Principles of Constitutional Design

Donald S. Lutz

CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521857789

we then add the score for each separation-of-powers institution used by a given country. On the index, Britain has a score of 1.0 (an elected parliament with weak bicameralism, a cabinet appointed by the prime minister, a monarch as a separate but symbolic executive external to parliament, and an amendment process that requires approval by both houses and the external executive). One might argue that a more refined index would allow us to capture the "softness" of factors contributing to the British score, and a better score might be closer to .5 or at least below 1.0. However, the purpose is not to capture some objective phenomenon in all of its nuances, but rather to give us a useful way of comparing political systems. For an initial comparison, the United States has a score of 8.00. The Separation of Powers Index developed here retains the parliamentary and "presidential" forms as virtual opposites. New Zealand's parliamentarism comes in with a score of .50, and the scale ranges up to a probable high score of around 10.00. We can now array political systems between these two "polar" types without having to force any country into a category that destroys the possibility of taking into account degrees of difference in the separation of powers. It also allows us to identify systems that have a rough equivalence in the separation of powers, even though they use a different institutional mix.

Popular Control versus Popular Sovereignty: An Empirical Test

Over the past three chapters, the discussion has driven home the paradoxical nature of the two faces of sovereignty, and thus of popular sovereignty. Sovereignty is a theoretical concept that simultaneously requires the presence of a supreme power and of limits on that supreme power. A Popular Control Index, developed in Chapter 3, permits quantification of the relative extent to which the people have supreme power in a given political system. A Separation of Powers Index, developed in this chapter, measures the extent to which there are limits placed on popular control. These indices are essentially based on the presence of a variety of institutional provisions in national constitutions. Table 4.2 codifies the relevant data for seventy-five nations that appear to have passed the tests required to be termed constitutional republics. These data include their respective scores on the Popular Control Index and the Separation of Powers Index. Using these data

TABLE 4.2. *Data on Constitutional Republics (Democracies)*

Rank Country	Population (in millions)	Freedom House Score	Separation of Power Score	Size of Lower House	No. of Political Parties[a]	Size of Upper House	No. of People per Representative (in thousands)	Percent of Vote by Largest Party	Popular Control Score
1 India	966.8	3.0	5.35	545	17+	250	1,888	36	5.50
2 United States	268.0	1.0	8.00	435	2	100	616	52	7.15
3 Brazil	164.5	3.5	7.00	513	7+	81	320	21	6.35
4 Mexico	97.6	3.5	6.70	500	6+	128	155	44	5.65
5 Japan	125.7	1.5	3.25	500	6+	252	251	48	5.55
6 Germany	84.1	1.5	5.75	656	7	68	128	38	4.75
7 Philippines	76.1	2.5	6.50	204	8	24	373	63	6.35
8 United Kingdom	58.6	1.5	1.00	659	3+	1,200	90	45	4.55
9 France	58.2	1.5	4.75	577	9+	321	101	42	6.85
10 Italy	57.5	1.5	4.90	630	5+	31	91	45	6.60
11 Korea (South)	45.9	2.0	4.00	299	5		154	52	5.80
12 South Africa	42.3	1.5	5.15	400	7+	90	106	63	4.75
13 Spain	39.2	1.5	3.40	350	4+	208	112	39	6.15
14 Colombia	37.4	4.0	6.25	161	6+	102	232	55	7.45
15 Poland	36.7	1.5	4.20	460	6+	100	80	37	6.25
16 Argentina	35.8	2.5	6.00	254	5+	46	141	52	6.10
17 Canada	30.3	1.0	4.25	305	5+	104	103	41	4.45
18 Venezuela	22.4	2.5	6.85	203	5+	50	113	28	6.35
19 Taiwan	21.7	2.0	3.50	164	4		132	46	5.05
20 Romania	21.4	2.0	4.40	343	6+	143	62	30	6.70
21 Australia	18.4	1.0	5.10	146	5	76	126	64	6.10
22 Netherlands	15.7	1.0	3.60	150	4+	75	104	24	4.60
23 Chile	14.5	2.0	6.55	120	7	32	121	31	7.05
24 Greece	10.6	2.0	2.50	300	6		35	42	4.90

25 Czech Republic	10.3	1.5	3.35	200	7	81	5	34	4.65
26 Belgium	10.2	1.5	4.05	150	11	70	68	19	4.60
27 Hungary	9.9	1.5	2.80	386	8		26	54	6.35
28 Portugal	9.9	1.0	2.60	230	7		43	44	6.05
29 Sweden	8.9	1.0	1.40	349	9		26	45	5.45
30 Dominican Republic	8.2	3.0	4.35	120	3+	30	69	48	5.80
31 Austria	8.1	1.0	4.50	183	5+	63	44	38	6.10
32 Bolivia	7.7	2.0	3.60	130	10+	27	59	40	5.30
33 Switzerland	7.2	1.0	5.00	200	11+	46	36	28	6.90
34 Benin	5.9	2.0	3.85	83	9+		71	24	5.00
35 El Salvador	5.7	2.5	2.45	84	9+		67	35	4.60
36 Israel	5.5	2.0	1.85	120	15		46	28	4.55
37 Denmark	5.3	1.0	2.25	179	10		29	35	6.15
38 Finland	5.1	1.0	2.25	200	11		26	28	5.00
39 Papua New Guinea	4.5	3.0	1.75	109	13		41	22	4.40
40 Norway	4.4	1.0	2.75	165	8		27	37	4.85
41 Nicaragua	4.4	3.0	3.75	93	11		47	46	5.30
42 Lithuania	3.6	1.5	3.00	141	6+		26	50	5.95
43 New Zealand	3.6	1.0	1.35	120	6+		30	34	4.75
44 Ireland	3.6	1.0	4.30	166	7+	60	21	39	6.05
45 Costa Rica	3.5	1.5	4.60	57	2+		61	49	5.00
46 Uruguay	3.3	1.5	5.95	99	4+	30	33	36	6.75
47 Panama	2.7	2.5	3.65	72	12		37	44	6.60
48 Latvia	2.4	1.5	2.25	100	9+		24	18	4.85
49 Slovenia	1.9	1.5	2.75	90	7+		22	27	5.90
50 Botswana	1.5	2.0	1.35	44	2+	15	34	61	3.40
51 Estonia	1.5	1.5	2.55	101	7+		14	32	4.90
52 Mauritius	1.2	1.5	2.15	70	4+		16	65	3.95
53 Trinidad and Tobago	1.1	1.5	2.50	36	3+	31	31	47	3.95
54 Fiji	.8	3.5	3.65	70	6+	34	11	44	4.10
55 Guyana	.7	2.0	1.50	65	4+		11	53	3.40

(continued)

TABLE 4.2 *(continued)*

Rank Country	Population (in millions)	Freedom House Score	Separation of Power Score	Size of Lower House	No. of Political Parties[a]	Size of Upper House	No. of People per Representative (in thousands)	Percent of Vote by Largest Party	Popular Control Score
56 Cyprus (Greek)	.5	1.0	4.00	56	5+		10	35	3.25
57 Solomon Islands	.4	1.5	1.65	47	5+		9	45	3.40
58 Luxembourg	.4	1.0	2.00	60	5		7	35	4.10
59 Bahamas	.3	1.5	2.65	40	2+	16	7	85	4.30
60 Iceland	.3	1.0	4.15	42	6		4	63	5.05
61 Barbados	.3	1.0	2.20	28	3	21	9	64	4.15
62 Belize	.2	1.0	2.10	29	3	8	8	52	4.15
63 Vanuatu	.2	2.0	2.70	50	5		4	34	4.70
64 St. Lucia	.2	1.5	2.30	17	2	11	9	65	5.05
65 Micronesia	.1	1.5	3.50	14	0[b]		9	0	7.10
66 St. Vincent	.1	1.5	1.50	21	2+		6	57	5.25
67 Grenada	.1	1.5	2.35	15	3+		6	53	4.10
68 Kiribati	.1	1.0	4.45	41	3+		2	32	6.45
69 Dominica	.1	1.0	2.15	30	3		2	57	4.75
70 Antigua and Barbuda	.1	3.5	2.30	17	2+	17	4	65	4.45
71 Marshall Islands	.1	1.0	1.90	33	0[b]		2	0	3.60
72 St. Kitts and Nevis	.04	1.5	2.95	14	4		4	64	4.60
73 Liechtenstein	.03	1.0	2.35	25	3	1	52	4.90	
74 San Marino	.03	1.0	1.15	60	6		.4	43	4.65
75 Palau	.02	1.5	4.25	16	0[b]	14	1	0	5.80

Note: This list includes data on new, emerging (unconsolidated) democracies as of January 1, 2000, and includes all countries except Andorra and Monaco that scored at least 2.0 on the Freedom House scale, which includes all liberal democracies. However, the list also includes a number of nonliberal democracies that are often not included in studies of democracies or democratization.

[a] The number of parties that won seats in the two most recent elections – a + indicates there are more parties contesting than won seats.

[b] No parties – everyone runs as an independent.

and indexes, it is possible to empirically test for the existence of popular sovereignty.

If there is such a thing as popular sovereignty in the political world we inhabit, it should be revealed by the tendency for those who write constitutions to include more and more constitutional limits through the introduction of a higher level in the separation of powers as the level of popular control increases. If there is no distinction between a sovereign and a supreme power, and thus between popular control (democracy) and popular sovereignty (a limited popular control), it will be revealed in one of two ways. There will be no significant statistical relationship between the Popular Control Index and the Separation of Powers Index; or else there will be a negative relationship, which implies something radically different from what has been developed theoretically.

The data set includes at least twice as many political systems as is usually the case in cross-national comparative studies of democracies and democratization to this date. In part this is because the small democracies are almost always ignored. It also results from an attempt by other researchers to avoid inclusion of possibly controversial cases that might undermine their respective study's credibility. In this study, however, we are focusing on principles of constitutional design rather than on democracy per se. Countries that might be considered marginally "democratic," or perhaps unconsolidated democracies, can still qualify here as constitutional republics if the minimal test described in Chapter 1 has been met. Indeed, the presence of constitutional republics, whose democratic commitments might be called into question in studies of democratization, or only securely consolidated democracies allows here for the introduction of a wider range of variance. Nation-states with a currently weak commitment to popular control should also demonstrate a weak development in institutions for limiting a majority rule that is not yet consolidated.

All but seven of the countries listed in Table 4.2 scored at least a 2.5 as of June 2000 on the widely used and respected Freedom House scale. Every country that scores 1.0 to 2.5 falls into one of their liberal democracy categories. India, which has a score of 3.0, is usually referred to as the world's largest democracy, and Colombia and Brazil are often included in studies of democracies. Including them does not seem to do violence to normal academic usage. Finally, excluding the

half-dozen more controversial nations listed in Table 4.2 does not alter the empirical results, except to marginally improve the correlations in some instances.

When we look at Table 4.2, the Popular Control Index scores are listed in the right-hand column. The first thing to note is that, on an index that ranges from a theoretically possible 1.0 to 13.2, these seventy-five countries range from 3.25 to 7.45, with a mean score of 5.3. Because the use of competitive elections is the minimal definition used historically for republican government, and because on the Popular Control Index competitive parliamentary elections every four years would produce a score of about 3.0, anything below 3.0 would not be a constitutional republic in terms of the index used here. The seventy-five countries, then, tend to be clustered in the low to middle portion of the effective index range of 3.0 to 10.0. Put in standard democratic theory terms, strong democracy characterized by frequent and effective popular participation is almost everywhere avoided. Still, there is more than enough variance in the index scores to test some obvious hypotheses.

One hypothesis might be that the smaller a country's population, the higher its score would be on the Index of Popular Control. Given the honored position of classical Athens as a model of democracy, and the strictures against small republics by theorists ranging from Montesquieu to Madison, it is intuitive to suppose that smaller populations can and will organize with a higher level of popular control. In fact, regressing each country's Popular Control Index score against its population produces a virtually flat curve. Eliminating the sixteen countries with the smallest populations reduces the correlation very slightly (by .029), which indicates that smaller democracies are slightly more inclined toward popular control, but not to a statistically significant degree. The strength of popular control varies independently of population size.

Another hypothesis might be that the number of political parties is for some reason associated with a greater degree of popular control. Again, there is a virtually flat regression curve that indicates no relationship. This finding is important for several reasons. First, empirical studies of political systems tend to focus heavily on electoral and party systems, even though these two important political institutions

are usually not mentioned in the formal constitution. Some argue that formal constitutional provisions are not as important as the nonconstitutional institutions that shape political behavior, and usually electoral and party systems are prominently mentioned. However, party and electoral systems turn out not to be important for predicting the level of popular control. All that matters is that there be some form of honest elections and any type of party system as long as it is competitive. Put another way, party and electoral systems are not critical constitutional variables. Second, since multiparty systems are associated with the various parliamentary forms of constitutional republicanism, the flat regression curve indicates that the Popular Control Index favors neither parliamentary nor "presidential" systems. Third, this last conclusion is in line with the argument made earlier that the traditional parliamentary-presidential dichotomy usually used in comparative analysis may not be the most useful approach.

A third hypothesis might be that the higher the level of popular control, the higher the score on the Freedom House index; or, conversely, the higher the level of popular control, the lower the Freedom House score. In the first instance, we might assume that higher levels of popular control make it more difficult for those in government to abuse the rights of the people. In the second instance, we might assume, with theorists like James Madison, that higher levels of popular control tend to produce something usually termed "tyranny of the majority." In fact, regressing the Freedom House scores against the Popular Control Index scores produces, again, a virtually flat curve.

This final conclusion, however, ignores a critical variable emphasized in the present study. Higher levels of popular control may not endanger rights because those who design constitutions with higher levels of popular control also build in a higher level of separation of powers to compensate for the dangers to rights posed by higher levels of popular control. When we control for the effects of separation of powers, the relationship between the Popular Control Index and the Freedom House index is a negative .370. That is, as the Popular Control Index scores increase, the scores on the Freedom House index for protection of rights tend to decrease when controlling for the level of separation of powers. Put another way, as the level of popular control increases, failure to increase the separation of powers results

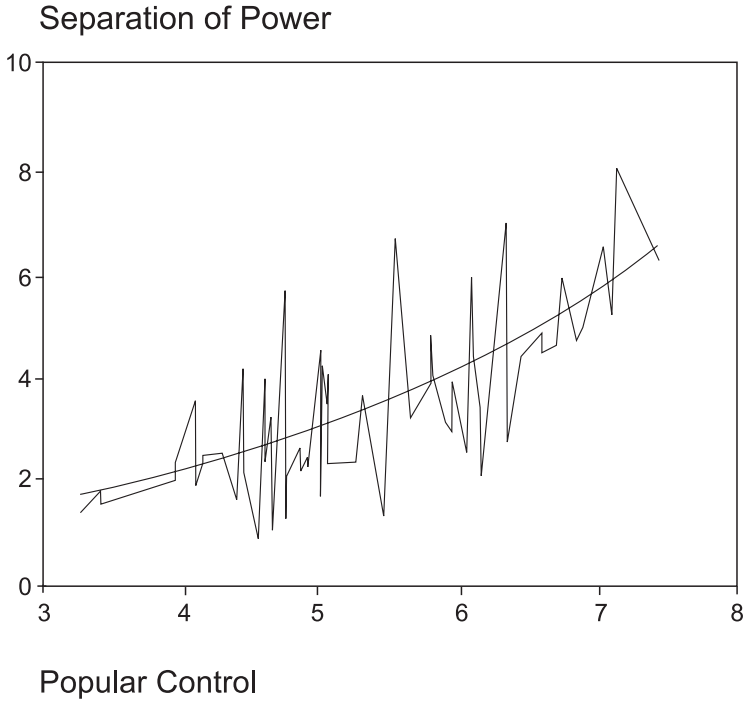

FIGURE 4.1. Popular control and separation of powers using the seventy-five-nation sample. SEPPOW QUA: $r^2 = .497$; d.f. = 72; F. = 35.59; significance = .000; b0 = 1.8817; b1 = −.5009; b2 = .1508.

in a greater probability that the country will fail to qualify as a liberal democracy under the Freedom House definition.

James Madison would not be surprised by this finding, nor would he be surprised by the underlying relationship that explains it. The most important empirical relationship uncovered by this study is that the level of separation of powers increases as the level of popular control increases. The r square for the linear curve of best fit for the relationship is .487 (significant at the .001 level), and the quadratic curve of best fit has an r square of .497 (significant at the .001 level – see Figures 4.1 and 4.2.[1] It is of interest that the empirical results here that

[1] The relationship between the Popular Control and Separation of Powers indexes was also tested using multiple regression techniques. The model used a number of variables including the country's population, land area, number of parties, average constituency size, per capita income, size of lower and upper houses, and other standard variables.

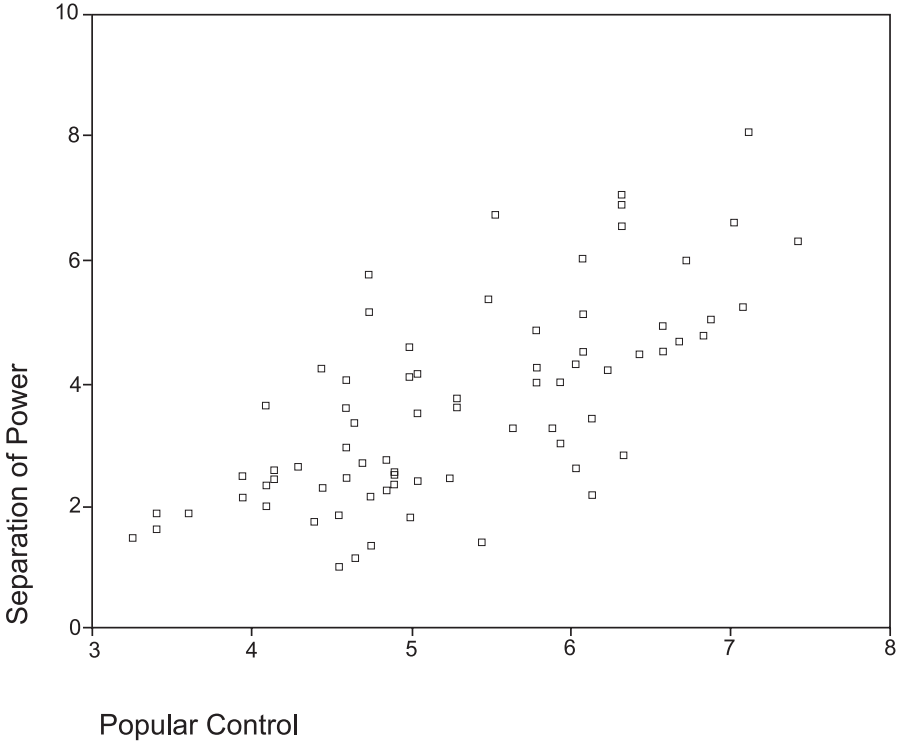

FIGURE 4.2. Bivariate relationship between popular control and the separation of powers using the seventy-five-nation sample. Pearson correlation: .698; significance (two-tailed) = .000 (correlation is significant at the 0.01 level).

use contemporary cross-national data indirectly confirm the insight first codified by Jean Bodin more than four hundred years ago. There is an important difference between power and limited power, and those who frame national constitutions tend to separate or distribute power as it increases in strength.

Although this study includes a larger than normal sample of nations, it is still possible that the combination of countries in some way affects the results. One way to test for this possibility is to use the sample of countries found in Arend Lijphart's widely read 1999 book *Patterns of*

The model explained 81 percent of the total variance, with the Popular Control Index explaining 51 percent of the total variance in the separation of powers – which is virtually identical to the strength of the relationship represented by the quadratic curve of best fit for the simple regression test.

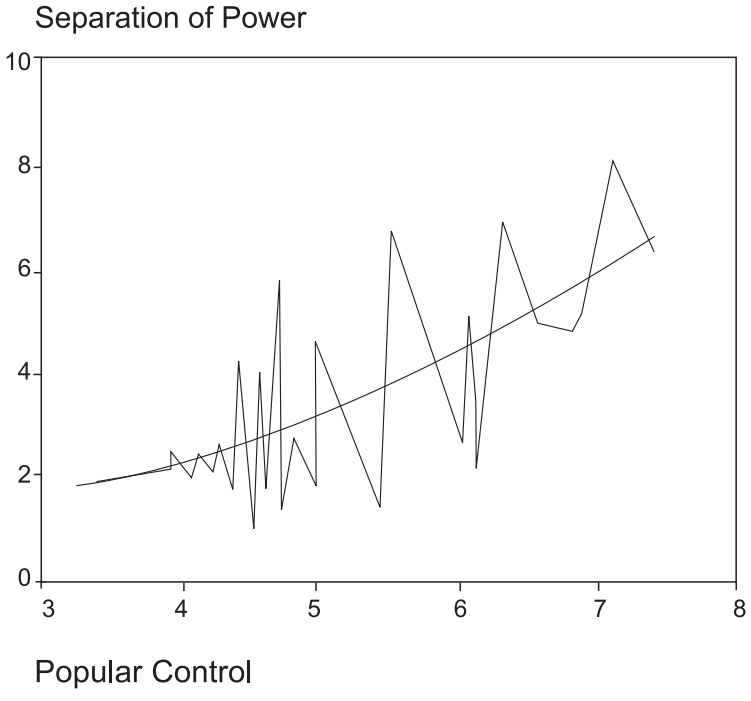

FIGURE 4.3. Quadratic curve of best fit for popular control and separation of powers using Lijphart's thirty-six-nation sample. SEPPOW QUA: $r^2 = .444$; d.f. = 33; F. = 13.16; significance = .000; b0 = 1.9637; b1 = −.5343; b2 = .1543.

Democracy.[2] Testing the relationship between the two indexes using his thirty-six countries, which also uses several countries not found in the seventy-five-nation sample used here, produces an r square of .436 for the linear curve of best fit, and an r square of .444 for the cubic curve of best fit with the same level of significance. The regression curve using his sample shows an almost identical set of curves, with the quadratic curve indicating a gradual increase in separation of powers as popular control increases (see Figures 4.3 and 4.4).

If instead of a regression curve we use a simple bivariate Pearson correlation, the seventy-five-country sample used here produces a .668 correlation, and Lijphart's thirty-six-country sample results in a .660

[2] Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999).

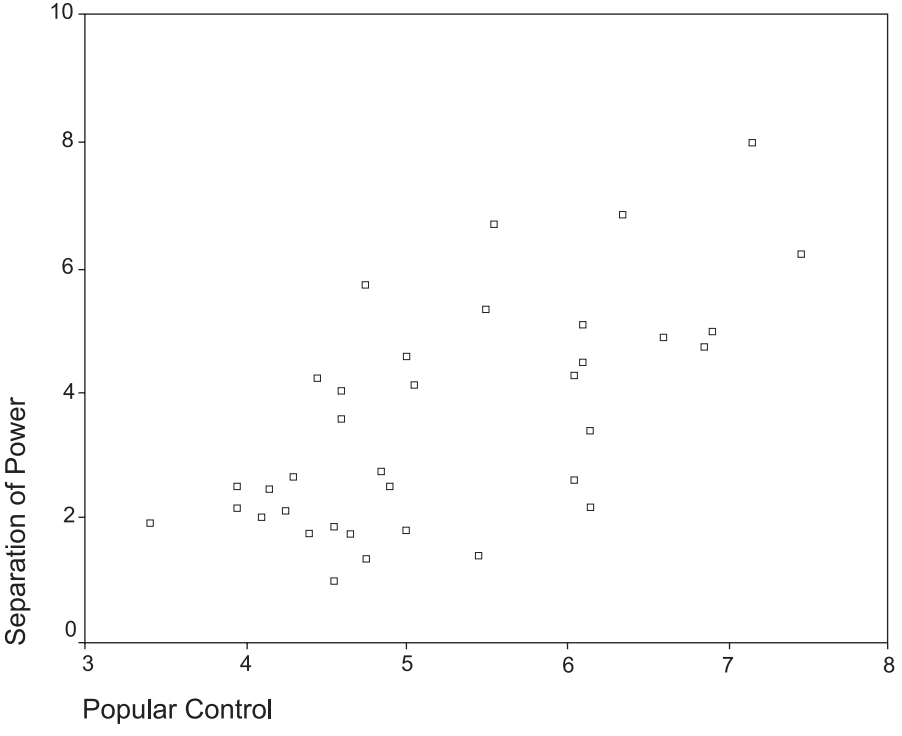

FIGURE 4.4. Bivariate relationship between popular control and separation of powers using Lijphart's thirty-six-nation sample. Pearson correlation: .660; significance (two-tailed) = .000 (correlation is significant at the 0.01 level).

correlation. The effects of sample size and content were tested further by randomly selecting samples of thirty-six, fifty, and sixty countries from the seventy-five-nation data base for analysis. The strong correlation between the Popular Control Index and the Separation of Powers Index holds and is almost identical, regardless of the specific cross-national sample used. Finally, an analysis of the residuals in the seventy-five-nation study confirms that the regression analysis meets the tests for linearity, normality, and constant variance that are required to establish the statistical independence of the two indexes.

What we have uncovered empirically is the advantage of popular sovereignty versus simple popular control apparently perceived by framers of constitutions at different times and in many different countries around the world. It does make a difference that we seek a sovereign rather than simply a supreme power, and this is as true

of popular control as other forms of supreme power. The empirical evidence supports the efficacy of the long-standing theoretical usage of sovereignty, as well as the almost universal penchant of those who design constitutions to seek something other than simply more democracy. Thus, if popular sovereignty is the sine qua non of constitutionalism, and separation of powers converts popular control into popular sovereignty, separation of powers is also at the heart of constitutional design.

Some Further Considerations

Although it has been argued here that de facto popular sovereignty underlies all political systems centered around popularly elected representatives, popular sovereignty is often not part of the theory used to explain or justify what are unquestionably constitutional republics. For example, in the United Kingdom a doctrine of popular sovereignty was explicitly rejected during the 1688 convention that produced the Glorious Revolution, and for the past three centuries the concept of "parliamentary sovereignty" has been official constitutional doctrine. Elsewhere, statist assumptions sometimes hold sway. The reification of the state has resulted in the notion of the state as sovereign, and many would argue that this is the proper view of sovereignty. Political theorists holding to a statist perspective would probably argue also that the limits identified here are not designed to limit popular sovereignty but to limit "state sovereignty."

Bodin suggested that a realistic analysis requires us to push our analysis through the chain of power until we come to the entity that first grants power and that has ultimate control over the chain of power holders and power grantors. According to Bodin's method, if the people have the ability to elect and remove those who are at the top of the chain of power, they are in fact sovereign regardless of the legal or constitutional doctrine used to explain and justify the operation of the political system. Suppose, on the other hand, we for some reason prefer another theory that assigns the word "sovereign" to parliament or to the state. The theory under development here does not require agreement on which entity should be termed "sovereign" legally, which is why the phrase de facto popular sovereignty has been used. The fact remains that constitutional republics worthy of the name, regardless