Principles of Constitutional Design

Donald S. Lutz

that will both lay out the constitutional elements that define the concept and allow us to engage in an empirical analysis.

Toward an Operational Definition of Popular Sovereignty

According to Saint Augustine, God is in the details. If God is the true sovereign who serves as the model for the earthly sovereign, then we find God in his earthly guise in the details of a constitution that creates popular control and then transforms popular control into popular sovereignty. That is, the first thing we should be able to discern from a constitution is the location of sovereignty, an expectation consistent with the first principle of constitutional design – create a supreme power. One problem with constitutions is that frequently they contain hortatory statements concerning sovereignty that are not reflective of the facts of sovereignty underlying the political system. It is necessary, therefore, to follow Bodin's dictum and search for the supreme power in the sum of the details in a constitution.

When we conduct such a search for the supreme power, it is necessary to read the document in its entirety and consider the total effect of its various interlocking provisions. We must be able both to identify and to evaluate the relevant provisions, which in turn requires that we have some provisional method for combining what we find into a reasonably meaningful conclusion. Our specific concern in the rest of this chapter is to devise a means for identifying the relative presence of popular control and then of popular sovereignty. In Chapter 1 we defined democracy as "a political system characterized by direct popular control." Popular control, in turn, is a situation where the people are the supreme power. In its pure form, the people gather together in the same place and pass all laws, and nothing is done by government until and unless such direct, popular authorization occurs. This pure form rarely occurs in the real world, so we are left with devising some way of estimating the degree to which this condition is approximated. We do so here by developing an Index of Popular Control, which permits a summary of the cumulative effect of relevant constitutional provisions toward approximating popular control.

A sovereign, however, is a limited supreme power, so popular sovereignty is popular control limited in some way. A Separation of Powers Index will be constructed in the based on the

cumulative effects of provisions designed to turn popular control into popular sovereignty. Why we term this a "Separation of Powers" Index will be fully explicated in that chapter. The attempt to "quantify" popular control, and then popular sovereignty, does not in principle produce a clear result for the simple reason that observers will differ on what constitutes enough popular control to qualify a political system as democratic, as well as on the level of limits needed to transform a popular supreme power into a popular sovereign. Nevertheless, such an exercise will provide us with the means, in principle, to compare the relative level of popular sovereignty in various political systems and to focus our attention on the details that make a difference rather than continue to make global, relatively unanchored judgments as we do now. The following elements are relevant provisions for an Index of Popular Control:

1. The entity that writes or designs the constitution
2. The entity that approves or adopts the constitution
3. The entity that proposes revisions or amendments
4. The entity that approves or adopts revisions or amendments
5. The presence of a statement identifying the supreme power
6. The proportion of directly elective offices at the national level
7. The average frequency of national elections
8. The decision rule used to determine electoral winners
9. Requirements for officeholding
10. The availability of popular referenda for policy initiation, for adopting public policy, and/or for recalling elected agents
11. The size of the legislature in relation to the population (and, thus, constituency size)

Constitutionism was earlier defined as a set of attitudes shared by relevant actors to the effect that the supreme power should be limited, there should be a covenant that lays out the ends and means for limiting the supreme power, and the covenant should be enforced and obeyed. Those who use the index will have to make an informed judgment about the extent to which constitutional provisions are actually followed in the face of incentives to do otherwise. There is no way around such a judgment, since otherwise the limiting provisions in the text of the constitution have no real force. Political systems vary in the

probability that constitutions will be followed, so the answer cannot be a simple yes or no.

The Index of Popular Control rests on the fundamental assumption that popular control is defined by a majoritarian principle, not one of unanimity. Buchanan and Tulloch, among others, argue persuasively that it is often preferable to use extraordinary majorities rather than simple majorities in order to minimize what political economists call externalities or external costs, which is their way of saying unwanted or undesirable consequences.[34] Rational political actors, defined as those who maximize benefits and minimize costs, frequently would rather bear the additional decision costs that extraordinary majorities require in order to protect some vital interest or value. Although this may be good constitutional theory, it is not helpful for a theory of popular control because it allows a minority to block proposed legislation and thus determine the outcome. When it comes to popular control a majority is always preferable to a minority, which drives us toward simple majority as the preferred decision rule for popular control. For this reason, the Popular Control Index weights an extraordinary majority less than simple majority in terms of its contribution to popular control. If the people are to be heard, it makes more sense in terms of popular control for them to be heard positively through a simple majority than negatively through a blocking minority. The relative weight assigned to each possible institution is based on its relationship to a simple majority of the people being able to determine the outcome.

This assumption explains the absence of certain electoral system variables. Much has been written about the superiority of proportional representation because it minimizes the "disproportionality" between the number of votes cast for a political party and the number of seats that party obtains in the legislature. However, it is unclear whether such proportionality, although intuitively in line with a sense of fairness, contributes to popular control. The point of popular control is that the people have the supreme say, especially in the selection and control of their agents. Proportionality ensures that all major opinions are represented in the same ratio within a legislature as they occur within the general population, but while this contributes to a

[34] James M. Buchanan and Gordon Tulloch, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962).

fair discussion, it contributes nothing to majority rule. It may, instead, hinder majority rule by producing such hard-and-fast divisions in the legislature that majorities are difficult to form, or else by tending to produce "deals" behind closed doors that end up leaving out the very minority opinions that proportionality had ensured a place in the legislature to begin with. There is also the well-documented tendency for multiparty systems produced by proportional representation to tend toward two party blocs that approximate a two-party system, which renders suspect the supposed advantages of proportional representation. If proportional representation is so good at representing popular opinion, why do systems using it move away from its purer form and toward a system of two umbrella parties that is characteristic of non-proportional systems?[35] Theorists frequently argue that proportional representation enhances the legitimacy of legislative decisions, but it has to be noted that two-party systems result in political systems that are at least as stable as those based on a multiparty system, indicating at least equivalent legitimacy. Also, "legitimacy" is a term associated with popular sovereignty rather than popular control, and therefore is more in the nature of limiting popular control than enhancing it.

At the same time, there is nothing inherent in a two-party system that makes it a better method for popular control than a multiparty system. One could argue that the "first past the post" plurality rule in an electoral district is closer to majority rule than a proportional representation approach, but we are concerned here with popular control that is systemwide, not district-specific. In conclusion, for these and other reasons constitutional provisions that establish one kind of electoral system rather than another are not considered important for creating or defining popular control. As long as there are fair elections that allow popular control of those elected, we will consider all electoral systems as equivalent. Although electoral systems are an important means of matching a particular form of government to the characteristics of the people, no one has ever shown that proportional representation and multiparty systems are better or worse at creating and preserving popular control as it has been defined here. Single-member districts that are compact, contiguous, and contain approximately the same number of

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[35] For further discussion, see Arend Lijphart, *Electoral Systems and Party Systems* (Oxford: Oxford University Press, 1994), pp. 143–144.

voters seem to produce about the same overall responsiveness to popular opinion in the United States that proportional representation does, for example, in the Scandinavian countries.

It also needs to be pointed out that few constitutions contain provisions describing the electoral system, and most of these are couched in general, vague terms. Put most simply, those who design constitutions generally do not consider the form of the electoral system a constitutional matter – at least in terms of proportional representation versus single-member districts. On the other hand, the constituency of the second house of the legislature is always laid out in the constitution, as is the executive's constituency.

One possibly important variable for popular control is the internal dynamics of a legislature. Critics of proportional representation argue that, by making clear legislative majorities unlikely, it leads to bargaining behind closed doors that may thwart popular will. However, if that problem were limited to multiparty systems, we would see systems of popular control moving away from proportional representation. An interesting fact is that once an electoral system is put in place, no matter what kind it is, a people will rarely change to another that is very much different.[36] This also argues for a rough equivalence among electoral systems with fair elections as far as popular control is concerned.

Some have argued that the size of the legislature is an important variable for popular control. James Madison argues, for example, that if a legislature is too small it will tend to be dominated by one or a few strong personalities, whereas one that is too large will require organization by a tight leadership that will also tend toward a kind of legislative oligarchy.[37] A system of popular control would therefore move toward a legislative size that is large enough to make it responsive to popular opinion but not so large as to become dominated by a legislative oligarchy. Interestingly, research does reveal a tendency in legislative size, but instead of moving toward the singular moderate size, constitutional republics tend toward the cube root of their respective populations.[38]

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[36] Ibid., p. 52.
[37] Ostrom, *The Political Theory of a Compound Republic*, pp. 92–101; and Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Cleveland: Meridian Books, 1967), pp. 374, 395.
[38] Rein Taagepera, "The Size of National Assemblies," *Social Science Research* 1 (1972): 385–401.

The larger the population, the larger the legislature. The size of the legislature does seem to be an aspect of popular control, primarily because the larger a legislature vis-à-vis the population, the smaller the constituency size, and the closer the relationship between representatives and their respective constituencies. Presumably, the closer this relationship, the stronger the incentives for representatives to respond to popular opinions and sentiments. We will therefore use the cube root of a nation's population as our baseline and adjust the overall Index of Popular Control by the extent to which its lower legislative house diverges from the cube root rule.

The cube root phenomenon is an interesting case of where those who design constitutions unconsciously struggle toward a similar sense of what is fair and workable in a constitutional republic. The overall tendency is for legislatures to increase in size as a population grows larger, but at a declining rate vis-à-vis increasing population – that is, the size of the average constituency grows larger at an increasing rate. We can surmise several things. First, given a choice, those who design constitutions for constitutional republics prefer the smallest constituency to representative ratio that is practicable. As populations get larger, designers become increasingly sensitive to the problem of overly large legislatures and allow constituency size to increase at an increasing rate. In the end, however, a certain population size is reached where any reasonable constituency size produces a legislature that is simply too large to prevent the legislative oligarchy phenomenon. Madison would view these large legislatures as no longer "moderate" in size, and Robert Michels would invoke the Iron Law of Oligarchy. This raises the question of the extent to which large constitutional republics can sustain sufficient levels of popular control, although as we will see later, bicameralism, federalism, and other institutions can be used to compensate for the problem.

The preceding discussion is an attempt to clarify the basis for including or excluding legal-constitutional provisions in the index. The matter of how to weight each possible provision is more difficult to explain or justify. For purposes of discussion, as well as for grounding an initial analysis, Table 3.1 lists the weights assigned to each possible variation. The total weight assigned to each element of the index implies its relative importance vis-à-vis the others. Thus, for example, the frequency of elections (a possible maximum of 2.00 points) is twice as important

TABLE 3.1. *An Index of Popular Control*

Element and Variation	Weight Assigned to Specific Outcome
Constitution written by	
Elected convention	.85
Legislature	.25
Constitutional court	.10
Body appointed by legislature	.10
Body appointed by executive	.00
Executive	.00
Constitution adopted by	
Referendum – absolute majority	1.00
Referendum – plurality	.85
Elected national convention	.50
National legislature	.25
Majority of state conventions	.50
Majority of state legislatures	.25
More than 65% of state conventions	.65
More than 65% of state legislatures	.40
Constitutional court	.00
Appointed legislative commission	.00
Appointed executive commission	.00
Executive	.00
Revisions proposed by	
Referendum – absolute majority	1.00
Referendum – plurality	.85
Elected national convention	.50
National legislature	.25
Majority of state conventions	.50
Majority of state legislatures	.25
More than 65% of state conventions	.65
More than 65% of state legislatures	.40
Constitutional court	.00
Appointed legislative commission	.00
Appointed executive commission	.00
Executive	.00
Revisions approved by	
Referendum – absolute majority	1.00
Referendum – plurality	.85
Elected national convention	.50
National legislature	.25
Majority of state conventions	.50
Majority of state legislatures	.25
More than 65% of state conventions	.65
More than 65% of state legislatures	.40
Constitutional court	.00
Appointed legislative commission	.00

TABLE 3.1. *(continued)*

Element and Variation	Weight Assigned to Specific Outcome
Appointed executive commission	.00
Executive	.00
Specific statement assigning sovereignty	
To the people	.35
To a national, elected legislature	.00
To the constitution	.10
To the nation (*Das Volk*)	.10
To the state	.00
To an elected executive	.00
To a nonelected executive	.00
To a political party	.00
Proportion of directly elective offices at national level	
All directly elected	1.50
All except judiciary	1.00
All except executive	.75
Only the legislature	.50
Average national election frequency	
Annual	2.00
Only legislature annual	1.50
Biennial (average)	1.25
Every 3rd year (average)	1.00
Every 4th year (average)	.75
Every 5th year (average)	.50
Every 6th year (average)	.25
Every 7th year (average)	.15
More than 7 years (average)	.00
Decision rule to determine electoral winner	
Half + 1 of all citizens	1.25
Half + 1 of all registered	1.00
Half + 1 of those voting	.75
Plurality of those voting	.50
Requirements for officeholding	
Citizenship, residency, and age	1.00
Party nominees only	.50
Property ownership	−.25
Belong to specific party	−3.00
Specific class or caste	−3.00
Initiative, recall, and/or legislative referenda	
All three	1.00
Any two	.75
Any one	.50
Ratio of cube root of population to size of lower house (size of lower house divided by cube root of population): The score for this element is this ratio divided by three, rounded to nearest .05.	
Maximum score	1.00

for establishing popular control as how a constitution is adopted (a possible maximum of 1.00 points).

Imagine a political system that combines the highest scoring variation for each element. It would have a constitution written by a convention elected expressly for that purpose, be approved in a referendum by an absolute majority of the eligible electorate, and be amendable by the same process used in its initial adoption. There would be a specific statement in the constitution certifying that the people as a whole are sovereign and that all government officials, elected or unelected, are the agents of that sovereign. All major national officials – legislative, executive, judicial, and administrative – would be directly elected annually by at least one-half plus one of the total electorate. The people could initiate legislation, pass judgment on proposed legislation, and recall elected officials who displeased them – in each case using a relatively easy-to-initiate referendum. Finally, the lower house would be exactly in accord with the cube root rule. This hypothetical political system would score 13.20 points on the index and reflect a higher level of popular control than any political system now in existence or ever likely to exist. By comparison, the United States would have a score of 7.15.

The index is not intended to indicate precise values but instead to show that in a constitution the attempt to create popular control rests on the cumulative effect of many rules or provisions, and no one rule is decisive. Scholars could argue convincingly and at great length that values for various institutions should be higher or lower, but the essential point of the index would still be intact – popular control is defined by the cumulative effect of many rules. Ideally we could assign empirically determined values for many of the provisions, as will be done in a comprehensive analysis of the amending process later in the book. In the meantime, these relative valuations are offered as points of departure in debate over the relative importance of different aspects of popular control.

The index just devised consists of institutions that together support and tend to produce popular control. These institutions must be distinguished from other, more general conditions that undergird popular control. For example, the high incidence of politically relevant midrange voluntary organizations is an important condition for the creation and preservation of popular control, but one cannot produce

these by passing laws, although the laws can encourage and sustain such organizations by preserving a wide latitude for citizenship initiative free from government regulation.[39] Another condition is the widespread and inexpensive availability of reliable information about public matters. A constitutional provision establishing a free press will be helpful, but once again it is not so much a case of passing laws as it is of not passing laws that interfere with spontaneous citizen coordination. An educated citizenry that can act independently, knowledgeably, and effectively is also a condition supporting popular control. However, it may be more accurate to say that popular control tends to produce cheap public education rather than the other way around. For one thing, democracy was born before public education had even been conceived. For another, it can be argued that both Nazi Germany and the Soviet Union had inexpensive public education and rather well-educated, certainly highly literate, populations, and yet this condition did not produce popular control. Many also argue for relative economic equality as a condition or precondition for popular control. Again, it seems just as likely that popular control comes first, and then relative economic equality tends to be produced by popular control. Compare the level of economic inequality today in the most inegalitarian constitutional republic with predemocratic Britain where the monarch and about four hundred families laid claim to about 80 percent of Britain's land area; or with the distribution of wealth in any other predemocratic monarchy, aristocracy, or empire.

This brief discussion is intended to underline the institutional and constitutional basis for the operational definition that is being developed here, as distinguished from a more sociological or "historical forces" perspective. Constitutional design as an enterprise concerns itself with the creation of institutions with reasonably well understood and predictable institutional characteristics, although not predictable institutional outputs. The approach here must therefore also be distinguished from more output-oriented operational approaches. For example, one could use the congruence between public opinion and public policy as an empirical indicator of the relative strength of popular control – especially the speed with which public policy is adjusted in

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[39] For a trenchant discussion of this factor, see Robert Putnam, *Making Democracy Work* (Princeton, N.J.: Princeton University Press, 1993).

light of shifting public opinion. Or one might use the relative symmetry between electoral outcomes and the distribution of offices as a measure of popular control. We do not do so here because we are interested not in popular control per se, but in limited popular control, or popular sovereignty. In a situation of popular sovereignty, there might not be a very high congruence between public opinion and public policy in the short run. Nor might there be a very high congruence between electoral outcomes and the distribution of seats.

It is fair to ask why maximum popular control is not found in real-world regimes. It is also fair to ask if we would want such a system. The answer to the first question is heavily predicated on our answer to the second, which is that generally we do not want extreme popular control. Instead, democratic theorists and citizens alike prefer popular sovereignty, which requires that popular control be limited in certain ways. We usually codify the need for such limits with reference to minority or individual rights, but we also prefer popular sovereignty to popular control because extreme popular control tends to produce political instability as the agents of popular control enact rapidly changing laws in response to the ill-considered whims, momentary passions, and undigested hopes of the people. As a result, the benefits of coordination are seriously compromised because long-term, mutually beneficial policies cannot be formulated or pursued. Imagine the space program, national defense, or safety-net welfare in the face of short-term swings in public opinion enforced by extreme popular control. Extreme popular control also destroys the role played by leadership in the formulation and execution of policies that are unpopular in the short term but popular in the long term once the effects are experienced.

For these and other reasons, constitutional republics usually reflect a preference for including many elements of popular control, but then reducing the extent to which extreme popular control is approximated by also instituting constitutional limits that structure the effects of popular control. Put another way, popular sovereignty is characterized by first enabling a relatively high level of popular control and then limiting popular control in ways that are beneficial for the entire project of popular sovereignty. This project has two parts. The first is to establish a supreme power capable of creating and maintaining the order necessary for a people to enjoy the benefits of coordinating the activities of

the many – preservation, liberty, sociability, and beneficial innovation. The second part of the project is to control this supreme power so that it will not threaten the benefits for which it was initially created. Thus, as with all sovereignty, popular sovereignty is predicated as a self-limiting supreme power, which implies that the most fundamental requirement for a political system grounded in popular sovereignty is a people among whom constitutional attitudes are widely diffused.

The first part of the constitutional project, the creation of a supreme popular sovereign, has now been explicated and codified. It is now time to do the same for the second part of the constitutional project.