Principles of Constitutional Design

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This book is written for anyone anywhere sitting down to write a constitution. The book is designed to be educative even for those not engaged directly in constitutional design but who would like to come to a better understanding of the nature and problems of constitutionalism and its fundamental building blocks – especially popular sovereignty and the separation of powers. Rather than being a "how-to" book that explains what to do in the sense of where one should end up, it instead explains where to begin – how to go about thinking about constitutions and constitutional design before sitting down to write anything. Still, it is possible, using the detailed indexes found in the book, to determine the level of popular sovereignty one has designed into a proposed constitution and how to balance it with an approximate, appropriate level of separation of powers to enhance long-term stability.

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Principles of Constitutional Design

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In memory of Daniel J. Elazar
In memory of Charles S. Hyneman
With thanks for the continuing presence of Vincent Ostrom

Contents

Preface

What follows will disappoint those looking for a "how-to" manual on constitutional design. Certainly there is much here that can be used by those writing or rewriting a constitution, but the major intent of this book is to help us understand constitutional design rather than lay out guidelines for constitutional construction – to help us think about the constitutional project rather than direct us toward specific institutional or constitutional outcomes. Even if one wanted to provide a set of instructions for those framing a constitution, it would be unwise for an outsider to do so. A fundamental fact about constitutional design is that there is no optimal model, no clear set of rules for matching a people and their situation with a set of institutions, and no inherently stable or superior constitutional system. We do know a great deal more about institutional design than Aristotle did, and even a good deal more than we did half a century ago. The empirical knowledge we now possess, however, tends to be piecemeal, theoretically unfocused, and sometimes contradictory. As important as the contributions of empirical and analytic approaches have been over the past half century, there is no substitute for just backing off and asking, How do we go about thinking about constitutionalism and the design of constitutions as an integrated project? That is the deep focus of this book, and that is why it is best to think of it as an exercise in political theory.

The book is aimed at political theorists, especially students of constitutionalism and institutional design, as well as those in the field of comparative politics. Portions may interest those working in international

relations, particularly Chapter 2 on the concept of sovereignty. Chapters 3, 4, 5, and 8 present empirical analyses of a cross-national data base using several newly developed indexes. Among other things, the parliamentary-presidential dichotomy is completely recast. It is hoped that anyone wrestling with the nature of constitutionalism, the definition of democracy, the design of democratic institutions, or democratization will find something of value. Still, this book is an extended exercise in political theory, which is reflected in the analyses drawn from Plato, Aristotle, Jean Bodin, Thomas Hobbes, John Locke, Baron de Montesquieu, James Madison, and a number of other political thinkers that inform the arguments of every chapter. Overall, constitutional design is approached as a project that recapitulates the structure of political philosophy as laid out in Chapter 7. As befits political theory properly pursued, the project of constitutional design brings together the various methodological strands of modern political science – normative, analytic, and empirical – that have tended to become isolated from each other. In the integrated project we term constitutional design, precise definitions matter, actors may or may not be "rational," human values guide empirical analysis, statistical analyses support propositions from great political theorists who continue to inform our thinking in fruitful ways, power and justice interact with culture, and many voices from a variety of political science subfields chant together – sometimes in harmony, sometimes not.

One basic premise of this book is the contention that constitutionalism, properly conceived, inevitably implies at least de facto popular sovereignty, which in turn implies at least some minimal separation of powers, properly conceived. These connections result in large part from the invention of a written constitution. Although constitutionalism is now heavily predicated on the existence of such a document, there are constitutional systems without a written constitution – witness Great Britain and Israel. Also, even though almost every nation now has a written constitution, most of these nations are not constitutional, and thus their respective peoples are not sovereign in terms of what we will call "the second face" of sovereignty. Therefore, it will be argued here that de facto popular sovereignty is coterminous with constitutional democracy – with or without a written constitution.

Because popular sovereignty will be linked with constitutionalism, and because almost every nation now has a written constitution,

independent nations that are sovereign in the constitutional sense will be distinguished from nations that are not. In particular, we will be interested in distinguishing the nature of those limits which make the ultimate power a sovereign so we can determine the extent to which a nation is using the strongest form of sovereignty – popular sovereignty – and which version of popular sovereignty it is using. The ability to make such determinations is one of several reasons why the theoretical portions of the book should be of interest to those working in comparative politics, primarily those working with what are now termed "democracies" but which I prefer to call constitutional republics.

Although inevitably the analysis will involve comparative constitutionalism, its ultimate aim remains to contribute to our theoretical understanding of constitutionalism, principles of constitutional design, and what is termed democratic theory. The book ends by arguing that designers of what initially appear to be highly varied constitutional democracies tend to reach broad solutions that display theoretically explicable regularities, even though the designers themselves do not consciously use these theories. That is, under conditions of liberty, people across cultures seem to arrive at constitutional solutions that display a shared underlying logic despite an astonishingly wide array of institutional arrangements. Institutional diversity reflects a logic of accommodation to the history, culture, circumstances, and hopes of the various peoples living in constitutional democracies. The underlying logic running through constitutional design, on the other hand, reveals the operation of a human nature that is collectively rational in terms of maximizing popular sovereignty, properly understood; or perhaps it is better to speak of minimizing the distance from an ideal of popular sovereignty. The multileveled logic of constitutional design tends to support rational-actor theory in general but illustrates how rationality must be carefully contextualized. That is, in constitutional and institutional design rational-actor analysis must be based on the maximization of goals and values established by historical peoples and not assumed ad hoc by the person doing the analysis.

Framers of constitutions seem to do surprisingly well on their own without assistance from design "experts." Enhancing our understanding of constitutional design may well tend to reassure us that the design process is best left to the people who will live under the constitution

being framed. The principles examined in this book all point toward such a conclusion, and the author hopes that as we learn to think more deeply about constitutional design, we will be led to conclude that popular sovereignty and not mere technical expertise is, finally, the best political technology we have available to us, no matter how expert the experts are.

Acknowledgments

As is the case with any book, the debts owed by this author are deep and multiple. Instead of providing a long list of names, however, I need to give special thanks to three men and two organizations. First, I need to thank the Earhart Foundation of Ann Arbor, Michigan, which provided, between 1988 and 2002, two grants that relieved me from the need for summer teaching. During the first grant period I wrote the first half of the book (Chapters 1–4), and during the second grant period I wrote the second half (Chapters 5–8). It is difficult to exaggerate the impact of this efficient, open, gentle, and effective grant process. Without these grants, this book would not have been written. Between 1980 and 2002, Liberty Fund of Indianapolis, Indiana, involved me in a number of colloquia that allowed me to discuss with varying combinations of the finest academic minds in America texts by Plato, Aristotle, Cicero, Bodin, Althusius, Montesquieu, Hobbes, Milton, Locke, Sidney, Rousseau, and Tocqueville, among others; and to discuss constitutionalism as expressed in more than one hundred specific constitutions written between 1800 and 2000, in North America, South America, central and western Europe, and Asia, as well as such constitutional concepts and principles as popular sovereignty, separation of powers, natural and civil rights, rule of law, parliamentary government, civil society, and constitutional amendment. Liberty Fund afforded me what amounted to a second education. For this continuing education I am deeply grateful.

Charles Hyneman first set me to the study of state and national constitutions in the autumn of 1965. He continued to serve as my mentor on this and related topics until his death in 1984. As Hyneman set me off on my quest, Vincent Ostrom began my education in public choice theory and principles of institutional development, an education that continues to the present. In 1978 Daniel J. Elazar first set me to examine covenantal theory in particular and federalism in general. From then until his death in 1999, Daniel Elazar was a constant friend and colleague whose teachings on constitutionalism are reflected throughout this book. Although any mistakes must be accorded my own, whatever may flow from this book that is useful and original must be considered a synthesis and extension of the work of three men on whose shoulders I stand and to whom I dedicate this book. Finally, and far from least, and for more than will fit here, I would like to give my deepest thanks to Linda Westervelt, my wife, compatriot, and coconspirator.

Principles of Constitutional Design

1

Constitutionalism

An Initial Overview and Introduction

A Recurrence to Fundamentals

Thomas Jefferson is famous for his notion that every generation should engage in revolution to preserve the blessings of liberty. The notion of "revolution" in use then, contrary to ours today, did not connote a violent break with the past but a thoughtful evolution away from the present. The early American state constitutions spoke of a "frequent recurrence to fundamental principles" as the bulwark of freedom and constitutional government. The framers of the United States Constitution included an amendment process at the end – not as an afterthought, but as the embodiment of this frequent recurrence to fundamentals, this permanent (r)evolution.

"Recurrence" does not mean "the reestablishment of" or "adherence to original intention." The recent debate over the intentions of the American founders has been far from sterile, but that discussion is not what is meant here. Rather, "recurrence to fundamental principles" involves the action of going back mentally and in discourse to recapture the principles that inform and animate our constitutional system, to reconsider these principles in the light of altered circumstances and commitments, and either to reaffirm in contemporary language and symbols what still speaks the truth to us or to alter and then ratify formally modifications or additions to these principles.

We stand in need of such a recurrence in part, ironically, because our political system seems to have triumphed in the face of a half-century

struggle with our political antithesis – the nondemocratic, anticonsti-
tutional Soviet Union. However, the long struggle with communism
has warped our own constitutional democracy in ways that have yet
to be analyzed and left us with a political vocabulary that is too often
descriptively inaccurate and theoretically misleading. In short, our very
ability to engage in the kind of discourse needed for a recurrence to
fundamental principles is impeded by the imprecision of terms that
success has brought. In part this results from inattention, but it also
results from the assumption that, because we knew what we did not
like about our Cold War adversary, we had a clear idea of what we had
been defending. However, soviet communism is so far removed from
constitutional democracy that what stands in opposition is everything
from noncommunist authoritarianism to the virtual anarchy of radical
laissez-faire government.

The demise of communism has brought with it not only the need
to reassess our own constitutional democracy but also a resurgence
of constitutional democracy elsewhere that can be studied for use in
our own conversation. In the widespread recurrence to fundamental
principles throughout eastern and central Europe, as well as in other
parts of the world (especially Latin America) where the end of the
Cold War allows such recurrence to proceed relatively free of external
meddling in internal affairs, we are witnessing the kind of revolution
Jefferson envisioned. For example, discourse elsewhere on the nature
and importance of civil society has led to a renewed discussion in the
United States about the decline in civil society and the manner and
extent to which we should alter civic education in the United States.

Books and articles concerning constitutionalism and constitutional
design have begun to proliferate, and the generation of new compar-
ative schemes for categorizing political systems is a growth industry.
There is also a resurgence in the literature declaring the demise of the
nation-state. The overall picture that emerges is a twenty-first cen-
tury with more and more democratic nation-states linked by world
markets in capital, goods, and labor that make democratic nation-
states less and less relevant. One thesis to be implicitly argued is that
the contrary is true. The continued growth of world markets hinges
precisely on more effective local control by constitutional democra-
cies. Put another way, recent economic difficulties in Asia underscore
the importance of rule of law and transparent political and economic

processes in addition to institutions of popular sovereignty, as opposed to political corruption, arbitrary or authoritarian government, or centralized elite decision making. Rule of law and popular sovereignty virtually define constitutional democracy. In the long run international markets and the continued health and spread of constitutional democracy are intertwined. Even technological innovations associated with computer networks depend upon, as well as enhance the spread of, constitutional democracy.

One way of dramatizing this linkage might be to reproduce an e-mail message I received sometime during the past fifteen years.

Apologize for slow response – electricity off and on every day. Cannot attend your conference because it is difficult to travel, and I must stay with the family in case more serious violence spreads. There is shooting in the streets at night, and people have been disappearing. Construction and repairs have stopped, money seems to have fled, and delivery of food is a problem. There is almost nothing moving in or out of the city.

This person and his family are now safe in another country. Was he keying the message from Somalia, Eritrea, Indonesia, Uganda, Panama, southern Mexico, Sri Lanka, Bosnia, Zaire, Haiti, Cambodia, Sierra Leone, Peru, Afghanistan, Burma, Colombia, Chile, Brazil, Moldavia, Venezuela, Algeria, Armenia, Azerbaijan, Ethiopia, Argentina, Nigeria, Iraq, Armenia, Kuwait, Tadjikistan, Yemen, Sudan, Albania, Bulgaria, Nigeria, Angola, Nicaragua, Zaire, Congo, Rwanda, Chechenya, Kosovo, Lebanon, or Kashmir? It could have been from any of these places, but it was in fact from another. That there are still so many possible places left that fit the description in the e-mail message, even after the lengthy list, is a measure of how wildly premature are the assumptions of both an automatic, effective sovereign operating everywhere and a benign "world order" replacing the system of nation-states, a world order of international organizations, multinational corporations, free trade, the Internet, and an unrestricted flow of goods, capital, and people.

The breakdown of order in the absence of an effective local power makes trade, financial markets, and even the Internet nonfunctional. Nation-states, or the local equivalent, remain the fundamental requirement for these world markets and networks to function. Indeed, the need for local order has been behind the proliferation of nation-states
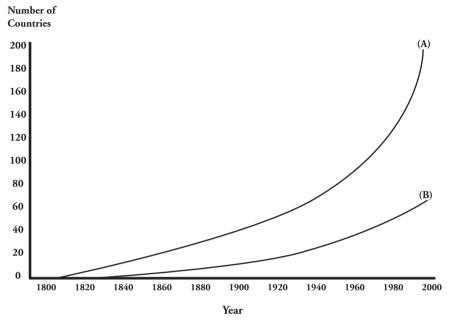
**Number of
Countries**

FIGURE 1.1. Approximate number of countries with a written consitution (A) compared with the approximate number of countries having met the requirements to be a constitutional republic (B).

and the framing of constitutions in order to create at least the semblance of what passes for local sovereignty. At the same time, the presence and operation of these international networks create pressures for both effective local sovereignty and, in the long run, the spread of constitutional democracy. The short-lived "Asian model," although at first very successful economically, illustrated the power of these pressures as the countries supposedly embodying this new model found themselves vulnerable to rapid economic shifts in the relative absence of true constitutional democracy.

Consider Figure 1.1. Over the past two centuries, we have moved from a situation where almost no country had a written constitution to one where almost every country has one. A gradual, fitful process from 1800 to 1900 increasingly accelerates after 1900 until it finally slows down as there are fewer and fewer countries remaining without a written constitution. Comparison with the historical curve for constitutional democracies is instructive. The disjunction between the two

curves indicates how much more difficult it is to develop a constitutional democracy than it is to adopt a written constitution. Still, it is remarkable how the lower curve tracks the upper one with a lag of one century or less. It is quite possible that once a country writes down a set of rules, even though they are merely window dressing, these rules over time create among the people an expectation of reasonable compliance that amounts to a self-fulfilling prophecy. In day-to-day operations the leaders of nondemocratic countries often use most of their written constitution as a convenient means for coordinating behavior and minimizing inefficiencies. Over time it can be quite natural for a people to ask why 90 percent of a constitution is followed and not the other 10 percent. Perhaps there is a connection between continued economic development and constitutional democracy; or increasing trade between nations is the driving force behind the worldwide recurrence to fundamental principles. Although such speculation rests on unsystematic anecdotal evidence, the similarity between the two curves is suggestive and demonstrates the potential for continued diffusion of constitutional democracy.

What are the prospects for such diffusion? For our purposes here, in order for a nation to be considered a functioning constitutional democracy, it must have achieved the following performance criteria:

1. There is a constitution that is followed rather than ignored.
2. The constitution is based on and supports the rule of law.
3. There are free elections involving essentially all of the adult population.
4. There are two or more competitive parties.
5. There has been at least one peaceful transfer of power between competitive parties, or between significantly different party coalitions, through the free electoral process; or else we are confident that an electoral outcome that would replace the currently dominant party or party coalition would be peacefully accepted.

Although group B countries listed in Table 1.1 have not yet fulfilled these criteria to everyone's satisfaction, they are still viewed by many as constitutional democracies. Events over the past decade in Estonia, Korea, Latvia, Lithuania, Mexico, the Philippines, South Africa, Taiwan, and Uruguay have been especially reassuring in this regard. Within the next decade at least seven nations in group B are likely

TABLE 1.1. *Current Functioning Constitutional Democracies*

Group A: Current major constitutional republics (democracies) ($n = 32$)

Argentina	India
Australia	Ireland
Austria	Israel
Belgium	Italy
Brazil	Japan
Canada	Netherlands
Chile	New Zealand
Colombia	Norway
Costa Rica	Papua New Guinea
Czech Republic	Portugal
Denmark	Poland
Finland	Spain
France	Sweden
Germany	Switzerland
Greece	United Kingdom
Hungary	United States

Group B: New or renewed constitutional republics (democracies): Probably stable and generally viewed as at or near the performance criteria ($n = 21$)

Benin	Nicaragua
Bolivia	Panama
Botswana	Philippines
Dominican Republic	Romania
El Salvador	Slovenia
Estonia	South Africa
Jamaica	Taiwan
Korea (South)	Turkey
Latvia	Uruguay
Lithuania	Venezuela
Mexico	

Group C: Current small constitutional republics (democracies): Populations less than 1.5 million ($n = 30$)

Antigua and Barbuda	Marshall Islands
Bahamas	Mauritius
Barbados	Micronesia (Federated)
Belize	Nauru
Cape Verde	Palau
Cyprus (Greek)	St. Kitts and Nevis
Dominica	St. Lucia
Fiji	St. Vincent and the Grenadines
Grenada	San Marino
Guyana	São Tome and Principe
Iceland	Solomon Islands
Kiribati	Trinidad and Tobago
Liechtenstein	Tuvalu
Luxembourg	Vanuatu
Malta	Western Samoa

to move into group A, and group B will add six or seven countries not now on the list. There is also a good possibility that three or four now in group B will cease to be considered functioning constitutional democracies by anyone. Group C countries are generally considered constitutional democracies but because of their small size are usually ignored by scholars in comparative politics.

Altogether at least sixty-two constitutional democracies with more than 2.2 billion people were functioning in 2000, although one could argue that the actual number is about seventy. The small countries in group C are usually not included in comparative studies because they are likely to skew empirical studies in ways that are not helpful. However, size is not an unimportant variable for constitutionalism where the first rule is to match the constitution to the people and their circumstances. This rule requires that we include the smaller democracies in order to look for tendencies related to size of territory and/or population. It is also helpful to reconsider the countries in group A in this regard. Countries with roughly 5 to 10 million people such as Austria, Belgium, Costa Rica, the Czech Republic, Denmark, Finland, Greece, Hungary, Ireland, Israel, Norway, Portugal, Sweden, and Switzerland probably have more in common with the small constitutional republics in group C than with many of the others in group A.

Nor will it do to ignore the other extreme in size. Countries more than 500,000 square miles in extant or with more than 75 million people have a strong tendency toward federal or quasi-federal structures. For this reason it may be no more helpful to consider France a model for the government of a united Europe than to consider Iceland a good model for France, or the United States for Venezuela. Put another way, is it immaterial for Germany that it is smaller in geographical size than Paraguay; or for Mexico that it is larger in extent than France, Germany, Italy, Britain, and Spain combined; or that the European country with the largest territory (France) would be the eleventh largest country in the Americas (less than half the size of Bolivia); or that Portugal, Switzerland, the Netherlands, Belgium, and Austria are not only all smaller in geographical size than Guatemala, Honduras, and Nicaragua, but also smaller than Cuba? Perhaps none of this matters, and because of modern communications and technology, the problems of governance for Russia, Indonesia, and India in fact do not materially differ from those of Sweden, Italy, Costa Rica, or Ireland – at