

Principles of Constitutional Design

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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

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

describes the curve of best fit for the relationship, and allows us to select an amendment rate by manipulating only two variables: the difficulty of the amendment process and the number of words in a constitution.

The length of a constitution is a surrogate measure for the degree to which a constitution is a simple framework document as opposed to one that also constitutionalizes a number of normally nonconstitutional policy areas. Quantifying the length of a constitution is straightforward by counting sections, sentences, or, as is done here, words.

Quantifying amendment difficulty requires that we first create an index to take into account all of the possible components that could be used in varying combinations to create any amendment process, and then to assign numerical values to each possible component. The numerical value for a given component must reflect its relative possible weight vis-à-vis any other possible component using one of two methods. In the first method the relative weights can be estimated, and the estimates can be indirectly tested by observing how the resulting index “behaves” when it is used to code actual constitutions. The second method is to find a way for weights to be assigned empirically. The latter tactic is available here because American state constitutions hold enough variables constant to permit empirical measurement of many key variables. The weights for these key variables can then be utilized when other variables are obvious equivalents or multiples of the variables we have been able to measure empirically.

An important aspect of Chapter 5 is thus the empirically derived Index for Estimating the Relative Difficulty of an Amendment Process that, together with identification of length as the other important variable, allows us to select some reasonably small range of future amendment rate. It is unclear how much of constitutional design is in principle reducible to such empirically supportable relationships that can be used for institutional manipulation. However, even if we could uncover a large number of such empirical relationships involving constitutional variables, the problems of constitutional design would be far from over. Using the evidence from Chapter 5, we can see that a rational actor would still need to be very clear about what kind of outcome is preferred and why. For example, if someone prefers constitutional stability defined in terms of constitutional longevity, some combination of institutions that produces an amendment rate of about one amendment per year would be optimal. On the other hand, if for some reason

framers of a constitution prefer a stronger supreme or constitutional court intervening at a higher rate in future constitutional revision than would normally be the case, an optimal institutional solution might be a combination of some more difficult amendment process with a shorter constitution that is limited to laying out the basic framework of a political system. The longevity of the constitution would be compromised unless other parts of the constitution invited or required a significant level of judicial involvement in constitutional revision. However, a high level of judicial involvement carries other risks for both constitutional longevity and legitimacy under conditions of popular sovereignty. In the end, the relationships described by the equation for the curve of best fit for Figure 5.1 make it easier for constitutional designers to act rationally but do not answer the question of how a rational actor should act.

Much of constitutional design from the viewpoint of positive political theory thus requires that the rational actor first identify the preferred outcome, or set of outcomes, and this requires more theoretical argument of an explicitly normative nature. Furthermore, that normative discussion must proceed at several levels. At the lowest level, the constitution must be made appropriate to the “virtues” of the people, as Aristotle puts it. As Montesquieu and others note, appropriateness refers to the geography, demography, history, and shared values of a given people. As James Madison and others note, appropriateness includes also the behavioral tendencies common to all humans. That is, just as the constitutions should be realistic with respect to the actual situation of a given people, it should also be realistic with respect to human nature. Legislatures that are too small or too large produce broadly predictable consequences for all humans regardless of their culture, geography, or population size. Population size also has broadly predictable consequences that should be taken into account. There are also broadly predictable consequences that arise from human nature when one places political power in the hands of a relatively small part of the population whether through popular elections or other means. Finally, as Aristotle and others have indicated, constitutions marry power with justice, and any constitution must respond to the broader imperatives of constitutionalism itself, which includes some notion of justice, or at least of constitutional morality.

Too often, those who design or analyze constitutions ignore the normative component under the quiet assumption that some value is noncontroversially obvious. For example, parliamentary governments are often described as more efficient than “presidential” (higher separation of powers) systems. Efficiency is usually defined as the relatively rapid and accurate transference of public opinion or popular will into public policies. If there is any concern at all for minority and/or individual rights, such “efficiency” must be more explicitly justified, and probably balanced by other concerns that do not permit an automatic preference for “efficiency.” More consensual systems imply a willingness to sacrifice a certain amount of efficiency in favor of other normative considerations, but these other values must not be assumed as preferable either, including minority rights. Part of the underlying constitutional logic thus involves values.

- Constitutional systems do not support single values. Instead, any given constitution tends to favor some set of values over another set, and different institutions in a given constitution will embody or support different values.
- The mix of values supported constitutionally is not necessarily a congruent package – that is, they may not be part of a philosophically coherent system of justice.
- This possible incoherence results from inevitable disagreement within a population over what justice, equality, rights, representation, and other important political values mean, as well as how to best produce them.
- Every constitution will initially embrace some working balance among these values, and the mix of balances will tend over time, under conditions of liberty, to develop and change toward a more or less stable equilibrium.
- Designers and analysts of constitutions and their constitutive institutions can design for long-term rationality by designing a mix of institutions with certain tendencies, but only in the context of what is acceptable to the people in the short term so that the proposed constitution will be accepted and adopted.

Constitutional design does not come down to a set of purely technical, logical solutions. Instead, the curve in Figure 5.1, with its attendant theoretical discussion, demonstrates the need for constitutional design

to proceed as an integrated project that takes into account the various related questions laid out in Chapter 7. Empirical, analytic, and normative propositions need to be meshed in a comprehensive manner. One irony is that while those engaged in constitutional design must more explicitly engage the normative consequences of the institutions they design, the basic normative decisions now and in the future must ultimately be made by those who will live under the constitution and not be assumed by some external analyst. The nearly hyperbolic curve in Figure 5.1 could be used to design an amendment process that is technically optimal in some sense, but technical optimality is conditioned by normative concerns that can be analyzed but not determined by the analyst.

Rational-actor analysis is also conditioned by the fact that institutions do not operate in isolation but in an environment of many institutions with interaction effects. If we were to use only the curve in Figure 5.1 to design an amendment process, we would miss the effect of constitutional length. If we use these two together, we would still need to know the ratification process for the constitution, because the overwhelming tendency is for a people to prefer an amendment process that returns to a process that is identical or similar to the process used for ratifying the document. This eminently logical linkage between ratification and amendment processes implies that we consider both at the same time. This still leaves the matter of the reciprocal impact between a supreme court and the amendment process. Other institutions come into play depending upon the specifics of the amendment process. Is the national legislature in any way involved, or is it excluded? The curve in Figure 5.1 tells us how to predict a general amendment rate, but it does not tell us anything about the consequences of different amendment rates other than for constitutional longevity.

Who, then, is the potential rational actor here – the political scientist who proposes a rational-actor solution for an institution, which is then rejected by the people who are supposed to use it? I have been this person more than once when consulting for countries writing constitutions. Are a people who accept an institution designed using rational-actor analysis themselves rational when it turns out that the electoral system that was supposed to be optimal for representation turns out to make it easy for radical ideological minorities to warp elections, and this is one thing those people definitely did not want? I have witnessed

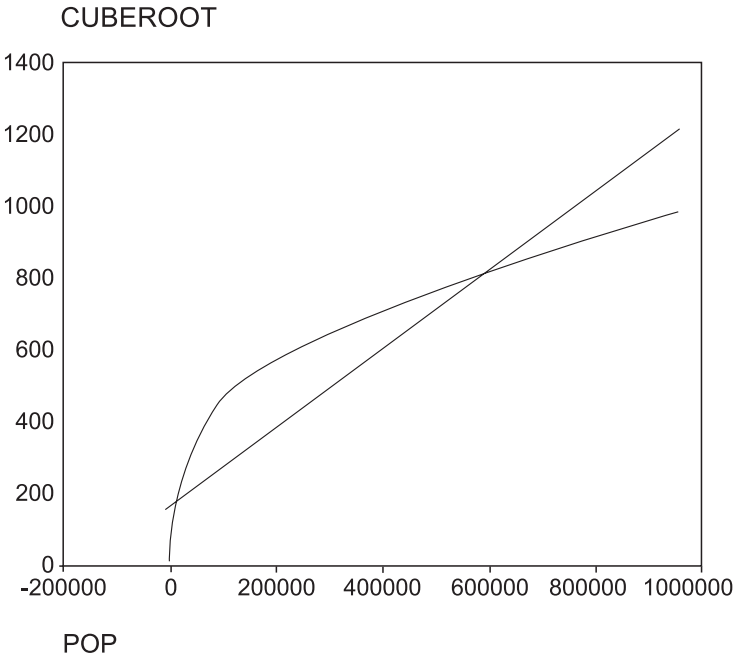


FIGURE 8.1. Cube root curve versus linear curve.

this more than once as well. The rational actor, as it turns out, is a highly useful but mythical creature that tells us about institutional tendencies given the rules that define them, but that cannot tell us which set of institutional rules to choose. The unwillingness to use rational-choice analysis in constitutional design is an error. Failure to use anything but rational-choice analysis in constitutional design is a contrary error. Neither type of disciplinary ideology is a formula for living in a world inhabited by humans.

The Cube Root Curve

The cube root rule – the size of a unicameral legislature, as well as the size of the lower house in a bicameral legislature, tends to approximate the cube root of the country’s population – has been known for some time, but little has been made of it. Figure 8.1 shows the shape of the curve generated by taking the cube root of a nation’s population compared with a linear curve that represents what we would find if the size of the legislative body increased according to some rule of