

# Principles of Constitutional Design

*Donald S. Lutz*

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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

tendencies. We choose to use this human-made tool, this technology, not for itself but for its relative advantage over other political technologies in the pursuit of fundamental human hopes. One can, in a sense, view constitutionalism as resting on natural inclinations, but constitutionalism flows from the human psyche in an attempt to channel and improve human nature. A constitution rests on deeply shared human hopes but not on behavior that, even when considered “natural,” is in any sense inevitable. Three hopes in particular justify, animate, and define constitutionalism – the universal human hopes, one might say inclinations, for self-preservation, unfettered sociability, and beneficial innovation. These three animating hopes of constitutionalism are sometimes encoded as life, liberty, and the pursuit of happiness; but rather than being a separable value, liberty is a concept that encodes the triple goal of self-preservation, unfettered sociability, and beneficial innovation.

Constitutional purposes are multiple, and liberty thus has several layers; among various related institutional implications are rule of law, republicanism, and limited government. Rule of law, often associated with equal treatment, was actually developed to minimize arbitrariness, particularly arbitrariness that threatened one’s life and livelihood. Republicanism, the belief that one should not be subject to laws to which one has not directly or indirectly consented, rests upon the free interaction of citizens in pursuit of the common good, which both assumes and enhances unfettered sociability. The common good, however, is not unlimited. Rather, republican government in pursuit of the common good has limits, and those limits are defined by human activity that results in beneficial innovation. “Beneficial innovation” is defined as any human invention that enhances or maximizes the probability of humans preserving themselves, developing morally and psychologically, and achieving relative material ease – without interfering with the inclination or ability to innovate further. Beneficial human innovations take many forms, including, but not limited to, such things as medical advances, effective international peace institutions, better teaching methods, more efficient production methods as well as more efficient ways of moving capital to underwrite such methods, faster and less expensive means of communication, advances in architecture and housing development that make human interaction easier in more pleasant settings, technological advances that can be used to free up

more time for people to choose activities involving self-expression or personally rewarding joint activities, creative expression in more highly developed art forms, and alterations in the workplace that enhance safety as well as the productive use of the entire personality.

“Beneficial innovation” is not to be confused with a notion of progress where more is always better. Nor is it to be confused with innovation per se. What is beneficial can only be determined by a freely interacting citizenry reflecting on the nature of the citizens’ own personal and human needs and hopes. Finally, although a free citizenry can determine whether an innovation is beneficial by adopting or not adopting it, “voting” for or against innovation – whether individually or collectively – must not censure, impede, or discourage future innovation if the system is to remain constitutional and serve the ends for which constitutionalism was invented.

If a constitution is to enhance the self-preservation of all citizens (otherwise why would they submit themselves to it); if it is to enhance the common good, which again implies consideration of all citizens; and if it is to protect the actions of beneficially innovative citizens whom we cannot identify beforehand, and who thus could come from any part of the population; then we must include all as citizens. That is, the constitution’s rule of law, consent-grounded republican institutions, and power limitations must extend to all citizens; and the extension to all citizens is called popular sovereignty. Popular sovereignty thus rests at the base of constitutionalism, and that is why any analysis of constitutionalism and constitutional design must begin with an analysis of popular sovereignty.

As a preface to the analysis that follows, it might be noted that popular sovereignty can take one of four broad forms. The first might be termed “direct popular sovereignty,” which describes a situation in which a people gather in the same location and make all collective decisions together face-to-face. A second form might be termed “strong popular sovereignty,” which describes a situation where there is more or less constant oversight of elected officials by highly participatory citizens using a variety of supervision and consent mechanisms beyond periodic elections. “Weak popular sovereignty,” then, describes the general situation where oversight is limited primarily to periodic elections. Finally, one might identify something called “foundational popular sovereignty” as the situation where the citizens are

essentially limited to approving the constitutional structure and the rules that define it, as well as the amending of those rules and that structure.

The [next chapter](#) begins a sustained analysis of sovereignty and popular sovereignty that will be philosophical, historical, and analytic.