

# Principles of Constitutional Design

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the government to the people, and that the most effective means of matching involved some form of popular consent. Popular consent implied what we now call popular sovereignty, and sovereignty of any sort implied a set of attitudes that we now call constitutionalism. What constituted popular consent, and what this consent actually entailed, thus became the key theoretical problem for political theory in general, and constitutional theory in particular.

### Toward a Definition and Typology of Popular Sovereignty

Consider the following definitions of “popular” from the *Oxford English Dictionary*.<sup>2</sup>

Generic definition: Affecting, concerning, or open to all of the people; as opposed to a particular class

Definition 1: Devoted to the cause of the people

Definition 2: Prevalent or current among, or accepted by the people generally

Definition 3: Studious of, or designed to gain, the favor of the common people

Definition 4: Approved by the people; based on the consent of the people

The **generic definition**, in the context of sovereignty, tells us that a political system characterized by popular sovereignty is one where sovereignty affects, concerns, and includes everyone. However, the next four definitions together lay out a typology that helps us understand the major contending positions on popular sovereignty. It makes a great deal of difference whether something is devoted to the cause of the people, in accord with popular opinion, designed to gain the favor of the people, or specifically approved by the people.

Definition 1 implies the weakest form of popular sovereignty and seems to be close to what Hobbes had in mind. Once established, the sovereign is assumed to be performing the job intended for it in the manner intended, but there is no way for the people to certify that this

<sup>2</sup> These definitions are taken from the *Oxford English Dictionary*, but they have been arranged and numbered to assist the analysis.

is or is not the case. In terms of a robust theory of popular sovereignty, we are asked to assume the very thing that needs to be established. Furthermore, once an agent is selected, sovereignty is permanently given away by the people. The agent of popular sovereignty becomes the actual sovereign, and popular sovereignty is no more than a transitional condition. From our own experience, it is difficult not to think of Marxist regimes that used this notion of popular sovereignty and the kind of politics that resulted.

Definition 2 is essentially the position defended by Bodin. When the agent of popular sovereignty is created, the agent promises to preserve and uphold the rules and customs already generally accepted by the people. The popular sovereign becomes generally inactive, but it can bind its agent or agents to uphold and enforce new customs that the people might evolve. One can imagine highly homogeneous, traditionalistic societies as being most comfortable with such a notion of popular sovereignty, and many still-traditionalistic societies currently have constitutions that reflect the Bodinian perspective. While Bodin defined this version of popular sovereignty, there are variations of it that approach definition 3. Some of its proponents – including Althusius, Bellarmine, and Suarez – place such a heavy emphasis on the power of the people over their agents that one is surprised they do not take the obvious step of explicitly making an elected body of representatives the apex of government. Kingly rule was still so much a part of normal expectations that their arguments usually turned more on the ability of the people to commit tyrannicide than on regularizing popular sovereignty through elected legislatures. Still, the cumulative impact of these theorists was to develop a sense of popular sovereignty so strong that it was easy, almost inevitable, for many theorists to take that next step.

Definition 3 is an even stronger form of popular sovereignty and is close to what Blackstone defended as undergirding parliamentary government. However, the common law as evolved in Britain expresses something closer to the second definition. To the extent common law in a country becomes primarily the sum total of parliamentary decisions, that country is institutionalizing a purer form of the third notion of popular sovereignty; and to the extent parliament shares its rule as the source of common law with the courts, we have a blend of the second and third notions.

Some may argue that when a constitution declares parliamentary sovereignty, it is by definition either enshrining the third notion of popular sovereignty, or perhaps not establishing any form of popular sovereignty at all. In answer to the first contention, it would seem prudent to follow Bodin's recommendation and look below the surface to trace power back to that entity which creates the rest. If the institution of parliament is created by the people and/or rests on actions by the people in order to exist and operate, then the people are de facto sovereign and parliament its de jure agent. Any parliament that is composed of persons elected by the people, and subject to removal in future elections, would appear to be merely the agent of a greater power. Indeed, it is the certainty of future elections that leads parliament to "be studious of the favor of the people." The key characteristics of this sense of popular sovereignty are that the people elect representatives on a regular basis but are otherwise inactive, except to judge the actions of their agents in future elections. Representatives are left free between elections to pursue the common good without prompting from the people. The result is usually termed "trustee representation," because legislators are, like trustees of a trust fund, supposed to use their own judgment in pursuit of the broad goals and principles that are laid out in the document establishing the trust.

The last notion of popular sovereignty is the most robust. It supports what some term "strong democracy," or participatory democracy, and produces what is usually termed "delegate representation" in its weakest form and direct democracy in its strongest. Delegates are agents who are supposed to represent those for whom they are delegates as if those represented are actually present.<sup>3</sup> Under the delegate theory, the people can and will be active in instructing their representatives and expect a high level of congruence between public opinion and public policy. The

<sup>3</sup> The best summary analysis of representation remains Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972). Her analysis reflects the ambivalence we have come to feel toward popular control when she notes the paradox of representation that characterizes modern democracy. On the one hand, we expect a representative to act as if those who are represented are in effect present, a position congruent with the delegate theory and thus of the fourth and strongest version of popular sovereignty; while at the same time we expect the representative to act better than the constituents would if they were present, which is congruent with the trustee theory of representation, and thus with the somewhat weaker third model of popular sovereignty.

majoritarian principle is stronger than is the case with the previous version, and attention to minority rights is accordingly weaker. The pure form would have all legislation passed by the people gathered together, or perhaps in referenda.

For the sake of simplicity we will term the first version of popular sovereignty the Leviathan Model; the second, or Bodinian, version we will call the Traditionalistic Model; the version that rests on elected agents acting according to the trustee theory of representation we will call the Constitutional Republic Model; and the strongest form, whether based on the delegate theory of representation or on referenda, will be termed the Constitutional Democracy Model. When it comes time to further differentiate political systems and their respective constitutions, we will find the analysis focusing primarily on Constitutional Republics and noting Traditionalistic and Constitutional Democratic elements that are included in the mixture. Few political systems will be found to approach a pure type. From this point on, what has been termed “constitutional democracy” out of deference to common usage will be termed a “constitutional republic” in keeping with the analysis laid out here. The former term will be reserved for a limited direct democracy, and the latter for a limited government that uses elected representatives. We can then speak of the relative strength of the democratic principle in any given constitutional republic.

Before we begin to unravel the various ways in which popular sovereignty can be embodied in a constitution, it will be helpful to return to the original development of a theory of popular sovereignty to explicate in greater depth and with more precision what popular sovereignty implies, and why it turns out to be the most efficient and effective means for matching a government to its people.

### **The Historical Development of Popular Sovereignty**

Jean Bodin published his *Six Bookes on a Commonweale* in 1576. Thomas Hobbes published *Leviathan* in 1651. Between 1570 and 1700, the competing theories of popular sovereignty that we today take for granted were defined, developed, and explicated in depth. Even a partial listing of the important works that contributed to popular sovereignty theory besides those of Bodin and Hobbes would have to include François Hotman, *Francogallia* (1573); Theodore Beza, *Du*