

AN ANALYSIS OF PROPOSALS FOR CONSTITUTIONAL CHANGE IN NEW ZEALAND

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FOR THE NEW ZEALAND BUSINESS ROUNDTABLE

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FOREWORD: THE PERILS OF SETTING A CONSTITUTIONAL ORDER

My first acquaintance with the people and the law of New Zealand came during July 1990 when, at the behest of the New Zealand Business Roundtable, I made a whirlwind speaking tour of Wellington and Auckland. On that occasion I addressed a variety of legal topics, relating primarily to such issues as legal complexity, professional and corporate liability, and environmental protection. I was impressed by the intellectual vigour that lay behind so many of the important legislative reforms that had just taken place in New Zealand, and that remained just in the offing.

The present Foreword is for a detailed study that exhibits much of the same intellectual enthusiasm that marked my trip to New Zealand, even though its chosen subject of constitutional governance is quite removed from the substantive issues of my earlier trip. In the course of their study, our authors - Penelope Brook Cowen, Tyler Cowen and Alexander Tabarrok - show how instructive it can be for thinkers to be of two minds. All three are passionate and articulate defenders of open factor and product markets, and support the legislative innovation that has helped make these a reality in New Zealand. Yet at the same time they adopt a conservative, in the sense of cautious, stance by making an eloquent defence of the constitutional status quo for New Zealand.

A question every reader of their document must address is whether our authors have taken a sound position in sharply differentiating between the case for constitutional and legislative reform. In order to examine this question it is useful to consider two separate types of constitutional provisions. First, there are the so-called structural issues, namely those concerned with voting rules and the distribution of legislative and executive power among elected officials. Second there are provisions that offer entrenched protection for individual rights against the state. The two issues are closely intertwined, and raise a fundamental question of whether New Zealand should adopt some Bill of Rights on the American model.

The main focus of the present study is the rules for making collective political decisions both generally and in New Zealand. Within a democratic society, there is no dictatorship by a single person, so collective decisions of governance must be made by vote. But under what type of rule? Voting rules by nature are exercises in procedural justice. Their implicit major premise is that there is no independent set of substantive ends that political institutions need to preserve or advance. Instead the test of a good society is the extent to

which its voting mechanisms match the will of the majority of the electorate. Theories of voting therefore assume that political will is all-powerful in the sense that there is no claim of private right that can stand in the way of a majority that disputes its validity. And this exclusive emphasis on voting rights is surely in tension with the Lockean theory of government, which sees the state as an institution which, for want of a better substitute, is organised to protect the “lives, liberties and estates” of its citizens against what would otherwise be the depredations that each person would inflict upon his neighbour. Democratic rule in its pure form erects barriers against private aggression, but places only political, not legal or constitutional, restraints on the exercise of the collective will. Claims for the superiority of the market over central planning, or the reverse, are not made in constitutional coin, but in political coin.

After careful consideration our authors reject various systems of proportional representation because of the inordinate weight that these systems give to small parties and because of their high administrative costs. And they reject the more complicated systems of “transferable” voting (in use, I should note, at the University of Chicago) propounded by the worthy Thomas Hare, whose major function is to see that each small and diverse element of the group is represented in its elective bodies. I think that they are correct here as well. The comprehension level of the system at the University is as low as it is everywhere else, and the system often produces some outcomes that surprise its participants: If the winning quota is 10, and 10 people vote for A first and B second, B receives no votes from those 10 electors no matter how many candidates are on the list. While broad representation may be appropriate for university governance, in political settings the numbers are too large, the confusion too great, and the push toward localism, identified by our authors, too potent for the advance of the common welfare.

By a process of elimination therefore, our authors settle on the status quo and conclude that the Westminster system, which has been followed in New Zealand since its earliest days, should be retained, if only because it has fewer flaws than its alternatives. The Westminster system has two key features. The first is directed to the election rules, and allows the person first past the post (with either a plurality or absolute majority) to take a seat in parliament subject to the condition that he or she may be unceremoniously dumped at the next election if the local electorate decides that its interests are better served by someone else. The second key feature is that the executive functions of government are lodged in the hands of a subset of the members of parliament, and not in a separate executive office, as is the case with the president in the US.

Finally, the study defends the unicameral New Zealand parliament on the ground that a single governing house further enhances the responsiveness of the political system to the

public will by giving politicians no place to hide: the party in power cannot point to the obstruction of a loyal opposition to excuse its legislative failure. It must stand or fall on the strength of its own performance.

Our authors are suitably cautious about the generality of their conclusions. They recognise that larger countries, whose internal economies are more isolated from world markets, might not prosper with the unicameral Westminster system that they urge New Zealand to retain. They also note that larger countries may well be amenable to federal systems, such as those found in Australia, Canada and the US. On many issues at least, federalism possesses the virtue of setting one government in competition with its rivals, and thus diffuses the risks of a runaway monopoly government by increasing the value of the “exit” rights held by all citizens: those citizens who do not like what they see can move to some other jurisdiction, albeit at some cost. The relatively flat system of state taxation in the US, and the elimination of many death duties, are but two manifestations of the effectiveness of this system.

The authors’ cautionary attitude is fully justified, for there is no doubt that any universal theory of political statecraft is sadly deficient if it does not take into account local variations in national history, national structure and national character. There are obvious lessons that one nation can learn from the successful and unsuccessful experiments of other nations. But these are only lessons that have to be interpreted in the light of local conditions. They are not inexorable commands that should be blindly followed.

But one question still remains. At one level, New Zealand has been quite successful for it, like most nations in the British tradition, has adopted a set of political institutions that have avoided the worst excesses of communism and fascism, and other forms of mindless and destructive tyranny. The consistent cultural support for democratic institutions may well have contributed to the success of the parliamentary tradition, but in all likelihood the causation runs simultaneously in both directions. The success of the parliamentary tradition may well have bolstered the popular support for democratic institutions. Given the alarming rate at which democratic governments fail, and the crushing losses suffered when totalitarian governments surge to the fore, this negative virtue looms very large indeed. Modern debates tend to swirl about economic issues, and however manifest their importance to human happiness and welfare, they must be kept in perspective: security of the person, and freedom of speech, thought and conscience against the arbitrary power of the state, still stand at the head of the list in setting the proper ends of government.

Yet by the same token, many other nations, with very different political constitutions, have avoided those totalitarian perils. All of these nations have not done equally well on

some other dimensions, including the economic ones. So before making any judgment about constitutional systems, it becomes necessary to press on to make a complete evaluation of the soundness of the New Zealand system. In so doing, our three authors start with the initial position that the great strength of any democratic government is its responsiveness to the majority will of the public, and that by this standard the New Zealand system does quite well indeed. But the question then arises, is responsiveness the correct standard? And here the right answer, or so I suggest, is both yes and no.

On some questions, their report has identified the right standard. If the question is whether New Zealand should declare war on a foreign nation, or merely extend it recognition or aid, then the decision is necessarily collective in nature and the prompt response of government to the will of the majority is about the best that can be done. There is no way that individuals of differing views can go their separate ways on matters of war and peace with other nations. So if it is a question of majority or minority will, far better that the former control to the exclusion of the latter. What is true about war and peace is true, I suspect, with other forms of public goods - the "non-excludable" benefits that government must supply to all people if it is to supply them to some. For these public goods, the system of quick accountability allows critical positions to change with a change in popular sentiment and will, and, in a small country at least, foster the debate and deliberation necessary to make responsible collective decisions. On some matters, then, the Westminster system fares quite well, even by the ideal standards of statecraft.

Yet there are other issues on which a powerful government, however responsive to the will of the majority, does not fare so well. In the American constitutional tradition, political responsiveness to majority will has long been regarded as a two-edged sword. On the positive side of the ledger we speak of the protection against tyranny and the divine rights of kings. But on the negative side we talk about transient political majorities, moved by the passions of the moment, that are subversive of the long-term stability of the nation. The tension between these two very different attitudes toward the popular will is evident from the founding of the US Constitution, which in its original form contained elaborate voting systems - indirect election of the President through the electoral college, the election of the members of the Senate (two from each state regardless of size) in staggered elections by the state legislators - and short terms for members of the House of Representatives. The complexity was not inadvertent: all these rules were designed with exactly the opposite ambition in mind. Major legislative changes were to take place only if there were a consensus of sitting legislatures, all of whom were elected by different constituencies at different times. New Zealand has a safe with one key which is carefully guarded. The American system has a safe that may be opened only if several different keys are inserted in the lock at the same time, where each key is in the possession of a different

group motivated by different sets of desires and ambitions. Which locking mechanism is superior depends on how often the safe will be opened for good purposes, and how often for bad ones.

Why the American insistence upon the creation of this elaborate form of government? Part of the explanation is the paramount role of federalist institutions. It is sometimes forgotten that the American Constitution was not drafted and approved by "We the People". The stirring opening words of the preamble to the American constitution are something of a noble lie. The constitution was drafted by a runaway convention of 55 delegates from 12 states (Rhode Island did not bother to show up), who acted and deliberated in that capacity. The convention exceeded its authority to amend the prior Articles of Confederation, and its handiwork was ratified not in direct election of the voting public, nor of the state legislatures (which were expected to oppose such radical innovations that crimped the traditional scope of their legislative authority), but by elected conventions chosen explicitly for the purpose of ratification. This federal system had to neutralise the risk of inconsistent commands on a hapless citizenry by each of the member states and by the central government. And it had to deal with the issue of cooperative action among the separate states where such could be necessary on the one hand, and mischievous on the other - as in the regulation of commerce and trade among the states, and with foreign nations. A written constitution is far more necessary in a federal system than elsewhere, for these delicate adjustments cannot be successfully undertaken by voluntary ad hoc negotiations.

It would be a mistake of major proportions, however, to assume that structural issues dominated American constitutional debates to the exclusion of all else. To be sure, there is relatively little effort to entrench individual rights in the original constitution, but the focus of that limited initial effort was with commercial life, as evidenced by the constitutional guarantee that no state should impair the obligation of contracts. That Delphic and general command was in response to the common legislative practice of passing debtors' relief statutes which allowed debtors to postpone or discharge their debts that were otherwise lawfully due. If there were more debtors than creditors within a single jurisdiction, the temptation for a majority to vote itself discharge from its debts was often too great to resist, and some safeguards against that possibility were thought to be part of the American system, even though they are no part of the New Zealand system.

The threat that political institutions pose to economic markets is not, however, confined solely to the release of past lawful debts. In market economies the past and the future are always inextricably combined. Property and contract are at one level publicly instituted, supported by political institutions. And without constitutional protection they may fall

prey to political intrigue. A business that invests heavily in plant and machinery today does so on the expectation that it will be able to hire skilled labour to operate its business tomorrow. A statute, passed after the completion (or indeed the onset) of a development programme could easily destroy the capital value of past investments even though its ostensible effect is to govern only future wage contracts with prospective workers. The protection of property and contract depend on permanent and stable legal arrangements that a Westminster system cannot provide, save by continuing prosperity and an extraordinary run of luck.

Given the good and bad sides of government intervention, the success of the Westminster system is far more difficult to evaluate. I have been told that New Zealand had a standard of living which was second in the world as late as 1900; that it declined steadily in relative terms in the first 50 years of this century, and then declined still more rapidly in the past 40 years. Until the notable reforms of the mid-1980s, New Zealand did nothing to reverse the decline of fortunes that was in large measure brought about by a double deadly dose of strict import and exchange controls that insulated the country from its foreign markets, and a complex set of state-dominated, industry-wide labour contracts that were models of inefficiency even in their own time. Given the deep rut in which New Zealand found itself mired as late as 1984, the unicameral government was a true blessing in disguise, because it allowed Sir Roger Douglas and his allies to sweep away much of the exchange and trade regulation, and the more recent government to take aim at New Zealand's ossified system of labour and employment contracts, which had been made only worse by the Labour government's ill-advised, and promptly repealed, effort to introduce a system of pay equity or comparable worth on top of an already cumbersome labour structure. To entrench the pre-1984 system of external and internal regulation would have been the kiss of death to a struggling New Zealand economy.

But to evaluate the soundness of institutions, it is critical to take the longer point of view, and to ask whether the impasses of the 1950-1985 period could have occurred, or occurred with such severity, if there had been a constitutional system of divided government, and a strong bill of rights in place to guard against it? That is, in assessing the good of a Westminster system, we must look for any structural flaws that account for its earlier failures, failures that in a sense were preconditions to its subsequent triumphs. And it is very hard for anyone to make those leaps across time and political systems to ask what might have been.

The problem in fact is still more complex because Americans have, I believe, nothing to gloat about in terms of the success of their own system in protecting markets against the unwarranted intrusion of politics. Indeed I think that it is clear that the actual operation

of governments in New Zealand and the US are far more similar than different. The differences arise because of the federal nature of the American enterprise. On those matters the US Supreme Court, well aware of the history of inaction of Congress on federalism issues, has generally been willing to strike down actions of individual states that impede the free flow of goods and services across state lines. The Court's protection has not been as consistent and vigilant as I might have it; but by no stretch of the imagination can anyone assume that state legislators have a free pass from the Supreme Court when they enact legislation that has differential effects on citizens of other states or on foreigners. At the very least any explicit preferences for local citizens against out-of-staters are conclusively smashed down, even if the legal outcome is awash in uncertainty where complex pieces of state legislation (often designed to have heavier impact on out-of-state parties) are able to pass constitutional muster.

But our Supreme Court takes a very different attitude when it deals with direct relations between the citizen and the government, whether it be the national government or one of 50 states. In those confrontations there is, I think, relatively little difference between the legal position in the US, with its elaborate systems of constitutional guarantees, and the New Zealand with its Westminster system. The point was brought home to me in 1990 on the Australian leg of my trip down under. Australia has a federal system without the substantive protections found in any bill of rights. A question arose in discussion about the level of protection that is afforded to property rights in mining interests in Australia and the US. I was told that in Australia the absence of any constitutional protection of property rights meant in practice that the government could regulate more or less as it pleased the economic use of minerals - the rate at which they could be taken out of the ground, and the prices for which they could be sold on the open market. On the other hand, I was told that the government could not politically find it feasible to just take over the mining operations itself unless it were prepared to pay just compensation to its owner. The functional line therefore was one between economic regulation (before which one could place the word "mere") and direct government occupation. I have no doubt that the same general consensus exists in New Zealand as well.

For all intents and purposes that is exactly the same legal regime that applies in the US under current law, notwithstanding the takings clause of the fifth amendment, binding today on both the national and state government, which provides "nor shall private property be taken for public use without just compensation". The word "taking" now occupies the verbal nerve centre in our constitutional discourse, and many solemn constitutional decisions of the US Supreme Court have intoned the same tired formula that a regulation of the use and disposition of private property does not constitute a taking unless it goes "too far" (those are the exact words of the legal test, penned by Oliver

Wendell Holmes, no less, and not my clever paraphrase), which somehow it never seems to do. So the de facto position here with respect to property rights is very close to that which exists under the Westminster system. In effect, we have invested in a far more complicated structure than is found in New Zealand, and have little to show for our efforts. The political equilibrium and the constitutional equilibrium seem to come out at the same place.

There is of course a second side to the problem that goes back to the gut issues of freedom of speech and conscience. That too is subject to constitutional protection in America under our famous first amendment guarantees of freedom of speech and the free exercise of religion (offset by a prohibition against religious establishment). But the response has been far more astute: our Supreme Court does not conclude that the protection of speech kicks in only where the government (state or national) aims for its complete suppression. It also kicks in when the state uses its powers to regulate and tax (powers which in this context often go too far) in ways that “burden” the exercise of these constitutional rights. The level of protection is very great indeed, and in some cases goes too far. Thus our law of defamation allows false statements of fact against public officials and public figures to go unchecked unless they are made with “actual malice” - here defined as knowledge that the statement is wrong or has been made with reckless disregard to its truth or falsity. The politician whose public career is destroyed by a false charge of adultery or financial irregularity made hours before an election has no remedy - even public retraction or correction - if the speaker of the words, or the newspaper or broadcast station that published them, was “merely” negligent in his or her recollection or evaluation of the story. Why good reputations should be destroyed by false words is a mystery to me, as it is a mystery to generations of libel lawyers, both in the Commonwealth and America, who thought that false statements of fact (as opposed to difference on matters of opinion) should be strictly actionable.

But even if the American law of defamation contains some points of departure from sound principle, I think that the level of actual practice on political debate, where things matter the most, is the same in the US as it is in New Zealand. The constitutional protections in our country may not be present in yours, but a strong public dedication to the principle of open debate has again led to a powerful convergence of outcomes notwithstanding the very strong differences in legal cultures.

So we are back to the same question we had with economic liberties, property rights, and market economies. If there is a convergence of outcomes in the two systems, what is the gain for institutionalising a complex and costly set of constitutional protections that do little to change the dominant legal practices, and may do much to inflame or elevate the level of political debate? For New Zealand, I am hard pressed to think that the mixed American

experience offers much hope that our constitutional system would do far better (especially on economic liberties) on foreign soil than it does at home. So if there is no overall improvement to show for the cost, why undertake the enterprise at all? Yet on the other hand, powerful advances could be made if a constitution had its greatest success in the area where it has today least public acceptance: in staying the hand of the state from wrecking the operation of competitive markets by ill-advised restrictions and regulations. But for that to happen there has to be a powerful shift in mind-set among legislators and judges. Otherwise, no matter how the text of the constitution is drafted, within a generation, and probably less, legions of determined judges will be able to gut the constitutional provisions of their intended meaning.

Indeed there is an additional risk. In modern political debate there is little attachment to the sanctity of property or contract, and those attitudes will clearly express themselves in constitutional discourse. I fear therefore that any proposed new bill of rights could well entrench the wrong economic perspectives: it would be an economic disaster, for example, for the constitution to enact provisions that call for extensive unionisation of the workplace, or for a comparable worth provision of the sort just repealed in New Zealand. An ambitious and sound constitutional system can only take root in a soil that is hospitable to its growth. So it may well be that our authors, if they had turned their attention to the question of a bill of rights, would have remained with the unvarnished Westminster system as well, fearing the wrong bill of rights and despairing of effective enforcement of a sound one. It is hard for an outsider to say, and the question surely needs some further deliberation and debate.

So does this mean that I think that the American constitutional system is a failure on its home ground? Relative to what it might have been, I do think - and I am most outspoken about the point - that the Supreme Court has missed the boat on many important issues of government structures and individual rights. Our commerce clause was drafted and intended to give the Congress only limited power over economic affairs: roughly transportation and communication across state lines, with foreign nations and with the Indian tribes, but not the unlimited power to regulate manufacture and agriculture, even of goods ultimately bound for interstate commerce. Yet those limitations have been decisively pushed aside and massive government regulation, with all its side effects, is often the order of the day in agriculture, manufacturing and labour markets. I wish that it were otherwise. Similarly, our contracts clause for some time has offered no shield against prospective interferences with future contracts and scarcely any more protection of existing contractual arrangements. Finally, as noted, our takings clause has done little to hinder extensive government regulation at all levels of the use and disposition of property. Indeed the most recent pronouncement of the Supreme Court in the much debated case of *Lucas v. South*

Carolina Coastal Council (1992) appears to say that only where there is a complete loss of all gainful use of property does the protection offered by the takings clause kick in. The thousands of partial restrictions on the use and disposition of land therefore are subject to state discretion. Much of the protection of private property has become a dead letter at the hands of conservative judges who are utterly unwilling to venture into any intellectual thicket that a comprehensive overview of the takings clause might require.

Still, for all our manifest and abject failures of constitutional interpretation I would keep the US constitutional text as it is, and oppose strenuously any effort to repeal the liberties that we have at home, or to add new constitutional protections (e.g. protection of collective bargaining, or rights against private discrimination) into our Constitution. The common theme is the same that applies to New Zealand. There should on constitutional matters be a strong presumption in favour of the status quo and against any violent structural change. These systems are complex enough, and the interconnections between constitutional doctrine and political practice are hard enough for the most astute commentator or statesman to understand or to change. Better therefore that each system keep faithful to its own tradition, and seek to modify it towards a more open and free society by gradual and continuous pressures on all fronts - intellectual and legislative and judicial - than to risk the massive dislocations that could come from constitutional upheaval. There is an old expression that an old tax is a good tax, if only because people understand how it works and can adjust their affairs to it. I suspect that the wisdom behind that expression also carries over into the domain of constitutional law, both for New Zealand and the US, with their vastly different constitutional arrangements.

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1.0 APPROACHING CONSTITUTIONAL REFORM

1.1 Introduction

The New Zealand system of government is currently under serious re-evaluation. Comprehensive constitutional reform in the near future is possible and perhaps even likely. Over the next 12 or so months, New Zealanders will be asked to consider three kinds of constitutional reform.¹

In September 1992, there will be a referendum on the replacement of the present first-past-the-post electoral system with some form of proportional representation. In addition to indicating their preferences between these two general modes for choosing MPs, voters will be asked to indicate their favoured form of proportional representation, choosing between preferential voting, the single transferable vote, a supplementary system, and a mixed-member proportional system. If the 1992 referendum produces a majority in favour of a switch to proportional representation, a further referendum will be held at the time of the 1993 general elections. In this referendum, voters will be asked to choose between the top-rated form of proportional representation and first-past-the-post.

Secondly, a 1993 referendum is also proposed on the reintroduction of a second chamber of parliament or "senate". There has as yet been no formal indication of how the members of such a second chamber might be selected, or what powers they might have over legislation.

Thirdly, a Citizens Initiated Referenda Bill is likely to be passed into law by the end of 1992. The Bill provides for non-binding referenda to be held where an officially sanctioned petition succeeds in attracting the signatures of 10 percent or more of eligible voters.

Constitutional reforms have been the subject of much recent discussion in New Zealand. Proponents of reform point to concerns about broken promises and weak accountability of political decision-makers to the electorate. More generally, they cite opinion poll evidence of a wide distrust of politicians and political institutions. What has been missing from much (though not all) of the debate has been a careful analysis of how successfully the proposed reforms are likely to be in addressing these sorts of concerns. Reform alternatives have received little systematic examination since the Royal Commission report of 1986.

¹ In addition to the present study, we recommend Catt et al. (1992) as a guide to the specifics of these proposals.

In this study, we attempt to analyse the likely effects of the three proposed reforms. We take as our starting point an examination of the current Westminster parliamentary system. We focus on the incentives that operate under this system, on the premise that policy outcomes are shaped by the way in which constitutional rules mould the exercise of politicians' interests. We then consider how the present incentives would be changed by proposed reforms.

1.2 Why Democracy?

Our treatment of potential electoral and constitutional reforms considers democratic forms of government only. This focus represents our conviction that democracy is the only feasible system compatible with long-run freedom and prosperity. We see democracy as offering the following benefits:

- politicians have incentives to implement policies favoured by a large number of individuals;
- the citizenry can vote out politicians who act contrary to the national interest;
- democracy provides for an orderly succession of power;
- non-democratic forms of government require costly suppression, given that many individuals prefer democracy;
- no single individual can enrich himself or herself greatly at the expense of the rest of the nation; and
- democracy allows for free and open discussion of public policies.

These potential benefits of democracy are among the standards we will use to evaluate constitutional alternatives for New Zealand. While democratic forms of government are highly imperfect, we agree with Winston Churchill that democracy may be the worst form of government, but all other forms are worse yet.

Autocracy, the primary alternative to democracy, does not provide satisfactory incentives and liberties. Autocratic governments do not generally have the incentive to promote either freedom or prosperity. The autocrat knows that economic growth and a wealthy citizenry ultimately spell the end of autocracy. For this reason, autocrats tend to favour

economies based upon special concessions and privileges, rather than free competition. The energies of an autocrat are usually devoted to suppression of alternative sources of power (both economic and political), rather than the creation of wealth.

We do find several examples of enlightened autocrats who have governed with a reasonable degree of benevolence and led their countries through periods of rapid economic growth (for example, Singapore's Lee).² Nonetheless, benevolent autocrats are the exception; the incentives of autocracy favour control and attract control-oriented individuals. Furthermore, the autocratic system of government cannot ensure that the successors of a benevolent autocrat will be benevolent as well.³

1.3 Analytical Framework

We analyse electoral reform by focusing on the operation of incentives. Incentives and constraints are two sides of the coin which shapes government policy; each incentive can be seen as offering a corresponding constraint. Incentives originate from voters, special interest groups, politicians, the bureaucracy, international forces and the like, and influence the policies that governments implement.

More specifically, we consider six incentives influencing government behaviour and consider how differing electoral systems affect the scope and influence of these incentives. These incentives overlap to varying degrees, but in our judgment represent the most important forces affecting government behaviour.

The six incentives we consider are:

(i) The incentive to mirror the preferences of the median voter

Electoral competition encourages politicians to propose and implement policies that appeal to voters. Under winner-takes-all or first-past-the-post electoral systems, politicians tend to converge to a centrist ideology and pitch their campaigns to the median voter. The median voter is the voter who stands in the middle of the political spectrum.⁴

² Singapore, however, has a questionable record on free speech and civil liberties.

³ The argument for democracy and against autocracy is presented in more detail in Cowen and Tabarrok (1992).

⁴ The incentive for politicians in a democracy to appeal to the median voter has been emphasised most strongly by Downs (1957). For a more technical treatment of the points made in this section, see Mueller (1989).

The incentive to appeal to the median voter can be illustrated by considering a one-dimensional political spectrum with different ideological positions aligned from left to right. Voters and candidates take positions along points of the spectrum. We assume, for the moment, that voters are distributed evenly across all political ideologies.

Left-----Median-----Right

With this distribution of preferences, politicians maximise votes and the chance of election by taking positions in the middle of the political spectrum.

Incentives for the election of politicians close to the views of the median voter are not absolute. Politicians may be elected on one set of promises and implement another. Furthermore, governments based upon regional or district elections will represent some weighted average of the medians in each district, rather than the median of the nation as a whole.

Other, more technical issues may prevent the median voter incentives from holding. If voters are clustered at the extreme left and right points of the spectrum, for instance, politicians have little incentive to gravitate towards the middle. Similarly, median voter incentives break down when political issues cannot be represented on a uni-dimensional ideological spectrum. In other cases, the electoral mechanism deliberately weakens the influence of the median voter by according representation to minority parties (i.e. proportional representation).

Despite these caveats, we still see median voter incentives as an operative force in most democracies. Changes in the strength of this incentive are a primary difference between Westminster systems and proportional representation.

(ii) The incentive to serve special interest groups and lobbies

Governments have incentives to appeal not only to voters but also to organised political interests and lobbies. These interests and lobbies include trade unions, business groups, farming associations, ethnic minorities, and so forth. Special interests may offer support, funding, favourable publicity and perks to politicians. All of these factors give politicians an incentive to weight electoral constraints less heavily and consider the views of organised minorities.

The term “special interests” may have either favourable or pejorative connotations. One person’s “special interest” is another person’s “endangered minority”. We do not mean to prejudge when the influences of special interests are desirable. By special interests we simply mean minority groups who express their intensity of preference through organised political action.

Mancur Olson (1971, 1982) argues that special interest privileges are an important cause of economic stagnation. For Olson, the problem is that smaller, more concentrated lobbies often have more influence than more numerous but diffuse lobbies. When the benefits of a policy are concentrated across a relatively small number of individuals and the costs are diffused across a larger number of individuals, interest group support for the policy will tend to exceed the opposition to the policy. One hundred individuals who benefit greatly from a policy have an incentive to organise an interest group or lobby, whereas one million individuals who lose by a small amount do not.

Government does have incentives to favour the preferences of small, well-organised minorities and lobbies and the policies demanded by these minorities are not necessarily the policies that are good for the nation as a whole. Nonetheless, minority lobbying also may serve as a useful check upon the desires of a majority in a democracy. We accept Olson’s point without concluding that all special interest activity is harmful.

(iii) The incentive to maximise revenue and redistribute resources from productive citizens to the government

Governments wish to maximise their tax revenue intake, all other things being equal. Higher revenue implies more money to spend on favoured projects, more political and bureaucratic perks, and greater influence and prestige for politicians. To varying degrees, government agents have an incentive to expropriate resources from citizens to serve their own interests, rather than the interests of the citizenry in general.

The citizenry, of course, does not necessarily prefer that the government maximise tax revenue. Nonetheless, when electoral constraints and checks and balances (both explicit and implicit) are weak, governments have latitude to act in this manner. As we argue below, different electoral and constitutional regimes affect the strength and nature of this tendency.

(iv) The incentive to favour particular regions and districts at the expense of other regions and districts

Political systems sometimes favour the redistribution of resources from one region to another. If representatives from one region are especially powerful, for instance, they can use their power to extract resources from the country at large. Examples of such behaviour are pork barrel policies, or subsidies or tariffs that favour particular regions. In other cases, regions may profit at the expense of other regions through the operation of special interest groups apart from the electoral process. Regionalism may also take the form of representatives focusing upon constituency service, rather than proposing policies to address national issues.

The extent to which electoral and special interest incentives operate at a national or regional level is largely a function of the electoral system. As we will see below, some regimes, such as preferential voting, encourage the predominance of local and regional interests, and other regimes, such as the mixed-member proportional system, focus electoral and special interest incentives upon the national level. Similarly, the regional focus is stronger in federal than in unitary systems.

(v) The incentive for politicians to indulge their own policy preferences or ideology

To the extent that other constraints and incentives are not binding, politicians will implement their own “ideology” or vision of what is good for the country.

Different electoral systems will give politicians varying degrees of freedom to indulge their policy preferences. The influence of political ideology may be either positive or negative. We do not attempt to resolve the age-old debate of whether politicians should serve as voters’ agents (doing what the voters believe to be best) or as the voters’ trustees (doing what the politicians believe to be best for the voters), but we do stress the importance of this distinction for evaluating constitutional reform.

(vi) The incentive to respond to international constraints

The need to compete in world markets limits the policy freedom of a country. Poor economic policies will damage international competitiveness and, in the limit, encourage the flight of resources to other political jurisdictions. International

constraints operate through political desires to be re-elected, please special interest groups, and maximise government revenue.⁵

International constraints play an especially powerful role in small, open economies such as New Zealand. To the extent that resource flight is easy, or that international trade comprises a large percentage of gross national product, international constraints channel the direction of political incentives. In the chapters that follow, we examine how different electoral systems affect the ability of politicians to respond to these international constraints, and, to some degree, shape the role that these constraints play.

1.4 Normative and Positive Analysis

Our analysis is primarily positive in nature and focuses upon how different electoral and constitutional regimes affect the relative strength of political incentives. We do not offer a running commentary on whether these changes in political incentives would be desirable or undesirable. When judging the desirability of different electoral systems, we do not use any single overriding normative standard or benchmark.⁶ Our primary purpose is to present an analytical framework for considering the relevant issues, rather than to persuade the reader to accept any particular set of normative recommendations. We do, however, offer our own recommendations and normative evaluations in the concluding remarks section of each chapter.

Throughout our normative remarks, we treat electoral and constitutional regimes as the relevant choice variables. Particular policies are not a choice variable. In other words, we do not consider options that first institute so-called “desirable” policies and then lock these policies into place with constitutional reforms. This procedure begs the question, given the constitution-level choices New Zealand is facing. The question is not whether we should institute policy X and lock this policy into place, but which constitutional regime will provide the best incentives to implement policy X in the first place. Furthermore, even if we could lock the “best policies” into place today we cannot do so for the future. The

⁵ For a recent examination of the increasing role played by international constraints, see McKenzie and Lee (1991).

⁶ There is a considerable academic literature which attempts to find such a normative standard or social welfare function. The current state of the debate (especially the Arrow Impossibility Theorem) implies, however, that we cannot find a single, overriding normative standard that fulfils fairly general criteria of reasonableness.

policies that will be adopted in the future will depend not only upon the policies adopted today, but also upon the constitutional regime chosen.

We also do not wish to burden the electoral system with enforcing or encouraging a very specific set of policy views. Specific policy preferences should be debated through democratic forums, rather than built into the electoral system. In our view, a desirable electoral system should allow the government to respond effectively to external pressures, both from the citizenry and from international competition. A good pragmatic outcome is a government which presides over a high rate of economic growth and respect for civil liberties, while providing policies that are satisfactory to a wide range of the citizenry. While such outcomes are not always possible, we can be biased against electoral systems that make such outcomes less likely.

1.5 Overview

Each of the chapters of this study considers the operation of a particular constitutional system or component of a constitutional system. Chapter 2 analyses the incentives that operate under the current Westminster parliamentary system in New Zealand. Westminster systems allow for rapid change but these changes are also subject to constraint. In a Westminster system, electoral constraints, intra-party constraints, and international constraints are the primary determinants of policy. We consider also the extent to which politicians can foist their favoured policies upon the electorate in a Westminster system. Chapter 2, which is analytical in its thrust, is essential for understanding the later comparisons with alternative electoral mechanisms.

Chapters 3 through 5 examine electoral and constitutional alternatives to the current New Zealand system, focusing upon the possibilities currently being debated. Chapter 3 considers the four forms of proportional representation on the September referendum: preferential voting, the single transferable vote and the mixed member proportional and supplementary systems. We address how each reform would affect the incentives of individuals in government and the nature of government policy.

The four forms of proportional representation under consideration would have significantly different effects upon New Zealand government. The mixed member proportional system, for instance, would herald a move towards the coalition governments found on the European continent. The effects of the supplementary system would be less radical, and would depend upon the number of seats allocated to proportional representation. The single transferable vote, used for the Irish legislature, would lead to weak party structures and incentives for

local constituency service. Preferential voting would leave the basic structure of the Westminster system intact but would tally second-place preferences and allow these preferences to count when no party wins more than fifty percent of the vote. We compare these different reforms with each other and with the Westminster system. We find both pros and cons when comparing the Westminster system with these electoral alternatives, but favour the mixed member proportional system over the other forms of proportional representation and the Westminster system over the mixed member proportional system.

Chapter 4 focuses upon whether New Zealand should reinstitute a second legislative chamber. We describe how a second chamber must be constituted differently from, and share comparable powers with, the first chamber if it is to act routinely to check legislative outcomes. We then consider the implications for representation and accountability of instituting this kind of strong bicameralism. In New Zealand, the introduction of a strong second chamber would fundamentally alter the nature of accountability in government, and undermine the effective operation of the Westminster system. A weak second chamber would, by contrast, be compatible with the maintenance of a Westminster system. However, the capacity of a weak second chamber to enhance the operation of the present system, at reasonable cost, would be strictly limited.

Chapter 5 deals with citizens' referenda and considers alternative forms such referenda might take. We examine the incentives created by different referenda, and how these incentives would affect government policy. The form of referendum proposed in the New Zealand Citizens' Initiated Referenda Bill gives the citizenry only weak powers and would have little effect upon New Zealand government. Other, more binding, forms of referenda would, in general, make government more representative of majority opinion, place additional constraints upon politicians, weaken the protection of minority rights, and weaken the role of political parties. We recommend that the present proposals for citizens' initiatives be made more accessible, but remain non-binding. We also recommend the introduction of binding protest referenda, which would enable legislation to be struck down within a limited time after its passage, and the use of binding, government-controlled referenda on constitutional issues.

Chapter 6 summarises our findings and canvasses possibilities for further research. We briefly consider alternative constitutional reforms which might enhance the accountability of politicians and the quality of policy without altering the fundamental features of the New Zealand Westminster system. Without denying that improvements are possible, we note that the ability of any programme of constitutional reform to improve upon the workings of democracy is limited. Choice between systems of government is a choice between necessarily imperfect mechanisms for identifying, aggregating and satisfying the

interests of diverse voters. In this context, we note that at least some of the present concerns about New Zealand's system of government may be better addressed by redefining the scope of government, rather than altering the rules by which government is conducted. However, we argue that the proper scope of government should and indeed must, in an existing democracy, ultimately be subject to a democratic test.

2.0 CONSTRAINTS ON POLICY-MAKERS IN THE NEW ZEALAND SYSTEM

2.1 Introduction

Government in New Zealand is based on a Westminster model inherited from the UK.¹ The key characteristics of the particular version of the Westminster model that has developed in New Zealand are as follows:

- There is no entrenched, written constitution. The constitution consists, instead, of a combination of statutes, procedural rules and conventions.²
- Parliament is the source of sovereignty. The party forming the majority in parliament constructs a cabinet from its elected members. Cabinet members are collectively and individually responsible to parliament. The executive and legislative divisions of government are linked through the cabinet.
- Party discipline is central to the conduct of parliament. Conscience votes are used rarely, and party constitutions and whipping are used to facilitate party unity in voting on legislation.
- Parliament is unicameral, and policy-making powers are largely concentrated at the national level.
- There is plurality rule. Members of parliament are elected from single-member districts, under a first-past-the-post voting system.
- The bureaucracy is largely anonymous, career-oriented and non-partisan.

¹ An excellent description of the details of the Westminster system as it has evolved in New Zealand is provided by Ringer (1991). The classic exposition of the operation of the Westminster system, focusing upon England, is Bagehot (1963).

² The key pieces of legislation are the Legislature Act 1908, which deals with the powers and privileges of parliament; the Judicature Act 1908, which establishes the functions and status of the courts; the Electoral Act 1956, which contains the details of electoral law; the Constitution Act 1986, which defines the role of the monarchy and the powers of parliament, declares the independence of the judiciary, and clarifies issues relating to the transfer of power after an election; and the Bill of Rights Act 1990, which sets out a number of basic rights. With the primary exception of certain provisions of the Electoral Act, any of these Acts may be overturned by a simple majority in parliament.

- The judiciary is independent, and has no direct powers of legislative review.

The popular perception of the Westminster system is that it gives governments - or a few key members of the executive - largely unlimited power to define policy. Policy changes can be radical, numerous and rapid. The relative ease with which policy may be changed in a Westminster system should not, however, be confused with an absence of constraints on policy decisions. The relative paucity of formal constitutional checks and balances does not imply that no checks and balances exist. Policy-makers cannot choose freely from a completely open set of policy options.

In this chapter, we show how policy options are constrained in the New Zealand system of government. We concentrate on four, interrelated, determinants of policy outcomes.

First, we consider the role of elections in shaping the policies that governments pursue. In a unicameral parliamentary system where members are elected on a first-past-the-post basis, governing parties generally have a clean majority, conferring a considerable degree of discretion over policy. However, voters can also, routinely, overturn governments in elections. Relatively small shifts in voter support can make the difference between winning and losing an election. Competition for electoral favour results in a continuing constraint on the behaviour of government and opposition alike. The nature of this constraint is discussed in Section 2.2.

Secondly, governments are constrained by the need to maintain the unity of their own party in the legislature. On a day-to-day basis, the ability of a government to secure the necessary parliamentary support for its policies depends not on convincing the opposition, but on the support of its own caucus. By convention, caucus presents a united front in parliamentary debate and voting. Caucus support must ultimately, however, be earned rather than assumed. Backbenchers concerned with their prospects of re-election will generally be unwilling to support policies they expect to be unpopular. Unless a government is willing to make concessions in its policy stance to reflect the concerns of its backbenchers, its ability to deliver a unified vote in parliament will be weakened. The daily constraints imposed by caucus further support the tendencies of elections to produce policies favoured by the median voter. The way in which caucus members continually enforce the electoral constraint is discussed in Section 2.3.

Thirdly, governments face a range of international constraints, both political and economic, which limit their policy options. Especially in a small, open economy such as New Zealand, policy must take account of the need to compete for resources in international markets.

Policies that result in the loss of capital or labour resources, weakening economic performance, will tend to cost electoral support and endanger political perks. The impact of the flow of resources between countries on policy options is discussed in Section 2.4.

Fourthly, the policies that governments implement are affected by ideas and ideologies. In a Westminster system like New Zealand's, ideological preferences can shape policy in two ways. First, governments with particular policy preferences can influence electoral support for those policies by explaining their rationale and timing their implementation carefully. Favoured policies will be implemented to ensure, as far as possible, that the electorate sees the benefits in time to reward the government at the next election, and the policy itself shifts resource flows to increase support for the policy, once the election comes. Secondly, the preferences and ideologies of the bureaucracy, which has the benefit of permanence, can to a certain extent shape or moderate policy. These two conduits of ideology into policy are discussed in Section 2.5.

In a Westminster system, the power of citizens is concentrated in their ability to overturn and replace governments at election time. The degree of discretion that a government can exercise over policy is determined by the way in which pressures outside of elections combine to sharpen the electoral constraint, and also by its ability to shape the electoral constraint.

The pressures described in this chapter will vary in their impact between countries and over time. The ease with which policy can be changed is likely to be more or less constant, so the degree of policy discretion will vary. In Section 2.6, we discuss how the different forces described in Sections 2.2 through 2.5 interact. We then consider the conditions under which the Westminster system is most likely to produce effective and responsive government.

2.2 Elections in Westminster Systems

Politics in democratic states are characterised by relatively peaceful, institutionalised competition between political parties. Citizens, voting in parliamentary elections, are the arbiters of this competition. The exercise of a vote is the primary formal means by which the success of one or other party is tagged to citizens' preferences and perceptions. The prospect of having to compete in general elections brings other, less formal and continual, kinds of competition in its wake.

The significance of elections as a constraint on governments and a determinant of policy varies among constitutional systems, but is most potent in majoritarian and unicameral systems such

as New Zealand's. In this section, we discuss the way in which electoral competition affects policy.

In a unicameral parliamentary system where members are elected by a first-past-the-post system, voters have an unmatched ability to fire and replace governments.³ Governing parties routinely have a clean majority of seats.⁴ And governments are also, quite routinely, overturned in elections. In a first-past-the-post system, relatively small shifts in voter support can make the difference between winning and losing an election. Governments are for this reason particularly susceptible to swings in public opinion. The result, in Popper's words, is "a continual process of self-criticism" by the party in power and the party that could, at the next election, assume that power.

Parties compete both for direct influence over policy, and for electoral favour. In a Westminster system, the ability of an opposition to influence legislation directly is limited. This is particularly so when majorities are solid, conscience votes are rare, and whipping is strictly enforced.⁵ However, it is possible for an opposition, as well as a government, to use the formal and informal institutions of parliament to shape and inform public opinion in ways that affect their electoral prospects. These institutions include parliamentary debates, question time, private members' bills and the select committee system. In addition, politicians can use a variety of extra-parliamentary means to shape the electoral contest, ranging from media coverage and debate to constituency work. The nature of the electoral constraint is also shaped by the role of political parties in selecting and supporting candidates and debating broad policy positions.

2.2.1 Constraints of Parliamentary Convention

Parliamentary convention constrains policy through several different media, including debate, select committees and the requirements of parliamentary procedure. Each of these conventions operates outside of a written constitution, but nonetheless constrains the choices of politicians.

³ By contrast, in the US system who holds power, and how defensible that power is, depends on the results of sequential elections - results that may well cancel each other out. See Smith (1988) for an account of the interaction of a Democratic legislature and a Republican presidency. The location of power is also more ambiguously linked to electoral mandates in systems based on proportional representation (see Chapter 3).

⁴ The main exception in New Zealand this century was the Coates-Forbes coalition of 1931 to 1935.

⁵ The frequency with which members vote against their parties varies between parliamentary systems, but is considerably rarer than in congressional systems. Floor-crossing in New Zealand remains relatively rare. In the case of the 1981-1984 National government which had a one-vote majority, however, it was used to considerable effect (see Section 2.3.2).

Parliamentary debate shapes and legitimises policy, and maintains political accountability to electors. In particular, parliamentary debate provides a regular forum through which both the government and the opposition can advertise their position on policy issues to voters. Through the press, the reporting of parliamentary debates transmits information about policy to the public. Debates also allow routine scrutiny of the government by the press and the electorate. On the whole, governments prefer to avoid battles in the debating chamber, and moderate legislation accordingly. Concessions to opposition arguments may not be apparent in the course of a debate, but may well be implicit in a governments subsequent actions (Robinson, 1978b).

Question time and the opportunity to introduce private members bills provide opportunities for criticism and for the extension of parliamentary debate into areas outside the government agenda. Neither is likely to have a significant, immediate impact on the path of policy. Question time provides for increased public scrutiny of the conduct of ministers and their departments, but easily becomes formalised. Private members bills are rarely successful in the sense of passing into legislation.⁶ However, together with the media coverage they generate, they do inform the electorate.

The select committee process is another convention through which backbench politicians from both the government and the opposition can influence legislation.⁷

The select committee process has been greatly strengthened over the past 30 years (beginning with the establishment of the Public Expenditure Committee in 1962). Traditionally, select committees heard petitions and examined proposed legislation. It is only since 1979 that the majority of bills have been referred to select committees as a matter of course.

Select committees play roles in constraining and shaping policy that extend beyond those implied by their formal powers. At their best, they provide for informed discussion of policy issues in a manner not possible (or at least unlikely) in formal parliamentary debates. These

⁶ Exceptions in recent years include the 1985 Adult Adoption Information Act and the 1986 Homosexual Law Reform Act.

⁷ There are at present thirteen "subject" committees responsible for related groups of portfolios. These committees have the power and duty to scrutinise the policy, administration and expenditure of government departments within their field, and the power to initiate inquiries. All citizens have the right to make written submissions to select committees, and to appear before them. Proceedings of select committees are generally open to the media. There are also three special purpose committees, the business committee (responsible for reviewing other committees), the privileges committee, and the regulations review committee (which examines all statutory regulations). An insight into the work of a select committee in developing legislation is provided by Bradford (1991).

committees help to transmit information from the general public to the government, and allow citizens to exert an influence on policy in a more specific and detailed way than is possible through the ballot box. They also provide a forum for a particular kind of competition between government and opposition MPs. Select committee hearings give the participating MPs an opportunity to develop their image (establishing their concern and expertise) before interest groups. Further, although select committees are numerically dominated by government members, and it is relatively rare for an opposition member to be given the chairmanship of a select committee, they provide a venue in which compromise is possible (if not necessary). Finally, cabinet ministers proposing bills, and wishing to be supported through the select committee process, are likely to be influenced by the composition of the relevant committee, both opposition and government.

At a more routine level, the ability of governments to pass legislation is constrained by the requirements of parliamentary procedure. Some matters may be dealt with by means of regulations, and some may be dealt with under parliamentary urgency. But the great majority of policy must be implemented through the normal legislative process, set out in the standing orders. For complex legislation, this process can be protracted, with extensive public consultation and/or expert review.⁸ Parliament may not be in session when a government decides a new piece of legislation is needed, or that an existing piece of legislation should be amended. When parliament is in session, there may be no room on the legislative programme. If time can be found, the prospect of scrutiny that attends parliamentary debates and select committee proceedings may be a disincentive to pursuing a change whose political acceptability is in doubt (Mulgan, 1989).

2.2.2 Political Parties and the Electoral Process

So far, we have concentrated on how the operation of parliament reinforces the electoral constraint between elections. In this section, we turn to the role of political parties in shaping the electoral process, and the policy options available to politicians.

Parties simplify the democratic process for electors. The existence of parties provides electors with an ideological screen with which to sort and identify candidates. In a first-past-the-post parliamentary system, the existence of parties also gives voters a means of signalling where they want policy-making power to lie. Selection of a local MP therefore reflects not only an assessment of his or her personal merits, but also more general preferences about which party should be in government. Consistency between what parties appear to

⁸ The Resource Management Act 1991, for example, was over three years in the making, and involved a series of consultation processes before and after formulation of the bill itself.

offer at elections, and what their parliamentary wings do when they achieve power, is important to the stability of the system and the credibility of candidates. Party ideology, party manifestos, and the bonds formed between party members provide a framework within which to operate and a basis for mutual commitment and cooperation for MPs. The importance of party affiliation to electoral success (re-election of party dissenters who subsequently stand as independents is rare) provides an incentive for tolerance and flexibility.

Broad political parties are most influential in the activities surrounding general elections. Some of this influence is direct. For example, both major parties in New Zealand have a direct role in candidate selection.⁹ In both parties, too, non-parliamentary members are involved in the formulation of election policy.¹⁰ Parties also exert an indirect influence on the policy platforms adopted by their parliamentary wings. Parties provide much of the on-the-ground support for electoral candidates, raising funds, organising meetings, checking the electoral roll, and canvassing and courting voters. Their enthusiasm for these tasks will be influenced by the extent to which they expect successful candidates, whether in government or in opposition, to pursue the policies endorsed by the wider party. As elections approach, parliamentary parties, and the government in particular, will wish to avoid alienating those who have signed up to support them.

The role and influence of parties on the electoral process may change over time, as the conventions of political campaigning change.¹¹ For example, election campaigns in New Zealand in recent years have become increasingly presidential in nature, with leadership receiving a proportionately higher emphasis vis-a-vis policy than formerly. (The depiction of elections as contests between leaders is, indeed, consistent with the reality of the executive role in the policy-making process.)

Recent elections have also seen greater diffidence about the use of firm and credibly binding manifestos. Whereas prime ministers like Kirk and Muldoon had used manifestos as a

⁹ Labour party candidates are selected by committees made up of representatives of the party council and members of the local electorate committee. The level of local representation depends on the relationship between party membership in the electorate and the Labour vote at the previous election. In addition, a secret ballot of members present at the selection meeting counts as a further vote in the selection process. National party candidates are chosen by local members, subject to the approval of the national party organisation.

¹⁰ Expectations about the role of the wider party in the formulation of policy differ between National and Labour. In the Labour party, there has traditionally been a strong belief that the party conference should be the final arbiter on policy. In the National party, the conference has been treated more as a sounding board for policy (Mulgan, 1990).

¹¹ Indeed, parties are a relatively recent innovation in political systems, gaining strength only following the introduction of mass suffrage in the late 19th century.

constraint on policy and a tool for disciplining wayward members of caucus, Labour in the 1980s placed relatively little emphasis on specific policy promises. The economic policy on which Labour campaigned in 1984 was vague - a state of affairs that can only partially be explained by the fact that it was contesting an early election. In 1987, Lange campaigned explicitly on the basis that the government's record, not a manifesto, should be assessed by voters¹². This did not appear to cost Labour electoral support; indeed, the increased majority won by Labour in the 1987 election could be regarded as an endorsement of the approach (Mulgan, 1990). In the 1990 election, there was a return to more formal manifestos. Manifestos remain, however, schedules of promises that it may be prudent to keep, but which can be broken.

However important party unity may be for practical reasons, governments are ultimately accountable not to their parties, but to the electorate. The party check on policy is ultimately subordinate to the check imposed by elections. In the normal run of things the positions adopted and promoted by parties act as a constraining influence on their parliamentary wings. In times of crisis, however, when radical policy changes are required, parliamentary parties may depart from the policies represented by their party base. Their political survival will then depend on the extent to which they can convince voters that a departure from the party's traditional policy platform is broadly beneficial.¹³

2.3 The Role of Caucus

In Section 2.2, we discussed a number of ways in which competition between political parties shapes and constrains the policies that governments can develop in Westminster systems. But however potent the threat of electoral loss may be, the fact remains that competition between parties or factions in the period between elections is weaker than in congressional and other mixed systems. A government may be embarrassed in parliamentary debate, may make strategic compromises in select committees, and may be sensitive to media coverage.

¹² Lange argued, for example, that "if anyone judged the incoming government on the basis of a manifesto after three years of office, they'd have to be very silly indeed... [T]his Government will be judged by its record and what hope it gives people in the second term ... the Government will not be judged by an intricate examination of any manifesto" (quoted in Mulgan, 1990, p. 17).

¹³ A dramatic shift in policy inevitably causes tensions within a party, as illustrated by the experience of the Labour government in its 1987-1990 term. At the 1988 conference, for example, the prime minister responded to party concerns by agreeing to establish a series of policy committees combining parliamentary and non-parliamentary members. Ministers were required to consult with these committees on matters that might involve a contravention of party policy. In 1989, there was an (unsuccessful) attempt to alter the party's constitution to bind the parliamentary wing to the decisions of party conferences.

Ultimately, however, a party with a parliamentary majority need not heed the wishes of the opposition.

In a system where the winner, at least in principle, takes all, the stakes shift from inter-party competition to intra-party competition. The prime minister and perhaps only a handful of key cabinet ministers appear to have near boundless power. Becoming part of the executive, or at least influencing it, becomes crucially important.¹⁴ As the discretionary power available to the executive increases, so do the forces influencing and bidding for this power. For this reason, constraints are not removed but shifted to another form - intra-party and caucus constraints.

In this section, we discuss the ways in which competition within a governing party can operate to shape the policies endorsed by the executive. We focus on competition for the leadership and for cabinet positions, on the role of caucus, and on the role of such institutions as collective responsibility in the cabinet, caucus secrecy and whipping. In the process, we show how caucus can filter electoral pressures through to the executive on an ongoing basis.

2.3.1 Competition for Executive Positions

The power to initiate policy, and to ensure that policy passes, lies primarily with the prime minister and the cabinet. The greater the power of this group, the more intense will be competition for membership. Competition within caucus for party leadership and for positions in the cabinet will, in turn, shape the policy positions adopted both by the successful and by aspirants.

2.3.1.1 Party Leaders

The leadership of a party's parliamentary wing is determined by the vote of caucus. Caucuses can and do force or encourage the removal of leaders they think are under-performing. The small size of New Zealand caucuses, and the fact that it is caucus, rather than the wider party, that elects the parliamentary leader, make party leaders in New Zealand more vulnerable than their colleagues in, say, Britain or Canada.¹⁵

¹⁴ By contrast, presidential power in the US system is moderated by congress, and positions of influence on congressional committees confer a direct ability to influence policy and expenditure in favour of particular constituencies. Competitive pressures are therefore more widely spread.

¹⁵ In Canada, for example, party leaders are elected by conferences of party members, rather than by caucus (Weller, 1985).

The last two decades in New Zealand afford ample evidence of the vulnerability of party leaders. John Marshall resigned as leader of the National Party in 1974, lacking the ability to gain the support of the majority of his caucus. Robert Muldoon, after surviving one challenge to his prime ministership in 1980, was ousted from his leadership of the (by then) opposition in 1984. His successor, Jim McLay, was replaced by Jim Bolger in 1986. The experience of the Labour party has been equally turbulent. In 1983, Bill Rowling declined to stand for re-election to the party leadership when a loss to David Lange appeared almost certain. In 1989, David Lange resigned from the prime ministership in the face of caucus criticism over his handling of economic policy issues and, in particular, the removal of Richard Prebble and Roger Douglas from the cabinet. His successor, Geoffrey Palmer, resigned prior to the 1990 election, in the face of increasing dissent in caucus and the prospect of electoral defeat.

In selecting a prime minister (or potential prime minister), caucus members are influenced by a range of criteria. They are generally interested in the candidates' leadership qualities and personal priorities, as well as their reputations for standing by promises - in particular, promises made within the caucus. They are interested in the way in which candidates are likely to allocate cabinet posts. And they are interested in whether candidates are likely to take account of the interests of non-cabinet members of caucus. Candidates perceived as unwilling to listen, unable to compromise, overly prone to favouritism, or simply maverick, are unlikely to succeed. Successful candidates who turn out to be these things are, in the medium to longer term, unlikely to survive.

Competition for leadership increases the accountability of leaders. The reputation of incumbent leaders is constantly assessed, often by comparison with rivals. If a leader's performance wavers, rumour, plotting and threats of replacement flourish. The positive result of these threats is that leaders are compelled to listen both to backbenchers and to influential colleagues (Weller, 1985). Unlike the US congressional system, for example, the performance of leaders is assessed by party members on an ongoing basis. The monitors of executive power hold an ongoing threat of dismissal in their hands. In addition, a party with a reputation for ignoring backbenchers will weaken its electoral prospects, because voters prefer candidates who will get a fair hearing in caucus.

2.3.1.2 Cabinet Ministers

Competition for cabinet positions can also reinforce the accountability of the executive to backbench interests.

The methods by which cabinets are selected differ between the two main parties in New Zealand. In Labour governments, caucus elects members to a defined number of cabinet positions. Cabinet rankings, and specific portfolios, are then decided by the prime minister. In National governments, the prime minister decides the membership of the cabinet, as well as cabinet rankings and the allocation of portfolios. In both cases, however, the prime minister is in practice constrained by the preferences of caucus. A National prime minister is unlikely to have much greater freedom than his or her Labour counterpart in deciding who will be in the cabinet. And both will be influenced by the preferences and concerns of caucus in deciding how portfolios are allocated. (In addition, both are likely to face the practical constraint of finding a sufficient number of suitable candidates in a small caucus.)¹⁶

To ensure the passage of favoured policy programmes, prime ministers need to maintain caucus unity. The creation and reinforcement of unity will be a critical factor in deciding cabinet seniority and allocating portfolios. Cabinets are likely to include not only loyal supporters of the prime minister, but also potential or declared challengers.¹⁷ Potential dissenters, once included in the cabinet, will be bound by the collective responsibility of cabinet. (Backbenchers, by contrast, are free, within bounds, to criticise government policy.) At the same time, the inclusion of dissenters in the cabinet, and the assurance that this offers their caucus supporters of some influence over cabinet policy, can assist in the promotion of caucus unity. The cost of this assurance is an increase in trade-offs within the cabinet, implying a possible moderation of policy. The prime minister's ability to reshuffle his or her cabinet, including the power to dismiss recalcitrant ministers, provides some assurance that the power of dissidents in the cabinet will not be exploited - in particular, by contraventions of the conventions of collective responsibility and cabinet secrecy.¹⁸

¹⁶ Historically, cabinets in New Zealand were small - an 1873 Act set an upper limit of seven members. In the 1950s and 1960s cabinets had around 16 members; by the early 1970s there were 20. Under the fourth Labour government, while the cabinet itself numbered between 18 and 19, once parliamentary under-secretaries and ministers outside cabinet were taken into account, the executive numbered between 26 and 28 - just over half the size of caucus.

¹⁷ On the subject of appointment to the cabinet in the UK, Crossman writes:

"I remember Aneurin Bevan once saying to me, 'You know, Dick, there are only two ways of getting into Cabinet. One way is to crawl up the staircase of preferment on your belly; the other way is to kick them in the teeth. But,' he said, 'for God's sake, don't mix the two methods.' "That remark contains a great truth about the way a British Cabinet is chosen. It contains within it quite a number of enemies of the Prime Minister and rivals who would be too dangerous outside. As Bagehot said, 'the first ten people in the Cabinet pick themselves'; they have got to be there, either because they are indispensable, or because they are potential enemies." (1972, p. 32)

¹⁸ Notable recent dismissals include Muldoon's dismissal of Quigley in 1982, following Quigley's publicly expressed disquiet about "think big" policies and his participation in the "colonels' coup" of 1980; Lange's dismissal of Prebble and then Douglas's exit in

As recent experience in New Zealand has shown, the unity of the cabinet and of caucus can break down, and do so publicly. However, the rarity of such events, given the tremendous scope for disagreement among members even of the same party, attests to the strength of competitive and institutional forces for unity. Unity does not imply that the cabinet and caucus rubber-stamp all policies desired by the executive. Rather, the executive proposes policies that will succeed in achieving a relative degree of unity.

2.3.2 The Day-to-Day Powers of Caucus

After a cabinet has been selected, the primary means by which backbenchers can influence the direction of policy is by attempting to influence ministers. Their main bargaining counter is cabinet reliance on caucus support for the passage of legislation. Cabinet must make at least some concessions to backbench influence if it is to retain the degree of caucus support and unity on which the real power of the cabinet depends. The principal forum for this formal trade in support and influence is the weekly caucus meeting, but in practice the barter is continual.

Caucus and caucus committee meetings bring together the cabinet and backbenchers to debate policy issues under a rule of secrecy. The secrecy of caucus deliberations, like the secrecy of cabinet deliberations, enables at once frankness in the discussion of differences, and the presentation of a unified face to the outside world. These conventions are reinforced by the whipping system, which delivers a unified vote in the House.¹⁹ In the case of the Labour party, the party constitution requires unified voting.

Even if the cabinet has the numbers to impose its will on caucus unilaterally, a policy of systematically ignoring caucus would be unsustainable, given the threat to party unity. Secrecy is a convention subject to change. If backbenchers are satisfied with their ability to influence the cabinet through caucus, they are likely to abide by this convention. The threat of breaking secrecy confers on them a degree of power to achieve such influence. Cabinet intransigence towards wider caucus opinion would encourage backbenchers to impose pressure on the cabinet directly, for example through leaks to the media, or through pressure groups or the parliamentary opposition (Breton, 1991).

1988; and Bolgers dismissal of Peters in 1991. This flurry of dismissals brings New Zealand more into line with other parliamentary systems (Boston, 1990).

¹⁹ The activities of the whips may also promote caucus unity by improving the cabinets information about the opinions of backbenchers (Norton, 1981). However, the role of whips as conduits of information is likely to be less important in small New Zealand caucuses than in the large caucuses of, say, the UK parliament.

Caucus members also retain the option of crossing the floor to vote with the opposition on policies that they oppose. In practice the use of this option is rare. It is, of course, most effective where the government's majority is small. For example, the 1981-1984 National government, which had a one-vote majority, was particularly susceptible to backbench dissent. Its perceived inability to govern, following a series of floor-crossings by both government and opposition members, was used as a justification for an early election in 1984.^{20,21}

The size of the cabinet vis-a-vis caucus is also important. The smaller is the cabinet relative to caucus, the greater is the likely influence of backbenchers as a group, but the smaller is the cost of individual backbenchers crossing the floor. Where caucuses themselves are small, sheer camaraderie may be a uniting factor. Where caucuses are habitually large relative to cabinets, as is the case in large parliaments, the prospects of attaining cabinet rank will be small, and the energies of backbenchers may be devoted more to select committee activities than to attempts at influencing policy through caucus.

Unanimity in party voting in the House, and silence on matters of disagreement, necessitate flexibility in the policy line taken by the prime minister and his or her key ministers in the face of opposition from their parliamentary colleagues. The apparently fragile conventions of secrecy and party discipline can compel greater accountability in policy-making than is at first apparent.

2.4 International Constraints

So far, we have concentrated on domestic constraints on policy makers. Governments' policy options are also shaped by international constraints. In this section, we concentrate on the role played by economic constraints, and in particular on the pressures created by the potential for resource flows between countries.²²

²⁰ In December 1983, three National MPs voted against a government measure to control interest rates by government regulation, but the legislation was passed with the support of two Social Credit and two independent (formerly Labour) MPs. Shortly afterwards, two National MPs joined Labour, Social Credit and independent MPs to defeat a clause in the Industrial Law Reform Bill on youth rates. At the beginning of the 1984 Parliamentary session, one National MP formally withdrew from the National caucus, while promising to continue voting support for the government. At this point, the prime minister requested an early election.

²¹ Voting against one's party is significantly more damaging in parliamentary systems than in congressional-presidential ones. In a system of separated powers, policy disagreements are less likely to destabilise governments because they do not directly endanger the survival of the president (Rockman, 1985).

²² Palmer (1987) lists a number of areas in which international treaties and conventions constrain domestic policy. These include postage, civil aviation,

Through the present century, the emphasis in election campaigns has increasingly been on economic performance. Governments seek support and are judged on the capacity of their policies to generate economic growth and prosperity. The performance of governments in this sense depends on their ability to attract and retain resources in increasingly competitive international markets.

Historically, governments have taken two broad kinds of approach to this problem. The first has been to attempt to seal the borders, whether through the brutally autarchic approach of a Burma or the strictly enforced restrictions on exit of the former communist countries, or through systems of exchange controls and trade barriers. Autarchy of varying force was the prevailing approach in both socialist and so-called market economies through the middle decades of this century. Autarchic policies held strongly in New Zealand, for example, through from the late 1930s to the early 1980s.

The second approach is to enable resources to move in and out of a country relatively easily, but to design policy so that they will tend to come and stay. (Freedom of exit is a crucial component, based on the recognition that the ability to attract resources, and the cost at which they can be attracted, will reflect the ease and costs of exit.) This is the approach that has been adopted in New Zealand since the mid-1980s. It is also being attempted, to a lesser or greater extent, in many other countries, from Latin America to Central Europe.

The nature and strength of resource flow constraints on governments will differ according to the approach adopted. Strongly protectionist governments may, at least in the medium term, succeed in sealing themselves off from international pressures on their policy mix. Rigid exchange controls and a fixed exchange rate, for example, may inhibit the flow of capital out of the country in the event of an adverse policy development. Generous production subsidies may retain investment that would otherwise flow elsewhere. In the longer run, however, resources will flow into and out of even highly protected economies in response to internal policy developments. Evidence on this point is provided not only by the economies of central and eastern Europe, but also by New Zealand's own experience in the late 1970s and early 1980s. Heavily protectionist policies, reinforced in the wake of Britain's entry to the EC and the oil crises of the 1970s, imposed increasing fiscal and efficiency costs, reflected in persistent fiscal deficits, capital outflows, and heavy dependence on the government.

weather information, communications, customs, diplomatic and consular relations, visas, trade rules, banking obligations, money exchange, the movement of people, refugees and extradition. These legal or treaty obligations differ in kind from the constraints implied by resource mobility, which are the subject of the present section.

In addition, governments are sensitive to international ratings of their performance. In particular, country ratings applied by agencies such as Moody's and Standard and Poor's have a direct effect on the cost of funds to governments. Strenuous efforts may be taken to maintain a high rating, particularly in the areas of fiscal and monetary policy. These factors will tend to reinforce natural pressures arising from resource flows.

International constraints should not be thought of as a force contrary to the operation of democracy, or as a force that requires politicians to violate the wishes of voters. With the exception of explicit written treaties, international constraints do not have independent force apart from how they influence the economy and voters' pocketbooks. International constraints do, however, induce wealth-maximising outcomes in areas where voters are likely to be ignorant of economic policy issues. For instance, voters may not be informed about the withholding tax on foreign investment, but international constraints will encourage politicians to adopt policies that will increase foreign investment and domestic real wages.²³

2.5 Ideology and Personal Policy Preferences in Parliament and the Bureaucracy

Although we have focused so far upon the constraints operating in a Westminster system, the Westminster system does also provide considerable scope for politicians to implement policies of their own choosing. Political agents may indulge their individual policy preferences either by influencing the electoral mechanism or by operating through parts of government that are not subject to election (for example, the bureaucracy). Starting with elections and then moving on to the bureaucracy, we examine how politicians may enjoy independent latitude and then consider how this independence affects the content and nature of policy.

The ultimate binding constraint in parliamentary systems, the electorate, has the power to recall the government only once every three years in New Zealand. Between elections, governments may attempt to change the preferred policies of the electorate. While the electoral constraint is ultimately binding once in operation, the government can direct and influence preferred policies by changing constraints. By influencing electoral preferences, politicians have the scope to implement their own views of what is good for the country.

²³ International economic constraints tend to encourage outcomes contrary to voters' wishes only in those cases where voters do not desire policies that tend to maximise wealth. International competition for resources, for instance, may lead to a lowering of environmental standards to attract foreign investment. In this instance international competition can make voters worse off, but generally international competition favours the interests of voters.

When speaking of government influence over electoral preferences, we mean the ability of the government to shape the economic environment.

Governments may influence electoral preferences in several ways. First, governments may influence electoral preferences by inducing resource flows that are hard to reverse. A typical example is the liberalisation of capital markets in New Zealand in the mid-1980s. The electorate may or may not have favoured capital market liberalisation prior to reform, but the reforms themselves created a constituency for maintaining reforms, once in place. Firms developed greater international linkages, jobs were created to manage capital flows, the floating exchange rate increased the strength of some sectors, and so on. The losers from the new policies were still in opposition, but a new class of well-identified beneficiaries had been created.

Governments can also implement their preferred policies by attempting to constrain their successors. Successive governments can be (partially) constrained by the judicious timing and use of policies. A current government, for instance, may try to constrain its successors by exposing them to international pressures that limit the room for action. The institution of a market-determined flexible exchange rate in 1985, for instance, performed this function. The costs of fixing the exchange rate subsequently increased, as the reimposition of capital controls would have imposed considerable practical problems and reduced confidence in New Zealand financial instruments and securities.

A government can also attempt to enshrine the institutions by which a preferred policy is implemented. For example, the Reserve Bank Act of 1989 attempts to create a durable and transparent mechanism for monetary stability. It gives the Governor of the Reserve Bank the responsibility for meeting pre-specified inflation targets.²⁴ While the act is vulnerable to amendment or repeal, the legislative process required to change the Act is more cumbersome and overt than that required to modify an unlegislated policy. Perhaps most importantly, once the Act is in place, the political costs of resuming an inflationary monetary policy increase greatly. In order to resume inflation, the New Zealand government would have to acknowledge specifically that inflation was now its goal, and would be spending the considerable reputational capital it has built up through the Act.

The second method of government influence over electoral preferences involves the timing of policy so that policy benefits are apparent before elections (and costs appear after elections). By using the lag between implementation and the next election to educate voters about the

²⁴ See Cowen (1991).

benefits of change, governments have scope to shift voter sentiments and preferences to accord with their own policy agenda.

For example, by implementing the Employment Contracts Act in the first year of its term, the present National government increased the probability that beneficial effects in terms of productivity improvements and employment would be felt before the 1993 election. In the process, it increased the probability that a constituency opposed to centralised wage bargaining would be well-established before the election.

An example of the relative vulnerability of “late” policy initiatives is afforded by the Employment Equity Act 1990, which established an Employment Equity Commission with responsibilities for equal employment opportunities and comparable worth.²⁵ This legislation came into force on the eve of the 1990 election, which saw the replacement of a Labour government with a National government. National had given indications some time before the election that it would repeal the legislation, and duly did so in December 1990. The new Employment Equity Commissioner had only a very limited period in which to establish an institutional domain and constituency. Comparable worth claimants had little time to lodge a large body of cases with the Commission. Further, there had not been time to see any of these cases through to their conclusions; the Commission did not have a chance to build up a list of satisfied customers. The costs of change were therefore relatively low.

Only some kinds of policy change are directly susceptible to this kind of manipulation. For example, governments will be wary of pursuing policies whose costs become evident early, but whose benefits are likely to accrue beyond the date of the next election. A number of policies that involve major restructuring of the economy may fall into this category. Adverse employment effects are felt early, obviously and painfully, while the wider benefits of increased productivity and standards of living may take some years to be recognised. The shorter the period between elections, the more binding this constraint on policy is likely to be. To the extent that radical policy programmes pay off more slowly than relatively incremental changes, policy will be more conservative the shorter is the parliamentary term.

Governments will be more willing to implement policies whose benefits are felt early, but whose costs are disparate and fall late, even if they expect their successors to reverse these policies. For example, a government may selectively distribute import quotas or production subsidies to favoured constituents, to the longer-term detriment of the wider community, even if it recognises that a successor may redistribute (or eliminate) this patronage. This

²⁵ For a description and critique of the legislation, see Brook (1990) and New Zealand Business Roundtable (1990).

propensity will, however, be checked if constituents have a preference for relatively small, stable benefits over large, possibly short-lived, ones.²⁶

Westminster systems, with their strong reliance upon electoral constraints, and weak reliance upon explicit division of powers, provide considerable scope for politicians to pursue their own policy preferences. Herein lies the source of many complaints about the Westminster system. The implicit New Zealand constitution, while reflecting preferences tightly through the electoral mechanism, does not prevent politicians from influencing electoral preferences through manipulating the economic environment.

Versions of this complaint are heard from both sides of the political spectrum. On one side, those who favour a relatively unregulated market economy argue that latitude for political ideology allowed various New Zealand governments to pursue welfare and protectionist policies that aggravated New Zealand's economic slide by reducing the flexibility of the economy. Once New Zealand governments had instituted protectionism, for instance, pressures were created that made this protection difficult to remove.

On the other side of the political spectrum, those who favour a more interventionist role for the state blame the Westminster system for the free market reforms of the Roger Douglas period. Many of these reforms, once instituted, have proved relatively difficult to reverse. Even if the electorate did not approve of these reforms initially, the electorate may, however, come to recognise their longer-term benefits, or at least be unwilling to bear the costs required to reverse the reforms.

2.5.2 The Bureaucracy

The potential for elected politicians to pursue their personal policy preferences produces pressures for other independent sources of power in government. While the New Zealand government does not possess a judiciary with the formal power to overturn legislation, the bureaucracy is a power centre independent of the elected government to a certain degree. As such, the bureaucracy may play two roles: constraining the executive and implementing its own policy preferences.

²⁶ In the past, New Zealand has had marked electoral cycles, with fiscal deficits rising in election years in bids for electoral support. More recently, governments have used a refusal to use election-year expenditure to win votes as a platform in their election campaigns.

The bureaucracy receives its power from providing politicians with policy advice and implementing (or ensuring the implementation of) policies that governments adopt.²⁷ Both of these powers can affect the final outcomes experienced by citizens. Policy advice is important because ministers rely heavily upon their departmental advisors for information and insights. Maintaining a good relationship with these advisors is important for eliciting information and developing effective policies. Policy implementation is important because rules and regulations must be drawn up in detail and enforced if they are to prove effective.

The bureaucracy has both advantages and disadvantages when engaged in a conflict with ministers over a policy programme. By virtue of its permanence, the bureaucracy has a potentially strong advantage over politicians in developing and defending a particular ideological stance. As the ambit of government policy has grown, the potential for the bureaucracy to influence policy has also grown.

Nonetheless, the bureaucracy is also heavily dependent upon the government. The bureaucracy relies upon ministers to ensure that its favoured policies receive a fair hearing in the cabinet and in the House. Ministers also control the flow of public funds to departmental activities and defend (or criticise) the actions of the bureaucracy to the Minister of Finance at budget time.

Recent reforms have increased the autonomy but also the accountability of the bureaucracy.²⁸ By replacing convention with contract as a means of handling relationships with departmental heads, the reforms have in principle given ministers a greater degree of control over policy outcomes. The contractual approach gives departments greater freedom of choice about how to achieve the outputs required by ministers, but also makes them more clearly accountable for the delivery of these outputs. The reforms should be seen in the light of considerable growth in the public sector that had, over a number of decades, increased the chance for bureaucrats to redirect, rather than simply stabilise, the policy-making process. In this sense, the reforms can be seen as shifting the balance away from departmental discretion over policy outcomes, in favour of ministerial discretion, while at the same time providing greater transparency and susceptibility to public scrutiny.

²⁷ Ministers provide a formal link between the permanent bureaucracy and the executive and are formally accountable to the cabinet and parliament for the performance of their departments. In practice, they delegate day-to-day administration to departmental chief executives, and also rely extensively on their departments for policy advice.

²⁸ These reforms are embodied in the State Sector Act 1988 and the Public Finance Act 1989. See Boston (1991), McKinlay (1990), Martin (1990), Pallot (1991), and Scott and Gorringer (1988).

2.6 Concluding Remarks: When Does a Westminster System Work Well?

Since all known sets of constitutional rules are demonstrably imperfect, we must ask comparative questions: Is the New Zealand system, as it can be expected to operate, as good as or better than other feasible constitutional arrangements? And would we answer differently if New Zealand were larger (or smaller), or more (or less) economically developed, or suffering a greater (or lesser) problem with status quo policies?

The absence in New Zealand of an entrenched, written constitution, and of any formal separation of powers, does not imply an absence of checks and balances on executive power. Rather, policy-makers in New Zealand are constrained by a range of mostly informal checks and balances.

Governments are compelled to contest hair-trigger elections. To win, they must try to select policies whose political benefits are timely and exceed their costs. They must perform credibly and reasonably consistently in the rough and tumble of parliamentary and media debate. They must retain the loyalty of party faithful, and/or win new and committed constituencies.

To pass legislation, prime ministers and cabinets must consistently secure the support of their caucus. Support and the appearance of party unity come at a cost in terms of influence -influence over the actual allocation of positions in the executive, and influence over the policies pursued by the executive.

These constraints indicate several notable advantages of a Westminster system. Policy-makers can respond to events in a flexible and timely fashion. Furthermore, the medium of intra-party constraints involves a continual funnelling of electoral pressures upon the executive. The prime minister and cabinet are given the ability to implement favourable policies, and they are held accountable for their actions.

The potential for problems in a Westminster system arises when a misguided executive can implement preferred policies that are undesirable for the nation as a whole.²⁹ As we have seen above, the preferences of the electorate can be manipulated even when electoral constraints remain operative. Depending upon the preferences of the leaders, policy can be

²⁹ Another potential source of problems is when the majority of the citizenry itself supports, or chooses to ignore, policies that are harmful, unjust, or otherwise undesirable. We defer consideration of this issue, however, to Chapter 5 on referenda.

manipulated in either a favourable or unfavourable direction. In evaluating a Westminster system, the critical issues are therefore how different constraints interact, and the initial situation of the country in question.

In any system, day-to-day checks and balances arise from the need for promoters of a policy to convince others of its worth. The costs of convincing others determine the magnitude of the checks and balances imposed by any particular system. These costs differ between systems.

In a Westminster system, the key group that the executive must convince, at least on a day-to-day basis, is the caucus. Especially in a small country such as New Zealand, caucus itself is likely to be small, and is bound by common party affiliation. It is also conveniently gathered in the weekly caucus meetings. While the costs of securing caucus support may vary between policies, on average they will be low relative to other systems. Legislation can be passed relatively cheaply and rapidly. Legislative packages tend also to be consistent; in particular, expenditure decisions are more likely to be made in close connection with revenue decisions than in, say, a presidential-congressional system.³⁰

Although the bulk of our comparative analysis will come in later chapters, it is worth noting here that alternative constitutional arrangements involve higher costs of passing and agreeing upon legislation than does a Westminster system. In the presidential-congressional system of the US, for example, the president must win the support of both houses of congress and avoid a judicial veto.

Under many forms of proportional representation, the passage of legislation requires approval of a coalition government. Although this requirement is similar to the requirement of caucus unity in a Westminster system, it will generally be more costly to achieve. Coalitions in multi-party systems are generally manufactured after, not before, elections, and lack the adhesive provided by common party membership. While coalitions of parties may survive a number of electoral cycles, there is less assurance that they will do so than there is that party members in a Westminster system will remain with the party. Nor is membership of a majority party such an important prerequisite for electoral success as in a Westminster system. In addition, coalitions in multi-party systems are not bound by the same conventions of secrecy or whipping found in Westminster systems. As a result, favoured legislation is

³⁰ Breton (1991) notes that problems of free-riding and fiscal illusion will be smaller in parliamentary than in congressional systems. At budget time, the cabinet must make simultaneous decisions about expenditures and revenues, and decisions must be, at least formally, unanimous. The use of a unanimity rule reduces the possibility of free-riding by individual ministers. Similarly, the presence of fiscal illusion depends on the perception of a separation between revenue and expenditure decisions, which may be difficult to maintain if the cabinet is functioning effectively.

likely to be bought at a price of larger, and more overt, trade-offs in terms of both the detail of the legislation and other legislative packages.

2.6.1 The Interaction of Constraints

The greater ease of passing legislation in a Westminster system implies that successful Westminster systems are those accompanied by implicit checks and balances that operate in the proper direction. Furthermore, Westminster systems are most effective when radical policy changes may be required. We isolate the following factors as favourable to the operation of Westminster systems:

- a well-informed electorate;
- a small, open economy willing to subject itself to international competition; and
- the necessity for policy change in the future.

We have noted that the electoral check is particularly strong in a first-past-the-post parliamentary system, because it enables the ready, even routine, removal and replacement of governments. Elections of this kind will work to promote good government if they compel political parties to compete on the basis of the quality of their policies. A prerequisite is an electorate that can discriminate between policy programmes - that can make reasonably sensible assessments about the quality of performance and promises. Voters do not need to understand the detail and merits of, or have a view on, every policy implemented or proposed by a past or prospective government. (This is precisely the kind of information that representative government economises on.) But they do need to know, in general terms, what the government and opposition stand for, and how they are likely to perform in practice.

International factors may be more or less binding in their ability to constrain legislation. For example, as illustrated by the policies of the late 1970s to early 1980s, it is feasible to attempt to shut out international pressures by pursuing a form of economic autarchy. In this instance Westminster systems tend to compound bad legislation, at least in the short run.

The experience of New Zealand through the post-war period suggests that policies leading to a gradual erosion of economic performance can be sustained, and reinforced, over many years. The policies implemented under the 1975-1984 Muldoon administration in the wake of Britain's entry to the EC and the oil crises of the 1970s were ultimately an extension of a general policy approach that had been in place since the 1930s. The assurance that

international constraints will, in the long run, compel policy changes, may provide scant comfort.

In the longer term, international constraints did prove binding and the Westminster system responded with deregulatory policies from the mid-1980s. Given that the New Zealand economy has now been opened to the world, we expect the Westminster system in the future to provide superior performance than it did through say, the 1960s and 1970s. A general effect of the economic policies implemented since the mid-1980s has been to reduce barriers to resource flows in and out of New Zealand. The result is that governments are more constrained than previously to compete with other jurisdictions. If their policies are sound, resource flows into the country are likely to reinforce their positive domestic effects. Poor policies bring a risk of resource outflows - both the withdrawal of foreign resources, and the departure of domestic resources. In this sense, the policy changes of the 1980s brought a fundamental (beneficial) change in the nature and strength of constraints on policy-makers.³¹

In today's economic climate, we see international constraints as playing a binding role in the short run. In the 1980s New Zealand made a fundamental policy decision to compete in the world economy rather than pursue autarchy. The disciplines for good decision-making are now powerful. In addition to explicit policy decisions, general improvements in information and communication technologies have improved resource mobility and tightened international constraints. As long as we expect these disciplines to hold, we can be relatively sanguine about the results that will be produced by a Westminster system.

The stabilising function that we have attributed to international resource flows is likely to operate with differing force among countries of different sizes - even if their basic policy programmes are similar. In a country with large, diverse, internal markets, for example, international constraints are less likely to be binding than in small countries heavily dependent on imports and exports. In small, open economies, too, there is likely to be more need to respond rapidly and flexibly to external shocks. (For example, Britain's entry to the

³¹ The New Zealand experience may usefully be compared with that of the US and Sweden. The US has had little success in addressing its policy problems or reforming its government. The US system is paralysed by deadlock at the federal level. With an extensive division of power, the President and the two houses of Congress (with the Federal Reserve and the Supreme Court as other players) cannot agree upon a programme of action that will address problems such as the budget deficit. The recent "pirate candidacy" of Ross Perot reflects the frustration of the American public with the "insiders" of Washington.

The Swedish system, based upon proportional representation, developed an extensive welfare state that has ultimately proved unsustainable. Sweden has been in the midst of an economic crisis since the early to mid 1970s, and voters have since strongly repudiated the welfare state philosophy. Nonetheless, policy changes have been slow in coming.

EC had a considerably greater impact on New Zealand than on larger commonwealth countries trading with Britain.) On average, Westminster systems might be expected to perform better in small, open countries than in large ones.

Finally, Westminster systems also work best in situations where substantial policy changes are required. The Westminster system permits rapid responses to major policy problems or exogenous shocks. Although Westminster systems do not guarantee that the legislation passed will be in the proper direction, they do at least minimise the chances of legislative deadlock. Alternative systems, such as that in the US, have found legislative deadlock a serious problem when trying to address important issues such as the budget deficit or education policy.

To pursue this contrast further, the US constitution can be seen as designed to preserve and build upon favourable initial conditions. Its inherent conservatism may be desirable where the existing body of law (for example, an inherited system of common law) is sound, and where destabilising exogenous shocks are expected to be rare or absent. But such conservatism will be less appropriate from other starting points. For example, the introduction of a constitution and separation of powers on the American model may unduly restrict the implementation of a deregulatory programme in a new democracy in Eastern Europe, or an underdeveloped country with a history of interventionist colonial law.

If the suitability of a Westminster system is in part a matter of where a country starts from, it follows that the appropriateness of this system for a particular country could change over time. The likely need for change will depend in part on the sensitivity of the Westminster model's performance to such factors as size and openness. It will also depend on the capacity for evolutionary changes within Westminster systems. In the absence of entrenched, written constitutions, Westminster systems have proved capable of sustaining significant evolutionary changes: the extension of suffrage, the growth of the party system, the emergence of caucus as a forum for policy debates, and the extension of the select committee system, for example. The scope for ongoing evolutionary change should therefore be taken into account in deciding the case for revolutionary constitutional reforms. It is possible that in many instances constitutional problems can be addressed more effectively by evolutionary change than by direct reform.

3.0 PROPORTIONAL REPRESENTATION

3.1 Introduction

The forthcoming referendum offers four electoral systems as alternatives to the current Westminster system: preferential voting, the single transferable vote, mixed-member proportional systems, and supplementary systems. Each system allocates legislative seats according to a numerical formula. Except for preferential voting, each of these formulae offers representation to candidates and parties who do not receive a majority or plurality of the vote in any single district. The Westminster system, in contrast, awards district seats on a winner-take-all plurality basis.

To summarise each system very briefly, the mixed member system allocates seats in the legislature in proportion to party votes. The supplementary member system maintains the current first-past-the-post seats but adds some seats allocated in proportion to party vote. The single transferable vote allows voters to rank all candidates in their district and uses a complicated numerical formula to determine the winner. Preferential voting maintains the basics of the Westminster system intact, but allows second-place votes to count towards determining the winner if no party wins more than fifty percent of the vote.³⁸

Mixed-member proportional and supplementary systems are similar in their effects, as we shall see below; we refer to these as partial list systems.³⁹ We discuss this point in more detail below. Partial list systems are distinct from the single transferable vote, which is based upon quite different principles and creates systematically different effects. Under partial list systems party structures are strengthened and government by coalition replaces the Westminster winner-take-all” tendency. Under the single transferable vote party structures are weakened and representatives emphasise local benefits and constituency service. Preferential voting would not alter the current Westminster system substantially.

Most Western democracies use some form of proportional representation, with the exceptions of the Anglo-American countries (to varying degrees). The exact form of proportional representation varies with each country. The mixed-member proportional

³⁸ All of these systems can, in principle, be used to accommodate special Maori seats (see Catt *et al.*, 1992) or be used to eliminate special Maori seats. For this reason, we see the question as to the future of the Maori seats as separate from the choice of electoral mechanism and do not consider this issue in the present study.

³⁹ Supplementary systems, however, do not modify the status quo significantly if the number of supplementary seats allocated by proportional representation is small.

system is found in Germany, the single transferable vote is used in Ireland, preferential voting is used for the Australian lower house, and the supplementary system is now used in the fledgling democracies of South Korea and Hungary.⁴⁰ We also discuss list systems in general, which are used in many countries in either pure or modified form.

Many countries which currently have proportional representation once had other forms of democracy but switched electoral systems, most commonly in the early years of this century. In Table 3.1 we summarise the history of adoption of proportional representation - where the system was adopted, when, and for what reason.⁴¹

Moves to proportional representation tend to be irreversible. Once proportional representation is adopted both small parties and the leaders of large parties (who control party lists) have a strong stake in the system. With the exception of France, which has changed constitutions several times, no countries have voluntarily abandoned proportional representation for alternative forms of democracy.⁴²

3.1.1 Overview and Summary of Results

Each of the four suggested electoral reforms would change the scope and direction of government activity. To present an overview of these changes, we summarise how each reform would change the relative strength of the factors influencing government behaviour. Again, we do not attempt in the body of the text to judge whether these results are desirable; we save such judgments for the concluding remarks. The focus of our attention is changes in the balance of power. The following outline is a summary and overview of the analysis to follow.

Preferential voting would not change the status quo dramatically. For the other reforms, the factors influencing government behaviour would change in the following manner:

⁴⁰ Other versions of the supplementary system are used in Denmark, Venezuela, and Greece, although these systems are not close enough to the New Zealand proposal to furnish useful data. See Nohlen (1990, p. 88) on the use of supplementary seats in these countries.

⁴¹ This table is adapted from Nohlen (1984), pp 219-21.

⁴² France adopted proportional representation briefly in 1985 and returned to majority rule in 1986. In Italy there is currently a movement to replace proportional representation with a Parliamentary system. On the Italian debate, see Nohlen (1990, pp 253-9).

Country	Last change of the principle of representation	Reform within the established principle of representation	Intention of the reforms
Austria	1919/1945	1971	New distribution of the constituencies
Belgium	1919	None	-
Denmark	1920	None	
Fed Rep of Germany	1919/1949	1953 1956	Less proportionality Raising the threshold of representation
Finland	1906	(1935,1955)	(Affecting candidacy only)
Greece	1951	1974 1977 Among others	1974: Increase 1977: Reduction of disproportionalities.
Iceland	1942	1959	More proportionality/ new distribution of constituencies.
Italy	1919/1946	1956	More proportionality by reform of the divisor
Luxembourg	1919	None	
Netherlands	1917	1921 1923	Less proportionality. Reform of the allocation of remaining seats.
Norway	1919	1953	More proportionality / reform of the divisor procedure.
Portugal	1975	None	
Spain	1976	None	
Sweden	1909	1949 1971	1949: More proportionality
Switzerland	1919	None	1971: Threshold of representation against splinter parties

1. *Government mirrors the preferences of the median voter.*

All forms of proportional representation would weaken the influence of the median voter. In the multi-party system produced by partial list systems, no single party attempts to stake out the middle ground. The single transferable vote also weakens the influence of the median voter but less so than partial list systems.

2. *Government is influenced by special interest groups and lobbying.*

Both partial list systems and the single transferable vote have ambiguous effects here. In Westminster systems interest group pressure is channelled through the majority party. Partial list systems channel interest group pressures through multi-party coalitions instead. The single transferable vote would place these pressures upon individual legislators and away from party organisations.

3. *Government maximises revenue and redistributes resources from productive citizens to itself.*

Partial list systems weaken the ability of government to redistribute wealth from one group of citizens to another or to the government. The use of multi-party coalitions implies that policies must be supported with a greater degree of consensus than under the Westminster system. Under the single transferable vote the ability of the legislative to check the executive is weakened and less consensus is needed to pass policies.

4. *Government provides benefits to particular districts and regions, at the expense of other regions.*

The single transferable vote markedly increases the incentives for political representatives to seek wealth redistribution at the local and regional levels. Partial list systems, in contrast, favour policies with a national rather than regional focus.

5. *Government indulges the policy preferences (“ideology”) of politicians in office.*

Partial list systems have ambiguous effects here. Under partial list systems political parties differentiate themselves by ideology to a greater degree but, once in office, face greater explicit checks and balances. Westminster systems, in contrast, give greater influence to the ideologies of voters rather than politicians, but also place weaker explicit checks upon a ruling government. The single transferable vote weakens the influence of politicians’ ideology by redirecting political effect towards constituency service and regional policies.

6. *Government finds its hand forced by international constraints.*

Both partial list systems and the single transferable vote decrease the ability of a government to respond rapidly and flexibly to changing international constraints. Through

its clear demarcation of government power and responsibility, the Westminster system has the greatest scope in this regard. International constraints play a smaller role under other electoral alternatives.

The remainder of this chapter is organised as follows. Section 3.2 considers preferential voting, a system that would not alter the status quo drastically. Section 3.3 examines the single transferable vote, the “outlier” form of proportional representation. We examine the incentives created under the single transferable vote and focus upon the properties of the single transferable vote which differ from other forms of proportional representation.

Sections 3.4 through 3.6 provide the bulk of the comparative analysis. Section 3.4 considers the operation of pure and partial list systems. Although the pure list system is not on the forthcoming referendum, an understanding of the pure list system is essential to grasp the derivative mixed-member proportional and supplementary options. Section 3.5 compares directly the mixed-member proportional and supplementary member alternatives in cases where the number of supplementary seats is significant. Section 3.6 provides a general comparison of proportional representation and the Westminster system of government.

3.2 Preferential Voting

Preferential voting, sometimes called alternative voting, is based upon single member constituencies and a winner-take-all electoral formula.⁴³ The current Westminster system would remain intact with a single exception. Voters would choose not only a first choice, but also subsequent choices in order of preference (second, third, etc). When no candidate gains more than fifty percent of the vote, these additional rankings are used to determine the winner.

The most prominent use of preferential voting is found in Australia, where the system has been used to elect the Federal House of Representatives since 1918. Preferential voting is used also in the lower houses of many Australian states and for the Irish presidency.

The specific formula behind preferential voting is the following. If no candidate wins more than fifty percent of the first preference votes, the additional voter rankings are used to

⁴³ The terminology used in describing voting systems can be confusing. What the referendum calls “preferential voting” is usually called “alternative voting.” To worsen the confusion, the phrase “preferential voting” used by the referendum is often used by other writers and analysts to describe what the referendum calls the “single transferable vote”.

determine a winner. (In contrast, the status quo based upon plurality simply awards the seat to the candidate with the largest number of votes). The candidate with the fewest first place votes is eliminated. The second place choices of the voters who preferred the eliminated candidate are now elevated to first place votes. If a candidate now has more than fifty percent of the vote, that candidate is elected. If not, we perform the same step, eliminating the candidate with the next smallest number of first place votes. Lower choices of these voters are elevated once again, until one candidate has won fifty percent or more. If subsequent eliminations do not result in one candidate having fifty percent or more, the seat is awarded to the candidate with the largest number of votes.

Under preferential voting, whether voters must rank all candidates can be mandatory or optional (both have been tried in Australia). Whether universal ranking is mandatory or voluntary does affect the operation of the mechanism. When universal ranking is optional, many individuals will choose only one, or perhaps two candidates. The rationale for preferential voting is partially vitiated, and a candidate can be elected without having fifty percent of the vote. When universal ranking is mandatory, voters, with their lower choices, may be helping to elect candidates whom they do not favour. Moreover, some percentage of voters will refuse to rank all candidates and thus hand in ballots that do not count.

Preferential voting may affect actual outcomes because resort to second and third place preferences is likely to occur frequently in New Zealand. Not since 1951 has a government received a majority of the votes cast by electors. Although preferential voting will often give the same winner as plurality voting, it need not always do so. Most likely, had New Zealand used preferential voting the results of some elections would have been reversed.

Preferential voting tends to favour parties that are the second choices of those inclined to vote for a third party. A voter can choose a third party without “wasting” his or her vote if the third party has no chance of winning. If no candidate wins more than fifty percent of the votes and the third party is eliminated, this voter’s second choice will now count towards determining the final outcome.

For this reason, preferential voting tends to favour third (or additional) parties. Because voters can choose third parties without “wasting” their vote, third parties are likely to have more success in marketing their candidates to voters. Preferential voting thus encourages a greater diversity of opinion in electoral contests and increased party competition before an election.

The greater diversity of opinion, however, does not necessarily imply an electoral contest that better reflects the preferences of the voters. The number of parties will still be small and these parties will not reflect all shades of voter opinion. In fact, the major parties may be less inclined to stake out controversial or innovative positions. The use of a ranking scheme favours candidates that generate the least opposition, rather than those candidates that command the widest support. Being chosen second rather than first by a voter involves no disadvantage if the party chosen first is dropped. Parties that are chosen last, however, will not obtain additional votes in this fashion.

Unlike most other forms of proportional representation, preferential voting does not significantly increase the likelihood that third parties will participate in governing coalitions. Once all the votes are tallied, seats are still handed out according to a winner-take-all formula. The only difference with the status quo is that the winner is computed on a different basis. Third and smaller parties have an easier time winning votes, but unless these parties attract widespread support, these additional votes need not translate into additional seats.

Furthermore, preferential voting also weakens third parties in one important respect. Larger parties need no longer consider third parties an electoral threat. If a larger party knows that a third party cannot split its vote by dividing the electorate (second place votes will still count), the larger party will be less inclined to make policy concessions to neutralise the influence of the smaller party. In this regard smaller parties have less influence, and the incentive to start smaller parties decreases. Alternatively, the incentive to repair a split in the party is reduced.

For these reasons, the encouragement given to small parties under preferential voting is ambiguous. As we see in Australia, third and smaller parties are present but have not attained the influence of third parties on the European continent, where traditional forms of proportional representation are used. In Australia, preferential voting can be said to have encouraged the Liberal-Country (now National) party alliance (and thus a governing role for the National party), but large parties are not necessarily dependent upon small ones, as in, for instance, Germany. We are thus likely to favour alternative voting if we wish to encourage small parties slightly, but not too much.

Preferential voting does not necessarily remedy the kind of inequities associated with a first-past-the-post electoral system. While the status quo allows candidates to be elected with less than fifty percent of first place votes, preferential voting also creates possible inequities. These inequities arise because preferential voting potentially treats second, third, and lower place votes as equal to first place votes.

In the 1966 election in Australia, for instance, the Liberal-Country party won a large parliamentary majority with a tiny majority of the popular vote. In the Canadian province of Alberta in 1948, preferential voting allowed one party to win all the seats in the legislature with only 58 percent of the first place votes. Similarly, in the Australian state of Victoria in 1967, the Liberals won three times as many seats as Labour despite having fewer first-place votes.⁴⁴

For the reasons discussed above, we do not see preferential voting as a significant alternative to the status quo. While preferential voting is not dominated by the status quo, neither does preferential voting offer clear-cut advantages. Throughout the remainder of this chapter, we will focus our attention upon those electoral alternatives that would systematically modify the current Westminster system.

3.3 The Single Transferable Vote

The single transferable vote was a popular reform proposal in the late nineteenth and early twentieth centuries, especially in Anglo-American countries. John Stuart Mill and Thomas Hare were especially prominent as founders of the single transferable vote movement.

The single transferable vote allocates seats in the legislature according to voter ranking of available candidates. Voters are given a list of all eligible candidates and list these candidates from most favoured to least favoured. The information contained in these rankings is then used to determine electoral results (the exact formula is explained below).

In addition to its national use in Ireland (since 1920, and formerly in Northern Ireland), the single transferable vote has also been used in Malta, for local elections in Tasmania (since 1907), and to elect the upper house in Australia (since 1949). In New Zealand the single transferable vote formerly was used for some local elections (e.g. in Christchurch city). We focus upon the effects of the single transferable vote when adopted fully at the national level.⁴⁵

⁴⁴ On these instances, see Ham (1986), pp 93-94.

⁴⁵ For more detail on the Australian experience than is provided below, see Wright (1980).

Electoral systems based upon the single transferable vote tend to produce the following effects:

- voters can express preferences for more than simply their favourite candidate or party;
- representatives are focused towards constituency service and district policies, rather than national policies;
- political parties are weak, non-ideological, and subject to frequent infighting;
- the ability of the legislature to check the executive is weak;
- most voters are confused by the mechanics of the single transferable vote; and
- sophisticated voters have an incentive to manipulate the system and vote an order which is not their true preference.

We now consider the operation of the single transferable vote in more detail.

3.3.1 The Single Transferable Vote Formula: A Technical Digression

The election of representatives under the single transferable vote is based upon the concept of a quota, sometimes called the Droop quota. Representatives who satisfy the Droop quota (explained further below), based upon information from voter rankings, achieve election. Each voter is first given a ballot and then asked to rank as many candidates as he or she wishes (first choice, second choice, third choice, etc.). The single transferable vote system attempts to ensure that as many voter preferences as possible are counted, even when a voter's first choice is not elected.

The Droop quota hurdle is the smallest number of first-place votes sufficient to ensure election. If we take the case of a nine-member district with one hundred voters, the Droop quota is eleven; it would be impossible for more than nine candidates to each receive eleven first-place votes.⁴⁶

⁴⁶ The general formula for the Droop quota is to divide the number of voters by the number of candidates plus one, disregard any fraction, and then add one; in this case, $[100/(9+1)] + 1 = 11$. Note that the smaller the number of seats allocated to a district, the more difficult for minority parties to achieve representation.

Once all the ballots are tallied, the single transferable vote elects those politicians who have eleven or more first-place votes; i.e. those who satisfy the Droop quota. Assuming that not all nine seats have been filled, further computation is required to fill the additional seats.

We now take the voters whose first choice votes did not matter and count their second-place vote as a first-place vote. Specifically, we examine the second-choice votes of two groups of voters: those who do not see their first choice elected and those whose votes are extra” or “surplus” votes for candidates who did win, in the latter case if a candidate receives seventeen first place votes but requires only eleven, six of these supporters will now have their second vote transferred and counted elsewhere.⁴⁷

After transferring unused votes we add these “new” first-place votes and see which candidates meet the Droop quota from this pool. Those who do are elected.

If not all the seats have been filled, another step in the procedure is used. We then drop out the votes of that candidate with the smallest number of first-place votes. If a voter’s first choice has been dropped, that vote is then allocated to the next candidate on the voter’s list. We compute the Droop quota once more and choose those representatives who meet the quota. We then drop the candidate with the second smallest number of first-place votes and transfer those votes, and so on, computing the Droop quota each step of the way. The process continues until we have elected the chosen number of representatives.⁴⁸

The single transferable vote can be applied to any number of legislative seats, even as small as one (at which point the system approaches preferential voting). The Royal Commission Report suggests five seats per district and Ireland uses between three and five seats per district. Any number of candidates can run for the chosen number of seats.⁴⁹

⁴⁷ The decision as to which six votes are to be counted the surplus is a complex one and has been met with various formulae for the provision of impartiality. We do not wish to consider such complex technical issues in the theory of voting. Needless to say, actual voters are not likely to understand any procedure chosen.

⁴⁸ Annex A, which examines the incentive to vote strategically under the single transferable vote, also presents numerical examples of exactly how the single transferable vote works.

⁴⁹ Because the single transferable vote uses voter ranking of all candidates, the single transferable vote is best suited for use at the district level where the number of representatives to be chosen is small. Requesting voters to rank, say, one hundred national candidates in order of preference is unlikely to produce accurate or meaningful results. Even with a long list, however, voters always have the option of voting for a small number of candidates, or even just one candidate.

In Ireland, the results of the single transferable vote tend to be roughly proportional. That is, if a party receives twenty percent of the first-place votes cast, that party tends to receive close to twenty percent of the seats in the legislature. The difference between first-place votes cast and seats received rarely exceeds five percentage points (e.g. twenty percent of first-place votes and fifteen percent of the seats; see Penniman, 1978, p. 26). The percentage of voters who see their first choice elected is usually about seventy percent (Penniman, 1978, p. 30).

Once representatives have been elected, a ruling government is formed either through a coalition or through a majority party. In section three of this chapter we consider the operation of coalition governments in more detail. Here, we focus upon those features of the electoral mechanism which distinguish the single transferable vote from other forms of proportional representation.

3.3.2 Complexity of the Single Transferable Vote

The complexity of the single transferable vote allows voters to express an additional range of preference. Voter expression of preference is not limited to the selection of a first choice but encompasses the entire range of candidates. There is also less likelihood that a vote will be wasted” on losing candidates. Even if the first choice of a voter is not elected, the preferences of that voter still have input towards determining the final outcome.

The greater expressiveness of the single transferable vote, however, comes at the price of a complex electoral mechanism. The single transferable vote is subject to two criticisms resulting from its complexity. First, under the single transferable vote a majority of voters are unaware of how their electoral system works. In this regard the single transferable vote does not use a very representative process, even if the final allocation is roughly proportional to the percentage of first-place votes cast.

The complexity of the single transferable vote also may affect outcomes if voters cannot mark their ballots accurately. Data on voter confusion are difficult to find because the ballots used in modern elections are typically secret. Nonetheless, available evidence suggests that voter confusion is likely to affect ballot markings adversely under the single transferable vote.

A study of the Irish election of 1973 implies that many voters simply ranked candidates in alphabetical order past a certain point on their ballots. A random sample of the Irish population showed that surnames with the first letter A, B, or C occurred 20.3 percent in the general population yet 33.6 percent in the legislature. Similarly, surnames with the letters

P-Z occurred 19.4 percent in the general population but only 11.9 percent in the legislature (Chubb, 1982, p. 161). Voters appear to have been overwhelmed by the complexity of the choices offered, although Ireland had been using the single transferable vote for many years.

Another study, this one of the single transferable vote in New York, produced similar conclusions. The city of New York experimented with the single transferable vote for its city council from 1937 to 1947, when the system was abandoned as unsatisfactory. A study by the New York State Constitutional Conventional Committee concluded that voter confusion on ballots was rampant. In the borough of Brooklyn, for instance, thirty-one percent of the ballots were either invalid or unusable. On many other ballots, confused voters had voted alphabetically or selected a favourite candidate and then selected all of the names directly below that candidate on the ballot.⁵⁰

The second criticism points out the possibility of manipulative or “strategic” voting under the single transferable vote. Those voters who do understand the workings of the single transferable vote do not always have an incentive to rank the candidates according to their true preferences. Irish parties are aware of the potential for vote manipulation and sometimes instruct and persuade their supporters to take advantage of the system in this regard (Gallagher, 1986, pp 255, 273).

In some situations, voters have an incentive to rank their favourite candidate last rather than first. In other cases, a candidate will fail to achieve election, even if he or she would defeat all other candidates in a one-on-one run-off election.⁵¹

Examples and a proof of these propositions can be found in Annex A. Nonetheless, the intuitive reasoning behind these results is evident. For instance, the method of eliminating candidates with the smallest number of first-place votes gives voters an incentive to falsify their candidate rankings. Consider the case of a voter who prefers Smith to Jones but realises that Smith is a heavy favourite and that Jones is in danger of early elimination. That voter may shift his

⁵⁰ The results of the New York study are presented in Hermens (1984).

⁵¹ Such perverse results are not empirical rarities. Following an examination of Irish data, Katz (1984, p. 138) noted that in fourteen percent of his sample, a party's vote (the percentage of times marked as first choice on a ballot) and seat shares in the legislature moved in opposite directions.

or her first-place vote to Jones even though Smith is preferred. In contrast, first-past-the-post systems, as long as they are restricted to two major parties, do not provide this incentive, albeit by limiting voter choices. The single transferable vote provides no guarantee that votes reflect true preferences.⁵²

3.3.3 The Single Transferable Vote and Political Incentives

The effect on political incentives is perhaps the greatest difference between the single transferable vote and list and partial list systems. Whereas list systems focus political incentives upon national problems and strengthen political parties (see below), the single transferable vote focuses representative attention on local issues and weakens the role of political parties.

The direct appeal to voters under the single transferable vote changes the incentives of legislators. Legislators tend to focus upon constituency service and district-specific policies rather than national politics. Voting is on the district level and campaigns must focus upon satisfying district needs. Politics becomes less a matter of ideology and more a matter of “delivering the goods” to constituents.

The emphasis upon constituency service is illustrated by the Irish experience with the single transferable vote. In Ireland politicians complain frequently that they are required to cater continually to constituency whims and preferences. Politicians have little time to address national problems or think strategically about future policy in broad terms. In the Irish Dail, a deputy frequently is called a “constituency messenger” (Calder, 1988, p. 65). Irish representatives spend considerable time helping their constituents deal with government bureaucracies (Chubb, 1982). Similar tendencies operate in the single transferable vote in Tasmania and Malta (Gallagher, 1986, pp. 266~7).⁵³

⁵² We cannot remedy this defect of the single transferable vote by modifying the voting procedure. It has been proven that voting procedures which involve multiple rankings are always subject to the possibility of strategic behaviour; this work is an offshoot of Kenneth Arrow’s seminal “Arrow Impossibility Theorem”; see Arrow (1963) and Mueller (1990). On the general manipulability of voting schemes, see Gibbard (1973), Satterthwaite (1975), and Mueller (1989). Winner-take-all systems are not subject to manipulability when only two candidates run but are subject to manipulability when more than two candidates run.

⁵³ This interpretation of Irish politics is widely accepted. Gallagher (1980, p. 491) notes, for instance, “The local orientation of almost all political activity in the Irish Republic has been much remarked upon.” See also Gallagher (1985), Mair (1987), and Penniman (1978) on local incentives in Irish politics and for a general introduction to Irish politics and the Irish electoral system.

The tendency of the single transferable vote to encourage constituency service (as opposed to national policy) is even stronger than under current electoral institutions. Under a

Westminster system, party constraints and party unity play some role in focusing the attention of representatives upon national issues.

The single transferable vote weakens political parties by requiring members of the same party to compete against each other in the same election. Rather than using candidate selection processes and political parties to determine which party members have first crack at elected office, the single transferable vote allows voters to decide. In effect, the single transferable vote combines candidate selection and run-off into one comprehensive election. We should expect no more party unity under the single transferable vote than we find in candidate selection processes; candidates in the same party are more likely to feel rivalry than unity.

In Ireland we even find examples where sitting representatives prefer to fill empty seats with members of the opposing party; filling the seat with a member of one's own party would increase the degree of competition faced at the next election. When two candidates from the same party are running in the same district, they tend to divide the district into personal bailiwicks to minimise the chances of a direct clash (Katz, 1984, pp 143-4).

Parties find it difficult to develop coherent ideological platforms that all or most members adhere to. Since representatives focus upon providing private benefits for their constituents, they are less inclined to adhere to a party line or consistent ideological position. Furthermore, candidates will differentiate themselves from competing members of the same party and not just from the opposition party. Re-election requires competition against (part of) a legislator's party, rather than unity with a legislator's party. For these reasons, in Ireland, political parties exist primarily in the form of local branches which become active shortly before elections.⁵⁴

The weakness of parties and the emphasis upon constituency service decrease the ability of the legislature to check the power of the executive branch of government. Members of the Irish parliament rarely challenge the executive, not because they are loyal to party ideology, but rather because they are preoccupied with constituency service. The government dominates parliament considerably more than in other countries (Gallagher, 1980, pp 501-2). Intra-party constraints are weak under the single transferable vote.

⁵⁴ On the non-ideological nature of Irish politics, see Chubb (1982), Gallagher (1985), Mair (1987), and Penniman (1978).

Because the single transferable vote de-emphasises ideology and party structure, the single transferable vote does not necessarily give rise to a multi-party system and coalition

government. The lessening of the ideological content of politics makes it more difficult (and less rewarding) to start a third party. Upstart politicians who wish to run for election are less likely to find themselves ideologically excluded from the major parties. These politicians will find it simpler to attach their name to a prevailing party rather than start their own organisation. Furthermore, the small number of seats in a district (from three to five in Ireland; the Royal Commission recommends five for New Zealand) limits the room for party proliferation.

The compatibility of the single transferable vote with a two-party system is illustrated by the historical evidence. Tasmania, for instance, has had more than eighty years of the single transferable vote (since 1907) but is still essentially a two-party system (Wright, 1984, p. 133). The Country party, which traditionally represented farming interests, found little support in Tasmanian local politics. Farming interests instead choose to support farmers who run on one of the two major tickets; the weakened party structure under the single transferable vote makes this possible (Lakeman, 1984, p. 46). Similarly, attempts to form a strong National party in Tasmania have not succeeded.

Maltese politics also has been limited often to two dominant parties (Katz, 1984, p. 140). In Ireland, the fate of third parties has been mixed. The Irish system evolved from a multi-party system to two parties (many commentators have interpreted Fine Gael and Labour as a single party; see Katz (1984), for instance). Since the 1980s there has been a blossoming of third parties but most of these parties are a reflection of the polarisation of the Irish conflict, rather than an intrinsic result of the single transferable vote.

3.4 List and Partial List Systems

We consider now the use of party lists to allocate seats (the pure list system) and systems which combine use of lists with first-past-the-post selection criteria (partial list systems). We compare and contrast the properties of various list systems to set the stage for our later comparison of partial list systems and the Westminster system.

The list system is the purest form of proportional representation. In its simplest form, the list system allocates seats in parliament according to the percentage of the vote each party receives. If three parties receive forty, forty, and twenty

percent of the vote total, for instance, these parties will receive forty, forty, and twenty percent of the parliamentary

seats, respectively.⁵⁵ Voters choose a party rather than an individual representative and the party organisation determines which individuals will fill the allotted seats. Henceforth arises the name “list system”; parties rank potential representatives in a list from which elected members are drawn.⁵⁶

The list system may be used at either the national or district level. When used at the national level, the list system puts all votes into the same pool. The matching of votes to parliamentary seats is performed across this national pool. National versions of the list system are found in the Netherlands and Israel, the two countries with the “purest” list systems.

When used at the district or regional level, list systems pool votes within each district. Districts are awarded multiple seats and the distribution of seats within each district is determined by the percentages obtained in each district pool.

New Zealand, as a country with a small electorate, is a more likely candidate for use of national lists rather than regional lists. Most countries with proportional representation, however, use some version of a regional list system. Although the Royal Commission report focuses upon national list systems, the scope of the list system to be considered remains an open choice.

3.4.1 Differences Between National and District List Systems

The choice between national and district list systems influences the incentives that operate under proportional representation. National list systems favour the following features:

- strong party organisation at the national level;
- incentives to propose national policies rather than regional policies; and
- increased representation for small parties.

⁵⁵ Modifications to list systems are considered below, such as the requirement that a party win a minimum percentage of the vote to achieve representation.

⁵⁶ Allowing voters to reorder the party list does not in practice affect the final outcome much. When such “open lists” have been tried, voters generally accept voluntarily the rankings offered by their parties, usually because voter information about the particular candidates is limited.

Regional list systems, in contrast, favour the following features:

- slightly weaker incentives for national policies;
- weaker national party organisation and stronger regional party organisation; and
- weaker representation for small parties.

Both district and national list systems link a politician's chances of election to his or her standing on the party list. Politicians in the upper reaches of party lists are virtually assured of election, whereas the probability of election decreases as one moves down the list.

The critical role of party lists induces politicians to curry favour with the elite of their party to maximise chances of election. Individuals high in the party hierarchy have considerable influence both because they allocate list positions to others and because they can place themselves high on the list and virtually ensure their election. These features encourage strong and hierarchical party organisations at the levels (either regional or national) that the lists are drawn up.⁵⁷

These incentives encourage party unity and the devotion of political energies to proposing policies which will increase party reputation. Individual politicians who are disloyal to the party or who serve their own interests at the expense of the party as a whole will find themselves out of favour with the party hierarchy. These representatives will be placed lower on the list, with a correspondingly lower chance of election.

National and district list systems treat minority parties differently. Both the national and district versions of the list systems may, to varying degrees, produce an election of members not strictly proportionate to the distribution of votes. Under district list systems this disproportionality is more likely to hurt the chances of small and minority parties.

The possibility of disproportional seat allocation arises because of an integer constraint (e.g. half a legislator cannot hold half a seat). The various methods used for distributing fractions invariably favour the larger parties.

Under the Sainte-Lague system (one typical allocation method, and the one suggested for New Zealand), for instance, winning one of thirty seats requires approximately five percent of the total vote; winning one of twenty seats requires

⁵⁷ In Germany, lists are drawn up at the regional level at party conventions held six to eight weeks before election day. See Conradt (1986, Chapter 5). A representative can run for a district seat and also be on the party list.

more than seven percent of the total vote (Royal Commission, 1986, p. 33).⁵⁸ Representation approaches proportionality as the number of seats becomes large. Outcomes are very close to true proportionality, for instance, with a pool of one hundred seats.

The advantage of being a larger party increases as the pool of seats decreases. Since regional list systems break up the national legislature into smaller “pools”, these systems also place an additional burden upon small parties. The smaller the number of representatives chosen in a given pool, the greater the share of the vote required to achieve representation.

Perhaps for this reason, the two countries with a national list system, Netherlands and Israel, are among the smallest Western democracies. Use of a district list system in small countries would handicap small parties significantly since the number of seats in each district would be small. Handicapping small parties would counteract one purpose of proportional representation systems.

The district list system increases the likelihood of small party representation only to the extent that such parties have concentrated geographical support. Small parties with concentrated geographical support can receive representation in their strongest districts even though they might fare worse if all votes were placed in a single national pool. In practice, however, the factor of geographical concentration is usually insufficient to compensate for the handicap that small parties face under regional list systems.

3.5 Mixed-member proportional and supplementary systems

Both mixed-member proportional and supplementary systems are combinations of the list system and the first-past-the-post system. Either a mixed-member system or a supplementary system can be combined with either a district or national list system. We start with the mixed member proportional system, which is closer to the pure list system than the supplementary system is.

The mixed member proportional system composes a legislative chamber from two distinct groups of elected representatives: those elected through district-specific first-past-the-post contests and those elected through a list system.

⁵⁸ Other methods available are the d'Hondt formula and the Largest Remainder formula. In each case the disproportionality increases as the number of seats in the pool decreases. In the limiting case of one seat, fifty-one percent is needed to win that seat and we are back to first-past-the-post. The different methods of treating disproportionality are explained in detail in Royal Commission (1986), pp 71-75.

Voters make two distinct votes in the voting booth: one vote for a district representative and one vote for a party. In Germany,

seats are divided equally between party list seats and seats elected by district, but in principle this numerical balance could be varied.⁵⁹

The final distribution of power in the legislature is determined only by the vote for the national party. Herein lies the potentially confusing feature of mixed-member systems. The votes for district representatives influence which individuals are sent to parliament but these votes have no influence over the percentage composition of the legislature. For instance, if a party does poorly in the district-by-district voting but well in the national election, their final position is reflected solely by their results in the national election.

The mixed-member proportional system works in the following manner. First the votes are tallied for the district representatives and the winners are awarded seats in the legislature. Then, votes for national parties add another group of representatives to the legislature. This second group of seats, however, is not awarded in proportion to the percentage of the national vote that each party has received. Instead, this second group of seats is awarded so that the total distribution of seats (from both district-selected seats and party votes) mirrors the proportion indicated by the party votes.

District elections influence the balance of power in the legislature only under one special condition. If the number of mandates won by a given party in districts exceeds the number allotted to them by the party list vote, these surplus mandates are kept by the party and the size of the legislature is increased.⁶⁰

⁵⁹ In Germany and in the Royal Commission report, first-past-the-post districts are comprised of a single member only. In principle, however, a hybrid system is possible which would combine multi-member districts elected by a single vote per person (as in Japan, which uses a non-transferable single vote in multi-member districts) and party lists. Note also that the German system maps votes on to party lists at a regional level rather than a national level, as discussed in the section above.

⁶⁰ Apart from this exception, the number of list seats and district seats is equal in Germany and is suggested to be equal in the recommendations of the Royal Commission report. Additions to the size of the legislature, when they occur, are very small (see Nohlen, 1990, p. 210).

Both the mixed-member proportional system and the pure list system distribute the final balance of power by the same criterion. The primary practical difference between the two systems is the relatively weaker party structure in the mixed-member system. Mixed-member proportional systems allow some representatives to base their electoral fortunes upon their reputation in a specific district rather than their place on a party list.

In practice, however, this difference is weak. The influence of the party label tends to be decisive in the plurality contests. In the German mixed member proportional system, for instance, voters tend to choose a party label rather than a particular representative, even when they vote in one-on-one district elections (Conradt, 1986, p. 123).

The supplementary system is more direct than the mixed-member proportional system. Under the supplementary system, some percentage of the seats in the legislature is allocated through district voting (again with single member districts) and some percentage is allocated through party lists. The final balance of power is determined by the sum of the two outcomes. Unlike in the mixed-member proportional system, the votes for district representatives affect the balance of power as much as the votes for national parties do.

The properties of the supplementary system depend upon the proportion of seats allocated to party list selection. To the extent the proportion of party list seats is small, the supplementary system does not differ fundamentally from the current first-past-the-post system. The party which wins the majority of the first-past-the-post seats would likely still have enough power to govern without entering into a coalition with other parties.

Furthermore, the differential and minority nature of the supplemental seats would likely give their holders less stature and influence. A relatively small number of list seats also would decrease the ability of small parties to win these seats, because the mathematical bias against small parties increases as the number of seats decreases (see above). We would have essentially the current Westminster system with a certain amount of “token” representation for minority parties in parliament.

The Royal Commission considers one scenario where the size of parliament is expanded to 120 seats and 30 of these seats are based on party lists. Along similar lines, the Electoral Law Committee of 1988 proposed a supplementary member system with 97 single-member district seats and 25 supplementary

seats.⁶¹ In these cases the fundamentals of the Westminster system are likely to remain intact.

In the analysis that follows we focus upon the scenarios where the number of list seats is high enough to affect the ultimate balance of power, simply because we wish to focus upon the differences between proportional representation and the Westminster system. The power of the supplementary seats either will atrophy, leaving the Westminster system in place, or pressures will be present to expand the percentage of seats chosen by proportional representation. To the extent that the number of list seats is increased, we move towards true proportional representation. A small number of supplementary seats is unstable as well. In those cases where minor party support was required to govern, a very small number of minor party representatives could wield decisive power over a government.

Table 3.2 gives a schematic overview of the principles governing distribution of seats in the pure list, mixed-member proportional, and supplementary electoral systems.

3.5.1 Mixed-Member and Supplementary Systems: A Comparison

When compared to alternative electoral systems, mixed-member proportional and supplementary systems have similarities far greater than their differences, at least if the supplementary systems specifies a fairly high number of party list seats. The primary difference is whether the final balance of power is to be determined by party votes alone or by party votes and district votes jointly.

On this point the mixed-member proportional system involves both an advantage and a disadvantage. The advantage of a mixed-member proportional system arises because voters can indicate a preference for a candidate without supporting that candidate's party. A good candidate in an unpopular party has a stronger chance of election. Knowing this, a strong candidate in an unpopular party also has an incentive to distance himself or herself from an unpopular party. As we noted above, however, the influence of the party label still tends to be decisive in most cases.

The disadvantage of a mixed-member system arises from the potential for voter confusion. Although Germany has had the mixed-member system since 1949,

⁶¹ The Royal Commission report mentions in passing (1986, p. 33) another version of the supplementary system. The final distribution of seats must mirror the percentage of the national vote that each party receives. First district-specific constituents are elected and then these names are "topped off" with names from party lists so that the percentage distribution of seats mirrors the percentage distribution of votes. This version of the supplementary system is much closer to the traditional list system, because minority parties have no difficulty achieving representation and need not succeed in first-past-the-post elections.

evidence suggests that many voters still do not understand how the system operates. Voters, for instance, will split their vote by selecting a candidate and a party from opposing sides. Survey evidence indicates these voters do not understand that only their party vote affects the balance of power in the legislature. At the height of an electoral campaign, less than half of the voters understand the precise meaning of the two ballots. After the election is over this percentage drops to one-fifth (Spiegel, 1983, p. 37). As a result, many votes are wasted or cast mistakenly.

Table 3.2
Different Forms of Proportional Representation

	Selection of Representatives	Determination of Final Representation
Pure List	Party list	Party votes
Mixed-Member	Party list and district choice	Party votes
Supplementary	Party list and district choice	Party votes and district votes

The mixed-member proportional system also creates the potential for strategic voting. The system can be manipulated if voters understand that the size of the legislature is increased when a party wins more seats in the district elections than they are entitled to from the second ‘list’ vote. If two parties in a coalition advise their supporters to split their votes between the two parties, a large

number of surplus mandates could be created artificially. While the number of surplus mandates created in the German system has been quite small

(Kaase, 1984, P. 164 and Nohien, 1990, P. 210), this possibility does point to a logical defect in the mixed-member proportional system.⁶²

In the discussion that follows, we consider both systems together, ignoring the differences, and compare general features of proportional representation (in the partial list form) to Westminster systems. The analysis of coalitions, however, is applicable also to preferential voting, if the single transferable vote were to produce a coalition rather than single-party rule.

3.6 Proportional Representation and Westminster Systems

In this section we consider the primary differences between proportional representation and Westminster systems. We offer the following points as a summary of our results:

- Proportional representation and Westminster systems are based upon different conceptions of democracy; proportional representation emphasises the importance of a representative process, whereas Westminster systems emphasise the importance of a representative outcome.
- Under Westminster systems political parties are attracted to the median opinion and tend to converge in their policies; proportional representation encourages ideological differentiation of parties.

⁶² In Germany the percentage of split-ballot voting is quite high, especially among supporters of the two smaller parties, the FDP and the Greens. In one year (1980), more than half of the voters for the FDP split their ballot (Kaase, 1984, p. 163). The possibility of strategic ballot-splitting also gives a large party the incentive to split into two smaller parties and discourages two smaller parties from merging to form a large party.

- Proportional representation allows for the proliferation of small and minority parties.
- Under proportional representation politicians become less accountable to voters and more accountable to fellow coalition members.
- Under proportional representation the monitoring of politicians (by coalition members) is stricter but also less close to the preferences of the median voter.
- Proportional representation is likely to involve a greater separation of powers between the legislative and executive branches of government, and thus increase the likelihood of policy continuity.
- Ensuring the stability of proportional representation implies measures that limit the ability of the electoral mechanism to represent minority opinion, such as restrictions on minor party representation.

3.6.1 The Nature of Representation

Proportional representation and Westminster systems are based upon different premises concerning the fundamentals of democracy. Westminster systems start with the notions of accountability and clear demarcation of power. Voters are offered a forcing decision which is likely to place parliament and the cabinet in the hands of one party or the other; the victorious party is then directly accountable to the voters. The electoral mechanism defines a demarcation of power and a form of representation follows as a secondary consequence.

Proportional representation, in contrast, builds representation into the fundamentals of the system. The electoral mechanism first ensures that different opinions are represented in parliament. A demarcation of power (e.g. a coalition government) follows as a secondary consequence from this distribution of representation.

Which electoral mechanism is more “representative” depends upon our definition of this slippery concept. Under first-past-the-post, a government theoretically can be elected by winning fifty-one percent of the vote in fifty-one percent of the districts, a sum total of only slightly more than one quarter of the total electorate. This required total can be even lower when more than two parties are present.

New Zealand governments have been elected frequently with less than fifty percent of the vote, with a low of 38.8 percent in 1981 (Royal Commission, 1986,

p. 14). In both 1978 and 1981 the winning National party actually collected fewer votes than the losing Labour party. Proportional representation, in contrast, would not have given either party a decisive majority for constructing a cabinet.

In other regards, however, proportional representation is less representative than Westminster systems. Under proportional representation there is no guarantee that actual policy outcomes will be representative, even when the decision-making process represents minority opinion to greater degree. In fact, representation of minority opinion may make policy outcomes less representative. If by 'representative' we mean a policy that reflects the preferences of the median voter, Westminster systems are likely to produce more representative outcomes than proportional representation systems.

Advocates of proportional representation usually place greater stress upon the value of a representative process than the value of a representative outcome. Advocates of first-past-the-post, in contrast, argue that greater effective representation is achieved through a clear demarcation of power.⁶³

We now consider how proportional representation and Westminster systems differ in their practical consequences and how these consequences affect the content of policy.

3.6.2 Nature and Strategies of Political Parties

Proportional representation and first-past-the-post systems differ most fundamentally with respect to the kind of political parties which result and the strategies these parties pursue. Under the Westminster first-past-the-post system, parties have an incentive to move towards the preferences of the median voter, as explained in Chapter 2. Politics is relatively non-ideological and the two parties are close in their policy positions.

Within a given party we do tend to observe differences in regional emphasis to best compete in each electoral district. Nonetheless, within each district the two parties are still close together. Furthermore, in a relatively homogeneous country the variety of party positions across different districts will not be great.

⁶³ Theoretical approaches to the concept of representation start with the Arrow Impossibility Theorem (Arrow, 1963; Mueller, 1989), which shows that no form of democracy will satisfy all of our intuitions concerning satisfactory properties of representation. Many advocates of proportional representation, such as the Royal Commission, simply assume that proportional allocation of legislative seats is more representative, but this conclusion is unwarranted.

Under proportional representation the tendency to move towards the median voter position is weakened considerably; parties instead stake out ideological positions spaced along the political spectrum. Because representation is no longer determined by a winner-take-all-system, the incentives to move towards the median are less strong. Parties can adopt a more ideological position (thus failing to win a majority of the vote) without losing their representation in parliament. Differentiation of policy positions supersedes competition to carry the central position.

Proportional representation still offers some incentive to move towards the median because extremist parties are likely to achieve less representation than parties closer to the centre. Nonetheless, the penalty of less representation is less compelling than the penalty of no representation at all. Furthermore, parties on the extremes do not in all cases receive fewer seats than parties in the middle. If there are two dominant parties reasonably close to the centre (but not at the median), the most effective means of achieving partial representation is to move to one of the extremes, rather than to the centre where competition for votes is stronger.

The ability to achieve representation by staking out ideological positions influences the nature of political debate and the content of policies. Politics becomes a matter of competing world-views to a greater degree. On one hand voters have more real choice between alternatives, but on the other hand they are more likely to be very unhappy with many of the contending parties.⁶⁴

Proportional representation will have a similar effect on the nature and number of individuals who vote. Individuals with strong ideological views are more likely to go to the polls because they will find at least one of the available parties more to their liking. Individuals with moderate views, in contrast, will be less happy with all parties and perhaps less inclined to vote.

3.6.2.1 Number of Political Parties

The ability to engage in greater policy differentiation allows proportional representation to support a greater number of political parties than does a first-past-the-post system. Unlike a first-past-the-post system, parties that attract only a small percentage of the vote (say five to ten percent) can achieve ongoing representation in the legislature and may even contribute to a coalition

⁶⁴ Political scientists agree that political debate in the Continental countries (which have proportional representation generally) is sharper and more ideological than political debate in the Anglo-American countries (see Katz, 1984; Lijphart, 1984; Duverger, 1953).

government. Among European countries with proportional representation, only Austria has failed to develop more than two large parties. In the Netherlands the number of parties in the legislature has been as high as fifteen (Lakeman, 1984, p. 46).

Third parties have a difficult time achieving representation under a first-past-the-post system. In the case of New Zealand, the Social Credit party has received as much as sixteen percent of the vote (in 1978) and twenty percent of the total vote (in 1981) without achieving substantial representation. Had proportional representation been in effect in New Zealand in 1978, for instance, the Social Credit party would have won fourteen seats and other parties would have won four seats (Johnston, 1984, p. 66). In actuality, under first-past-the-post the Social Credit party won one seat in 1978 and two seats in 1981.⁶⁵

Other third parties in first-past-the-post systems tend to be short-lived and tend to rely upon a single personality or issue for their survival. The New Zealand Party, for instance, was essentially a creation of Bob Jones and dwindled when he left the political scene.

The tendency of proportional representation to support a greater number of parties is illustrated in Table 3.3, where we underline those countries which use first-past-the-post. An examination of this table shows that countries with first-past-the-post are least likely to have effective third or fourth parties.⁶⁶

3.6.3 The Nature of Coalition Governments

The presence of more than two parties often necessitates the formation of a coalition government under proportional representation. When many parties

⁶⁵ This comparison is not strictly accurate because voters certainly would have voted differently had proportional representation been the electoral mechanism. If anything, however, we would expect a greater willingness to vote for small parties than was observed.

⁶⁶ Table 3.3 is taken from Lijphart (1984a, p. 122). Lijphart weights the number of parties by the influence each party has. A country with many small parties with little influence, for instance, has fewer “effective” parties than a country where small parties have much influence. Influence is measured in terms of electoral seats. For an explanation of this weighting scheme, see Lijphart (1984a, Chapter 7).

compete through differentiating their product, one party rarely wins enough of the vote to govern alone. Instead, two or more parties will join together and form a ruling coalition. Extensive reliance upon governing coalitions is a primary characteristic of proportional representation systems.

We find a relationship between the presence of proportional representation, the number of parties in the legislature, and the ability of the largest party to win half of the seats in the legislature, as illustrated in Table 3.4.

Table 3.3
Average, Lowest, and Highest Effective Numbers of Parliamentary Parties
resulting from Elections in 22 Democracies, 1945-1980

	Mean	Lowest	Highest
<u>United States</u>	1.9	1.8	2.0
<u>New Zealand</u>	2.0	1.9	2.0
<u>United Kingdom</u>	2.1	2.0	2.3
Austria	2.2	2.1	2.5
<u>Canada</u>	2.4	1.5	2.9
Australia	2.5	2.4	2.7
Germany	2.6	2.2	4.0
Ireland	2.8	2.4	3.6
Japan	3.1	2.0	5.8
Sweden	3.2	2.9	3.5
Norway	3.2	2.7	4.1
Luxembourg	3.3	2.7	4.1
<u>France V</u>	3.3	1.7	4.6
Italy	3.5	2.6	4.4
Iceland	3.5	3.2	3.9
Belgium	3.7	2.5	6.8
Denmark	4.3	3.5	6.9
Israel	4.7	3.4	6.0
France IV	4.9	4.2	5.9
Netherlands	4.9	3.7	6.4
Switzerland	5.0	4.7	5.5
Finland	5.0	4.5	5.6

Source: Based on data in Thomas T Mackie and Richard Rose, The International Almanac of Electoral History (London: Macmillan, 1Q74); European Journal of Political Research 2-9, no.3 (September 1974-81); and John F Bibby, Thomas E Mann, and Norman Arnstein, Vital Statistics on Congress, 1980 (Washington, DC: American Enterprise Institute, 1980) pp 6-7.

3.6.3.1 Negotiating a Coalition

The negotiation of a governing coalition occurs after election results have been tallied. At this stage of the electoral process, parties modify their policy positions

to appeal to each other, rather than to appeal directly to the voters. Minor parties will receive promised policy concessions in return for support in a governing coalition. Coalitions tend to be formed among parties that are relatively close in their political views (Lijphart, 1984a, Chapter 4). By forming coalitions with ideologically closer parties, each party avoids especially distasteful concessions.⁶⁷

Table 3.4: Relationship Between Electoral Systems and Single-Party Majority Government, 1982

	Parties Winning Seats	Largest Party's Share Seats	Largest Party Wins Half of Seats
	Latest Election N	Percent	(Percent of Postwar Elections)
Non PR Systems			
Australia	3	43	20
Britain	9	53	91
Canada	3	52	54
France V	6	56	28
Japan	6	56	53
New Zealand	<u>3</u>	<u>51</u>	<u>100</u>
Average	5	51	58
PR Systems			
Austria	3	52	45
Belgium	13	20	7
Denmark	9	34	0
Finland	8	26	0
Germany	3	45	11
Ireland	4	45	33
Israel	10	40	0
Italy	12	41	11
Luxembourg	6	41	0
Netherlands	12	31	0
Norway	7	42	40
Spain	10	58	33
Sweden	5	48	8
Switzerland	<u>13</u>	<u>25</u>	<u>0</u>
Average	8	39	13

⁶⁷ In Italian politics, for instance, most parties find it especially difficult to offer acceptable concessions to the Communist Party, and thus prefer to exclude the Communists from coalitions.

Source: Calculated from Mackie and Rose (1982), updated for 1982 by Rose (1984, p. 80).

Proportional representation systems involve two rounds of promise-making whereas the Westminster system involves only one. Under proportional representation parties first promise to their electorate various policy changes. Election results are then tallied and a second round of promise-making may ensue, this round among the parties, rather than between the parties and the electorate. Proportional representation is thus less

“representative’ than it at first appears. Receiving seats in the legislature is not the same as having political power.

The presence of the second round of negotiating and promise-making affects the operation of electoral campaigns. Voters know that all party promises are subject to later renegotiation once a party attempts to form a governing coalition. Proportional representation institutionalises the renegotiation of earlier electoral promises. Although parties offer voters a clearer choice *ex ante*, voters also know that promised distinctions will be moderated *ex post* to form a governing coalition.⁶⁸

The second round of negotiation also implies that voters can never ensure that a particular party never reaches power. Even if a strong majority of voters desire that this party does not reach power, the party may negotiate its way into power in the post-electoral stage. Voters lack a decisive and final means to punish parties that have displeased them or broken past promises.

Once a governing coalition is in place, the behaviour of each party in the coalition is monitored primarily by the other coalition parties. Parties are under pressure not to disturb other coalition members for fear that the alliance will collapse.

The influence of minor parties upon coalition formation is frequently quite strong. In Germany, for instance, there are three parties that have contributed to ruling governments: the Christian Democratic Union (CDU), the Social Democratic Party (SDP) and the Free Democratic Party (FDP), with FDP as the smallest of the three. Nonetheless, the FDP has a critical influence upon the composition and policies of the ruling government.⁶⁹

⁶⁸ For a treatment of proportional representation coalitions and voting behaviour using game theory, see Austen-Smith and Banks (1988) and Baron (1992).

⁶⁹ Only in 1957, when the CDU/CSU polled slightly more than fifty percent of the vote under Adenauer, was a coalition unnecessary. On the general background of German politics, see Conradt (1986), Padgett and Burkett (1986), and Livingston (1986).

Neither of the two larger German parties generally receives enough votes to rule alone. The absence of a stand-alone mandate implies that the FDP, often with less than ten percent of the vote, effectively decides which party will lead the ruling coalition. Twice, in 1969 and 1982, the FDP switched coalition partners so as to create a new national government.

The FDP also insists upon policy concessions for their support in a coalition; these concessions have generally been in the area of economic policy. SDP unwillingness to meet

these concessions was the primary reason why the FDP shifted support to the CDU in 1982. Perhaps the most drastic case of conditionality came in 1961, when the FDP alliance with the CDU was based upon on the explicit condition that the CDU would not run Konrad Adenauer for chancellor in the next election.⁷⁰

3.6.3.2 The Nature of Monitoring under Different Systems

The necessity of constructing a ruling coalition affects the content of policy under proportional representation. Smaller parties obtain greater influence over policy and the electorate in general has a lesser influence. Parties in a governing coalition are less accountable to the electorate in general and more accountable to other coalition members.

Under proportional representation direct electoral constraints are generally weaker. Parties are more ideological in nature and are less closely constrained by the electorate from implementing their vision of what is good for the country. These same parties, however, face stronger constraints from the other parties in the coalition.

The use of other parties as monitors weakens electoral accountability but may strengthen the monitoring process in general. Voters are not always the most efficient monitors because their information about politics is often poor and their incentive to monitor politicians closely is weak (Downs 1957). Under a Westminster system, intra-party constraints (e.g. ability to deliver caucus and avoid a vote of no confidence; see Chapter 2) are used to monitor the cabinet but voters are still responsible for monitoring the party.

Under proportional representation, in contrast, parties in the coalition have a strong incentive and ability to monitor each other. The coalition parties are small in number, have good information about politics, and have a clearly defined policy programme. By concentrating the monitoring function in political parties,

⁷⁰ On the influence of the FDP in German coalition politics, see Padgett and Burkett (1986, Chapter 5).

we sacrifice representative monitoring but improve the quantity and quality of the monitoring that occurs.⁷¹

Proportional representation systems separate initial sources of political support (voters who supported the party) from post-election monitoring (other parties in the coalition) to a greater degree than Westminster systems do. For this reason, post-election monitoring is

less concerned with the fulfilment of initial campaign promises and more concerned with enforcing what other coalition members regard as “good government.”

3.6.4 Greater Separation of Powers under Proportional Representation

Proportional representation usually involves a greater degree of separation of powers between legislative and executive branches of government than do Westminster systems. As we saw in chapter two, Westminster systems fuse the executive and legislative branches into a ruling cabinet drawn directly from parliament. Systems of proportional representation, while drawing the executive branch from the representative chamber(s), create an executive branch with greater independence. Conflict of opinion between executive and legislative branches, for instance, is more likely under proportional representation (Lijphart, 1984a, Chapter 5).

The weakened links between the executive and legislature result from changes in conventions and incentives, rather than from explicit changes in legal rules. The legal relations between the executive and legislative branches under proportional representation often do not differ greatly from the legal relations found in Westminster systems. In most countries with proportional representation, for instance, the legislature can depose a government with a vote of no confidence and the executive has the right to call for new elections.⁷² Nonetheless, the presence of multi-party coalition governments weakens the link between these two branches of government.⁷³

⁷¹ Opposition parties may attempt to monitor in a Westminster system, but unlike coalition parties under proportional representation, Westminster opposition parties have very little influence over the behaviour of the individuals being monitored.

⁷² Norway, which uses proportional representation, is one exception, to this generalisation.

⁷³ Separation of powers under proportional representation, however, is still not nearly so strong as in systems with an explicit separation of powers, such as the American system of government.

First, the balance of power in the executive branch differs from the balance of power in the legislature of a coalition government. While smaller parties are usually assigned seats in the cabinet, their influence in the cabinet is generally less than their percentage contribution to the coalition. The largest party tends to control the position of prime minister (or president, in some countries) and therefore obtains a disproportionate influence in the executive branch. Executive and legislative branches identify with each other less closely and greater divergence of opinion is likely.

Secondly, the presence of coalition governments implies that the prime minister and legislature have a diminished ability to influence each other through intra-party constraints and incentives. We have argued previously that both the executive and legislature have an incentive to cooperate because long-run payoffs depend upon stature and influence within the party. Stature and influence within the party can be used to ensure future jobs, influence over party policy, assignment to desirable tasks, etc.

When a significant portion of the legislature does not share a party with the prime minister, these constraints are weakened. The prime minister and cabinet have greater difficulty in influencing members of the legislature, and vice versa. Not only is influence diminished across party lines, but also within the same party. The executive is less inclined to influence its own party members when it knows that other members of the coalition will not follow suit. Similarly, members of the executive's party in the legislative coalition have less influence over the executive because their partners in the legislative coalition (i.e. members of other parties) have less influence over that executive.

3.6.4.1.1 Effects of Separation of Powers

The increased separation between legislative and executive branches under proportional representation affects the content of government policy. Governments will find it more difficult to act and when they do act, will act more slowly. The chances that any given piece of legislation will pass are smaller. In general, government becomes more conservative (in the literal sense, and not necessarily in the modern political sense). Governments are less likely to commit errors but also less likely to implement policy improvements. Continuity of policy increases in likelihood.

The increased separation of powers affects also the incentive to propose legislation and address national problems. When these two branches of government are not strictly unified, voters are uncertain which branch is to be assigned blame or credit for events and policies. Accountability declines and

each branch of government is more likely to attempt to pass its favoured policies rather than cater to voter demands.

3.6.5 Stability and Tenure of Governments

Proportional representation and Westminster systems create different degrees and kinds of stability in ruling governments. Under proportional representation, coalition government is likely and stability depends upon the ability of the ruling coalition to hold together. Defections from the coalition threaten the stability and tenure of governments. Under Westminster systems, the tenure of governments depends more directly upon voters and intra-party constraints.

Many early critics of proportional representation focused upon instability as a fatal flaw in that system of government. This criticism was especially popular in the 1930s and 1940s (see Hermens (1941), for instance). The failed Weimar democracy that led to totalitarianism had been based upon proportional representation and evinced little stability. Governments would form only to find themselves dissolved in short order because coalition participants could not agree upon policy and a balance of power within the coalition. Centrist governments frequently were dissolved when extremist parties on the left and right would defect jointly; the extremist parties left to their own devices, however, also were incapable of forming a stable government. The dictatorship of Hitler arose in this political vacuum.

The potential for instability under proportional representation follows from the nature of the electoral mechanism. When no party achieves a majority of the vote, there is always more than one potential ruling coalition. Once a coalition has been formed, the losers can, in principle, always break the initial coalition by offering some of the coalition participants a better deal. The greater the number of parties, the greater the number of potential coalitions and the greater the potential for instability.⁷⁴

The instability charge against proportional representation has fallen out of favour in recent years. Post-war experience on the European continent has shown that proportional representation systems can possess considerable stability and need

⁷⁴ The intuition behind coalition instability can be illustrated by considering the analogy of a simple game. Imagine that three people are vying for a dollar bill. If any two of these parties can agree how to divide the dollar amongst themselves, they keep the dollar and are paid that division. If two parties agree, for instance, to a fifty-fifty division, the losing party (who has nothing) will come along and offer fifty-one cents to one of the coalition members, who will jump ship. The new fifty-one to forty-nine coalition also is unstable, however, because the new loser can offer fifty-fifty to the player with forty-nine, and so on. On the mechanics and mathematics of coalition instability, see Mueller (1989).

not lead to totalitarianism. (West) Germany, for instance, readopted proportional representation after the war and has been one of the most stable polities in the world. Other countries, such as Switzerland, have used proportional representation for much longer without any tendency towards either chaos or totalitarianism.

Furthermore, instability of government does not necessarily imply instability of policy. In Italy, for instance, few governments since the end of World War II have lasted more than a year; by 1981 the forty-third postwar government had been formed (Hermens, 1984, p. 27). Yet, the Italian policy environment is not quite as chaotic as it may first appear. The major party, the Christian Democrats, have remained political leaders despite ever-shifting

coalitions and led Italy through a period of rapid economic growth and political freedom.⁷⁵

3.6.5.1.1 Minimum Winning Percentages

Systems of proportional representation have also developed institutional devices to increase stability while keeping the basic features of the electoral mechanism intact. Perhaps most important is the use of minimum winning percentages' to keep very small parties out of the legislature.

In Germany, for instance, small parties must achieve a minimum of five percent of the national vote (or 3 district seats won outright) to achieve legislative representation. The Christian Democrats, the Social Democrats, and the Free Democrats have reached this hurdle, the Greens have reached this hurdle sometimes and with difficulty, and numerous small parties (including the neo-Nazis) have failed to reach this hurdle. For New Zealand, the Royal Commission report suggests a minimum winning percentage of four percent (or one seat won outright), with exemptions for "ethnic" parties, such as Maori and Pacific Islander parties.

The use of minimum winning percentages appears important in protecting the stability of proportional representation. Episodes where proportional representation was unsuccessful, such as Weimar Germany, did not possess this restriction. Countries with a relatively low minimum winning percentage, such as

⁷⁵ The government of Northern Ireland is an example of the other side of this coin. The Unionists ruled for fifty-one years (1921 to 1972) but did not succeed in producing a stable policy environment. In Italy, we have seen policy stability but the negative side of the coin has involved considerable corruption, difficulty in undertaking reforms, and little accountability.

Israel (traditionally one percent and in the last election, one and one half percent) also are plagued by greater instability. The low minimum gives small, extreme parties (in Israel the religious right) the power to bring down governments or hold these governments captive. Dissatisfaction with this state of affairs recently led Israel to institute direct election of the prime minister. Furthermore, there is still debate in Israeli politics concerning increasing the minimum winning percentage yet further.

By limiting the number of parties we limit not only the number of potential winning coalitions but we affect also the nature of the parties likely to join coalitions. The minimum winning percentage encourages the formation of parties that represent a relatively broad spectrum of opinion, are committed to the democratic process, and expect to participate in numerous future elections. Parties of this sort have a stake in the democratic system and wish to protect their long-term reputation. These parties are less likely to engage in irresponsible coalition-jumping for the purpose of creating trouble for the ruling coalition or garnering temporary political advantage.⁷⁶

No country with proportional representation represents minority opinion to the greatest degree possible. The use of minimum winning percentages, electoral formulae which award disproportionate seats to large parties (because of the integer problem, as explained above), and the coalition formation process, all limit the representation of minority opinion. These electoral mechanisms contribute to stability and have stood the test of time. Nonetheless, they show that proportional representation supports stability by limiting the very features which motivate proportional representation in the first place, representation of minority opinion.

Although the instability charge, in extreme form, is not a compelling critique of proportional representation, the average life of governments is shorter under proportional representation than under alternative electoral systems, as illustrated in Table 3.5.

Differences in electoral tenure, however, should not be overstated. The proportional representation systems with governments of relatively short duration (e.g. Belgium, Denmark, Finland, and Italy) have extremist parties represented in

⁷⁶ This point does suggest that proportional representation is best suited to countries with an established tradition of democracy with responsible political parties. Proportional representation will perhaps prove less effective in the emerging democracies of eastern and central Europe, most of whom have adopted or are adopting some form of proportional representation (see Elster, 1991). As an exception to this point, West Germany adopted proportional representation successfully after World War 11, although the Germans did not have an established democratic tradition at the time.

the legislature. In countries where extremist parties are relatively weak or not present (Germany, the Netherlands, Norway, and Sweden), the average tenure of governments under proportional representation is very close to the average tenure of democratic alternatives (Riker, 1984, p. 105).

The shorter nature of government tenure under proportional representation does reflect differences between proportional representation and Westminster systems of government. Under proportional representation, coalition governments make continued rule dependent upon a greater number of independent sources of power (e.g. different parties in the coalition). When the concept of representation is placed before that of demarcation of power, the continued rule of any single government becomes more fragile. Yet at the same

time, a change of government may represent a smaller change in policy, because of the greater separation of powers under proportional representation and the ability of political parties to re-emerge in subsequent coalitions.

Table 3.5: Effective number of parties and average cabinet durability in 20 democracies, 1945-1980

Average Cabinet Life		Fewer than 3.0 parties	3.0 to 4.0 parties	More than 4.0 parties
	More than 5.0 years		Australia (2.5) Austria (2.2) Canada (2.4) Ireland (2.8) New Zealand (2.0) United Kingdom (2.1) Germany (2.6)	Sweden (3.2)
2.5 to 5.0 years			Iceland (3.5) Japan (3.1) Luxembourg (3.3) Norway (3.2)	Denmark (4.3) Netherlands (4.9)
Less than 2.5 years			Belgium (3.7) France V (3.3) Italy (3.5)	Finland (5.0) France V (4.9) Israel (4.7)

Note: The effective number of parties is shown in parentheses. From Lijphart (1984a, p. 148).

The shorter average tenure of governments under proportional representation has both benefits and costs. On the positive side, governments which are not satisfying their mandate can be deposed through a reshuffling of coalitions, On the negative side, governments can be deposed simply because they fail to

satisfy their coalition partners on matters that are not necessarily in the national interest.

3.7 Concluding Remarks

The forthcoming referendum offers four different electoral systems as alternatives to the status quo: preferential voting, single transferable vote, the supplementary member system, and the mixed-member proportional system.

Each of these electoral mechanisms offers a very different constitutional option with different properties and incentives. It is a mistake to lump these alternatives under the general heading of “proportional representation”. Indeed, two of the options (preferential voting, the single transferable vote) do not provide directly proportional representation at all and possess properties contrary to traditional systems of proportional representation.

To start with the two less radical alternatives, we recommend against both preferential voting and the supplementary member system. Preferential voting does not provide for proportional representation, but instead allows second place choices to count when no candidate receives fifty percent of the vote. The basics of the Westminster system are kept fundamentally intact. In this sense the adoption of preferential voting would not have drastic consequences in either a positive or negative direction. Preferential voting would be a safe choice, but we do not find a strong argument for changing the status quo to institute preferential voting.

The supplementary system also keeps the Westminster system fundamentally intact, while adding some seats to parliament based upon proportional representation. Unless the number of supplementary seats is large (which it is not in current proposals), the supplementary member system also offers few advantages. Twenty to twenty-five seats based upon proportional representation are a fraction of parliament to begin with. Furthermore, these seats would likely become token seats based upon party patronage with less influence than their numbers would indicate. The electoral mechanism would become more complicated and the accountability of first-past-the-post members would decrease slightly. To whatever extent we are interested in the virtues of proportional representation, we should consider the mixed-member proportional system instead.

Moving on to the more radical alternatives, we recommend most strongly against the single transferable vote. This system, used in Ireland, allows voters to rank all candidates, using a complex formula to determine the winner. The result tends to be a breakdown of party politics and incentives for representatives to serve local constituents rather than to check the executive. Furthermore, the electoral mechanism would be complicated significantly and voters and candidates would have incentives to engage in strategic behaviour. Of the four systems under consideration, the single transferable vote is the only one with unambiguously negative consequences.

The most serious of the four options under consideration is the mixed-member proportional system, used in Germany. This system would offer parliamentary representation for smaller parties and make coalition governments likely. Experience on the European continent with the mixed-member system (and assorted variants) illustrates that this form of proportional representation is a viable and stable form of government.

The mixed-member proportional system would offer some advantages over current institutions. Specifically, the necessity of assembling and maintaining a coalition government places checks upon governmental powers and allows greater representation for minorities. Furthermore, the process of government is made more representative in the sense that a greater number of different opinions can be heard in the legislative chamber.

Nonetheless, we do not favour the mixed-member proportional system for New Zealand. Under this system, minority interests may hold the ability to extract excessive policy concessions from a government and obtain undue power. In Germany, for instance, the sentiments of the Free Democratic Party (FDP, a minority party that usually wins between five and ten percent of the vote), determine which of the two major parties will come to power. The decision of the FDP concerning which coalition to create supersedes much of the voters' influence. In this sense coalition governments and proportional representation are less democratic and less representative.

Furthermore, government becomes less accountable to voters when coalition formation is present. Voters are never sure which party is responsible for which decision and voters can never decisively turn a party or government out of power. We see the negotiation of coalitions after an election as contrary to democratic principles. Promise-breaking is institutionalised and the influence of party machines increases. In addition, under the mixed-member system political

parties could obtain even more power by controlling the process of candidate nomination.

The mixed-member system also complicates the electoral mechanism and is not understood by many voters. Even in Germany, a well-educated country where the system has been used for many years, the workings of the system are not well understood.

More generally, we do not favour the mixed-member system because we expect the Westminster system to perform reasonably well in the future, provided that New Zealand remains an open economy. Changing the electoral mechanism would increase policy uncertainty and affect the workings of government in an uncertain manner, without a strong presumption in favour of improvement.

ANNEX A: THE POSSIBILITY OF PERVERSE RESULTS UNDER THE SINGLE TRANSFERABLE VOTE

Consider the operation of a transferable vote system for the selection of one representative (we present an example with only one representative for purposes of expositional simplicity; the examples are fully generalisable). Assume that there are four classes of voters with relative ratios of 7-6-5-3. That is, the first class of voters represent 7/21 of the population, or one-third. The second class represents 6/21, etc. The four candidates are Adams, Brown, Cobb, and Dale and voter rankings are as follows:⁷⁷

Initial Voter Tabulations

- | | | |
|------|----|--------------------------|
| I. | 7: | Adams, Brown, Cobb, Dale |
| II. | 6: | Brown, Adams, Cobb, Dale |
| III. | 5: | Cobb, Brown, Adams, Dale |
| IV. | 3: | Dale, Cobb, Brown, Adams |

Under these rankings Adams will win the election. The Droop quota is 11 but no candidate has eleven first-place votes. We then drop Dale, the candidate with the lowest number of first-place votes, and distribute his first-place votes to Cobb. Still no candidate satisfies the Droop quota so then we drop Brown, who has the (new) lowest number of first-place votes.

⁷⁷ This example is adapted from Brams and Fishburn (1984).

Adams is elected even though Brown would defeat any other single candidate in a one-to-one election, including Adams himself. Furthermore, an additional number of first-place votes can hurt a candidate. Return to the above example and imagine that the fourth class of voters place Adams first rather than last. The new ballot rankings are now as follows:

Further Voter Tabulations

- I. 7: Adams, Brown, Cobb, Dale
- II. 6: Brown, Adams, Cobb, Dale
- III. 5: Cobb, Brown, Adams, Dale
- IV. 3: Adams, Dale, Cobb, Brown

Although Adams now has more first-place votes, these ballots will now elect Brown rather than Adams. Initially no candidate has the Droop quota so we drop the candidate with the lowest number of first-place votes, Dale. We then drop the candidate with the next lowest number of first-place votes, Cobb. (Note that formerly we had dropped Brown here but now we drop Cobb; there are no longer first-place votes from the fourth class of voters to give to Cobb since Adams stays in the race.) Brown now has the Droop quota of eleven and is elected. Adams loses in spite of his increased popularity.

Not only is the final result perverse, but voters have an incentive to lie about their true preferences. Since the fourth class of voters preferred Brown to Adams under the initial set of rankings, these voters have an incentive to mark their ballots to rank Adams above Brown, precisely to prevent Adams from being elected.

4.0 UNICAMERALISM AND BICAMERALISM

4.1 Introduction

The idea that a second chamber of some form might be reintroduced in New Zealand has surfaced periodically in debates on constitutional reform. Most recently, the government has proposed that a referendum should be held at the time of the 1993 general election on the reinstatement of a second legislative chamber.⁷⁸

The majority of governments in established democracies have bicameral legislatures.⁷⁹ The incidence of unicameralism and bicameralism in industrialised countries is shown in Table 4.1⁸⁰

Table 4.1: Unicameralism and Bicameralism in 21 Industrialised Countries (based on population)

	Small Countries		Large Countries	
	Unitary	Federal	Unitary	Federal
Unicameral	Denmark Finland Iceland Israel Luxembourg New Zealand Norway Sweden			
Bicameral	Ireland	Austria Switzerland	Belgium France Italy Japan Netherlands United Kingdom	Australia Canada Germany United States

⁷⁸ See Jackson (1991) on the politics of abolition, and the ongoing interest in bicameralism in New Zealand. Catt et al. (1992) discuss the present proposal.

⁷⁹ Unicameralism has become more common in recent decades. Denmark adopted a unicameral system in 1953, and Sweden in 1971. A number of newly democratic countries have also adopted unicameral models. (On the shift to unicameralism in Denmark, see Arter (1991); on Sweden see Sydow (1991).)

⁸⁰ This table is drawn from Lijphart (1984a), p. 94.

New Zealand had a bicameral system from the establishment of a domestic system of government in 1852 until 1951. The abolition of the second chamber (the Legislative Council) in New Zealand was at the time based more on concerns about the value of a particular form of bicameralism than about the validity of bicameralism as a general approach to government.

Traditionally, the virtues attributed to second chambers were explicitly anti-democratic in nature. Second chambers were seen as a means of imposing a conservative check on the exercise of the popular will in houses of commons, a check that was often deliberately protective of the interests of the landed nobility, as in the case of the UK House of Lords. However, the protection of landed or “noble” interests by means of an aristocratic second chamber was also a concern that motivated the framers of the US constitution, and the founders of governments in the British colonies.^{81,82}

In the present century the case for or against second chambers has usually been couched in terms of their value and efficacy as a pro-democratic check on the exercise of government power. It is this potential role of second chambers that is the focus of the present chapter.

4.1.1 Summary of Findings

Not all second chambers can routinely affect legislative outcomes. A second chamber will only be a strong component of a system of government if:

- it is elected, and the basis of election differs from the first chamber, so that the composition of the two chambers differs; and
- the powers of the two chambers to influence legislation are roughly equivalent.

In New Zealand, the introduction of a strong second chamber would fundamentally alter the nature of accountability in government, and in a manner which would in our view be unsustainable. Westminster systems of government revolve around the accountability of the executive to parliament. With two equally powerful but differently composed chambers, the

⁸¹ On the use of a second chamber to balance the “aristocratic” against the “popular” interest in the US, see Madison’s Federalist Papers 62 and 63 (Hamilton et cii., 1961).

⁸² In attempting to follow the model presented by the UK House of Lords, the founders of the New Zealand system of government were much exercised by the difficulty of finding anything approaching a nobility on which to draw. Contemporary journalists described the Legislative Council rather as “a club or lounge of large runholders, retired military men, and nouveaux riches” and “a collection of political old fogies and rich respectable nobodies” (McLintock and Wood, 1987, p. 40).

executive will face continuing conflicts in defining the interests to which it is accountable. As a result of these conflicts, we might expect a general weakening of accountability to the electorate. In particular, we would expect:

- a reduced incentive on the part of politicians to mirror the preferences of the median voter;
- an increased incentive to serve the interest of strong special interest groups;
- an increased incentive to maximise revenue and redistribute resources from citizens to the government;
- an increased incentive to favour particular regions and districts at the expense of other regions and districts;⁸³
- an increased incentive for politicians to indulge their own policy preferences or ideology; and
- a reduced incentive to respond favourably to international constraints.

Accountability conflicts of the kind described here are not necessary features of bicameral systems. Rather, they are a product of the particular combination of strong bicameralism and a Westminster parliamentary system. Strong bicameralism and accountable government could, by contrast, be combined if New Zealand were to adopt a more consensual system of government (for example, with the first chamber being elected on a proportional representation rule), or a presidential system of government (with executive power distanced from the legislature).

The introduction of a weak second chamber, such as a nominated chamber with limited powers to review legislation, would not fundamentally disrupt the operation of a Westminster system of government.⁸⁴ However, its capacity to enhance its operation, at reasonable cost, would also be strictly limited.

⁸³ This outcome will hold where the second chamber is elected under a federal system or by means of regionally-based proportional representation.

⁸⁴ This point is borne out by the experience of the UK and Canada.

4.1.2 Chapter Outline

In Section 4.2, we consider the factors determining the strength of second chambers in bicameral systems, and their capacity to act as a check on first chambers. In Section 4.3, we consider the incentives of second chambers to check the policies of first chambers. In particular, we discuss the implications of different forms of bicameralism for the representation of minority or special interests, the role of parties, and the accountability of representatives for policy outcomes. In Section 4.4 we consider the implications of introducing a plausible second chamber in a majoritarian parliamentary system such as New Zealand's. Our conclusions are set out in Section 4.5.

4.2 Determinants of the Strength of a Second Chamber

Critics of bicameralism have long asserted that second chambers are liable to be either ineffective or destructive; that “if a Second Chamber dissents from the first, it is mischievous; if it agrees with it, it is superfluous”⁸⁵. For example, in the late nineteenth century, the New Zealand Legislative Council frequently disagreed with the House of Representatives, frustrating a number of key policy initiatives. Following the 1891 changes in tenure arrangements, however, the council reached such heights of ineffectiveness that its abolition could pass almost without notice; the government had in practice been functioning on a unicameral basis for some time.⁸⁶ The Australian Senate's tendency to frustrate the intentions of the House of Representatives has fluctuated with the party composition of each. The dismissal of the Whitlam (Labour) government in 1975, for example, followed the successful blocking of supply by the Senate, then dominated by a Liberal-Country party coalition (Epstein, 1976; Jackson, 1992).⁸⁷

Not all second chambers have the capacity to act either positively or destructively. Rather, the presence of this capacity depends on their form and powers. In this section, we consider variations in two key parameters: the mode of selection of members for second chambers, and the powers explicitly or implicitly allocated to the second chamber. The strength and character of constraints created by the second chamber will depend on the combination of these factors.

⁸⁵ Sieyes, quoted in Johnson (1938, p. 12).

⁸⁶ See Jackson (1972, 1991), Lipson (1948), and McLintock and Wood (1987).

⁸⁷ Conflicts of this kind have been relatively common in Australia, in particular at the state level (McLintock and Wood, 1987; Rydon, 1983).

4.2.1 The Basis of Membership

Where the basis for selection is broadly similar between chambers, the second chamber is likely to mirror the first closely in its composition and preferences. Where the basis of selection differs, the second chamber has potential to seek to counteract or alter the legislative proposals of the first.

The basis of membership in the two chambers may differ in one or more of the following ways:

- members of one of the chambers are elected, and members of the other nominated;
- the electoral base or electoral districts differ between the two chambers;
- voting rules differ for the two chambers; and/or
- the term of members differs between the two chambers.

In this section, we describe possible variations and their effects.

4.2.1.1 Nomination

Modes of nomination vary in detail, but appointments to the second chamber are generally based on the recommendation of political leaders. Thus in the UK, the ability of the prime minister to confer peerages introduces a degree of selection by appointment into an otherwise hereditary institution. In Canada, and in the New Zealand Legislative Council before 1951, the second chamber is/was constituted purely of the nominees of successive governments.

The extent to which the party-political composition of the second chamber mirrors that of the first in such cases depends on the relative tenure of members. Initially in New Zealand, for example, members of the Legislative Council were appointed for life. The switch in 1891 to a seven-year term increased the potential for successive party-political appointments.

The similarity or dissimilarity of composition between the two chambers depends in part on the existence of any eligibility criteria for the second chamber. Eligibility criteria may be more restrictive for the second chamber than for the first. Access to a significant proportion of seats in the UK House of Lords by means of hereditary peerages or bishoprics are examples. Alternatively, members of the second chamber may be appointed on a functional or corporatist basis as representatives of particular interest groups.⁸⁸ A variation in the

⁸⁸ A large number of the members of the Irish Senate must be elected from a pool nominated by vocational and cultural interest groups. The corporatist nature of the senate is, however, reduced by the fact that the power to select senators is allocated to national and local legislators, more preoccupied by party politics than by particular sectoral interests (Lijphart, 1984a).

character of representation is less likely where members of the second chamber are appointed by incumbent politicians, unless the tenure of members differs significantly between the two chambers.

4.2.1.2 Electoral Districts and the Electoral Base

Federalism is the most common basis for differences in the electoral base between two chambers.⁸⁹ The usual motivation of federalism is to enable regionally disproportionate representation of interests, by deeming large and small regions equal.⁹⁰ In the US, for example, proponents of bicameralism wanted to ensure that unpopulous states were not overwhelmed by populous states.

In most federal systems, the electors are the same for the two chambers, but the districts within which they vote differ. In Germany, by contrast, the entitlement to elect members to the second chamber (the Bundesrat) is vested in the state governments (Loewenberg and Patterson, 1979).⁹¹ Depending on population, each state selects between three and five Bundesrat members, usually drawn from its state cabinet (Lijphart, 1984a). The powers of the second chamber approximate those of the first on legislation affecting the states, but are less for national policy matters.

In Norway and Iceland the second chamber is elected out of the first chamber by members elected to the first chamber, with an effect close to unicameralism.

4.2.1.3 Divergent Voting Rules

Where the second chamber is popularly elected, the electoral rule may differ from that applied in first chamber elections. For example, members of the first chamber may be elected in a first-past-the-post system, but members of the second chamber elected under some form of proportional representation or preferential voting. This is the case, for example, in Australia, where senate elections use a form of preferential voting.⁹² (In this case,

⁸⁹ Australia, Austria, Canada, Germany, Switzerland and the United States all currently use federal systems.

⁹⁰ The main contemporary exception to this rule among federal systems is Austria (Lijphart, 1984a). In France, in principle a unitary system, an effect akin to federalism is achieved in that the senate is elected by an electoral college in which small, rural communes, together accounting for less than one third of the population, control more than half of the votes (Lijphart, 1984a).

⁹¹ 14 A similar mode of election was used for the US Senate up until the turn of the present century.

⁹² Palmer (1987) and O'Connor (1988) suggest a second chamber for New Zealand elected on the basis of proportional representation, but the retention of the first-past-the-post system for the House of Representatives.

differences in the electoral mechanism between the two chambers are compounded by the federal basis of elections to the senate.) Within bicameral proportional representation systems, the mode of selection may differ between chambers.

Adding a second chamber selected according to a proportional representation rule to a first chamber selected on a first-past-the-post basis is likely (according to the FR rule used) to result in differing representation and party compositions between the two chambers, even if elections are simultaneous. The character of debate and the location of power in the two chambers will also differ. The first chamber will generally be dominated by a single party, and driven by a unified cabinet and strong party caucus system. The second will be more consensual, and driven by the need to maintain coalitions that cross party lines. As a result, disagreement is likely between the houses, and possibly also between members of the same party in different houses.

4.2.1.4 Term of Office

At the limit, members of second chambers may be appointed for life, as is/was the case for the House of Lords and the New Zealand Legislative Council before 1891, or until a defined retirement age.⁹³ Where second chambers are elected rather than appointed, terms for second chamber members range from four to nine years, as against two to five years for their first chamber counterparts. With the exception of Switzerland, the members of second chambers have terms of office which are either equal to or longer than those of first chamber members (Lijphart, 1984a).

In addition, elections for the second chamber are often staggered. In Australia, the Netherlands and Japan, for example, one half of the membership of the second chamber is renewed every three years. In the US and France, one third of the membership of the second chamber is renewed every second and third year respectively. Members of the Austrian, German and Swiss federal chambers are elected at irregular intervals, in a staggered manner (Lijphart, 1984a).

In each case, even where voting rules and districts are similar for the two chambers, their party-political make-up may differ if voter preferences change over time.

⁹³ For example, senators in Canada are expected to retire at 75.

4.2.2 The Powers of the Second Chamber

The second key determinant of the capacity of the second chamber to counteract the legislation of the first is the power constitutionally or conventionally attributed to the second chamber. This capacity will be greatest where the two chambers have either the same powers or differing but more or less equal powers.⁹⁴

In most bicameral systems in established democracies, the second chamber is subordinate to the first chamber. For example, negative votes by the second chamber may often be overridden by a vote of the first chamber. The powers of the second chamber with regard to money bills are typically more restricted than their powers with regard to other legislation. For example, the second chamber may have the power to reject, but not to amend, money bills, as is the case in second chambers based on the UK model.⁹⁵ In parliamentary systems, the cabinet may be exclusively responsible to the first chamber. Where the powers of the second chamber are greatly attenuated, a bicameral system will approximate a unicameral system.

Formally equal powers with regard to the passage of legislation are found in only four cases: Belgium, Switzerland, Italy and the US (Lijphart, 1984a).

In practice, the powers allocated to, or assumed by, a second chamber cannot be treated in isolation from the mode of selection. Second chambers that are appointed rather than elected lack the democratic legitimacy of their elected counterparts, and are typically allocated more circumscribed powers. Appointed second chambers may also be voluntarily circumspect in the exercise of their powers. Indeed, their survival in democratic states may be conditional on such circumspection.^{96,97} Conversely, a second chamber elected by the same electorate as the first is likely to be more aggressive in the exercise of its powers, however limited those powers might be.

⁹⁴ In the US, for example, lower house prerogatives with regard to domestic policy are matched by Senate prerogatives in foreign policy.

⁹⁵ The implementation of this rule in the New Zealand Legislative Council was a matter of some controversy in the nineteenth century (McLintock and Wood, 1987).

⁹⁶ J. S. Mill, for example, noted that if a second chamber was less representative than the first, it would not have any real ability, in a democratic state, to resist even the 'aberrations' of the first: "It might be suffered to exist in deference to habit and association, but not as an effective check. If it exercised an independent will, it would be required to do so in the same general spirit as the other House: to be equally democratic with it, and to content itself with correcting the accidental oversights of the more popular branch of the legislature, or competing with it in popular measures" (1958, p. 189).

⁹⁷ Oliver (1991) attributes this approach to the UK House of Lords in the post-war period; Stockley (1986) does similarly for Canada.

4.2.3 Conditions for Strong Bicameralism

Two conditions need to be met for a second chamber to be in a strong position to check the policy decisions of the first (Lijphart, 1984). First, the two chambers must differ in the nature of their composition (be “incongruent”). This condition will hold in the majority of nominee systems, in federal systems which yield disproportionate regional representation, and in systems where the electoral mechanism differs between chambers. Secondly, the powers allocated to the two chambers must be more or less symmetrical; they must have either the same powers with respect to legislation, or different but equally significant powers. The combination of these factors in thirteen countries with bicameral legislatures, and their implications for the strength of bicameralism, are set out in Table 4.2.⁹⁸

Table 4.2: Three Types of Bicameralism, Based on the Congruence and Symmetry of the Two Chambers

	Incongruent	Congruent
Symmetrical and moderately asymmetrical	Strong bicameralism: Australia Germany Switzerland United States	Weak bicameralism: Belgium Italy Japan Netherlands
Extremely asymmetrical	Weak bicameralism: Canada France United Kingdom	Insignificant bicameralism: Austria Ireland

In countries such as Belgium, Italy, Japan and the Netherlands, where the powers of the two chambers are roughly equal, the likelihood that the use of these powers will result in significant modifications in policy outcomes is reduced by the fact that the two chambers are elected on a similar basis, and therefore produce similar patterns of representation of interests. In Canada, France and the UK, where second chamber members are selected on a very different basis from members of the first chamber, the potential for policies to be altered to accommodate differences in representation is limited by the attenuated powers of the

⁹⁸ This table is drawn from Lijphart (1984a), p. 99.

second house.⁹⁹ Similar conditions applied in the New Zealand Legislative Council from 1891 (Jackson, 1972).

By contrast, in Australia, the US, Switzerland and Germany, more or less equal powers coincide with different electoral bases, and the conditions are set for the second chamber to operate as an active and effective check on the first. The nature of this check differs, however, in that whereas Australia and the US are majoritarian systems, Germany and Switzerland are consensus or coalitional systems. We will consider the implications of this difference in Section 4.4.

4.3 Bicameralism and the Flavour of Democracy

Arguments in favour of second chambers are generally couched in terms of beneficial ways in which second chambers might act to check legislative power, by:¹⁰⁰

- preventing usurpation of power or unscrupulous behaviour by first chamber legislators¹⁰¹
- ensuring a more reasoned or wider representation of the will of the electorate than is possible with a single chamber; and
- enhancing the quality of the legislative process and legislative outcomes.

⁹⁹ In Canada, however, there is growing support for transforming the senate into an elected body, with membership equalised across the provinces and enhanced legislative powers (The Economist, 13 June 1992).

¹⁰⁰ See, in particular, Johnson (1938), Lees-Smith (1923) and Stockley (1986).

¹⁰¹ James Madison argued, for example, that a second chamber would reduce the chances of usurpation of power “by requiring the concurrence of two distinct bodies in the schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient”, and would provide a safeguard against yielding to sudden or violent passions, or appeals for demagogic leaders (Federalist Paper 62, in Hamilton et al., 1961). In the case of the American Senate, the ability to effect such outcomes rested in the co-equal powers allocated to the Senate and the House of Representatives, with each being allocated the power to check the legislation of the other. The incentive to check abuses of powers was seen as resting in the jealous interest of each chamber in defending its own powers (Johnson, 1938). J. S. Mill based his case for a second chamber more purely on the “evil effect” on the mind of any politician of recognising that he must seek only his own consent to his actions. A second “constituted authority” was in his view required in addition to the electoral check to control the despotism of a majoritarian single chamber (Mill, 1958). It should be noted that Mill was writing before the institution of mass suffrage, the rise of the political party, and the evolution of the constraining power of party caucuses described in Chapter 2.

However, the capacity to influence policy where the conditions for strong bicameralism are met does not in itself tell us much about the incentives of a strong second chamber to use its powers in a pro-democratic fashion. In this section, we consider the incentives of strong second chambers, focusing on:

- the representation of minority and special interests;
- the role of political parties;
- accountability to the electorate; and
- the capacity to enhance the quality of the legislative process.

In most cases, bicameralism alters the basis of representation, and the sensitivity of legislatures to minority and special interests. Its implications for the role played by political parties is more directly dependent on the electoral rule in each chamber, and the congruence of these rules between chambers. Bicameralism weakens accountability to the extent that it makes decision-making by members of the two houses less transparent than in a unicameral system, and opens up possibilities for vote trading between houses. A second chamber may, in a more narrow sense, enhance the debating and drafting of legislation. However, the benefits of this last role may be exceeded by the costs of operating the second chamber.

4.3.1 Representation in Bicameral Systems

Unicameral systems are by and large restricted to operating on a single electoral rule.¹⁰² In selecting this rule it is necessary to weigh up preferences on such matters as the balancing of minority and majority interests, and the role of parties vis-a-vis parliamentary coalitions in determining policy consensus. The nature of representation and accountability of representatives to the represented, as described in Chapter 3, depends on the rule chosen.

An explicit intention of bicameralism is to afford a structure of representation that may differ from representation in a single house. For example, federal systems are designed to superimpose a representation of regional interest over the representation of popular interest. Where regions differ in size, or regional representation is not proportionate to the population

¹⁰² The provision in New Zealand for four Maori seats is an exception to this rule.

base, the result will be a skewing of representation in the system as a whole towards particular regions.¹⁰³

In a bicameral system, there are two chances at choosing an electoral rule, and different bases of representation may be used between the chambers. If second chamber members are selected on a different basis from first chamber members, and are themselves subject to an electoral check, the interests that members seek to serve will differ between chambers. In order to promote their own re-election, members of the second chamber will, from time to time, wish to amend or reject the policy decisions of the first, and promote policies of their own.

If the two chambers have equivalent legislative powers, differences in the basis of selection of members between chambers will have a similar effect to proportional representation in a unicameral system. The passage of legislation will depend on an ability to achieve consensus between the two chambers. The mode for achieving consensus will, however, differ from a unicameral PR system, because decision-making in bicameral systems is sequential. Policy outcomes will be shaped by traffic between the two chambers. The accountability of members of either chamber to the electorate will depend on the transparency of dealings between the chambers.

In general, strong bicameralism, like strong proportional representation, reduces the predictability of policy outcomes. It also reduces the ease with which policy may be passed. In a unicameral Westminster system, the passage of legislation requires a simple majority in parliament. In a bicameral system, the same result can only be achieved if representation in the two houses is broadly similar (or if the second chamber has very limited powers). In other words, legislation can be passed by a simple majority only under weak forms of bicameralism. In strong bicameral systems, legislation may only be passed by achieving the equivalent of a super-majority in a unicameral system (Buchanan and Tullock, 1965). The executive therefore has less flexibility in determining policy than in a Westminster system.

Two chambers are also harder to manipulate than one. Where politicians have preferences of differing intensity about policy issues, they may attempt to trade votes. For example, a politician with a weak preference on one policy issue may vote against his or her preference on this issue, in order to secure the votes of other politicians on an issue where his or her preferences about the outcome are relatively strong. (This practice is referred to as “log-rolling”.) Securing a majority by trading votes is more difficult where there are two houses. With log-rolling, it is possible for a little over 1/4 of voters to control a unicameral

¹⁰³ In addition, the electoral college mechanism by which presidential candidates are selected in the US is designed to prevent candidates from concentrating their campaign efforts on a few populous regions only.

legislature, whereas over 7/16 are required to control a two-house legislature (Buchanan and Tullock, 1965).

The impact of bicameralism on the ability of minorities or special interest groups to influence policy depends on the form of bicameralism. Some forms of bicameralism are designed to confer explicit electoral advantages on particular groups. Clearly, federalism (when based on states of varying sizes) does so for lightly populated regions.¹⁰⁴ The French system of electoral colleges does so for rural voters. Systems where members of second chambers are selected by local governments will gain a flavour of local government politics and preoccupations. And where second chamber members are elected on a corporatist basis, they will reflect the interests of those sectoral groups large or influential enough to gain votes in the selection process.

In each of these cases, an element of inequality is introduced to voting power, independent of the particular electoral rule used. The result may be significant for the fortunes of particular political parties. In some Australian states, for example, the bias towards rural districts in second chamber elections historically made it difficult for the Australian Labor Party to gain majorities in state senates (Rydon, 1983).

Differences in the character of the two chambers in a bicameral system may affect the nature of representation and policy outcomes. Second chambers are generally smaller than first chambers.¹⁰⁵ As a result they provide a more focused target for lobbying by special interest groups than larger, more disparate first chambers. The intensity of such lobbying, and the nature of the groups that practise it, will depend on the powers of the second chamber. Clearly, relatively weak second chambers will be less of a target than strong ones, and lobbying will focus on the perceived areas of greatest strength. In the US, for example, it is natural for small, local lobbies to focus on members of the House of Representatives. Groups with a state-wide basis or a foreign policy focus are more likely to lobby their senators.¹⁰⁶

Differences in the composition and institutional structure of the two chambers may also be reflected in differing policy perspectives. In the US, for example, deliberations in the House

¹⁰⁴ In addition, the existence of a federal system may change the nature of policies voted for. See, for example, Rose-Ackerman (1981) on the use of federalism to shift costs and benefits between state jurisdictions.

¹⁰⁵ The House of Lords in the UK is the major exception, although in practice the active membership of the Lords (increasingly dominated by the life peers) is probably smaller than the active membership of the Commons.

¹⁰⁶ There are further differences. Fenno (1982) notes that media coverage of Senate elections far exceeds coverage of elections for the House of Representatives, and that Senators have considerably greater recognition and status than their House counterparts.

of Representatives are dominated by a committee system, while deliberations in the Senate are fashioned more by principles of reciprocity. When members of the House and of the Senate come to confer on matters of disagreement over policy, the former tend to be seeking to defend bills fashioned in their committee workshops, while the latter are more concerned with ensuring the protection of individual senators' concerns to meet the interests of distinct segments of the public (Longley and Oleszek, 1989).

4.3.1.1 Representation in Nominated Second Chambers

Second chambers based on nomination generally become a means of patronage. Patronage on the part of party leaders has a dual function of providing incentives for performance at other levels of the system (for example, if MPs expect loyalty to be repaid by a second chamber seat upon retirement), and of influencing the behaviour and decisions of the second chamber. Most crudely, the latter may be achieved by filling the second chamber with members loyal to the ruling party in the first chamber.¹⁰⁷

Nomination is sometimes advocated as a means of ensuring the expertise and good character of members of the second chamber.¹⁰⁸ However, the result will more likely be self-serving patronage on the part of the nominators. Politicians who themselves seek re-election will rationally respond to political pressures in making second chamber appointments. They will also be influenced by their beliefs about different candidates' willingness to support favoured policies. The system of patronage that applied to the New Zealand Legislative Council from the turn of the century bore out these concerns.¹⁰⁹ By the time of the abolition of the Legislative Council in 1950, it had become "largely a pensioning-off place for party supporters, lacking form or function" (Jackson, 1972, p. 69). Indeed, as a sweetener to MPs voting on the abolition, the then prime minister, Sid Holland, provided for the money saved by abolition to be applied to a superannuation fund for MPs.

4.3.2 Political Parties under Bicameralism

In a weakly bicameral system, the role played by parties will be the same as in a unicameral system, and will be determined by the electoral rule applied in the first chamber, as

¹⁰⁷ This method was used by the New Zealand National government in 1950 to secure a vote in the Legislative Council in favour of its own abolition.

¹⁰⁸ Brazier (1991) suggests, for example, that the institution of life peerages has meant that the quality of debate in the UK House of Lords now well outstrips that in the Commons. Stockley (1986) writes in favourable terms of the use of patronage in any new second chamber in New Zealand. In particular, he suggests some value in securing membership of the second chamber for talented MPs and distinguished citizens with public sector experience.

¹⁰⁹ See, for example, Jackson (1972) on appointments by Dick Seddon.

described in Chapter 3. Under strong forms of bicameralism, the factors determining the influence of parties will become more complex.

The activism of second chambers in opposing and amending first chamber initiatives will depend on the nature of party representation in the second chamber. Where, for example, a second chamber is elected under some form of proportional representation rule, decision-making within the chamber is likely to be consensual and coalition-based, and participating parties are likely to be dispersed quite widely across the ideological spectrum. By contrast, a second chamber elected on a first-past-the-post rule is more likely to be dominated by a single party targeted at the median voter, in competition with only one other, similarly focused, party.

Where two majoritarian chambers are coupled, but electoral districts and/or terms differ, the two chambers will both be dominated by a single party, but the identity of that party may differ. Where the same party dominates both houses, the second chamber may seldom if ever openly challenge the legislative initiatives of the first. Such differences as do arise between the two chambers (for example because of differences in constituency in a federal system) are most likely to be resolved through such mechanisms as joint caucuses. Where the dominant parties differ between the two houses, the second chamber may indiscriminately veto, amend or undermine the initiatives of the first, for example, by withholding supply.

The implications of alternative forms of bicameralism where the first chamber is majoritarian are considered in more detail in Section 4.4.

4.3.3 Accountability to the Electorate

The consistency and enthusiasm with which members of either chamber promote the interests of their electorate will depend in part on the ability of the electorate to monitor the efforts of members. In an unicameral system, and in particular a majoritarian system, defining and enforcing the accountability of politicians is a straight-forward matter. Identifying those politicians responsible for the passage of any policy is relatively clear.

Responsibility is less straight-forward in bicameral systems. In particular, members of one chamber may rely on members of the other to enforce favoured policy decisions that they expect to prove distasteful to the electorate. For example, a bill may be passed in one chamber, but with the members of that chamber urging the other to reject it.¹¹⁰ The first

¹¹⁰ The success of such techniques is not, of course, guaranteed, as a famous New Zealand case illustrates. In 1893, there was some concern that Seddon, who had supported the passage of legislation for womens suffrage in the House of Representatives, would

chamber may rely on delays in the second chamber as a means of deferring bills close to election time. There are also likely to be trades between the chambers that obscure the accountability of either for specific policies. In the US, for example, a bill must be passed in the same form by both chambers for it to become law. Bills on which such agreement is absent are sent to ad hoc conference committees made up of representatives of the two chambers. These committees are a venue for negotiation, bargaining and compromise; moreover, it is not unusual for a committee to write completely new legislation (Longley and Oleszek, 1989).

4.3.4 The Quality of the Legislative Process

Second chambers have been recommended as means of improving the quality of the legislative process by:

- preventing the hasty or careless passage of legislation;
- critically reviewing legislation;
- taking on specific tasks in the legislative process that can be better performed by an upper than by a lower house; and
- providing a forum for discussion of important policy issues.

The very existence of a second chamber which must process bills before they can be passed into law introduces delay into the legislative process. Whether this delay is fruitful will depend on the ability and incentives of members of the second chamber to use it to effect legislative improvements over and above those secured by, say, an active caucus and select committee system in a first chamber of the kind described in Chapter 2. At the least, the creation of a delay may increase opportunities for the voicing of public opinion on proposed legislation.¹¹¹ The existence of a second chamber cannot, however, preclude the hasty passage of legislation at the end of each legislative session (Johnson, 1938). Where legislation is slowed down, the result may simply be slower, rather than better, legislation.

secretly attempt to frustrate its passage through the Legislative Council. When, unexpectedly, the Legislative Council passed the legislation, tradition has it that “a drunken Seddon vented his rage on the Leader of the Council, seizing him by the throat in the corridors of the House’ (Jackson, 1972, p. 135).

¹¹¹ Whether these opportunities do in practice increase will depend on whether the introduction of a second chamber displaces mechanisms for public representations in the first chamber, for example, through a weakening of the select committee system in the first chamber.

The expectation that a second chamber will improve the quality of legislation also rests on the assumption that the character of deliberation in the second chamber will differ in some fundamental ways from the first. Madison, for example, believed that an American Senate would proceed with more calmness, system and wisdom than a popularly elected House of Representatives (Cronin, 1989). This difference in approach would arise from differences in the manner of election of senators, and from the length of their term of office (now six years, as against two for members of the lower house). In practice, these differences have not yielded appreciable increments of calmness, system and wisdom (Fenno, 1982).

More simply, a second chamber could be expected to have a lesser workload than a first, leaving it with more time to serve on committees or investigate particular areas of government activity (Stockley, 1986). Experience with second chambers in practice offers some support for this argument. Commentators on the later years of the New Zealand Legislative Council, the UK House of Lords and the Canadian Senate, for example, note the quality of select committee debate in these chambers, and their contribution to the consistency and quality of legislative drafting.¹¹² It may be noted that in each of the cases cited the legislative powers of the second chamber are attenuated. It is this factor, rather than the simple existence of a second chamber, which most likely accounts for the time and effort devoted to detailed debate and review. Further, second chambers are not necessarily the most cost-effective means of achieving the quality gains described here. For example, similar or better outcomes may be achieved at lower cost by using a specialist (non-legislative) agency to review the drafting and constitutionality of legislation.

4.4 Second Chambers in Majoritarian Parliamentary Systems

In Chapter 2, we described the operation of a range of constraints on decision-making power in a majoritarian, unicameral system such as New Zealand's. Compared with coalitional or bicameral systems, unicameral majoritarian systems rely heavily on regular elections as a check on the legislative powers of the executive. The potency of the electoral constraint is reinforced by the role played by political parties at election time, by competitive processes within the caucus of the ruling party, and by resource flows reflecting international perspectives of the quality of policy. Decision-makers have some scope to use the electoral process strategically to develop support for favoured policies, but this scope is ultimately constrained by the need to maintain electoral support.

¹¹² On New Zealand, see Lipson (1948); on the UK, see Norton (1981) and Brazier (1991); on Canada, see Buckwold (1983).

In this section, we discuss the likely impact of adding a second chamber on the nature and efficacy of constraints on policy-makers in the New Zealand system. We begin in Section 4.4.1 by describing the characteristics that a second chamber would need to possess in order to be able to check first chamber decisions. In Section 4.4.2 we discuss the likely impact of a second chamber that met these requirements. We then, in Section 4.4.3, discuss the case for a second chamber with relatively attenuated powers.

4.4.1 A Strong Second Chamber for New Zealand

A second chamber, to be in an effective position to affect legislative outcomes, must:

- be selected on a different basis from the first; and
- have powers comparable with, if not necessarily identical to, those of the first.

The most practicable form of strong second chamber in New Zealand would be one elected by means of a proportional representation rule, with powers over legislation broadly equal to those of the first chamber.

4.4.1.1 Mode of Election

As described in Section 4.2.2, selection on a different basis means election on a different basis. A second chamber that is not democratically elected will in practice be in a weak position to gainsay the legislation of an elected first chamber. The relevant alternatives, therefore, would be:

- a federally based second chamber;
- a second chamber elected according to a distinct electoral rule (for example, a form of proportional representation); and/or
- a second chamber with members elected for different terms than in the first chamber.

Federalism involves a guaranteed division of power between central and regional governments (Lijphart, 1984a). It is most common in large countries with geographically or culturally disparate electorates. Switzerland and Austria are the main exceptions to the size rule. In Switzerland cultural diversity with a strong regional basis fits naturally with a

federal system, and federal electorates differ markedly in terms of size.¹¹³ In Austria, by contrast, seats in the federal districts (Länder) are allocated on the basis of population, cultural diversity has no strong regional basis, and federalism does not translate into the existence of a second chamber that differs markedly in composition from the first.

It is notable that all of the four strongly bicameral systems identified in Section 4.2 are federal systems. The link between federalism and strong bicameralism may be explained by the role of the second chamber in federal states of safeguarding the interests of the member states. For federalism to be strong, the second chamber must also be strong (Lijphart, 1984a).

It is difficult to see how strong federalism might be built in New Zealand. When provincial government did exist in New Zealand, it was rooted more in transport and communication problems than in the existence of strong regional interest, and the General Assembly was a unitary rather than a federal body. Where federalism (let alone strong federalism) presently exists, it has arisen as the outgrowth of compromise and cooperation between state governments with significant autonomy, and taxation and police power. Local government in New Zealand today lacks these characteristics. In addition, the population base is probably simply too small to support fully-fledged regional as well as national government. The New Zealand electorate as a whole is smaller than the population of many cities in federal states, let alone the states themselves.

Federalism also tends to be more potent where there is a diversity of regional interest. While diversity clearly exists in New Zealand, there is not the degree of regional diversity that characterises, say, a Switzerland. Moreover, alternative mechanisms have evolved in New Zealand for ensuring some recognition of regional interest at the executive level. For example, prime ministers building cabinets routinely attempt to ensure some balance of South Island and North Island, and rural and urban, representation.

The alternative is to use an electoral rule other than first-past-the-post for the selection of members for a second chamber. In this case, a rule could be chosen that afforded a degree of regional emphasis, without the creation of an explicitly federal system. The regional element in representation in a proportional representation system would, however, be weaker than in a full federal system. More generally, any of the strong forms of proportional representation discussed in Chapter 3 would generate a second chamber where representation differed markedly from that in a first-past-the-post first chamber.

¹¹³ The Swiss federation has four official languages, but cantonal boundaries are such that most cantons can be officially unilingual (Lijphart, 1984a).

Differences in the terms of first and second chamber members could potentially reinforce differences in representation between the houses based on federalism or variations in voting rules. On their own, however, differences in the terms of members are unlikely to generate routine and marked differences in the composition of the two chambers.

4.4.1.2 Powers

As described in Section 4.2.3, strong bicameralism requires an approximate equivalence of powers between the two chambers. The focus of the two chambers may differ in detail. So may the absolute size of their membership. However, the agreement of both chambers to any legislative initiative must generally be required before legislation can be passed. In the US, for example, a majority is required in both the House of Representatives and the Senate before legislation can be passed. In practical terms, this requirement implies a need for some mechanism for negotiation between the chambers on legislation over which there is disagreement.

4.4.2 Implications of Introducing a Strong Second Chamber in New Zealand

In this section we consider the implications of introducing a strong second chamber in New Zealand, holding other aspects of the system constant. As described above, this would involve superimposing a second chamber elected on a proportional representation rule on the present majoritarian parliamentary chamber, and allocating to the second equivalent powers to the first.

There is an inherent conflict between strong bicameralism and the Westminster form of parliamentarianism, which prescribes minimal winning cabinets (Lijphart, 1984a). In parliamentary systems, the executive is responsible to parliament. It has been argued that this characteristic makes parliamentarianism fundamentally incompatible with bicameralism, as both chambers may claim the power to hold the cabinet responsible. The two chambers may have different political majorities, and disagree with each other on matters of legislation as a matter either of ideology or of political strategy. The cabinet will in such cases have difficulties in retaining the confidence of the ruling party or coalition in both chambers (Longley and Olson, 1991).

Strongly bicameral parliamentary systems are found in both Australia and Germany. The constitutional crisis in Australia in 1975 appears to bear out the thesis that parliamentarianism sits uneasily with a strong second chamber. In 1975, Gough Whitlam's Labor cabinet had a solid majority in the first chamber, but faced a majority Liberal-Country party coalition in the senate. The latter used their majority in the senate to block supply, in

an attempt to force Whitlam's resignation or a dissolution of the first chamber. Whitlam and his party asserted that cabinet was responsible only to the first chamber, and resisted pressures for the dissolution of that chamber. The resulting deadlock was broken by the governor-general acting to dismiss Whitlam, appoint the opposition leader of the first chamber (Malcolm Fraser) as a caretaker prime minister, and call new elections for both chambers. The governor-general (Sir John Kerr) justified this approach on the basis that parliamentarianism could require cabinet responsibility to both chambers. The following elections were won decisively by the Liberal-Country party coalition (Jackson, 1992; Lijphart, 1984a).

In practice, the Australian system has remained intact through the 17 years since the 1975 crisis. Technically, a repeat of that crisis is possible, and the threat of a repeat can be assumed to influence the behaviour of the executive. However, it is also likely that the Senate perceives a threat that, should it attempt a repeat of its 1975 actions, its own future would be placed at risk. One possible explanation of the survival of the Australian system is, therefore, a *de facto* weakening of bicameralism, by means of voluntary restraint on the part of the second chamber.

In Germany the powers of the second chamber (the Bundesrat), while significant, are not directly equivalent to those of the first. In particular, the power to elect and dismiss the chancellor is allocated to the first chamber (the Bundestag). In addition, the Bundesrat has an absolute veto only over some bills, primarily those that have a direct impact on the Lander.¹¹⁴ A full veto power would, however, become available to the Bundesrat if an opposition with more than one-third of the seats in the Bundestag could secure a two-thirds majority in the Bundesrat (Lijphart, 1984a).

The problem in the Australian case, and the potential problem in the German case, stem from the fact that the cabinet is formed on the basis of a potentially narrow majority in the first chamber. In contrast, a cabinet formed on a broader, coalitional basis could conceivably maintain the support of two fundamentally different chambers. Lijphart (1984a), for example, suggests that the solution to the problem of mutually hostile majorities in a bicameral system is to form an oversized coalition cabinet. The effect of such an approach would be similar to a strong form of proportional representation in a single chamber, including a loss of flexibility in policy-making, and a reduction in direct accountability to the electorate.

¹¹⁴ For these reasons, the Bundesrat remains less ambiguously a states' house than the Australian senate, which has become more purely part of the party battle in Australian politics (G. Hawke, pers. comm.).

The conflicts created by implementing a strong form of bicameralism in a Westminster system can be expected to weaken the wider accountability of representatives to their electors. A lack of clarity - or outright conflict - in defining where the responsibilities of the executive lie will translate into a more general inability on the part of electors to hold the executive accountable. In this kind of environment, the actions of politicians are more likely to depart from a democratic ideal. In particular, there is likely to be:

- a weakening of the focus on the interests of the median voter, and a correspondingly increased incentive to serve special interest groups and lobbies;
- an increased incentive to maximise government revenue at the expense of the citizenry;
- an increased incentive to indulge personal policy preferences or ideology; and
- a reduced incentive to implement policies that respond efficiently to international constraints.

These arguments have important implications for New Zealand, if we assume the continuation of a first-past-the-post electoral system in the first chamber. If a strong second chamber is sought in New Zealand, other compensating changes would be required, implying a fundamental shift from a Westminster system. One possibility would be a shift to a coalitional system, with some form of proportional representation rule in both chambers, and larger than minimal winning cabinets, as suggested by Lijphart. Another would be a shift to a presidential model, such as that found in the US, where executive power rests outside of the two chambers, and legislatures are more likely to act independently of the president on policy issues (Longley and Olson, 1991).

4.4.3 A Weak Second Chamber

If the Westminster system is preserved in the first chamber, a second chamber will only be practicable if it is sufficiently weak not to create conflicts in executive responsibility.

A democratically elected second chamber would be unlikely to acquiesce in strictly limited powers. To guarantee that a second chamber would remain weak, therefore, it would need to be either nominated or elected on a non-democratic basis, for example on a corporatist basis.¹¹⁵

¹¹⁵ See, for example, Riddiford (1951a) on a corporatist second chamber, although Riddiford's specific proposals (according a particular say to, among others, university

A key element in limiting the powers of a second chamber would be to grant it weak or no powers with regard to money bills. This would accord with the convention that has developed in the UK and Canada, and which applied in the New Zealand Legislative Council from at least the 1890s. On other bills, the second chamber might be given a delaying, rather than a vetoing power (Catt et al., 1992; Palmer, 1987; Riddiford 1951a; Stockley, 1986).¹¹⁶

Present-day proponents of weak bicameralism in Westminster systems typically suggest a specialist focus for the second chamber. The tasks assigned to the second chamber would be designed to make use of the greater time available for deliberation in a relatively weak chamber, and any special experience on the part of its members. Palmer (1987), for example, suggests powers for a second chamber with a special, quasi-constitutional content, including the oversight of government administration and delegated regulatory and spending powers,¹¹⁷ and the oversight of matters relating to civil liberties and human rights.¹¹⁸

These latter functions are not, strictly speaking, legislative functions, although they may be carried out in such a way as to have an impact on the detail or wording of legislation. In this sense, they need not be carried out within a second chamber. In Sweden, for example, a separate Law Council was instituted at the time of the shift from bicameralism, charged with reviewing most legislation prior to its passage by the Riksdag.¹¹⁹ In addition, both Denmark and Sweden, in adopting unicameralism, made special provision for referenda on policy and constitutional issues.¹²⁰

More generally, it is unlikely that a second chamber would be the most efficient means of achieving the ends described here. In the first place, the institutional arrangements required to constitute a second chamber will not be especially conducive to securing individuals with

graduates, the Medical Association, the Sheep-owners' Federation, and the Law Society) would be unlikely to secure favour in the 1990s.

¹¹⁶ A judiciously applied delaying power may, however, have a comparable effect to a vetoing power.

¹¹⁷ On the implications of delegated powers for constitutional democracy, see Ratnapala (1990).

¹¹⁸ Vibert (1991) suggests a similar combination of roles for the UK House of Lords, adding a role in monitoring the application of any new written Bill of Rights, and a role as a constitutional court, in the event that the UK adopted a written constitution.

¹¹⁹ The Law Council consists of three senior judges, including at least one Justice of the Supreme Court and one Justice of the Supreme Administrative Court.

¹²⁰ In Denmark, there is provision for referenda on all Ri-sdug-approved (non-financial) legislation at the written request of 1/3 of its members (Arter, 1991). In Sweden, provision was made for minority-initiated referenda on constitutional amendments (Sydow, 1991). The use of referenda on constitutional issues is considered in more detail in Chapter 5.

the ability or incentives to make quasi-constitutional judgments of consistent quality. As described in Section 4.3.1.1, nominated second chambers quite routinely become a mechanism for patronage and pensioning-off, and the incentives of members are shaped accordingly. The review of delegated regulatory and spending powers, or of the implications of proposed legislation for individual rights, may better be carried out in an agency less shaped by personal debt and dependence.

Secondly, at least some of the functions suggested for weak second chambers could be carried out at less expense in other forums.¹²¹ For example, the Royal Commission (1986) suggested that the development of the parliamentary select committee system, the passage of the Official Information Act, the extension of the powers of the Waitangi Tribunal, and the creation of an Ombudsman and a Human Rights Commission, had reduced the need for the scrutinising role formerly attributed to a second chamber.¹²² To these checks may be added the constraints imposed on policy through the electoral process itself, through caucus bargaining, and by means of international resource flows, as described in Chapter 2. A further check may be provided by allowing protest referenda after legislation has been passed.¹²³

4.5 Conclusions

A strong second chamber could not be instituted in New Zealand, and accountable government maintained, without further, substantial changes to the system of government - a move either to a fully-fledged coalitional, multi-party system, or to a presidential system. In Chapter 3 we have noted a number of reasons for preferring, on balance, the present Westminster system over a mixed-member proportional representation system. Similar arguments (concerning accountability and flexibility) may be ranged against the introduction of a presidential system.

A weak second chamber could be instituted without disrupting the operation of the present Westminster system. Such a chamber would be limited to a reviewing role, perhaps with a constitutional flavour. However, a second chamber is unlikely to be the most appropriate, the most cost-effective, or a necessary institution for the performance of tasks of this kind. Moreover, in the period since the abolition of the Legislative Council in New Zealand, a

¹²¹ Catt et al. (1992) estimate that a 30-member second chamber could cost up to \$15 million per year to run. They base this estimate on the \$43 million per year it costs to run the present chamber.

¹²² It should be noted that the Royal Commission's rejection of the idea of a second chamber was directly linked to the introduction of proportional representation in the existing chamber. See also Jackson (1991).

¹²³ The case for protest referenda is discussed in Chapter 5.

number of other institutions have evolved that afford a degree of scrutiny of legislation and of government actions.

Further, bicameralism is most prevalent in large, populous states; unicameralism predominates among the smaller developed countries. Quite apart from the avoidance of large and costly legislatures, this pattern may be explained by the greater effectiveness of alternative checks on government power in smaller countries. A number of the constraints described in Chapter 2, for example, will be especially effective in small systems; moderately sized caucuses may bind cabinets more effectively and consistently than very large ones, for example; and small, open economies are likely to be more vulnerable to international resource flows than large ones.

In short, the reintroduction of a second chamber in New Zealand would not enhance the democratic working of the legislative process, and could detract from it. Specific concerns about, in particular, delegated powers or the protection of individual rights are better addressed by other means. One such means, discussed in Chapter 5, is an extension of the use of referenda on policy and constitutional issues.

5.0 AN ANALYSIS OF REFERENDA

5.1 Introduction and Definition of Terms

The New Zealand government has proposed a bill requiring that non-binding, national referenda be held on the request of ten percent of the electorate.¹²⁴ This chapter analyses the general properties of different types of referenda. In this section we define terms and give a brief history of the use of the various referenda forms. Section 5.2 analyses the effects of referenda on minorities and special interests, the quality of decision-making, and the Westminster system. Section 5.3 examines two issues of procedure, absolute versus proportional signature requirements and referendum wording. Section 5.4 builds on the earlier sections to analyse the New Zealand Citizens Initiated Referenda Bill. Our recommendations are set out in Section 5.5.

Referenda, mechanisms for referring political decisions or questions to a popular vote, come in different forms. We characterise referenda according to how much political authority is shifted from parliament to the citizenry. Government controlled referenda shift authority the least, initiative referenda shift authority the most. Between these poles lie mandatory referenda and protest referenda. Each form of referenda may be further divided into binding, contingently binding, and non-binding forms. Deadlock referenda and advisory referenda are less easy to categorise. The deadlock referendum has often been proposed but rarely adopted; the advisory referendum has little effect on the political system. We treat deadlock and advisory referenda only briefly.

The following definitions are adopted in this chapter:

Government Controlled Referenda: Referenda called by the government, on questions asked and worded by the government, to take effect according to standards determined by the government.

Mandatory Referenda: Referenda required to be called by law (usually by constitutional law). For example, the government may be required by law to call a referendum on bond issues beyond a certain amount.

Protest Referenda: Referenda initiated by the public to veto legislation already in effect or passed by the legislature but not yet in force.

¹²⁴ Specifics of the Bill are discussed in Section 5.4.

Initiative Referenda: Referenda initiated by the public, on questions asked and worded by the public.

Deadlock Referenda: Referenda initiated by one part of the government or the official opposition. For example, in the US, it has been proposed to give congress or the president the power to call a referendum in the case of deadlock. In a Westminster system, a referendum might be called on the request of 30 percent of the members of the House of Representatives, or such a power may be given to a second chamber.

Advisory Referenda: Referenda initiated by either the public or government but which cannot bind the relevant government. For example, in the US towns and counties have held referenda on foreign policy and nuclear strategy.¹²⁵

A referendum is binding if a majority vote alone has the power to create or veto law. A referendum is contingently binding if a majority vote and one or more additional requirements are necessary to create or veto law. For example, in federal systems a popular majority vote and a majority vote in a majority of federal units may be required. Alternatively, the referendum may be considered binding only if the proposal wins a majority among those voting, and those voting constitute a majority of eligible voters. A referendum is non-binding if the results are referred back to the legislature which is then free to take what actions it deems appropriate.

New Zealand is currently considering a non-binding initiative referendum; that is, a referendum in which the public initiates the process, and asks and words the question, but the results are referred back to the legislature.¹²⁶

5.1.1 A Brief Survey of Referendum Use

Government controlled referenda are by far the most common. Over one third of UN members have held at least one referendum, the great majority of which have been government controlled (Butler and Ranney, 1978a). (As this figure suggests, many non-democratic countries have held government controlled referenda.) The European democracies (1900-1981), excluding Switzerland, have held 66 government controlled or (occasionally) mandatory

¹²⁵ The advisory referendum is essentially a publicly funded opinion poll. Like other forms of referendum, an advisory referendum may generate interest or excitement in the political process which spills over into other questions, thus creating a more politically active and involved citizenry. The advisory referendum will not be dealt with further.

¹²⁶ The process is explained in further detail in Section 5.4.

referenda, no protest referenda and only three initiatives.^{127,128}

In Switzerland, by contrast, government controlled referenda are forbidden at the federal level. Hence, all Swiss referenda are mandatory, protest or popularly initiated. Between 1848 and 1978 the Swiss held 138 mandatory referenda, 85 protest referenda and 74 initiatives making a grand total of 297 referenda (a little over two per year on average).

Australia and New Zealand, which rank second and third after Switzerland in the use of national referenda, have held 39 and 28 referenda respectively.¹²⁹ Of the Australian referenda, 36 have been mandatory and the remaining three government controlled. A form of deadlock referenda is constitutional in Australia but no referendum has ever been called under this procedure.¹³⁰ Twenty five of New Zealand's referenda were held on liquor licensing and control, leaving two government controlled referenda and one referendum which was quasi-mandatory.¹³¹

The US has never held a national referendum but referenda are mandatory for constitutional issues in all but one of the 50 states. Thirty-nine states have some form of protest referenda, and 22 use some form of the initiative (Butler and Ranney, 1978a). Of these states, California has attracted the most attention because its population, geographic size and economy make it comparable to a powerful nation. Between 1912 and 1976, California held 543 mandatory referenda, 35 protest referenda, and 159 initiatives (an average of just over 11 referenda per year).

Most referenda are non-binding or contingently binding. Switzerland, for example, requires an overall majority of votes, and a majority of votes in more than half the twenty-two cantons, to pass a constitutional referendum. Denmark has required that a majority constitute at least 45 percent of the electorate to be considered binding (since 1953, 40 percent). A Danish constitutional referendum in 1939 in which 91.9 percent of the voters voted "yes" failed to carry because the 966,000 voting "yes" constituted only 44.9 percent of the electorate. New Zealand has placed similar restrictions on the base from which a majority is to be counted in

¹²⁷ Data are from Magleby (1984) and Butler and Ranney (1978a). Interwar Estonia and the German Weimar Republic are omitted. Four of the eight Greek referenda are omitted as undemocratic.

¹²⁸ The three initiatives were all Italian.

¹²⁹ Data for Australia are up to 1978; see Aitkin (1978). Data for New Zealand are up to 1984; see Wilson (1985).

¹³⁰ Deadlock referenda were constitutional in Ireland from 1922 to 1928, but were never used. See Aitkin (1978) and Manning (1978). The constitutions of Denmark and Sweden also make provision for deadlock referenda.

¹³¹ The 1967 referendum on the term of parliament concerned the Electoral Act, Section 189(2) of which provided for override of the entrenched clauses by a majority of voters. See Wilson (1985) and Royal Commission on the Electoral System (1986).

its licensing referenda. In the US, many different measures have been required for a majority to be considered binding, most of which are variants on the Swiss and Danish themes.¹³² Typically, requirements are strongest on constitutional amendments, whether mandatory or popularly initiated, and weakest on protest referenda. Statutory initiatives tend to hold a middle ground.

5.2 Analysis

The analysis of referenda is based upon the following important premise: voters cannot fully control their representatives.

If voters fully controlled their representatives, policy outcomes would tend towards the median voter's preferred point with or without referenda.^{133,134} In such a case, the choice between direct and indirect democracy would be one of form and not of substance. The decision to use referenda becomes important only when the above premise holds. Voters cannot fully control their representatives for a variety of reasons:

- Voters lack complete information about what actions their representatives take and what effect those actions have on voter welfare.
- Monitoring of representatives is costly and subject to a "free rider" problem. Monitoring by one person is costly for that person but improves representative performance for all. Hence, each person has an incentive to "let the other person do the work", and free ride.
- Political parties sell packages of policies rather than single policies so that voters cannot pick and choose to achieve their ideal packages.

We are not arguing that lack of voter control is necessarily either regrettable or desirable. Nor are we arguing that lack of voter control supports or does not support referenda. Lack of

¹³² See Magleby (1984) and Zimmerman (1986) for examples.

¹³³ Technically, a number of auxiliary assumptions about preference distributions, coalition formation and institutional structures must hold if policy outcomes are to approach the median voter's preferred point. For our purposes, however, the statement in the text is accurate.

¹³⁴ A longstanding normative debate exists on whether a representative should act as the people's agent or as the people's trustee (see Pitkin, 1969). Should a representative act as the people would, or instead act as he or she believes the people would if they were fully informed? In the present study, we are more concerned with the positive question, of when voters can induce representatives to act as agents.

voter control is simply a necessary premise of any argument for or against referenda. For example, if voters lack control because they are uninformed about the issues this may be part of an argument for representative democracy. Representatives, unlike voters, can spend the time and resources necessary to understand complex ideas and decide what is best for the public welfare. On the other hand, lack of information may imply that representative democracy allows government to ignore the wishes of the public to further the government's own goals. Similarly, if voters lack control because of the packaging of policies, this may allow representatives to take into account the rights of minorities - or it may allow special interest groups to siphon funds from the public purse.

Rather than taking sides on these arguments, we characterise influences on government in terms of a series of incentives:

- the incentive to mirror the preferences of the median voter;
- the incentive to serve special interest groups and lobbies;
- the incentive to maximise revenue and redistribute resources from productive citizens to the government;
- the incentive to benefit particular regions and districts at the expense of other regions and districts; and
- the incentive for politicians to indulge their own policy preferences or ideology.

We refer to these incentives in the following discussion and note the direction of change that referenda imply, where appropriate.

The effects of referenda will be discussed under three headings: minorities and special interests, the quality of decision-making, and the Westminster system.

5.2.1 Minorities and Special Interests

5.2.1.1 Minority Rights

The effect of referenda on minorities has been of continual concern¹³⁵. Two arguments, one

¹³⁵ The Royal Commission on Electoral Reform, for example, wrote that "it is of major concern to the Commission that the extensive use of referenda - particularly as the result of popular initiatives - can pose very real threats to minority rights and interests" (1986, p. 175).

empirical and the other theoretical, have been put forward which suggest that minority rights are less secure when the public exercises political authority directly. The empirical argument may be reduced to the statement that the public's preferences are "crude." If given the power, it is argued, the public will vote for reactionary laws which trample the rights of religious, racial or other minorities. A US sociologist, for example, calls the referendum "democracy's barrier to racial equality" (Bell, 1978).

Certainly, there are examples of enacted or proposed initiatives that have violated the rights of minorities. In the US the Supreme Court has sometimes struck down initiative-created law because it violated constitutional rights (Magleby, 1984). Counter-arguments point to successful referenda on women's suffrage, aboriginal rights, and other minority rights issues (Walker, 1987). The recent whites-only referendum in South Africa, to abandon apartheid and establish a multi-racial political system, which passed with almost 70 percent in favour, will doubtless be cited in the future.

More sophisticated arguments recognise that the crudity or refinement of the public's preferences is not the issue. At different times and places the public has different preferences, sometimes crude, sometimes not. The issue is whether or not these preferences are more likely to receive a hearing in a referendum or in a legislature. No systematic study has addressed this question. It is not difficult to find democratic legislatures that have violated the rights of minorities, but whether they have a greater or lesser tendency to do so than referenda is unknown.

While no empirical evidence exists on this question, there is an argument which suggests that legislatures may be more conducive to minority rights. The argument is called the "intensity of preference" argument (Kendall and Carey, 1968). In a referendum, if the majority wants policy A, policy A wins, even if the minority favours policy B much more than the majority favours policy A. This may be thought to be unfair or inequitable. Should a frivolous or near indifferent majority have its way over a serious and intense preference of the minority? A referendum system may also be "inefficient" if both majority and minority would prefer an alternative system.

If the minority has intense preferences, a referendum system may not always be in the interests of the majority. This seemingly odd result can occur because a referendum is an all-or-nothing decision. There is no room in a referendum for a compromise that both majority and minority may prefer. In a representative system, by contrast, a minority group can offer compromises and alternatives to the majority, or they can build coalitions with other groups

by promising their future support. Bargaining in the legislature may lead to an outcome that both the majority and the minority prefer to the outcome of the referendum.

The bargaining process need not occur directly. A politician will support a minority position if displeasing a majority a little is worse than displeasing a minority a lot. A package of policies that appeals to several intense minorities will often attract more votes than a package that appeals to a single non-intense majority. By unpackaging policies, a referendum allows weak majorities to trump intense minorities.

The conditions under which minorities are more protected in a representative democracy should be stated clearly. First, minorities will not be protected if the majority's "crude" preferences are also intense. No compromises are possible if the majority's preferences are as intense as the minority's. Secondly, the intensity of preference argument holds only if the minority has something to trade. In terms of politics, "having something to trade" means being organised so that pressure can be brought to bear upon the political system. For example, a geographically concentrated minority that is able to vote as a bloc can exert enough pressure to swing elections (even if still a minority in the smaller area) and therefore will be protected. Similarly, an organised and wealthy minority can lobby for protection, but a dispersed minority unable to organise will be ignored by the political system. For minorities to be protected, intense preferences are not enough. In addition, those preferences must be capable of being projected into the legislative marketplace. Minorities that cannot project their preferences into the legislature through either bloc voting or campaign support (or perhaps some other method) will not benefit from representative democracy more than direct democracy.

Most of the discussion of minority rights under referenda has considered the paradigm case of the 50 percent plus one rule. Other forms of referenda can offer more protection to minorities.¹³⁶ We consider two ways in which referenda can build in protection for minorities. First, the strict majority rule of referenda can be tempered by raising the proportion required to pass a law, thereby giving veto power to a minority.¹³⁷,¹³⁸ Geographical restrictions, restrictions on the base from which a majority is determined, and other such restrictions serve the same purpose (Buchanan and Tullock, 1962).

¹³⁶ Government controlled referenda and mandatory referenda should be of less concern to minorities to the extent that the status quo is reasonably just, on the grounds that a sin of omission is less objectionable than a sin of commission.

¹³⁷ This benefits minorities to the extent that minorities wish to protect the status quo. Higher majority requirements are thus "defensive" in nature.

¹³⁸ Minorities can also protect themselves by turning out in greater numbers when their interests are threatened. This effect will be more important the higher the proportion required to pass a law.

A second method of protecting minorities is to restrict the issues open to referendum voting. Mandatory referenda, for example, are held only on specific issues as prescribed by law. In a weaker sense, government controlled referenda are implicitly restricted because voting will occur only on those proposals that have passed through the representative process. Passing a referendum proposal through the representative process gives minorities an opportunity to make their preferences known. Restrictions can also be placed on protest referenda and initiatives. For example, initiatives on constitutional issues or issues dealing with a bill of rights could be forbidden.¹³⁹ One of the reasons Britain rejected the referendum in the constitutional discussions of 1910-1911 was the desire to restrict initiatives and referenda but the difficulty of doing so without a justiciable constitution or bill of rights (Bogdanor, 1981). New Zealand is currently in a similar situation.

Summary

Referenda increase the influence of the median voter and reduce the ability of minorities with intense preferences to bargain and offer compromises to protect their rights and interests. This may be a problem if the median voter's preferences are crude and other forms of minority protection, such as super-majority requirements or a bill of rights, are not built into the referendum process.

5.2.1.2 Special Interests

A second persistent concern about the use of referenda has been the fear that special interests, especially large corporations but also unions and wealthy lobbies, will dominate the referendum process. Opponents of referenda point to California, where in 1988 over US\$100 million (NZ\$185 million) was spent by tobacco, insurance, labour, and other lobbies on initiative campaigns (Grover, 1988).

Studies indicate that money can play a large role in referenda outcomes, but that the role is biased. Money is influential when it opposes a referendum proposition but less so when it supports a proposition (Cronin, 1989; Magleby, 1984). Money also has an effect on which issues reach the referendum stage. Gathering signatures, organising grass roots lobbying efforts and preparing for a referendum campaign can be expensive. All else being equal,

¹³⁹ The Royal Commission (1986) argues that a strong case can be made for referenda on legislation which would otherwise be decided on a "free" or "conscience" vote. The Commission notes that such issues often involve minority rights and interests - issues that we have argued are best decided in parliament where compromises can be reached and minorities can be respected. Considering the Commission's concern for minorities (see p. 175), it is odd that they did not draw the conclusion that referenda should not be used to decide "conscience" issues.

institutions and groups with greater wealth are more likely to get their proposal to the referendum stage than other less well-endowed groups. Signature gathering often suggests more about the wealth of the proposing group than the public's support of the proposal. Most voters who sign referendum petitions do not read the proposed question (Cronin, 1989). In California signatures have been gathered through direct mail campaigns which draw upon the hard sell techniques of the mail order business. Celebrity endorsements and other 'hoopla' techniques are common.

As with minority rights, however, the question to be asked is not, "does money influence the voters?" but, "does money have more of an influence on voters than on representatives?". In which system, direct or indirect democracy, will special interests find it easier to mould public policy?

Our earlier discussion of minorities under direct democracy gives a clear answer to this question. Special interests will find it less easy to mould public policy through the referendum process than through the legislature. Corporations, unions, and wealthy lobbies are the best example of minorities with intense preferences and the ability to project those preferences into the legislature. A tariff worth one million dollars in extra revenue to a corporation may cost each consumer less than a dollar a year. The preferences of the minority are intense, those of the majority mild. Few consumers will vote against a representative because he or she voted in favour of a tariff which costs them less than a dollar a year. On the other hand, the corporation will be willing to expend considerable lobbying effort in favour of the tariff. In a legislature these incentives work in favour of passing the tariff. If a referendum were held on the tariff, however, the outcome would be much less biased in favour of the corporation.

Certainly corporations and other special interests spend funds to try to convince voters that their special interest legislation is in the national interest. But if voters know their own interests, they are unlikely to be convinced. More important, to win in a referendum a special interest must convince many thousands of voters of the merits of its position. In a legislature authority is concentrated. The fate of a tariff likely hangs on the decision of a dozen or fewer representatives whom a corporation can target and lobby directly. The more concentrated the decision-making authority, the more easily a special interest can "transfer" its intense preference to the authority. The fewer the number of people who need to be lobbied, the more the special interest can offer each individual.

The fact that corporations and other special interests often spend enormous amounts of money on referendum campaigns - more than they seem to spend lobbying legislatures - supports the theory that special interests prefer legislatures. On the margin a dollar spent in the

legislature has more effect than a dollar spent in a referendum campaign because the first dollar is concentrated while the latter is diffused. Special interests spend more on referendum campaigns than on lobbying legislatures because money is more powerful in a legislature and less needs be spent to achieve the interests goals. in a referendum process money is more visible but less effective. It is not surprising, therefore, that “[f]inancially powerful special interests have strenuously opposed the adoption of the initiative and referendum (Cronin, 1989).

Summary

As in our discussion of minorities, referenda increase the influence of the median voter and reduce the influence of special interests. Minorities and special interests are different names for groups with intense preferences. Although we may evaluate these groups differently they can be analysed identically.

5.2.2 Debate, Deliberation, and Quality of Decision-Making

In this section we address the quality of decision-making by representatives and voters. Are voters ill informed or irrational? Can they make complex decisions? Does a representative system create more intelligent policy?

The Swiss have voted on wage and price controls (1973) and credit controls (1973). Californians have voted on nuclear plant restrictions (1976) and agricultural labour relations (1972, 1976). These issues are complex. Making a rational decision about them requires considerable knowledge, judgment, and logic. Many have argued that such questions are better left to parliament and the representative institutions of government. In this section we examine these arguments. Once again, we note that the issue is one of comparison, who is more competent: voters or their representatives? Unfortunately, objectively defining “competency” or “quality” is difficult because it is difficult to separate issues of preference from those of rationality.¹⁴⁰

Consider the debate over California’s Proposition 13, which drastically lowered California’s property taxes in 1978. Opponents of Proposition 13 called it an irresponsible display of irrational, short-term thinking. How are we to evaluate such claims? One method, used by Walker (1987), is to examine whether the behaviour displayed by voters is systematic, or whether it varies with circumstances. If the latter is true, then the charge of irrationality is blunted because voters would seem to be making some form of cost-benefit calculation.

¹⁴⁰ A second problem for any comparisons between referendum decisions and decisions made in a representative process is the small sample of referendum decisions.

In the five years previous to 1978, property taxes in California had risen rapidly, in some cases trebling. California at the same time was running a large budget surplus. Placed in this context, Proposition 13 seems less “irresponsible” than might otherwise be thought. Moreover, further tax-cutting propositions failed with strong majorities in 1979 and 1984. Tax-cutting measures also failed in other states which did not have California’s considerable budget surplus. Voters appear to have taken account of circumstances when voting on tax cutting propositions.

The evidence from this episode and from other referenda worldwide suggests that voters do not act in an obviously irrational or biased manner. Voters accept and reject propositions depending on circumstances and long-run considerations. A closely related issue is whether voters are systematically conservative or progressive. After reviewing the evidence, Butler and Ranney found that “the referendum is politically neutral” (1978b, p. 224). It is not surprising, therefore, that support for and opposition to referenda has historically cut across party and ideological lines.

Another approach to the issue of voter competency is to examine whether voters are systematically less informed than representatives. Even if we assume that voters are rational, their decisions may be less competent than those of representatives if voters are less informed. Without making assumptions about what represents a quality decision, we can make the weak assumption that the more informed a decision maker is, the higher the quality of the decision is likely to be.

The traditional defence of parliamentary institutions emphasised that parliament was an institution of reasoning. To be sure, parliamentary reasoning was not to be done directly, but instead was a result of the clash of opinion and debate (Schmitt, 1923). This idea of parliament holds less sway to the extent that parties control voting, and debate serves to rationalise policy rather than determine it. Nevertheless, although legislative debate is mostly non-deliberative, representatives specialise in policy areas and work to become informed about their policy specialisations (Krehbiel, 1991). The select committee system, for example, may be thought of as a method to improve the quality of parliamentary decision-making by creating specialisation areas and dividing intellectual labour.

Representatives specialise and become informed about policy because they will bear at least some of the consequences of being ill-informed. If a policy performs poorly the representative responsible will tend to be punished by other legislators who are less likely to confer their

support on future policy.¹⁴¹ Voters, on the other hand, have little economic reason to become informed because their vote has a negligible effect on the outcome of a referendum. This does not necessarily mean voters will be absolutely uninformed. Voters may inform themselves out of a sense of civic pride or duty or because the cost of information is low, perhaps because of mass advertising campaigns. However, the argument does suggest that voters will be less informed than representatives.¹⁴²

Voter competency and the “quality” of referendum decisions are subtly different issues. Even if most voters are not well informed the results of the referendum may still reflect those voters who are informed. If we assume that the uninformed vote randomly, a small minority of informed voters is enough to swing the election with a very high probability. The majority of voters do not have to be well informed for the outcome of the referendum process to satisfy the “well informed” criterion. If uninformed voters are biased in one way or another, however, then well informed voters lose the ability to swing the election. Voters who are unsure about the consequences of a proposal and who are also concerned about the consequences in practice tend to vote against the proposal.¹⁴³ Hence, biases are likely to be towards the conservative or status quo side.

Many political issues, it should be emphasised, are quite simple, and it can be safely assumed that voters are well informed. New Zealand, for example, has held regular referenda on local liquor licensing since 1894, and in 1949 held referenda on off-course betting, licensing hours (also 1967) and compulsory military training. The issues in these referenda are clear, voters are well informed, and they understand the consequences of their voting. A large proportion of referenda have been of this type. The issue of competency applies only to more complex issues, such as the Swiss and Californians have occasionally put to the vote.

Summary

Voters do not vote irrationally or without regard to circumstances. On complex issues, however, voters are likely to be less informed than representatives. Referendum outcomes will sometimes reflect this, especially if voters are misinformed or informed in a biased manner (see also the question of wording referenda below).

¹⁴¹ Ultimately, for this enforcement mechanism to work, voters must vote out representatives when the system is perceived to be performing poorly. However, voters need not know why the system is failing or who in particular is responsible for the failure. Even if voters vote indiscriminately against incumbents, this provides an incentive for representatives to self-monitor.

¹⁴² Representatives may also inform themselves out of civic pride or duty or because information costs are low, hence these reasons do not affect the balance of information.

¹⁴³ Voters uninformed but also uninterested tend not to vote

5.2.3 Referenda and The Westminster System

In this chapter we focus on the following three properties of the Westminster system:

- concentration of executive power / one party cabinets;
- cabinet government / strong parties; and
- parliamentary sovereignty.

One of the strongest arguments for the Westminster system is that it makes parties and politicians strictly accountable to the electorate. If the voters approve or disapprove of a policy or policy package it is clear in the Westminster system which party is responsible. The planks of the Westminster system listed above each contribute to this effect. By contrast, coalition cabinets, weak parties and judicial or other restraints can all blur the lines of accountability.

Accountability is important because it is a necessary (but not sufficient) condition for control. As is often the case, accountability and control must be traded off against other desirable properties such as representativeness and openness. In proportional representation systems, for example, parties are more representative, in the sense of supporting policies close to the ideal points of those who voted for them, but less directly accountable because of the necessity of forming coalition governments.¹⁴⁴ Similarly, for voters to hold parties responsible, parties must be able to control their members, thereby reducing competing proposals and debate within the party.

With these brief comments as background, we now examine accountability and referenda in a Westminster system.

A common objection to referenda is that they reduce the accountability of representatives.¹⁴⁵ In a trivial sense, referenda reduce accountability because some policy decisions formerly made by representatives are now made by voters. The important question, however, is whether referenda reduce the accountability of parties and politicians for decisions they do control. Referenda may reduce this form of accountability indirectly. Referenda reduce the power of the parties and therefore cabinet control of parliament. With cabinet less able to control parliament it becomes more difficult for voters correctly to place blame or credit on the responsible parties.

¹⁴⁴ See Chapter 3 on proportional representation.

¹⁴⁵ Zimmerman (1986) and Butler and Ranney (1978c) note some common objections to referenda. See also Boyle (1912).

In a plurality or first-past-the-post system of voting there is a strong tendency for the number of effective parties to be reduced to two (Duverger, 1963). Third parties may survive, as in Britain and Canada, but they rarely, if ever, rotate in office with the same regularity as the two major parties. The two major parties typical of Westminster systems together monopolise the political market. Private member bills are rare and are limited by the caucus so that they are poor substitutes for the parties. Hence, groups desiring access to the political market must use one of the two major parties as intermediaries.

The referendum and initiative are substitutes for political parties. The existence of substitutes reduces monopoly power. Hence the referendum and the initiative reduce the power of the political parties. This occurs both directly as some groups abandon the parties and focus on the initiative and referendum, and indirectly as parties lose resources and therefore some of their ability to control private members. This reduction in the power of the political parties makes it more difficult for cabinet to control parliament. Since cabinet is less able to choose its ideal policy and push it through parliament, it is more difficult for voters accurately to apportion credit or blame for policy among the cabinet, majority party, and opposition.¹⁴⁶

The reduction in the power of the political parties caused by occasional or moderate use of referenda is unlikely to change the political landscape greatly. Parties in a political system using referenda will remain the most important of all political intermediaries and actors. Nevertheless, the reluctance of most parties, in most times and places, to support the use of any form of the referenda system (especially initiative and protest referenda) indicates the negative effect referenda can have on the power of the parties.¹⁴⁷ Parties have been strongly against referenda even though polls consistently indicate a high support for referenda among voters.¹⁴⁸

¹⁴⁶ In the US system it is very difficult to ascribe policy to any single political entity because responsibility for policy is split among the President, the Senate, and the House, among the Republicans and Democrats, and between the conservative and liberal wings of the parties.

¹⁴⁷ Referenda reduce the power of political parties in general and in the long run. In the short run, however, a referendum may help a particular party. In the UK, the Labour party was split on the EC but managed to achieve consensus on the decision to let the voters decide. In other cases, no such consensus was found and a referendum split the party. Nilson (1978) describes both of these processes as they occurred in Scandinavian politics.

¹⁴⁸ A majority of voters in regions both with and without referenda tend to support their use. Magleby (1984) looks at the US evidence. The essays in Butler and Ranney (1978) often examine the international evidence. Butler, for example, writing on the UK experience, notes that both before and after the 1975 EC referendum, a large majority of all voters (69 percent before, 75 percent after) supported the process.

Summary

Referenda are a substitute for political parties. Hence, referenda reduce the power of political parties to shape policy and control parliament via the cabinet. With less cabinet control it becomes more difficult for voters to rationally reward or punish a party. This effect works to reduce the accountability of the parties to the median voter.

However, parties use their control of the political agenda to benefit their own members, often against the wishes of the median voter. We cannot ascertain which effect is stronger. The fact that most parties are against the use of referenda indicates, however, that the latter effect is usually stronger. Thus, the power of political parties is reduced and the power of the median voter is increased by referenda.

5.2.4 Parliamentary Sovereignty

Referenda tend to weaken parliamentary sovereignty by placing explicit and tacit constraints upon parliament. After a referendum has been held, the constraints are evident. The government will find it difficult to ignore non-binding referenda and virtually impossible to overrule binding referenda because of the moral authority of the referendum process. But the government is also constrained prior to a referendum. The simple possibility of a referendum can alter policy. In the great majority of circumstances a government will prefer to change a policy and avoid a potential referendum, rather than push the policy through and risk an embarrassing defeat.

As described in Chapter 2, these types of constraints are by no means unique. The UK and New Zealand constitutions are “unwritten,” but exist nonetheless. Referenda add some clauses to unwritten constitutions; clauses like “indicative referenda shall not be overruled, except in emergency situations”. Referenda are one among a host of factors which impose constraints upon government.

Referenda may also indirectly contribute towards constraining parliament because of the type of political institutions referenda complement. As was noted earlier, one reason the UK did not adopt the referendum was the difficulty of limiting referenda without a written constitution. It is possible to limit a binding referendum through regular statute law (as was suggested in the UK debates), but the difficulty is then to decide whether the referendum question falls under the statute or not. Directly or indirectly, the limiting of a binding referendum seems to call for some type of entrenched and justiciable constitution. The idea of direct democracy has much rhetorical and emotional power - it goes to the heart of modern thought concerning political legitimacy and justice. To limit such a power seems to require a

principle with more cachet than “parliamentary sovereignty. The principle of constitutional sanctity inherent in, say, a justiciable bill of rights is more likely to command the necessary respect. New Zealand has chosen to limit its initiative referenda by making them non-binding. If New Zealand were to adopt binding initiative referenda, the limiting issue would become more salient.¹⁴⁹

Summary

Referenda place constraints upon the political system. Even the possibility of a referendum can alter policy. On average these constraints will move policy towards that preferred by the median voter and away from that preferred by parties and the bureaucracy. Formal, entrenched constitutions tend to complement referenda because of the desire to limit referenda.

5.3 Procedural Options

In this section we outline two procedural issues that a system for holding referenda must address. The issues discussed are:

- absolute versus proportional signature requirements; and
- the wording of the referendum.

5.3.1 Absolute versus Proportional Signature Requirements

Placing a question on the ballot usually requires the presentation of a petition with X number of signatures. X is often a proportion of either all eligible voters or a proportion of the number who voted in, for example, the last general election. The latter measure will usually be much easier to meet than the former. Switzerland requires an absolute number of signatures. A Swiss constitutional initiative is called when a petition of 100,000 signatures is presented, and a protest referendum is called if 50,000 signatures are presented (within 90 days of the law being published).

Unlike an absolute rule, a proportional rule will become more difficult to meet as population grows. It is easier to gather 10 percent of 100 than 10 percent of 1000 signatures.¹⁵⁰ In 1912 an

¹⁴⁹ This issue is of little concern for government controlled and mandatory referenda because these are clearly adjuncts of the representative process. The issue is of more concern for protest referenda, but less so than for binding initiative referenda, for the reasons outlined in Section 5.2.1.1.

¹⁵⁰ This is true even if there are proportionately more potential supporters in the larger group.

initiative could be qualified in California with 30,000 signatures. Today, because of population growth, it takes over 500,000 signatures. In 1912 almost 70 percent of petitions that were titled managed to gather the required number of signatures. As population grew this ratio fell dramatically; in recent decades only 12 percent of titled petitions have managed to qualify.¹⁵¹

If the purpose in demanding a certain number of signatures is to show sufficient interest among the citizenry, then proportional signature requirements present a problem. In a larger population it is reasonable that more signatures are required to show that sufficient interest exists to warrant a referendum. But the collection of signatures is costly, thus the requirement for more signatures reduces the number of petitions brought forward even if the public would like to see referenda on these petitions.

As the number of signatures required increases, there is also a selection effect on petitions brought forward. Increasing the required number of signatures increases the relative number of petitions brought forward by wealthy groups. Wealthy groups are less deterred by high signature requirements than less wealthy groups. Thus, regardless of the support which the various petitions may have, there will be more referenda on questions brought forward by wealthy petitioners and this bias will increase with the number of signatures required.

One solution to this problem is to require, as in Switzerland, an absolute number of signatures. This ensures that any biases will not increase as population grows and, if the absolute number required is low, reduces the wealth bias to insignificance. The price paid is in more potentially frivolous questions reaching the referendum process.¹⁵²

Another solution is to reimburse petitioners per signature. If petitioners are fully reimbursed for their costs there is no bias towards wealthy groups. However, if there is no cost to bringing forward a petition, regardless of how likely it is to be passed, the public will have to make repeated trips to the polls simply to vote down referendum questions. Reimbursing only petitioners who successfully gather the required number of signatures, and reimbursing them at less than their full cost, will reduce the number of frivolous petitions while still allowing some balancing of the bias towards wealthy groups.¹⁵³

¹⁵¹ Data are from Magleby (1984).

¹⁵² By frivolous we mean the bringing forward of questions for referendum that everyone recognises the public is almost certain to reject.

¹⁵³ An absolute rule will become easier to meet as population grows because it is less costly to gather a fixed number of signatures as the proportion of required signatures of total eligible voters falls. However, this effect is much smaller than the effect of population growth on a proportional rule because the cost per signature is unlikely to vary a great deal with the total population. If at some point in the future it is found

Summary

As a population grows, meeting a proportional signature requirement becomes more difficult. This reduces the number of qualifying petitions, and biases those that do qualify towards those brought forward by wealthy groups. Absolute requirements can be used or petitioners can be reimbursed for signatures collected. A trade-off exists between the number of frivolous petitions qualified, the bias towards wealth, and the omitting of potentially successful referenda. Varying the cost of collecting signatures, through changes in the number required or reimbursement schedules, changes the terms of this trade-off.

5.3.2 Wording of Proposal

Psychologists (and opinion pollsters) have found that the way a question is phrased can dramatically affect how individuals view a question. A host of “semantic illusions” have been found parallel to the well known visual illusions. McNeill et al. (1981) and Tversky and Kahneman (1981), for example, have found strong evidence for a framing effect. McNeill et al. asked a group of physicians to indicate which of two therapies, surgery or radiation, they thought preferable. Each therapy constituted a probability of survival after one year and a probability of survival after 5 years. When presented in this form 84 percent of physicians preferred surgery and 16 percent radiation therapy. A similar group of physicians was then asked the same question but with the probabilities rephrased as probabilities of dying. Since the probability of dying is 1 minus the probability of surviving these questions are logically identical. Yet, when presented in the “dying frame” the proportion of physicians in favour of surgery dropped from 84 percent to 50 percent.

Framing effects are thus found to occur among well-educated physicians. Representatives and voters are also likely to be affected by such semantic illusions. The framing effect does not argue in favour or against referenda but it does suggest the importance of wording the question. Even the wording of the title may be important (Magleby, 1984). In 1972 California’s attorney general titled a proposition “The Pollution Initiative.” Despite the fact that the initiative would have limited pollution, opponents took advantage of the title and campaigned to, “Vote no on Pollution; vote no on Proposition 9”. Perhaps the voters were not fooled, but the presumably astute opponents of Proposition 9 thought they could be.

that too many frivolous petitions are being brought forward the absolute number of voters required can be increased.

Summary

The existence of framing effects and other semantic illusions illustrates that the selection of the title and wording of the question can be important. It is difficult to say what course of action should be taken to meet this problem. In the New Zealand Bill, the Clerk of the House is made responsible for the final wording of the referendum. To avoid any suggestion of bias, it is probably best for the Clerk to follow the petitioner's wording as closely as possible, within the constraint of making the question unambiguous and legally precise.

5.4 The New Zealand Indicative Referenda

The New Zealand Citizens Initiated Referenda Bill proposes New Zealand adopt a non-binding initiative.¹⁵⁴ Section 5.4.1 briefly describes the relevant aspects of the bill. Section 5.4.2 discusses the bill in light of the above introduction to referenda.

To bring a question to the referendum stage the following steps must be fulfilled. The proposal must first be presented to the House of Representatives. The Clerk of the House receives the proposal and publishes in the Gazette notice of the proposal and the petitioner's proposed wording. Comments on the wording are invited. In consultation with the petitioners, and taking into account any comments, the Clerk determines the wording of the proposal. No proposal on the same issue is allowed within a 5-year period. It is the Clerk's responsibility to determine whether the proposal meets this requirement. This entire process must be completed within 3 months of the Clerk first receiving the proposal. The final wording is published in the Gazette and the Clerk provides the petitioners with proper signature forms. Petitioners then have 12 months to collect signatures from 10 percent or more of eligible electors. If the petition is successful, a referendum must be held on the petitioner's question within 12 months of returning the completed petition to the Clerk of the House. The House may, by a majority of 75 percent, briefly delay the holding of the referendum, but in all cases the referendum must be held within 2 years of the return of the completed petition. During the campaign, published advertising expenditures for any person or group of people are limited to \$50,000. Besides the initiative, the government maintains the right to call a government controlled referendum.

¹⁵⁴ The proposed form of referendum has also been called an indicative referendum. Note that the indicative referendum differs from what we have defined as an advisory referendum because it applies to a government body, which is capable of following through on the results of the referendum.

5.4.1 Discussion and Analysis

The costs of petitioning for a referendum are quite high in the New Zealand proposal. Ten percent of eligible electors represents about 220,000 signatures. For a population of 3.4 million this is high by Swiss or US standards. The Swiss, with a population of 6.5 million, may call a constitutional referendum with 100,000 signatures and a protest referendum with 50,000 signatures. In the US the approximate number of signatures required for states with population sizes roughly similar to New Zealand is given in Table 5.1.¹⁵⁵

Table 5.1: Signatures Required for a Referendum to Proceed in Four US States and Switzerland

<i>State</i>	<i>Population</i> (millions)	<i>Signatures</i>
Arizona	3.6	127,000
Missouri	5.1	96,000
Colorado	3.3	61,000
Washington	4.8	139,000
Switzerland	6.5	50,000/100,000

California, which uses referenda more than all other US states, has a population of 29 million and requires approximately 525,000 signatures, slightly more than double the New Zealand requirement. The relative homogeneity of the New Zealand population and the high density of the population lower the cost of collecting signatures. However, the cost of collecting signatures is also high given that a successful referendum does not necessarily become law (but see further below). Moreover, most initiatives are rejected by voters. The cost of an initiative campaign is therefore high and the benefits uncertain and low. The relatively high cost and low return to bringing forward an initiative suggests that few will be brought forward and fewer still will pass. If most of the important information revealed in a

¹⁵⁵ These figures were calculated on the following basis. The 1988 voting age population was found for each state in the 1991 US Statistical Abstract. (The figure given in the text is total population.) Magleby (1984) gives the percentage of signatures required and the base on which this is calculated. The base is typically the number of votes cast in the most recent gubernatorial election. Since, in the US, this is typically about 50 percent of the voting age population, the figure for voting age population is halved and the required percentage taken. The figure given is for statutory initiatives. Constitutional initiatives typically require a slightly higher percentage and protest referenda a slightly lower percentage.

referendum is information about which initiatives succeed (it is not difficult to gather information on questions which will fail), the indicative referendum could be disappointing.

Referendum outcomes tend to be accorded a great deal of authority and legitimacy. It will thus be difficult for a government to ignore the results of a referendum. If the government chooses not to follow through on the referendum outcome, the opposition party will be quick to promise that it will recognise the will of the people should it come to power in the next election. Competition between the parties works to ensure that referendum outcomes are not ignored. Nevertheless, the referendum outcome is unlikely to be channelled directly into law. Rather, the government will tend to weigh the results of the referendum with the preferences and interests of the coalition making up the government's base of support. Legislation addressed to the issue of the referendum may be passed, but the precise nature of the legislation will have effects biased towards the government's supporting coalition. Non-binding initiatives or indicative referenda transfer less decision-making authority to citizens than other referenda.

Summary

Compared to the US and Switzerland, the number of signatures required to call a referendum in the New Zealand bill is high. Most initiatives fail in the referendum stage, and a successful initiative does not automatically become law. The difficulty and expense of running an initiative campaign reduces the number of proposals and biases the proposals that are presented toward those supported by wealthy groups.

Competition between the parties and the authority of a referendum outcome will tend to ensure that some form of the initiative proposal becomes law. Indicative referenda, therefore, move political outcomes toward the median voter but still allow considerable room for special interests (intense minorities), and bureaucratic influence.

5.5 Recommendations

In order to assess the effects of referenda it has been necessary to contrast referenda with representative government. The choice to be made, however, is not an "all or nothing" choice between systems, but a "more or less" choice between mixes of government. Referenda and the institutions of representative government may coexist and even complement one another.

Political institutions of all kinds, including parliament, voting systems, the secret ballot, constitutions, and judicial systems, are tools. Our goal in choosing among these tools is

complex and multi-faceted. We would like a government that is responsive to the majority and also respectful of the minority, that is decisive and also deliberative, that produces liberty and prosperity and also security and fairness. One tool is unlikely to achieve all these goals. A better outcome may be achieved by a combination of tools that takes advantage of the strengths of each.

Referenda are unique in creating a direct link between citizens and political outcomes. Without referenda all politics is mediated through institutions such as government, party, and parliament. Yet if a nation is to remain a democracy, citizens must at a minimum set the terms of the political “contract”. For this reason referenda are vital when a constitutional decision is being made.¹⁵⁶ New Zealand’s referenda on the terms of parliament and the forthcoming referendum on proportional representation afford implicit recognition of this.

The opportunity to legislate directly is of great importance not only in constitutional decisions but whenever the decision to be made strongly affects the interests of the mediating institutions. Representative democracy works least well when representatives legislate on their own powers and privileges. It is for these reasons that we believe referenda can play an important and valuable role in New Zealand politics. The New Zealand Citizens Initiated Referenda Bill is a positive first step in creating a well functioning referendum system. In what follows we make five recommendations to improve and extend the proposed system of referenda.

Recommendation One

The Citizens Initiated Referenda Bill requires signatures from ten percent of electors for a successful referendum petition. We recommend that this be reduced to five percent. In our judgment, a successful referendum is worth the cost of supporting several referendums that fail (especially when it is recognised that the information generated by a “no” vote is also valuable). High petition requirements reduce the number of referendums held and bias the referendums that are held towards issues supported by wealthy groups. Reimbursement for petition signatures could also solve this problem but lowering the petition requirement is a simpler procedure.

¹⁵⁶ This conclusion was also reached by the Royal Commission (1986, p. 176).

Recommendation Two

We believe absolute petition rules are preferable to proportional rules.

Population growth and proportional rules tend automatically to reduce the power of referenda. If the citizens of New Zealand support the indicative referenda, it seems unwise to build into the system the seeds of its own destruction. Population growth affects the operation of absolute rules much less drastically than it affects proportional rules.

Recommendation Three

The indicative referenda should remain non-binding.

The two areas in which referenda are potentially weakest are the treatment of minorities and the quality of decision-making. These problems affect the initiative referenda more seriously than other types of referenda. This judgment rests upon the assumption that “a sin of commission is worse than a sin of omission”. With respect to the treatment of minorities, we hold this assumption because in our judgment majorities can impose greater costs on minorities through the passage of “bad” laws than through the vetoing of “good” laws. Hence, it is more important to provide safeguards for minorities in initiative referenda than in protest referenda.

With respect to the quality of decision-making, consider the worst case scenarios under protest and initiative referenda. The worst outcome under protest referenda is that voters reject a beneficial law, while the worst outcome under initiative referenda is that voters pass a bad law. Since there are many more bad laws than good laws, and since it is easier to destroy than to create, the worst case outcome under initiative referenda is much worse than under protest referenda. Hence, the oversight of representative institutions is more important for initiative referenda than for protest referenda.

For these reasons we support the decision to make the initiative referenda non-binding. However, the key problems of referenda, treatment of minorities and quality of decision-making are likely to be less serious for protest, mandatory and government controlled referenda. This fact forms the basis of recommendations four and five.

Recommendation Four

We propose that New Zealand establish a binding protest referendum.

A protest referendum allows citizens to constrain government and exert a direct role in politics without creating a large risk for minorities or a danger of catastrophic policy mistakes. The protest referendum would work as follows. Within a short period of a bill passing the legislature, say 90 days, citizens would be allowed to petition for a referendum on the new Act. The petition requirements should be low, we suggest no more than 50,000, as in Switzerland. The referendum should be binding except perhaps for an emergency override clause requiring a super-majority in the legislature.

Our central point in this recommendation is that different types of referenda call for different types of regulation. The strengths of referenda can be better exploited and some of the weakness of referenda mitigated if New Zealand adopts more than one type.

Recommendation Five

Government controlled referenda are not to be avoided.

The use of government controlled referenda by the Nazis and other authoritarian regimes has given these referenda a bad press. Virtually all commentators refer to government controlled referenda as tools of the state. Aubert (1978) refers to government controlled referenda a “instruments of central authority” and Lijphart (1984a) calls them “weapons of political power” wielded by governments against citizens. This verdict is influenced too sharply by the practice in authoritarian regimes.¹⁵⁷ Most government controlled referenda in democracies have concerned constitutional issues. As noted above, it is intuitively clear that it is inappropriate in a democracy for the government to legislate on its own relationship to the citizens. Citizens in a democracy, therefore, are unlikely to accept a government that unilaterally rules on constitutional issues. Hence, most government controlled referenda in democracies have been closer in spirit to mandatory referenda than they have been to government controlled referenda in non-democracies. Mandatory referenda are preferable in most cases to informal referenda and we would support mandatory referenda on “constitutional” questions and perhaps even on questions of taxation and deficit financing, but “informal” mandatory referenda are also beneficial.

Like protest referenda, government controlled referenda are unlikely to affect minorities adversely or to result in significantly poorer policy choices than initiative referenda. We therefore encourage the use of government controlled referenda. Government controlled

¹⁵⁷ Another reason political theorists have considered government referenda as “hegemonic” is that a government will not hold a referendum it does not expect to win. But a government will not enact any policy if it does not expect to benefit, given the constraints it faces. Thus this argument hardly makes referenda a “political weapon”.

referenda can be especially beneficial when other forms of referenda are also available to the public. The use of one form of referenda accustoms citizens to the process. Ideally referenda should be seen as an ordinary aspect of democratic government.

Government controlled referenda can be especially beneficial when used in conjunction with parliament. Parliament has a comparative advantage when decisions are complex, but the citizenry can still be given the ultimate right and authority to choose how they are to be ruled. The tension between these opposing considerations cannot be eliminated, but can be assuaged if parliament filters issues before they are presented to the public for a final decision. Such a filtering process can reduce the information burden on the public without the public having to surrender final authority.

Consider the upcoming referendum on proportional representation. The public is to be offered four choices as alternatives to the status quo: preferential voting, the single transferable vote, a mixed-member proportional system, and a supplementary system. As is evident from Chapter 3, the effect of each alternative on the political system is distinct and complex. Perhaps a better procedure would have been to hold an open parliamentary debate over the alternatives, one of which would then be presented to the public. This would allow a higher level of debate among the public, while still leaving citizens the power to accept or reject important changes.

5.5.1 Towards the Future

As discussed above, referenda tend to complement entrenched constitutions and bills of rights. If political institutions were to remain unchanged in New Zealand, this tendency is of little effect and can be ignored. However, if New Zealand were to adopt an entrenched constitution and bill of rights, objections to the extension of referenda could be more easily met. Thus if an entrenched constitution is adopted, and citizens initiatives have proved popular, the referendum system is more likely to be extended than otherwise. Similarly, if the referenda system is extended, pressure for an entrenched constitution is likely to increase. The adoption of such a constitution may occur gradually. For example, provisions to protect Treaty of Waitangi rights and principles from the referendum process may be given a quasi-constitutional character. With this as precedent, further quasi-constitutional provisions would be easier to add, for example in the area of free speech or civil liberties.

In short, entrenched constitutions and bills of rights complement referenda. If at any stage they were to be adopted in New Zealand, the costs of extending the referendum provisions would fall.

6.0 SUMMARY AND CONCLUDING REMARKS

6.1 Introduction

New Zealanders are currently being asked to consider three kinds of constitutional reform: replacement of the first-past-the-post electoral rule with proportional representation; the reinstatement of a second chamber; and increased access to referenda.

Each of the three proposed reforms focuses on a different aspect of the present system of government. Proposals for the introduction of some form of proportional representation are targeted at the electoral mechanism - at how electors' votes are translated into seats in parliament. Advocates of proportional representation focus on the representativeness of the MP selection process as a key element determining the responsiveness of parliamentary institutions to voter interests.

Proposals for the introduction of a second chamber focus, instead, on checks on legislative initiatives within the parliamentary system - on the internal mechanisms available for delaying, altering or vetoing legislation introduced by the majority party in the house of representatives. Advocates of a second chamber typically focus on the merits of a more gradual and complex legislative process.

Proposals for increased resort to referenda (binding or non-binding) arise from consideration of the relative merits of direct and delegated decision-making. Advocates of increased use of referenda typically see benefits in having voters signal their preferences directly on some range of policy or constitutional issues.

Behind these proposals for reform lies discontent with the present system of government; with its accuracy and accountability in translating voter preferences into policy outcomes. Disquiet with our parliamentary system has been especially acute in recent years, as two successive governments have embarked on substantial programmes of economic reform. However, proposals for change have a much longer history. For example, proportional representation has been advocated periodically throughout New Zealand's electoral history. There were attempts to introduce preferential voting in 1912 and again in 1923 (Royal Commission, 1986)¹. And the case for introducing a reformed second chamber has

¹ However, preferential voting, while treated as a form of proportional representation for the purposes of the September referendum, is rather a variation on first-past-the-post (see Chapter 3).

been alive (if periodically comatose) since before the abolition of the Legislative Council in 1951. More generally, in the period since the abolition of the Council there have been numerous attempts to improve the workings and accountability of parliament, through such diverse means as the strengthening of the select committee system, the creation of an ombudsman, and the passage of the Official Information Act.

When considering concerns that have been raised about New Zealand's parliamentary system in recent years, we need to distinguish between transitory and endemic problems with the conduct of governments. Some problems may be self-correcting. For example, we have argued in Chapter 2 that, over time, routine promise-breaking is a poor electoral strategy, sustainable only in times of economic or social crisis. If 'self-correction' takes too long, however, we may still want to modify institutions that allow undue resort to short-term promise-breaking. On the whole, however, the primary focus of any programme of constitutional reform should be on endemic flaws in mechanisms for holding politicians accountable.

In any case, the potency of constitutional reform is necessarily limited. Systems of government are inherently imperfect. In choosing between different democratic models, or in deciding on reforms to a particular model, we are forced to choose between dissatisfying alternatives. We can only go so far in aligning politicians' incentives with the interests of voters, and in constraining politicians so that they avoid private temptation and act for the benefit of voters. And the very nature of the representative process requires trade-offs between the protection of majority and minority interests. Imperfections in the political system - a counterpart to more extensively discussed market imperfections - are, in short, inevitable.

6.1.1 Outline

We begin in Section 6.2 by summarising the implications of each of the reform proposals currently being considered in New Zealand for the accountability of politicians and the quality of political outcomes. In Section 6.3 we canvass alternative constitutional reforms.

In Section 6.4, we turn to the relative efficacy of governments and markets in delivering the outcomes desired by citizens. An assessment of the balance between the two will determine, in wider terms, the emphasis that we might place on constitutional reforms as a means of addressing ills in the political system. We also discuss the case for constitutional rules as means of defining the proper scope of government. Some concluding comments are set out in Section 6.5.

6.2 Summary of Findings

6.2.1 The Westminster System in New Zealand

A common perception of the New Zealand system of government is that it confers virtually unlimited power on the prime minister and the cabinet. The identity of the prime minister and cabinet may be changed in general elections, but between-times their policy-making powers are supposedly near absolute.

In Chapter 2, we have set out a number of reasons why we believe this perception to be incorrect, or at best to overstate the real power of the executive. Legislation can be passed with relative ease in a unicameral, majoritarian parliament. This point should not, however, be mistaken for freedom on the part of the executive to determine policy outcomes. In practice, the executive in the New Zealand system is constrained in a number of important ways.

First, the stakes in elections are high. Electors can quite routinely overturn and replace governments. But electoral constraints are not only binding at election time. Parliamentary debate and select committee processes are conducted with an eye to both informing the electorate and winning public support that will enable politicians to win elections. This information process is enhanced by an active media, by polling and by public access to official information. Prime ministers and cabinets are selected in part for their ability and will to conduct policy programmes so as to win elections.

Politicians can to some extent manipulate the electoral cycle in order to implement their favoured policies. However, they can only follow their own policy preferences, and still win elections, if they are able to convince voters of the benefits of their policy programme.

Secondly, the cabinet and prime minister are answerable, day-to-day, to their caucus colleagues. Backbenchers want to retain their seats in the next election. They will generally oppose policies that threaten their chances of re-election. Within the traditions of caucus, however, they trade some of their right to speak out in public on policy issues for the ability to influence policy within caucus. Parties in power are thus constrained from straying too far from policies that the electorate will find acceptable. However, once backbencher support has been secured, governments can pass legislation with relative ease and efficiency.

Thirdly, the smallness and openness of New Zealand's economy places limits on any government's discretion over policy. Poor policies lead to the loss of internationally mobile resources; good policies attract them. Closing the economic borders, for example with import and exchange controls, is at best a short-term solution. Where governments must compete by means of the quality of their legislation, their policy options are limited. The deregulatory policies adopted in New Zealand in the 1980s have served to make international constraints more binding, and in a manner that may be costly to reverse.

The fact remains, however, that a ruling executive in the New Zealand system has substantial policy-making power. Over long periods, governments have proved capable of exercising this power to the general detriment of New Zealanders. In this study, we have argued that, with the opening up of the New Zealand economy, we now have reason to be cautiously optimistic about future policy outcomes. We also note that New Zealand is likely to continue to face significant exogenous shocks, and that it will benefit from a system of government that enables rapid responses to such shocks. Indeed, we argue that a Westminster system is likely to work best in a small, open economy vulnerable to shocks -and that New Zealand would be less well served by a system of government that made substantial policy changes difficult.

6.2.2 Proportional Representation

Important differences exist between the electoral mechanisms proposed in the September referendum. Preferential voting would not provide for proportional representation at all, but would instead allow second-place choices to count when no party received 50 percent of the vote for a parliamentary seat. The basics of the Westminster system would be kept intact. The supplementary system would also keep the Westminster system fully intact, while adding some seats to parliament based on proportional representation.

The single transferable vote system, used in Ireland, allows voters to rank all candidates, using a complex formula to determine the winner. Introducing such a system in New Zealand would result in the breakdown of party politics, and would provide representatives with incentives to concentrate on serving local constituents, rather than checking executive power. The mixed-member proportional system, used in Germany, would offer representation for smaller parties, and make coalition governments likely.

Of the four available options, the mixed-member proportional system deserves the most serious consideration. Preferential voting and the supplementary system, while limited in their impact, would lead to some overall reduction in accountability. The single transferable vote option is, in our view, the worst of the four options.

The mixed-member system would offer some advantages over current institutions. Specifically, the need to assemble and maintain a coalition government would place checks on governmental powers and allow greater representation of minorities in parliament. However, in this system minority interests may obtain undue power. Ruling governments become less accountable to voters. And political parties may obtain too much power from their influence over candidate nomination.

More generally, we have argued against the mixed-member system because we expect the Westminster system to perform reasonably well in the future, provided New Zealand remains an open economy. Changing the electoral mechanism would increase policy uncertainty, and affect the workings of government in an uncertain manner, without a strong presumption in favour of improvement.

6.2.3 A Second Chamber

For a second chamber to be in position to act as a check on the present parliament, it would need to be:

- elected (nominated second chambers have less legitimacy than democratically elected ones);
- elected on a different basis from the first chamber (so that representation is not identical across the two chambers); and
- have comparable powers to the first chamber with regard to legislation.

In practice, a second chamber with these characteristics could not be accommodated within a Westminster system of the kind that operates in New Zealand. Cabinets formed out of narrow majorities in a lower house cannot also be held accountable to an upper house that may differ significantly in composition. Creating a second chamber that was effective as a source of checks and balances would require either the institution of some form of presidential system, or a move to a more broadly coalitional system.

A second chamber with a more limited role would be feasible - for example, reviewing legislation with a view to protecting individual rights, or reviewing non-money Bills. However, the quality of policy outcomes could probably be improved at lower cost by other means, such as reinforcement of select committee processes or reform of procedure in the existing chamber.

6.2.4 Referenda

The requirements for achieving a referendum under the provisions of the Citizens Initiated Referenda Bill are quite strong. In particular, the number of signatures required on a petition to secure a referendum is high relative to the population base, compared with other countries and jurisdictions that make frequent use of referenda.

On balance, we conclude that voters should have access to referenda as a means of enhancing the information about policy preferences available to politicians. We suggest that the present proposals should be made more accessible to voters for this reason. We agree that referenda initiated by voters should be non-binding. Where initiatives are binding, there is an increased risk that minorities will be disregarded. There is also a risk that laws will be passed that, while appealing in isolation, have adverse effects when taken in aggregate with other policies.

We suggest, however, that future provision could be made for binding protest referenda, enabling voters to strike down legislation within a fixed period of its passage. By restricting binding referenda to a protest role, we can decrease the likelihood that such referenda will be used to infringe the rights of minorities. We also support the use of binding government controlled referenda on constitutional issues.

6.2.5 Summary

The principal recommendations of this study are set out in Table 6.1.

Our primary reason for recommending against the introduction of proportional representation and a second chamber is that we believe that both innovations would weaken mechanisms for holding politicians accountable. They would also weaken politicians incentives to respond to voter preferences in a manner that strikes an acceptable balance between majority and minority preferences.

If present discontent with the New Zealand system of government is based on concerns about accountability and a proper balancing of minority and majority interests, the discontented would, in our view, be poorly served by either of these reforms. Both would make it harder to assign responsibility for particular policies to particular politicians - and to dispose of offending politicians come election time. Both would also make it harder to detect and guard against minority interests gaining undue influence over policy. Also, in a country

prone to exogenous shocks, both would make it harder to adjust policies to handle such shocks, increasing the likelihood of poor policy performance over extended periods.

Table 6.1: Summary of Recommendations

<i>Reform Proposal</i>	<i>Recommendation</i>
Voting Rules	
preferential voting	oppose
single transferable vote	oppose
mixed-member proportional system	oppose
supplementary system	oppose
Second Chamber	
powerful second chamber	oppose
weak second chamber	oppose
Referenda	
non-binding citizens' initiatives	support and make more accessible
binding citizens' initiatives	oppose
binding protest referenda	support
binding government referenda on constitutional issues	support

On the other hand, we believe that extended - but still limited - access to referenda would make it easier for voters to signal their preferences to politicians, and in this way to tighten the electoral constraint.

The three options for constitutional reform that are currently before the New Zealand public do not, however, exhaust the possibilities for constitutional reform. We turn to further options in the following section.

6.3 Further Options for Constitutional Reform

We have argued so far that there is a case, at least in New Zealand, for leaving the fundamental features of the Westminster system intact. The key features are the vesting of executive power in the prime minister and his or her cabinet, drawn from and accountable to parliament, and the first-past-the-post voting system that typically confers a majority on one parliamentary party. We have also argued for the retention of a unicameral version of

the Westminster system, on the basis that a strong second chamber would undermine the current pattern of executive accountability, while a weak second chamber would be unlikely to yield benefits in excess of costs.

A view that the general structure of government in New Zealand makes sense does not imply that constitutional reform is impossible or unlikely to yield benefits. But it does limit the range of possible reforms to those which would enhance the system's existing patterns of incentives and constraints.

In this section, we briefly canvass reforms in the following areas: parliamentary procedure; the number of members of parliament; public funding of political parties; the parliamentary term; the pay structure of politicians; and a written constitution and/or fully justiciable bill of rights. A detailed analysis of these (and other possible) reforms, and their likely impact, is, however, beyond the scope of the present study.

6.3.1 Parliamentary Procedure

In Section 2.2.1, we described how parliamentary debate, select committees, and the requirements of parliamentary procedure act to reinforce the electoral constraint on governments. Parliamentary debate provides a regular forum through which the government and the opposition can advertise their position on policy issues to voters. Debates also allow scrutiny of the government by the press and the public. Select committees provide a mechanism through which backbench politicians from both the government and the opposition can influence the content and detail of legislation. And the requirements of parliamentary procedure place practical limits on the speed with which, and manner in which, legislation can actually be passed.

The effectiveness of parliament in reflecting the electoral constraint on a continuing basis depends on both the detail of parliamentary rules and on the conventions of their application in practice. Recent decades have produced a number of innovations relating to the practice and openness of the business of parliament. Examples include the increasing prominence of select committees, the passage of the Official Information Act, and the extension of the parliamentary year. However, it is unlikely that the potential for internal reforms has been exhausted. We suggest that further work should focus on innovations that would enlarge opportunities for informed debate (for example, through further development of the select committee process), and reduce the potential for the hasty passage of quantities of legislation at the end of each parliamentary year.²

² McGee (1992) offers suggestions for the reform of parliamentary procedure.

6.3.2 The Number of Politicians

There are at present 97 seats in the New Zealand parliament, and the number will increase to 99 at the 1993 election. Various commentators have suggested that this number is too small to permit the effective and informed conduct of the business of the government and of parliament. For example, the Royal Commission (1986) suggested increasing the number of parliamentary seats to 120. It argued that such an increase would facilitate an improvement in the quality of government, through both an increased pool of talent for key positions and the scope for greater specialisation both at the ministerial level and in select and caucus committees.

The Royal Commission also noted that an increase in the number of MPs could change the dynamics of the relationship between caucus and cabinet. A large increase in numbers could, in our view, have a significant effect on the pattern and impact of intra-party competition, described in Section 2.3. For example, it would alter individual MPs' expectations about achieving ministerial status (perhaps leading to some redirection of energies to select committee processes), and could weaken some of the bonds that maintain caucus unity. While we agree that the increase suggested by the Royal Commission is sufficiently small to leave the present set of incentives basically intact, further work is needed to conclude that an increase in the number of MPs would lead to a notable increase in the quality of legislative processes or outcomes.

6.3.3 Public Funding of Political Parties

In Section 2.2.2, we described how political parties shape the electoral process, and the policy options available to politicians. Parties provide voters with a screen to sort and identify candidates, and also provide a focus for pre-election coalition- and consensus-forming. In a first-past-the-post system, the existence of parties also gives voters a means of signalling where they want policy-making power to lie. Broad political parties are most influential in the activities surrounding general elections.

Public funding of political parties is sometimes suggested as a means of enhancing the role of parties in the electoral process. It has also been preferred to private funding because of fears that private financial support would result in an undue influence over policy by, say, business or trade union groups. As noted by the Royal Commission (1986), parties already receive considerable indirect funding, through access to free television and broadcasting time, and the support services provided to sitting MPs. The Royal Commission sees a case for extending direct state assistance to political parties. It suggests a model in which aid is

linked to electoral votes, but skewed towards the opposition and significant smaller parties. It bases this case on the role of parties in informing and motivating the election process, in an era in which election campaigns are increasingly expensive and sophisticated.

We suggest that future work on public funding of political parties should focus on the quality of incentives provided by public vis-a-vis private funding of political parties and election campaigns. Any case for public funding (including the present indirect funding) should, in our view, be based on an assessment of any likely failures in purely private funding mechanisms, weighed up against the likely failures of public funding (including a bias in access towards incumbent politicians and governments).

6.3.4 The Parliamentary Term

New Zealand's three-year parliamentary term is relatively short by international standards. Four to five years are the norm in most western democracies (including the Westminster systems in the UK and Canada), although snap elections are also relatively common overseas.³

The selection of a parliamentary term reflects a trade-off between opportunities, at elections, for voters to remove and replace governments, and the provision of time and incentives for governments in power to implement policy programmes with other than a short-term focus.⁴ As noted in Section 2.5, a three-year term may prove uncomfortably binding where governments should, in the public interest, be pursuing policies with high short-term costs and long pay-back periods. On the other hand, the New Zealand experience has shown that such policies are still possible, if they are adequately explained and attention is paid to the timing of their implementation.

On balance, the Royal Commission opposed the extension of the present term in the absence of moves to tighten other constraints on executive power. An extension of the term was subsequently rejected in a 1990 referendum. In our view, there may be a case for reviewing the term in the future, if we are correct in our assessment that policy changes in the 1980s have tightened international constraints on policy discretion.

³ For example, in the UK, where there is a five-year term, elections may be called early if the party in power expects voter support to be at a peak before completion of its term.

⁴ A good discussion of this point is provided by the Royal Commission (1986, Chapter 6).

6.3.5 Politicians' Pay

So far we have concentrated on some of the rules surrounding the activities of parliament and election campaigns. But the quality of policy-making processes and outcomes will also be affected by the quality of individuals seeking to enter parliament, and their personal motivations. As in any occupation, the factors that motivate aspiring politicians may be many. Ideological conviction, a desire to do good, a desire for social prominence or power; all are likely to play some part. So, too, is the income that a politician expects to receive when he or she enters parliament, or rises to a cabinet position. Income may not be a prime motivator, but at the margin it does matter. Sensible public discussion on politicians' pay and stable arrangements for pay adjustments has been hard to achieve in New Zealand.

If income is important, we must confront such questions as:

- to what extent would higher incomes attract better MPs?
- do relatively low pay-packets simply mean that MPs look elsewhere for income (such as non-monetary favours, or post-retirement sinecures), and does this distort policy outcomes?
- is there a case for (or possibility of) linking pay to performance in some direct fashion?

6.3.6 A Written Constitution

A case has on occasion been made for a written constitution for New Zealand, setting out formally the checks and balances to apply in government. We believe that there would be value in more deeply entrenching rights of the kind set out in the Bill of Rights Act 1990. Such a document might also usefully entrench properly formulated rights or principles deriving from the Treaty of Waitangi.

We are less convinced that it would be desirable to have a written constitution that went further and placed explicit checks on the exercise of government power. Such checks make positive, as well as negative, change more difficult. If a country needs to undergo further policy change, or faces the prospect of ongoing exogenous shocks, it may be unduly hampered by a written constitution. Explicit written checks and balances are arguably better suited for situations like America in the late eighteenth century, where intrinsic conditions were already favourable for economic growth and liberty, than for New Zealand in the 1990s. (See also the remarks in 6.4.1 below.)

6.3.7 Summary

Reforms in any of the areas discussed in this section would, in our view, be unlikely to have more than modest effects on the accountability of politicians to the electorate or, more generally, the quality of policy outcomes, although improvements would be worth having. Democratic institutions are inherently imperfect, by any standard that we might devise for them. They require an institutionalisation of trade-offs in the absence of any universal rule for aggregating interests.⁵ Correspondingly, any definition of accountability of the elected to the electors is necessarily open-ended.

Our approach in the present study has been to accept these problems as irresolvable, and to address the second-order question of how to minimise the imperfections of a necessarily imperfect institution. The possible areas of reform surveyed in this section should be seen in that light. The present Westminster system is, we have argued, quite well-suited to New Zealand; better, at least, than the other options up for consideration. If we are to stay with a Westminster system, we should turn our minds to ways of making it work better, whether through a closer alignment of politicians' incentives with the nation's welfare, or through refinement of existing constraints.

6.4 The Imperfection of Politics: Alternatives to Purely Constitutional Reform

The present study focuses on the incentives and constraints created by New Zealand's present system of government, explains how they work, and then explains how they would be altered by proportional representation, bicameralism, and greater use of referenda. The key insight underpinning this analysis is that incentives matter as much in the political as in the economic sphere and, in turn, that incentives are shaped by the rules and institutions within which politicians and markets operate. The problem for voters is to align politicians' incentives as closely as possible with their own interests. Constitutional rules are one means to this end.

The problem of getting desired outcomes is, therefore, common to economic and political activity. But governments and markets involve categorically different means of defining and delivering desired outcomes. They also differ in their success as delivery mechanisms for different goods and services. Government-initiated decisions often result in the same

⁵ See our comments in Chapter 1 on the relevance of Arrow's Impossibility Theorem to constitutional debate.

package of outcomes for the entire citizenry; markets, in contrast, allow individuals to purchase goods and services of their own choosing. While government action is clearly necessary in society, we should not be surprised when many individuals are disillusioned with political outcomes. Such disillusionment follows from the very nature of political decision-making.

The recognition that political systems do not simply and predictably translate voter interests into outcomes suggests the use of non-political mechanisms for most resource allocation decisions. Much of the policy debate in recent years in New Zealand has focused on the proper scope of government and market. The position that one takes on the balance between the two depends, in part, on one's assessment of the relative success of governments and markets in delivering what citizens want. The ease of remedying deficiencies in markets compared with remedying deficiencies in political processes will be a factor in this assessment.

If markets can deliver a wide range of the goods and services that voters want at lower cost and with higher predictability than political processes, one would favour a general regime in which governments were assigned a smaller role (or command over CNP), and vice versa. In the (personal) view of the authors, the range of activities over which governments are consistently likely to outperform markets is, indeed, quite small. In this view, concerns about political processes and outcomes might more definitively be addressed by working to limit the scope of government and to enlarge the scope for private choices, rather than by introducing reforms to electoral arrangements or the basic structure of parliament.

Identification of market "failures" - attributed to the existence of public goods, of externalities, of monopoly power, and so forth - has generated a veritable industry among economists in the present century. A belief in the prevalence of market failure has generated concomitant recommendations for government intervention - including general expenditure programmes, regulation and antitrust enforcement, among other policies.

Since the 1960s, however, an increasing body of thought has criticised the notion of pervasive market failure. Criticism has focused, in particular, on the reliance of many market failure arguments on relatively unsophisticated economic models, which tend to assume away such factors as imperfections in information, or the evolutionary nature of economic processes and relationships.⁶ There is increasing recognition of the potential for political systems to produce undesirable, unintended outcomes - of the susceptibility of political systems to capture by special interests, for example, and of imperfections in the

⁶ Cowen (1988) contains a selection of writings critical of the (now) traditional emphasis on market failure.

alignment of political outcomes with voter interests. In short, public policy economists have now come to the rather obvious conclusion that any consideration of market or government “failure” is necessarily comparative in nature.⁷ Rules and institutions, incentives and information, all matter in determining outcomes, both in the market economy, and in the political arena. As illustrated by this study, the insight that institutions and incentives matter in politics can help to illuminate discussions of constitutional change.

6.4.1 Constitutions and the Scope of Government

If a position is taken on the proper scope of government - whether the position is that government is too large, or that it is too small = the question remains whether, within a broad debate about constitutions, we can remedy this situation.

We see at least two means of delimiting the scope of government. One is to influence the intellectual climate of society. The other is to select a written constitution that constrains the scope of governmental activity. Of these two means, we place greater weight upon the first. If the operation of a democratic government is to be constrained (or, indeed, extended), it should be constrained (extended) through influencing the opinions of the citizenry.⁸

Correspondingly, we do not favour the institution of a formal economic constitution guaranteeing “economic freedoms”, despite the fact that we strongly support the protection of such freedoms. Many advocates of liberal economics (for example, James Buchanan and Friedrich Hayek) do favour such a constitution to constrain government or enforce a regime of economic liberalism by written fiat. In some areas of policy governments can make legislative commitments to pursue sound economic goals. The Reserve Bank Act is an example. However, there are important differences between such legislative initiatives and fully-fledged, entrenched economic constitutions. We oppose the imposition of the latter for several reasons.

First, in New Zealand’s case we are not designing a constitutional regime from scratch, but are considering electoral reforms for a country in mid-stream. We do not wish to accompany our recommendations about electoral reforms with a particular vision of government and

⁷ We find the term “failure” as unhelpful when it is applied to politics as it is when applied to markets. The most important insight, in our view, is that incentives matter in politics as in markets. The important issues then become ones of assessing whether it is easier (or cheaper) for individuals to satisfy their demands, and enhance overall welfare, through markets or through political processes.

⁸ See Kerr (1988) on the role of ideas in shaping policy.

society that is not broadly shared by the electorate. Any attempt to impose a written constitution with controversial goals would likely result in constitutional reversal and destruction of the fabric of government.

Secondly, any attempt to enshrine a fixed scope for government in a written constitution would likely backfire in today's intellectual environment. Once economic issues were seen as fair game for the constitution, the pressures to write economic rights into the constitution would become very strong. The outcomes of constitutional conventions cannot be guaranteed in advance, as has been illustrated by the American experience.⁹ The calling of a large-scale constitutional convention or reform process is justified only when change is desperately needed, so desperately that we are also willing to risk change in the wrong direction.

Thirdly, we doubt if written constitutions necessarily provide strong safeguards against the erosion of individual liberty. Well-known is the Soviet constitution, whose written form purported to safeguard individual liberties to a considerable degree. A less extreme example is the constitution of the US. Because the intellectual climate of society has changed, the Supreme Court is no longer willing to examine economic regulations, and routinely allows substantial market manipulation to pass constitutional scrutiny.¹⁰

More specifically, it is not clear how a written constitution is supposed to protect economic liberties against encroachment. As long as we accept that government has a proper role in society, how are we to use a written document to distinguish "proper" from "improper" functions of government? The proper functions of government could not be listed or categorised definitively (even if agreement could be reached on its general scope), so the constitution would need, at some stage, to fall back upon phrases such as "the general welfare" or "the public interest". But these same phrases will justify different degrees of government intervention to different people.

Any attempt to provide a definitive list of proper governmental functions will quickly become obsolete in a rapidly changing world. The necessity of environmental protection legislation, for example, has become apparent only in very recent times. And while we see a prominent role for markets and property rights in protecting the environment, government action is required if only to define relevant systems of property rights. Would any such

⁹ The first constitutional convention in the US was originally nothing but an attempt to modify the earlier Articles of Confederation.

¹⁰ On this issue, see the work of Richard Epstein, specifically his book *Takings* (1985), and his foreword to this study.

action be supposed to count as “intervention” or “defence of property”? Such questions have no objective answer.

Serious debate over the proper sphere of government is beyond the scope of this study. Our focus here has been on the distinct question of how political systems translate policy preferences into policy. The implications of any particular system of government for, say, the emphasis placed on minority preferences, or the preferences of the median voter, hold whatever those preferences might be. However, we would also argue, for the reasons set out in this section, that trying to enshrine any particular view of the proper scope of government (“good policy”) in a written constitution is undesirable for both democratic and pragmatic reasons.

6.5 Concluding Comments

Behind the proposals for constitutional reform under consideration in New Zealand lies a substantial discontent with political processes and at least some of the outcomes of those processes. Some of the identified defects may, over time, self-correct. For example, we do not believe routine promise-breaking to be a sustainable political strategy. Other discontents may wane as the benefits of what have been painful policies become more widely felt.¹¹ If self-correction is too slow, or impossible given the limitations of government as a sphere of action, discontent is likely to remain. However, justifiable discontent is not a sufficient condition for constitutional reform. In addition, it must be shown that the benefits of any proposed change exceed the costs.

The primary concern of the present study has been to assess whether the three, complementary, proposals for constitutional reform currently being debated in New Zealand are likely to improve the democratic workings of government. This is a question that can, and we believe should, be asked quite independently of policy preferences, or attitudes to the reform programmes of recent governments. Democratic governments are meant to be filters through which the preferences of voters on matters pertaining to the general welfare are distilled into policies. Although we may be tempted to pass judgment on some of those preferences, in a constitutional debate it is necessary, instead, to focus on the quality of the filtering mechanism. The proper place for debate over what policy should consist of lies elsewhere. The outcome of that debate must depend on the powers of persuasion and the persuasive power of good policy.

¹¹ Policies that produce pain without benefits may, of course, rightly be reversed.

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