

Principles of Constitutional Design

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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

of ebbing that is quite natural. The overall trend has been steadily, if not inevitably, upward. A more interesting question is why the trend has continued upward even during periods much less auspicious for democracy than is the case today. Certainly the growth and spread of economic wealth has been an important factor, as has the continuous pressure from existing democracies to spread and protect the idea of democracy. Nor can we discount the impact on the spread of democratic ideas of growing international trade, the proliferation of international organizations, and other forms of cross-national exchange strongly aided by the spread of inexpensive mass communication technology. Still, as was suggested in Chapter 1, the diffusion of written constitutions may serve as both a surrogate for all of these factors as well as an independent variable.

Concluding Remarks

From the very beginning, the existence of a written constitution did not coincide with the presence of democracy. In 1789 the United States was still a developing nation both economically and politically. Some have suggested that in the absence of full adult suffrage the United States did not become a democracy until well into the nineteenth century. Robert Dahl has plumped for the 1960s as the beginning of true democracy in the United States. Certainly this has to be wrong. Constitutional democracy does not rest on a single variable, or on the perfect achievement of an ideal. Furthermore, as has been amply demonstrated, as democracies develop more fully, they actually move away from pure democracy institutionally by increasing the separation of powers as the level of popular control increases. Indeed, many today are loath to term countries with full suffrage but insecure rights as anything but “hollow democracies” or “pseudo-democracies.” For this reason, the preference in this analysis has been to refer to constitutional republics rather than democracies as the long-term goal. “Democracy” as an ideal implies the absence of individual and minority rights to thwart majority rule, and the use of constitutions implies a democracy, and a majority, that is not free to do anything it wants whenever it wants. The actual choices made by citizens of “democracies,” such as increasing the separation of powers to slow down majority rule and the use of rights to thwart majorities in certain policy areas, prove that “democracy” per se is not