

Principles of Constitutional Design

Donald S. Lutz

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An Underlying Constitutional Logic: Rational Actors?

Four Interesting Curves

Our aim in this book has been to consider principles of constitutional design in order to better understand the project as a whole rather than to develop formulae for designing constitutions. The nature of the project demands such a stance, because, if a constitution must be matched to the people who will live under it, there is no one ideal or model constitution. Instead, the history of constitutionalism shows that there is a large variety of possible successful designs. Still, various empirical regularities have emerged that can be used by framers of constitutions as they consider the preferred institutional pattern that best suits them; as a result, although there is not an overall science of constitutional design, the design project can be informed by political science.

Several empirical findings fairly plead for further explication, because together they suggest a deeply interesting aspect of constitutional design. Under conditions of liberty, those who frame constitutions exhibit a set of patterned choices that suggest constitutionalism has a certain underlying logic, and perhaps an underlying rationality. We will examine these four curves that designers seem to strain toward without conscious intent: the index of amendment difficulty generating a nearly hyperbolic curve with respect to amendment rate; the size of legislatures tracking the curve for the cube root of the population; the separation of powers increasing as popular control increases; and the historical curve for constitutional democracies tracking the

curve for the number of written constitutions. Each reveals a different aspect of possible human rationality in constitutional design, and each contributes to broader questions concerning the nature of rationality itself.

The Hyperbolic Curve Describing the Difficulty of Amendment

Chapter 5 analyzed the amendment process in American states as well as cross-nationally. Figure 5.1 presented the hyperbolic curve describing the basic relationship between amendment rate and the difficulty of the amendment process. The general conclusion, that the amendment rate rises as the amendment process becomes less difficult, is hardly surprising. Empirical political science is often accused of proving the obvious, and if Chapter 5 established nothing beyond this general finding, the charge of proving the obvious would apply here. However, empirical political science has disproved a large number of such supposedly obvious hypotheses over the past half century, so establishing empirical support is always a necessary first step. Chapter 5 goes well beyond this first step and suggests that the project of constitutional design replicates the integrated view of political philosophy as laid out in Chapter 7.

In the integrated project of political philosophy, part of what empirical political science is supposed to determine is where we are on a given continuum defined by some ideal and its contrary. It is also supposed to tell us how to move along that continuum – what we can do to alter the current state of affairs. In both instances we must be able to measure, which implies an ability to quantify. Quantification requires some reasonable, systematic basis for assigning numerical value to an observed event; and this, in turn, requires definitions clear and precise enough to distinguish the observed event for one phenomenon from an observed event of another phenomenon.

The key to Chapter 5 is not that it provides empirical support for an intuitively straightforward empirical relationship or that it measures the strength of that relationship, but rather that it describes and measures the relationship in a way that allows a rational actor to choose a strategy for optimizing a preferred constitutional outcome. The equation

$$A = [1/D + ((L/10,000) \times .6)] - .3$$