hayek, can be linked to a tradition harkening back to Adam Smith—a tradition which Peter Boettke has dubbed "mainline economics" (compared to "mainstream" economics). In this tradition "[t]here are real limits to economic analysis, and efforts at economic control."[8]

Smith's title conveys an important point: people plan and we therefore have "design" in the world. But in a decentralized system those designs become a source of variation, and an evolutionary selection process (whether Darwinian or Lamarkian) filters these variations. A good evolutionary filter makes decentralized "design" possible and desirable. This is a picture of bottom-up change. "Innovators," Smith explains, "can only propose and offer changes as trials in the form of new processes or products that may or may not be adopted."[9] Mill's "experiments of living"[10] generate new possibilities that may spread or die out. An ecology of such experiments produces an increased diversity of options in life and a more robust and resilient social system. We share Smith's pluralistic vision and his aversion to crony capitalism.

Sanford Levinson's calls for a constitutional convention seem to take it for granted that design is possible and desirable. It is therefore understandable that he would question whether we really are against design: "I presume that the authors cannot really be arguing that *all* design is impossible; specific designs may be decidedly unwise, but that does not negate the fact that designs are inescapable." Though Levinson himself recognizes the problems, he nonetheless argues that design we must. He reiterates his call for a Constitutional Convention,[11] an effort to "draft a constitution more fitting to our twenty-first century 'experience.'"[12] But, we wonder, for example, if his scheme for the random selection of delegates adequately specifies how such

---

6. Vernon Smith, *Design is the Source of Variation; Selection is the Filter*, 48 ARIZ. ST. L.J. 257, 257 (2016).

7. FRIEDRICH. A. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 85 (1967).

8. PETER BOETTKE, LIVING ECONOMICS: YESTERDAY, TODAY, AND TOMORROW 383–85 (2012).

9. Smith, *supra* note 6, at 257.

10. JOHN STUART MILL, ON LIBERTY 101 (2011).

11. Levinson, *supra* note 1, at 253.

12. *Id.*

a convention would work and, importantly, who would serve. May a randomly selected person decline to serve? Who precisely is to decide whether the deliberating body is "representative?" And so on. However such questions might be resolved, we believe there is no mechanism that can fully aggregate disparate experiences, judgments, preferences, and interests across social scales, nor, vitally, anticipate the future affordances of any constitutional measures or mechanisms such a convention might produce.

It is worth noting that in our original article we did not say that "design" is impossible. We said that *constitutional* design is impossible.[13] And we specified the sense in which it is impossible by saying, "Constitutional design fails because any constitutional clause, mechanism, amendment, language, passage, provision, or principle becomes a tool that unknown persons will use in unknowable ways for unknowable ends."[14] Intense dissatisfaction with current institutions does not somehow turn the impossible into the possible.

There is some justice in Levinson's comparison of our argument to the skepticism of Michael Oakeshott.[15] But we do not share Oakeshott's overall conservatism, however nuanced it may be. Andrew Gamble has recently said of Oakeshott, "Although generally considered a Conservative there is much in his thought which defies neat political categorisation. Indeed, the left has much to learn from him."[16] But we think Oakeshott was probably right to describe himself as conservative. "To be a conservative," Oakeshott explains in the book Levinson cites, "is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to utopian bliss."[17] Like Oakeshott, we are not utopians. In contrast to Oakeshott, however, we prefer a wisely sufficient exploration of the unknown to the familiar, the untried to the tried, mystery to fact, and the possible to the actual. Whatever may be true of Oakeshott, it seems fair to say that conservatives generally tend to prefer gradual change to quick leaps. While we generally esteem evolution over revolution, we are not gradualists. Though, that said, we might more generally say that we prefer pluralism and heterogeneity, rather than calling for one single approach, whether gradual or revolutionary.

Above all else, perhaps, Oakeshott repudiated "doctrine." He excoriated the "conversion of habits of behaviour, adaptable and never quite fixed or

---

13.   Devins et al., *Against Design*, 47 ARIZ. ST. L.J. 609, 679 (2015).

14.   *Id.*

15.   Levinson, *supra* note 1, at 249.

16.   Andrew Gamble, *On Michael Oakeshott: Scepticism and Rationalism in Politics*, 22 JUNCTURE 183, 184 (2015).

17.   MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 169 (1962).

finished, into comparatively rigid systems of abstract ideas."[18] For Oakeshott, the "main significance" of Hayek's critique of planning is the execrable fact that "it is a doctrine."[19] We imagine Oakeshott would accuse us, too, of "doctrine." As fully as we reject excessive rationalism and the pretense of complete knowledge, we are attempting to construct a system of abstract ideas. Like F. A. Hayek, Alan Turing, and Gregory Chaitin, our abstract ideas do imply necessary and insuperable limits of human knowledge. We imagine, however, that our epistemic humility would not have spared us from the charge of "doctrine."

Steven G. Calabresi interprets us to say that "changing circumstances and unforeseeable inventions and developments render all laws and institutions infinitely malleable."[20] But if laws and institutions were "infinitely malleable," history would not matter. Any tomorrow could follow from any yesterday, unraveling the influence of the past on the future. We make no such claims. On the contrary, ours is an explicitly evolutionary argument. Time matters in social, economic, and legal evolution in much the way it matters in biological evolution. What becomes, becomes out what is now present into its current Adjacent Possible.[21] We have emphasized novelty, surprise, and an open-ended future. But novelty, surprise, and an open-ended future do not imply that laws and institutions are "infinitely malleable." In our argument at least, they imply "path dependence," which is to say an enduring role of the past in shaping the future.[22]

Calabresi suggests that we make a Hayekian argument, but that we "have not applied Hayek's work as a whole."[23] "The key mistake that the authors of *Against Design* make is that they describe only Spontaneous Systems of Order in the Hayekian scheme and not Planned Systems of Order."[24] We noted, however, Hayek's confidence in constitutional design and explicitly expressed our view that he erred on this point.[25] "In our view," we said, "the distinction made by Hayek . . . between spontaneous orders and economies is illusory."[26] We recognize the co-existence of spontaneous and planned orders. But, as we indicated above, we think planned orders are not likely to be functional unless they are subject to a good evolutionary filter. Thus, planning may be possible for relatively small units within a society or nation,

---

18.   *Id.* at 21.
19.   *Id.*
20.   Calabresi, *supra* note 2, at 231.
21.   Devins et al., *supra* note 13, at 614.
22.   *Id.* at 620.
23.   Calabresi, *supra* note 2, at 232.
24.   *Id.* at 235.
25.   Devins et al., *supra* note 13, at 613.
26.   *Id.*

but impossible at the level of the whole society or nation. Planning at the national level is possible, of course, in one obvious sense. State actors can draw up plans and attempt to impose them on the polity. But the outcome will likely deviate significantly from what the planners promise.

Calabresi also links our arguments to Ronald Coase's "theory of the firm."[27] As important (and elegant) as Coase's argument is, the current literature on the theory of the firm paints a richer picture and in some important ways a very *different* picture than Coase gave us almost eighty years ago.[28] In any event, our point is not about design or planning at the level of individuals or firms integrated over diverse scales, but about large-scale planning and design focused at the level of whole societies and nations.

Calabresi also seems to equate Hayekian spontaneous order with the "wisdom of crowds." He says, "Spontaneous Systems of Order are epistemically superior to Planned Systems of Order because they incorporated the knowledge not only available to the Central Planned but also the crowd wisdom available to all the users." But in elaborating on this point, Calabresi equates the wisdom of crowds with information aggregation. Although he cites Surowiecki, who ranges well beyond information aggregation, Calabresi reduces the wisdom of crowds to the emergence of a common opinion or common action shared by everyone. This mistaken reduction is revealed by his admonition that we get, not the wisdom of crowds, but "an information cascade" when "information" is not "derived independently by each member of the crowd." In this mistakenly narrow sense, the wisdom of crowds has little to do with the benefits of spontaneous order. Spontaneous orders are epistemically superior to planned systems in part because they deploy dispersed knowledge *without* the necessity of aggregating such knowledge, which often exists in the tacit form of habits and custom rather than in any form that could be written down for transmission to the center. Information aggregation processes of the sort that might descend into information cascades are very different. They homogenize opinion, whereas spontaneous orders leverage and preserve epistemic diversity.

We acknowledge, of course, that opinion aggregation can sometimes produce good guesses, as Galton showed in "Vox Populi."[29] But our point is not about the need to aggregate (whether through votes or representation) to some kind of global, grand decision or Constitution for all—as that in itself

---

27.   *Compare* Calabresi, *supra* note 2, at 234, *with* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 386–405 (1937).

28.   *See generally* Todd R. Zenger et al., *Theories of the Firm-Market Boundary*, 5 ACAD. MGMT. ANNALS 89 (2011).

29.   Francis Galton, *Vox Populi*, 75 NATURE 450, 450 (1907).

is filled with folly—but rather to allow local adaptation and growth on the basis of differences. The notion of appealing to the wisdom of "crowds" tends to wipe out variance, and indeed can lead, as Calabresi notes, to non-independent, non-rational, and moblike behavior.[30] Thus, in some cases we would concur with Søren Kierkegaard that "the crowd is untruth."

Our preferred mix of spontaneity and planning would place more emphasis on planning and design at lower levels, allowing for higher-level spontaneous outcomes. Ironically, planning and design in fact would radically increase in such a "polyarchical" system, as disparate plans and designs can jointly be put to effect based on the anticipations, expectations, preferences and interests of individuals within their local contexts and communities.[31] Our view thus links to a deeply rooted yet diverse intellectual tradition, ranging from Jeffersonian democracy to Ostrom's polycentric governance, that advocates for bottom-up governance.[32]

Calabresi says, "[t]hanks to our Constitution, the United States is the fourth largest country in the world by territory, the third most populous country in the world, and is the world's only military superpower" and further the "U.S. economy is the largest economy in the world, and the U.S. has by far the highest GDP per capita of any of the so-called G-20 nations."[33] We question Calabresi's causality. The United Kingdom had a similar success with an unwritten constitution that owed more to chance than design. It seems worth noting, moreover, that many of the founders would not count it a success that the US has become a "military superpower" with "entangling alliances."[34]

A few **closing remarks** may be appropriate to add in the scant space remaining for this comment. Our argument in "Against Design" draws, *inter alia*, on modern complexity theory and recent developments in the theory of biological evolution. Our central argument is that the evolution of the biosphere and the economy—as well as the legal system—is inherently a creative process in which the present gives rise to new, previously unforeseeable opportunities and affordances. The relationship between the present and the future is not one of direct cause and effect, but of open-ended enablement. This is easily seen in technological evolution: the invention of the personal computer and its widespread diffusion did not cause, but enabled, the invention of word processing, which enabled file sharing, which

---

30. Calabresi, *supra* note 2, at 234.
31. *See generally* Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641 (2010).
32. *Id.*
33. Calabresi, *supra* note 2, at 238–39.
34. *Id.* at 239.

enabled the invention of the World Wide Web. The invention of the Web in turn enabled selling on the Web, and Amazon and Ebay emerged, creating content on the Web that enabled browsers to search the Web with engines such as Google. In legal systems, a law, once passed, enables often unprestatable loopholes that afford new, unprestatable, strategies that often call forth yet new laws and regulations with yet more unprestatable loopholes. Thus the law sprawls, often unprestatably. That which we cannot prestate, we cannot reason about. We cannot design with fully rational control.

But design, if pushed to lower levels, can lead to powerful experimentation and much-needed variance. Our argument relies on a form of self-organization and association that, for example, Tocqueville observed in the early United States. "As soon as several of the inhabitants of the Unites States have conceived a sentiment or an idea that they want to produce in the world, they seek each other out; and when they have found each other; they unite."[35] Constitutions can curtail these types of emergent dynamics, as illustrated by the *Dred Scott* case, wherein justice was denied because the Supreme Court's interpretation of the Constitution trumped the laws of anti-slavery states to the detriment of human rights.[36] A multitude of jurisdictions and systems allows for mechanisms of "exit, voice, and loyalty"[37] to operate and discriminate between those systems that are viable, desirable, just, profitable (or whatever valued outcomes individuals may seek) and those that are not. And importantly, the possible simultaneity of such systems encourages heterogeneity, the type of simultaneity that higher-order Constitutions tend to stamp out. A national decision against slavery would, of course, be infinitely preferable to heterogeneity in that particular dimension. But such a decision could be made without a written constitution as in the United Kingdom. In the U.S., a written constitution with an explicit bill of human rights and a preamble extolling the "Blessings of Liberty" did nothing to eliminate slavery.

Thus, in stubbornly being *against* design we are also arguing *for* something. If we are for any form of design, it is design that happens on a local basis, guided by individual reasoning and imagination, self-selection, and local and social interaction. At a high level, this of course can also be designed into a system or a Constitution. Calabresi might indeed argue that this is the case. Though, our point is that the historical case of the Constitution has scarcely accomplished this, and many successes seem to have emerged *despite* the Constitution.

---

35.   ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 492 (Harvey C. Mansfield & Delba Winthrop eds., trans., The Univ. of Chicago Press 2000) (1840).

36.   *See generally* Dred Scott v. Sandford, 60 U.S. 393 (1856).

37.   *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

Even distinguished constitutional scholars, such as Calabresi and Levinson, scarcely agree on how relevant the Constitution of 1787 is for the present age. Calabresi argues that the "most important features" of the Constitution remain the same and are as important as ever,[38] while Levinson suggests that the original Constitution represents a "clear-and-present danger."[39] They perhaps represent two ends of a spectrum. Where there is agreement, between Levinson and Calabresi, it is in the importance of constitutional design. Calabresi would seemingly keep things as they are, while Levinson has called for a Constitutional Convention. In other words, Calabresi seems to think the Constitution is responsible for keeping things as good as they are, whereas Levinson seems to think the Constitution is responsible for making things as bad as they are. But we argue that the problems in constitutional design are endemic to large-scale design itself.

The impossibility of constitutional design should, perhaps, encourage us to move as much decision making as reasonably possible away from the center and toward communities, individuals, and more local organizations. But that principle does not tell us what is "reasonably possible." Nor does it make all collective decision making otiose or undesirable.

How shall we wisely live with this uncertainty in our society and in constitutional law? How shall we design and at what social scales? How shall we wisely encourage spontaneous organization and diversity and at what scales? How should design and spontaneous order wisely mingle? We have no algorithms for deciding what to do, whether locally nor globally. We must dive in and make our choices as best we can. Though we have no algorithms to help, we are not without resources. Political principles such as the rule of law and freedom of conscious help guide us through an indeterminate host of relatively concrete choices without being, however, decision algorithms. So too the principles of common law. They guide the judge without somehow pre-deciding the case through some spurious algorithm or top-down mandate. Thus principles may guide us where design fails.

---

38. Calabresi, *supra* note 2, at 237.
39. Levinson, *supra* note 1, at 252.