

## I

## 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

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struggle with our political antithesis – the nondemocratic, anticonstitutional 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 comparative 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 century 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 democracies. 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

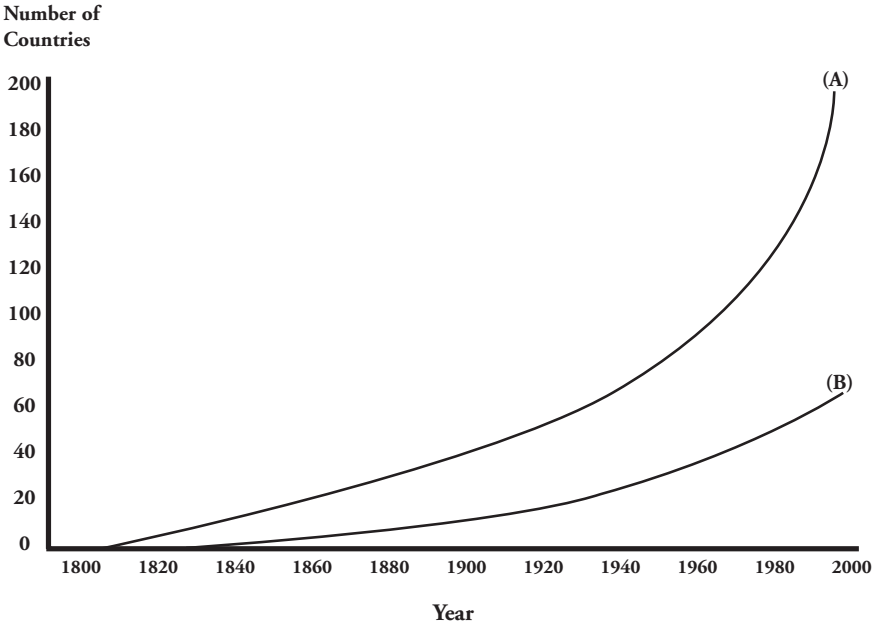


FIGURE 1.1. Approximate number of countries with a written constitution (A) compared with the approximate number of countries having met the requirements to be a constitutional republic (B).

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

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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 extent 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

least not for anything related to size. Perhaps this is the case, but it is unlikely. Invariably, matters of size are subsumed under “diversity” of some sort, which implies, improbably, we can assume that a given set of institutions are appropriate for a Brazil of 20 million or 200 million as long as relative diversity remains constant. The problem here is, given the evidence to be gleaned from human history, it seems highly probable that for a population to increase significantly it requires the introduction of increasing diversity of all sorts, although there are a few continuing exceptions, such as Japan. On the other hand, certain constitutional forms seem tailored for dealing with sensational increases in diversity without significant institutional change – federal systems, for example.

In our recurrence to fundamentals, we will not assume that any variables or aspects of life are immaterial, although initial study may lead us to conclude a greater importance for some than others – and not always the ones we now too easily take for granted. The growing number of constitutional democracies, and the diverse mixture of variables they contain, finally allows us to study constitutional democracy the way Aristotle studied constitutionalism in general. The stage we have recently reached in the history of constitutional democracy not only allows us to study the phenomenon; it requires that we do so. The nation-state is not going away. Every new development cited by those who see a more highly interconnected future world requires the successful functioning of something that resembles the nation-state, and it seems to favor the form of nation-state we term a constitutional democracy. The development of supranational organizations still rests on “local” control by nation-states, whether it be NAFTA or the South American Mercosur. Even the European Union rests on either the continuance of its member nation-states or the creation of one very large nation-state.

## General Constitutional Developments since World War II

Although this volume is concerned with the theoretical principles of constitutional design, these principles are not divorced from the actual behavior of constitutional democracies. Later discussion addresses this behavior in a more systematic fashion, but for now a general overview of some trends over the past half century and a look at some of



the lessons they hold provide an efficient entree to the discussion of principles.

*Growth of Democracy.* The growth in the number of constitutional democracies, though definite – from nineteen in 1947 to at least sixty in 2000 – has been episodic. Figure 1.1 creates the impression of a smooth and accelerating increase in numbers, but historically this growth has been characterized by periods of rapid increase followed by long plateaus or declines. The demise of the Soviet Union has produced the most recent upward surge, just as decolonization did in an earlier era. The probability for now is an increase over the next decade to about eighty countries that meet the test of constitutional democracy and then a plateau or perhaps minor decline in the numbers. In general the curve of constitutional democracies has followed the curve for the number of countries with written constitutions, with about a one-century lag, which has recently declined to a half-century lag. Constitutionalism is a difficult if rewarding form of government, and we should not expect significant future diffusion of the form to be rapid or inevitable. Figure 1.1 does imply, however, that if a nondemocracy has a written constitution, there are long-term pressures to democratize the system. A written constitution is a bit like a self-fulfilling prophecy. Still, one lesson to be learned from experience over the past half century is that, even though constitutional democracy is quite secure as we move into the twenty-first century, its spread is neither easy nor certain. The curve of its diffusion looks strong and hopeful, but it has taken more than two centuries of gains and losses to get where we are now.

*Diffusion of Institutions and Principles.* The diffusion or transference of both specific institutions and constitutional principles over the past half century has been significant. For example, the German electoral system has been widely copied, often with variation; indeed, the German constitutional system has served as a major model. Diffusion of socioeconomic rights has also occurred across Europe and into other parts of the world, along with the spread of federalism and the separation of powers as operative constitutional principles. Such transference does not result from simple copying but rather from the adoption of techniques and principles that effectively address problems and needs

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found throughout the world. Diffusion of institutions and principles is prima facie evidence that constitutional design makes a difference and that there are connections between institutional design and general political outcomes. In the end, however, the connection is pragmatic and practical, not ideological.

*Parliamentary versus Presidential Systems.* Nearly all new democracies constituted or reconstituted during the 1970s, 1980s, and 1990s have had elected presidents with varying degrees of political authority. Among newer democracies, true parliamentarism remains largely a phenomenon of the former British Empire. Since World War II, no existing “presidential” system has ever changed to a parliamentary system, whereas a number have moved in the opposite direction. This is evidence not of the inferiority of the parliamentary form but rather of the need for more separation of powers than a true parliamentary system provides. In Britain, the rule of law has been sustained primarily through a political culture that prevented the potential abuses of power inherent in the highly centralized and essentially unlimited power structure of the parliamentary form. The high failure rate of parliamentary government, especially in Africa, results from the absence of the unique and particularistic British political culture. So-called presidential systems have at the same time tended to incorporate institutions of a more parliamentary nature so that the distinction between the parliamentary and nonparliamentary form has become blurred. As a result of this blending, we should not only seek new categories and fresh analytic approaches to comparative constitutional study but also be cautious of research that makes such a distinction as if it were not problematic. One conclusion to be drawn is that constitutional design is not so much the science of finding an optimal form, but the art of mixing the old with the new, which results in an array of possibilities, each blending into the other. Institutional mixes will vary as the mixes of population and circumstances vary, and matching the underlying reality must take precedence over the defense of any given constitutional form as optimal.

*Growth of Separation of Powers.* A useful way to describe post-World War II institutional trends is as a general move toward a greater degree