

# Principles of Constitutional Design

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the underlying constitutional logic suggested by rational-actor analysis leads us to the curve linking the Separation of Powers Index with the Index of Popular Control. It is to that curve that we now turn.

### **The Curve Linking the Separation of Powers with the Index of Popular Control**

Consider once again the empirical curve uncovered in Chapter 4. The regression curve in Figure 4.1 shows a strong positive relationship between the Index of Popular Control and the Separation of Powers Index. Each index is calculated using a large number of possible institutions that together constitute most of the institutions in any possible constitution, regardless of where it might be placed on the parliamentary-presidential continuum. The Index of Popular Control results from scores assigned to the combination of institutions a people may use to control its government. Presented as Table 3.1, the index reflects eleven constitutional factors: what entity frames the constitution, adopts it, proposes revisions, approves proposed revisions, and has *de jure* sovereignty; the proportion of directly elected offices, election frequency, electoral decision rule, office holding requirements; whether there is provision for initiative, recall, or referenda; and how closely the legislative size is to what the cube root would predict. We can now see that the last element in the index is a surrogate measure of the attempt to maintain popular control in the face of increasing constituency and legislature size as the population increases.

The Separation of Powers Index, presented in Table 4.1, is similarly based on a large number of institutional factors: constitutional limits on legislative power, the presence and strength of bicameralism, and the complexity of legislative procedures when involved in amending the constitution; the relative independence of the executive in terms of selection and in terms of appointing ministers, plus the nature of the veto power if there is one; the relative independence of the judiciary in terms of selection and tenure, and the level of judicial review; and a host of miscellaneous institutions that illustrate the impressive inventiveness that humans can bring to the separation of powers.

These indexes are far more complex than the three- or four-element indexes usually generated by social scientists, and the relative weights assigned to each element are themselves composites of between three

and eleven subelements. Except for the relative weights of subelements in the amendment process, which were empirically developed in Chapter 5, the relative weights for the various elements were estimated. The overall theory developed in this book suggests that the elements should be grouped into the two indexes as has been done, and that the two indexes should be positively correlated. Given the complexity of the construction, the chances of accidentally supporting the basic hypothesis, let alone getting any kind of result, would appear to be quite slim.

The simple bivariate correlation between the two indexes is .698, and the  $r$  square for the curve of best fit is .497. The curve goes in the predicted direction. Using Arend Lijphart's smaller sample that includes some countries not considered here produces virtually the same results. Equally important, the two indexes are statistically independent. Others may test for independence using the data in Table 4.2. Furthermore, controlling for other major variables does not significantly alter the statistical relationship found here. The statistical results suggest that each of the two indexes measures some single phenomenon, and the theory suggests that these phenomena are popular control and the separation of powers. The theory and statistical results also imply that the relationship between these two measured phenomena reflects a phenomenon that can be called popular sovereignty, properly conceived. Using the definitions developed in this book, and the theory developed using these definitions, the empirical results allow us to say that *de facto* popular sovereignty is part of an integral, underlying logic for constitutional republics.

The underlying logic of constitutional design can be viewed as having a structure built around levels of analysis. We can illuminate this structure by summarizing a typical learning process in a class on constitutional design. Let us assume that we have initially assigned a class the problem of designing a legislature and that we have simplified our entry into the problem by focusing initially on the matter of legislative size. This typical entry point allows us to efficiently teach our students about a number of basic concepts, such as decision costs. Concern only for decision costs, ignoring the structure of the internal decision-making process, implies a small body, and logically fearless students will see the optimal solution for minimizing decision cost: a legislature of one. Even when we introduce the effects of internal organization, most

students see immediately that decision costs cannot be the basis for sizing a legislature, because the intuitive understanding of representation having something to do with matters outside the legislative body is widely shared. So we introduce the concept of externalities or external costs, operationalized in this instance as a concern for constituency size as a surrogate measure for the sense of connectedness between representative and those represented and thus for popular control. Soon it is apparent that some relative weighting of the two values is required. An equal weighting generates a linear curve with a forty-five degree angle between legislative size and population size, but there is no obvious way to justify equal weighting because a commitment to political equality does not necessarily imply weighting all possible design factors equally. One might recur to game-theoretic results in order to find some empirical basis for weighting the values, but in this instance cross-national data provide a better and more realistic answer. The earlier discussion of the cube root curve is now relevant, and it is possible to show that preferences for weighting the values do not remain constant over the possible range of legislative size but instead vary for reasons that are not immediately obvious.

Further analysis and reflection may lead some to conclude that underlying these two factors relevant for legislative size there may be a deeper single value at work such as maximizing popular control, or democracy, which encompasses and includes the two factors that rational actors are attempting to “balance” – constituency size and the size of the legislature. What does this broadened focus do to our institutional design for the legislature? It does three things. First, it raises questions about legislative selection variables in the pursuit of maximizing popular control. The design of the legislature must accommodate the electoral system used to select its members, and the party system associated with the electoral system. Second, it raises concerns about maximizing popular control through the internal organization of the legislature. Third, it raises questions about the manner and extent to which other political institutions contribute to or undermine the quest for maximizing popular control through the legislature.

The relationship between legislative size and the electoral system is complex and, in the end, indeterminate. After a series of complicated calculations and after reading summaries of electoral system effects, such as that in Lijphart's *Patterns of Democracy*, students generally

conclude that the various types of electoral systems that can be used seem to have little or no effect on a designer's preferences for legislative size. The type of party system utilized has a slight effect on legislative size, but does not alter the overall tendency to approximate the cube root curve. That is, multiparty systems tend to utilize a somewhat larger body than the curve predicts, and two-party systems tend to utilize a somewhat smaller body than the curve predicts. The former probably results from multimember districts having more representatives than the overall body needs in order to allow as many parties as possible a chance to win seats in each district. The more parties in the system, the greater this effect. Single-member districts associated with the few reasonable approximations to a two-party system do not need to accommodate as many parties and thus result in, on average, somewhat smaller legislatures. The overall effect of party system variables, however, is to increase slightly the average distance of a given legislature from the predicted cube root size given the country's population. But aside from lowering the formal statistical correlation with the cube root curve, the compensating effects of different party and electoral systems still track the cube root curve generated from the original two-factor analysis where legislative size and constituency size are "balanced."

As to the second concern, the party system does have consequences for internal organization, but these internal arrangements do not affect the size of the legislature since legislative size is a "given" when the popular control effects of internal organization are analyzed.

The third consideration, the effects of other institutions on popular control through the legislature, is a major turning point in class thinking. It is easy to demonstrate that maximizing popular control through the legislature implies either minimizing the power of other branches of government, or eliminating these other branches altogether by folding their functions into the legislature. In short, maximizing popular control through the legislature implies a parliamentary form of government. For this reason supporters of parliamentary government invariably chastise nonparliamentary government as "less democratic." Leaving aside the matter of the extent to which bargaining by the leaders of multiple parties behind closed doors might also be viewed as less democratic than what supporters of parliamentary government project as its primary virtue, Table 8.1 indicates that at a certain

population size constitutional framers abandon single-house legislatures for bicameralism. Bicameralism, as we have seen, is a decisive step away from simple parliamentary government toward a separation of powers that eventually blurs the distinction between parliamentary and presidential systems.

Bicameralism has an immediate effect on legislative size. Because the members of the second house can be added to the first when thinking about overall representation, the size of the lower or primary body of the legislature begins to slow in its growth relative to the cube root curve and then to stop altogether. Apparently the “balancing” between legislative size and constituency size is therefore gradually diminished and finally completely abandoned. The initial logic governing legislative size is thus abandoned in favor of a broader logic that increasingly takes into account the effects of other institutions. More important, the broader logic increasingly abandons pursuit of popular control alone and substitutes popular sovereignty that attempts to “balance” popular control with control of popular control. That popular control would itself be brought under increasing control seems to flow from the increasing population diversity that increasing population size seems to imply.

At some point, the second house stops growing in size as well as the first. At this point we are at a population size that, as Arend Lijphart has established, is associated with federal systems.<sup>3</sup> Federal systems have other legislatures that can be added to the national legislature in our calculations of “balancing” legislative size with constituency size. The broader logic that emerges with larger constitutional republics thus incorporates the initial logic used to generate legislative size but transforms it into an integrated institutional analysis based on popular sovereignty properly understood.

By pushing our analysis, we are led to conclude that popular control is itself balanced with another empirically determinable value, the separation of powers, which makes operational a set of values, including but not limited to individual liberty and minority rights, that to some extent complements and to some extent opposes the values associated

<sup>3</sup> See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty Six Countries* (New Haven: Yale University Press, 1999), chap. 10, especially p. 195.

with popular control, including but not limited to political equality and majority rule. The analysis that began by considering the optimal size of a legislature has led us to popular sovereignty as the deep value to be maximized, a value that encompasses and includes all of the other values encountered along the way; and by pushing our analysis to this level we end up accounting for virtually everything found in a constitution. The principle of popular sovereignty in this way can be seen as accounting for the artifact of a constitution to the extent that they are virtually coterminous.

Consider now how the design of an institution, in this case the legislature, encompasses various levels of analysis.

1. The optimal size of a legislature as determined by a rational actor taking into account the maximization of any single given value ( $x$ ) – for example, constituency size
2. The optimal size of a legislature taking into account simultaneously two values ( $x$  and  $y$ ) that lead in different directions – for example, constituency size and decision costs
3. The optimal size of a legislature taking into account a higher value that includes  $x$  and  $y$ , which we shall call  $A$  – for example, popular control
4. The optimal size of a legislature taking into account two higher values ( $A$  and  $B$ ) that lead in different directions – for example, popular control and the separation of powers
5. The optimal size of a legislature taking into account an even higher value that includes  $A$  and  $B$  – for example, popular sovereignty
6. The optimal size of a legislature taking into account values that encompass and include popular sovereignty in even higher value conflicts and syntheses

At which level should we expect a political scientist to conclude his or her analysis? Level 5 analysis has taken us to popular sovereignty and constitutionalism, but there is no reason to think that analysis should stop here. The theory developed has posited that constitutionalism was developed as a political technology in order to pursue liberty, self-preservation, sociability, and beneficial innovation. These values were taken as a given, although there is no reason to do so. The manner and extent to which these values individually or together animate

constitutionalism must be subjected to searching inquiry. It is interesting to note that if one were to begin with level 1 analysis and proceed all the way to level 6, one would recapitulate political philosophy as originally defined by Aristotle and summarized in Chapter 7.

This book is a work in political philosophy because it attempts to address the questions, What is the best political system? and What is a good government? The questions are not addressed head on, since the book does not explicitly argue for one type of government over another. Instead, this analysis suggests recasting somewhat how we think about the available alternatives. Classical political philosophy has always included discussion of regime types. Prior to the modern era, the list was often composed of monarchies, aristocracies, and democracies, for example, as well as their degenerate forms. Without reprising the history of regime categorization schemes, let me suggest that the discussion in recent years has become somewhat impoverished because of several trends. One is the retreat into a continuing attack on liberalism without suggesting alternatives. Another is the reduction of empirically studied regime types to “parliamentary” and “presidential.”

When we ask, What is the best form of government? or What is a good government? we are actually asking, What is the best regime? The answer suggested here has two parts. The first is that under conditions of liberty, humans will prefer a regime based on popular sovereignty. The second part of the answer is an attempt to refresh our eyes when gazing upon popular sovereignty. Popular sovereignty does not mean “democracy.” That would be, in the terms used here, a regime of simple “popular control.” Instead, under conditions of liberty, people will select (A) popular control that is (B) self-limited. Put another way, under conditions of liberty, humans will prefer popular sovereignty, a regime that is limited in what it can do and how it can do it.

Many political philosophers have argued for the creation of unity in a political system, a harmony among its parts, in order to eliminate factions or parties and thus eliminate political conflict. Philosophers as disparate as Hobbes, Rousseau, and Plato (read nonironically) come to mind. That is not the philosophical stance adopted here. Instead, assuming that political conflict flows inevitably from human nature, I argue for a constitutional view of politics. Under such a view, humans can create a political order that has sufficient unity to minimize violence while the inevitable political competition and conflict proceed apace,



but at the same time limit the reach of that political order in such a way as to not significantly disadvantage any of the factions or conflicting parties. The constitutional political order thus has to begin by asking what must be shared and what need not be shared. What needs to be shared, at a minimum, are citizenship and whatever that implies – hence the first face of popular sovereignty, popular control. In order not to disadvantage any faction, popular control must then be limited in ways that have together been identified in this book as the separation of powers. The first face of popular sovereignty enlists everyone in the common project, which provides unity and strength; while the second face prevents any faction(s) that might gain control of the governmental apparatus from threatening the basic agreement upon which the system is based, thus providing fairness and stability.

In a sense, modern constitutionalism is an attempt to accomplish what Plato generally suggested in the *Laws*: in the absence of a philosopher-ruler, substitute a regime of laws. The substitution of laws for the philosopher-king does not negate the need for philosophic “gadflies” to inform public discourse by holding up the possibility of improvement and teaching those who will someday be part of the politically active class, but it does remove the need to establish a regime of philosophers. The regime is instead composed of the many, organized under a constitution, acting as citizens within the limits imposed by the constitution, limits to which they have all agreed in order to become citizens. To say, therefore, that at the least citizenship must be shared is also to say that the constitution must be shared – a constitution that simultaneously undergirds order and liberty. Justice, on the other hand, is not embodied in the constitution per se. Instead, because a definition of justice is not shared by the citizens, the production of justice remains the responsibility of the popularly sovereign regime. This failure to share a definition of justice does not mean that justice is dominated by relativism but instead that achieving justice requires free inquiry, searching debate, and individual responsibility. It also means that we have not yet, if we ever will, achieved a universal, cross-generational idea of justice that can simply be taught by rote or written into perpetual laws. Constitutionalism says that we must do the best we can in an imperfect world that we hope we can improve. The well-structured constitutional polity thus does not eliminate political conflict but enables it to occur reasonably free of mob rule and elite control.

Is it rational to pursue in the most effective, efficient manner ends or goals that have not been examined, based only on the assumption that a rational actor wants more of whatever the end or goal represents? Recent developments in positive theory have attempted to include or account for what might be termed nonrational aspects of behavior, and while this is significant progress, it is not enough. Not only is it apparent that humans act in apparently nonrational ways, but it is also true that humans often act to maximize more than one value at a time, which is one way of explaining why apparently rational human beings risk their lives (the self-preservation of the classic rational actor) in the pursuit of other ends. What initially appears to be “irrational,” or perhaps inconsistent, behavior may instead be a simple refusal to maximize a single valued outcome while ignoring everything else. Rational action often takes the form of balancing, or at least taking into account, two or more values.

### **The Rising Curve of Constitutional Republics (Democracies)**

As noted in the first chapter, Figure 1.1 shows that the number of constitutional republics tracks the number of countries with a written constitution with a lag of fifty to one hundred years. Both variables are smoothed to the curve of best fit, but the actual historical process has been anything but smooth. There has been much discussion in the comparative literature about three “waves” of democracies emerging, and while the concept of three waves is reasonable, it is as much of a simplification as the smooth curve presented here. During at least four periods between 1800 and 1945, the number of democracies using any definition of democracy fell by as much as 30 percent, with long periods of no real net increase. Although the absolute numbers were not large during this century and a half, the ebb-and-flow pattern more properly represents several waves rather than one. There have been three waves since 1945 – the reestablishment of democracy in countries freed from Nazism, the rapid move of many countries from colonies to independent nations beginning in the 1960s, and the new democracies during the 1990s that arose from the demise of the Soviet Union. Some have asked portentously if the third wave of democratization is over, but this ignores constitutional history. The number of constitutional republics has always ebbed and flowed, and we are probably entering a period