

Principles of Constitutional Design

Donald S. Lutz

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this disjunction. The power element is restrained by the universalistic rule-of-law element. At the same time power is inclined to respond to popular and particularistic demands from various parts of the population, because future power rests on the distribution of governmental goods and services in a nonuniversal manner. We see this disjunction in, for example, the debate over affirmative action in the United States. The culture-power-justice nexus embodied in a constitution has been most famously examined by Montesquieu. His term “spirit of the laws” is an analytically useful approach to the overall problem, and we turn next to outlining his core contributions to comparative constitutional analysis.

Fundamental Principles and the Spirit of the Laws

As we recur to the fundamentals of constitutional democracy, analysis can develop from comparative empirical analysis, from careful analysis of texts that clarify language and thinking, from the logical analysis of models, and sometimes through simple deduction from prior principles. The incautious reader might conclude that the end product promises to provide a master plan or a set of blueprints that might be applied mechanically to the design of constitutional democracy. Such is not the intent of this study, even if the goal were reasonably possible. Understanding events post hoc, even the understanding of empirical relationships, does not translate in human affairs into highly predictable institutional outcomes. The many reasons for this do not bear lengthy reiteration. There are too many variables, most of which are not susceptible to human control; for the rest, the connections between independent and dependent variables are often so imperceptible and far removed that they cannot be effectively utilized; human attempts to control these variables elicit counter human attempts to thwart or slide past them; and the human ability to create and learn new responses can make formerly important variables irrelevant, and attempts at control counterproductive. The impossibility of the task defined by logical perfection, however, does not render the task unimportant or meaningless. On the contrary, the task is recommended by both its difficulty and its importance.

A pedigree for constitutional analysis, while involving many political philosophers, runs most directly from Aristotle through Montesquieu

to *The Federalist Papers*. Recent books have tended to work explicitly from Madison and Hamilton, but it is worth briefly summarizing Montesquieu here, if for no other reason than his approach is most directly supported by constitutional design over the past half century.

Montesquieu began by terming the reconciliation of freedom and coercion as the most fundamental problem of political philosophy. He worked from a conviction that organized political systems are created because they provide not only protection a la Hobbes, but also because they lead to long-term economic benefits not possible in prepolitical societies. In this regard he has some kinship with Locke, but Montesquieu's analysis is broader than Locke's. For one thing, Montesquieu defined the benefits of civil society to include justice explicitly, as well as the possibility of trade and commerce, whereas Locke never mentions justice. For another, Montesquieu recognized that the sovereign power created by humans frequently deprives citizens of the benefits for which it is created. As a result, his analysis focuses more clearly and deeply on the means to limit coercive power, which is another way of saying that Montesquieu was profoundly constitutional in his approach whereas Locke was only incidentally so.

To a significant degree Montesquieu is an intellectual heir of Aristotle, but most political philosophers who wrote during the seventeenth and eighteenth centuries had lost Aristotle's realism and empiricism. In his recovery of Aristotle, Montesquieu ends up looking very much like a relativist, but this is not the case. Montesquieu believed that there was no universally applicable solution to the freedom-coercion problem. Instead there are types of solutions such that the reconciliation of might with right must be achieved differently in different cultures and political settings. Any given solution, to be successful, depends on a number of factors. Among others, he identifies geography, climate, the size and nature of the population, the nature of the economy, and the traditions in place – including religion and the existing political culture. Because we can systematically analyze the effects of each, the solution in a given country to the freedom-coercion problem is thus neither arbitrary nor accidental.

To say that there is a nonarbitrary, nonaccidental solution is not to say that there is an ideal one. Under the best of circumstances the solution can only approximate optimality, and to seek either optimality or perfection is to invite inevitable disaster. There is no optimal solution

across political systems, or in any particular one, in large part because any successful solution cannot be permanent. It is subject to change by correction or corruption. In his view change is inevitable, and political institutions invariably lag behind social and economic change. As a result, both the content and application of constitutional principles are subordinate to facts, and facts are collected in order to generate and to condition the application of general principles. The principles that emerge are interconnected both logically and empirically. Logically, they illuminate the kinds of structures that are needed. Empirically, they help us to understand the inner logic of the specific set of structures adopted by a people. As a result, we are able to analyze the institutional logic of a political system using principles that transcend particular nations, and at the same time we can analyze the particularistic solution and its underlying, constitutive principles that integrate the society – which he terms the “spirit of the laws.” This “spirit” is a composite of what we earlier termed the culture-power-justice nexus, and provides the energy for the political system the way a mainspring or a battery does a watch. Overall, then, Montesquieu is not only the heir of John Locke but also of Jean Bodin and Niccolò Machiavelli. He is a realist and an empiricist.

The analysis of comparative constitutionalism pursued here uses Montesquieu’s approach not only because of its elegance or the veracity of the principles he advanced, but because the history of constitutionalism down to the present ratifies the utility and power of that approach. Although his analysis of the effects of climate strike us today as primitive and wrongheaded, he was correct in his general thesis that political power is organized in order to emancipate humans from the blind forces of nature, and that the political freedom that ought to result from man’s increasing power over nature is threatened by the very instruments of power through which he organizes to control nature. This thesis led him to a powerful anti-Hobbesian conclusion. Because humans in the state of nature are weak, they are not dangerous to each other. But the creation of civil society makes humans collectively strong, and this newly gained strength produces conflict within and between political systems. In short, the creation of civil society marks the beginning of a possible state of war, and Montesquieu’s solution to this possible state of war is a constitutionalism characterized by popular sovereignty and the separation of powers.

Again, though some of his analysis seems time-bound, Montesquieu held that constitutional democracy, which he generally termed a republic, is usually found in the form of a commercial society. Empirically he saw constitutionalism as enhancing what we now term economic development better than any other political form, and the more economically developed a country is, the stronger the pressures generated within the population for republican government. Here he ran into another problem. Economic development leads to the acquisition of vast riches, which in turn leads to greater and greater degrees of inequality. However, republican government (constitutional democracy in our terms) rests on republican virtue and equality. Hence we see the basis for his emphasis on a separation of powers structured so as to address the effects of inequality, and hopefully to redress it to some extent, while at the same time protecting the property of rich and nonrich alike.

Montesquieu did not believe that the constitutional form was the solution to the abuse of power. Rather, successful constitutionalism rested supremely on a political and social substructure that supported constitutionalism, which he termed the “spirit of the laws.” Without this underlying political culture, the formal institutions of constitutionalism are moribund. Tocqueville in his *Democracy in America* spoke similarly of the “habits of the heart” that undergird and make constitutional democracy possible. These “habits of the heart” or this “spirit” derives to a significant degree from the way we organize and live our day-to-day lives – hence the importance of economics for Montesquieu. Because constitutional democracy cannot be defined merely in formal institutional terms, Montesquieu resisted treating the separation of powers as a dogma and instead looked upon it as an instrument that allowed the population to organize a counterpower to power. Unless a people and their circumstances are such as to allow the creation of constitutionalism, it will not occur. By the same token, if the people do not organize themselves to preserve constitutional government in ways allowed by the separation of powers, constitutionalism will not last.

Conclusion

Constitutional government is not a natural form of political organization but a human artifact that is selected for use because of its beneficial