

Principles of Constitutional Design

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and the independent executive is only a part of the separation of powers that defines the document's originality that differentiates it from the British model. It seems more than odd to view the U.S. system as an outlier on most empirical measures primarily because it has an independent executive, when its executive was designed to be, and remains, weaker than is found in many "presidential" systems that do not result in outlier status because they lack some combination of bicameralism, federalism, judicial independence, and other separation-of-powers institutions.

Modern constitutional analysis, therefore, requires that we begin with the least separated version of parliamentarism; that we move beyond a simple parliamentary-presidential dichotomy to a separation-of-powers continuum; that we learn to distinguish parliamentary and presidential systems that blend into one another; and that we attempt to develop a Separation of Powers Index that can be more useful in testing empirical propositions about constitutional design. In short, our analysis must be able to deal with political systems that have different degrees of separation of powers that do not permit easy dichotomization, or even categorization.

The Pure Parliamentary Model

We can describe a minimal separation of powers in the following manner.

1. There is an elected unicameral legislative body.
2. The sole executive is selected by this body, resides in it, and presides over it.
3. All other executive personnel (cabinet, etc.) who are to implement and oversee policy are selected by and removable by the legislative body (not the prime minister).
4. This body is the final court of appeal on all judicial matters – there is no separate court of final appeal.
5. There are no limits on the power of this body to deal with any matter.
6. The system is unitary – there is no federalism or local governmental discretion.
7. There is minimal legislative organizational complexity.

This might be termed the Pure Parliamentary Model or a Minimal Separation of Powers Model, which will be used to anchor an index for distinguishing higher levels of separation. However, there is a history to the separation of powers that does not begin with pure parliamentarism. Instead, powers first devolved from a monarch, and then from a parliament that had replaced the king at the center. That is, separation of powers is a political principle that we can identify and discuss theoretically, but the political institutions that embody separation of powers did not generally result from the application of a theoretical principle as much as the principle evolved from the gradual discovery that political power could be institutionally distributed, as well as the gradual discovery of new functions that could be distributed in new ways. For example, during the colonial era in America, legislatures developed the principle of no multiple officeholding as a means of preventing the “buying off” of legislators through the governor giving them paying positions in the executive branch. This was termed a “separation of powers” even though no powers were actually separated. Only later did Americans begin to apply the term separation of powers to the separate election of an executive.

As we follow the history of constitution making down to the present, we find an increasingly complex set of institutions for separating powers as we learn to identify “functions” that were not previously identified as specific powers. Some countries, for example, have established electoral commissions to regulate and oversee elections. Until this century, no one really considered this a separate “function” or power, and it resided undiscovered in the legislative branch as the ability to determine who had been properly elected when he arrived to take his seat. Other constitutional systems have seemingly divided the executive into several persons (or commissions) and subjected these several persons to elections as independent entities. My favorite is the state of Texas, which has a separately elected governor, lieutenant governor, attorney general, treasurer, railroad commission (to regulate intrastate commerce), utility commission, and so on. One of the general post-World War II tendencies noted in Chapter 1 has been the gradual but persistent increase in constitutional separation of powers. This tendency is much older than half a century – it goes back to at least the seventeenth century. However, the long-term trend is not toward the U.S. model. Instead, there is a simultaneous movement away from

both the pure parliamentary model and from the extreme U.S. version of separation of powers toward a general middle ground.

The comparative politics literature has attempted to respond to these changes by developing middle categories between the “presidential” and parliamentary forms, such as “presidential-parliamentary” or “parliamentary-presidential,” or perhaps something like both of these to indicate which way they lean. The Separation of Powers Index is designed to move beyond simple, rough categorizations that focus narrowly on one office – the president. To illustrate how rough the conventional schema really is, one must realize that the paradigmatic example of the presidential form, the United States, actually has one of the weakest executives in the world – something that students of American politics generally recognize but that seems to be ignored by students of comparative politics. The federal, bicameral, and two-party aspects of the U.S. system, along with an independent judiciary with review powers, are arguably together more important than the fact of a relatively weak, independently elected president for explaining the political process and political outcomes. And yet the U.S. political system is categorized as “presidential.” What this term is really meant to say is that the U.S. has a high degree of separation of powers, which is true, but as the index implies, a separately elected president accounts for less than 25 percent of the phenomenon of separation of powers as it exists in the U.S.

The same is true for countries designated “parliamentary.” As the analysis using the Separation of Powers Index will show, because an independently elected executive is only a minor aspect of separation of powers, some so-called parliamentary systems lacking a separately elected president still have greater separation of powers than a number of the so-called presidential systems. Terming a system “parliamentary” misses whether or not it is also federal, has an independent and active court, is two-party or eleven-party, is bicameral or unicameral, and so on. For example, let us compare two parliamentary systems on a single point that seems to go generally unremarked in the comparative politics literature. In New Zealand the constitution can be amended by an act of a unicameral parliament and is the easiest in the world to amend. Australia, on the other hand, largely because it is federal, has probably the most difficult constitution in the world to amend because of its much stronger separation of powers as a

whole. Yet, these two systems are generally categorized together as “parliamentary.”

There is a need to capture the differences among political systems in the distribution of separation of powers. An index that captures these differences would be, at the very least, a useful supplement to the general categorization schemes currently in use. It would also permit the use of statistical techniques that assume a continuous variable. Statistical analyses, however, would now read “Political systems with a higher level of separation of powers tend . . .” rather than “Presidential systems tend . . .”

A Separation of Powers Index

The Separation of Powers Index is constructed by assigning weights to the various alterations in the minimal separation-of-powers model developed earlier as the pure parliamentary model (Table 4.1). That is, the various aspects of separation of powers are defined by their contribution to a move away from the pure parliamentary model outlined earlier where all powers are concentrated in a single political entity. As with the Popular Control Index, the final score is additive of a number of institutional elements, and the score assigned each institution is an estimate of each element’s relative importance for producing separation of powers. One apparent anomaly is that under element B the apparent creation of two executives produces less separation of power than the independent election of a single executive. However, if the head of government is in parliament, this prime minister prevents the separately elected executive from devolving much power away from parliament. It should be noted that it is also possible for some institutional elements to produce more than one incremental addition to the total index. For example, if an executive veto is subject to legislative override *and* judicial review, .25 would be added twice to the total. Or, if there is a second national court, .25 would be added to whatever other score was generated by that element.

Technically, the zero point on the index is represented by a pure democracy – all citizens assembled in one place, who together have all political power through majority rule. However, to keep matters simple, the zero point on the index is defined by a system with the characteristics of a pure parliamentary model. To this most basic model,