Principles of Constitutional Design

Donald S. Lutz

those engaged in constitutional design have preferred using some form of the Constitutional Republic Model that holds out the promise of institutional limits on a popular sovereign composed of fallible humans.

Constitutionalism and a Fallible Human Nature

"Strong democracy," or what is here called popular control of government, rests on a very positive view of the natural tendencies of humans in large groups, which in turn rests on a very positive view of human nature. The stronger the democracy that is proposed, the more positive the view of human nature required to sustain the proposal. A complementary perspective is that the more pessimistic one's view of human nature, the more inclined one is to support elitism. A very negative view of human nature inclines one toward very weak democracy and toward what can be termed "strong elitism." The set of attitudes that has historically undergirded and defined constitutionalism eschews both extremes when considering human nature and rests instead on what can be called a belief in human fallibility plus the "redemptive" possibilities of political institutions.

A belief in human fallibility is relatively neutral in its estimation of human nature but recognizes that, while there are "bad" individuals, the major problem with humans is that they miscalculate their own interests and how to achieve them, both as individuals and in groups. Put in the terms of this analysis, even though humans naturally seek the morally neutral goals of individual survival, liberty, sociability, and beneficial innovation, they are often mistaken about how to achieve them. There are several reasons for this. As James Madison points out in *Federalist Papers* 10, humans inevitably must act under conditions of imperfect information and on the basis of communication resting on a tool, language, that is frequently, by nature, ambiguous.[33] Consequently, humans are always in the process of learning from their

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[33] The analysis of Madison here is derived in part from Vincent Ostrom's excellent work *The Political Theory of the Compound Republic: Designing the American Experiment*, 2nd ed. (Lincoln: University of Nebraska Press, 1987). I have altered his analysis somewhat and introduced a slightly different terminology, in order to address more directly the topic under discussion here.

mistakes and successes. Also, the natural inclination toward liberty, because it does not lead easily to self-limiting behavior, frequently results in actions and proposed innovations that, under conditions of incomplete information and the inherent limits of language, are not always conducive to the ends they seek. Put another way, perceived short-term interests often conflict with the long-term interests. There is even, says Madison, a certain quality of irrationality in human activity such that perceived conflicting interests among humans sometimes rest on the most "fanciful" premises. However, because humans are not inherently evil, antisocial, or ill-willed, once experience shows us how to match means to ends more effectively, we are willing to sacrifice our perceived short-term interests in order to advance toward what he calls "the permanent and aggregate interests" of humans in general, and our people in particular.

This belief does not require us to assume a human nature naturally inclined toward beneficence and charitableness, but it does require that there be a human nature in the sense of more or less universally sought human goals, as well as a basic rationality defined in terms of both a tendency to seek more rather than less of these natural human goods and an ability to match means to ends appropriately. Cooperativeness thus rests on a realization that our general long-term interests are similar and a willingness to forgo short-term relative advantage in favor of our long-term interests once the relationship between the two becomes clear. Constitutionalism rests on a basic belief in human rationality but also a distrust of human passions that interfere with rational calculations. The Madisonian model, and all constitutionalism, rests on institutions that are supposed to prevent simultaneously the implementation of "passions" by any part of society, but especially by those who hold positions of power and create sufficient delay for the relationship between personal interests and the permanent and aggregate interests to emerge. Once this relationship is clear, humans will tend naturally to choose those policies which are in line with the reasons for institutions of coordination initially – individual survival, liberty, sociability, and beneficial innovation.

Any given political interest may or may not turn out to be in the permanent and aggregate interests for the reasons just cited; therefore, every interest must be treated equally and invariably subjected to the

same test through fair institutions effective at creating sufficient delay for long-term interests to be identified. At the same time, these institutions of delay should not be so effective that they prohibit deliberative majorities from reaching decisions and enforcing their wills. In this sense, political institutions are "redemptive," because they allow us to continually, and marginally, overcome not a "bad" human nature but one that is prone to fallibility. The demands, wishes, and hopes of every interest are thus in the form of a hypothesis: "If you do as we suggest, we will all be better off in the long run." The essential neutrality with which every interest must be treated in a constitutional system also explains why constitutional systems based on popular sovereignty must rest on rules of coordination rather than on rules of command. No one must be allowed to be a judge in his own case, and "command systems" allow this to happen. At the same time, everyone must be allowed to determine their own interest, and to consider how that narrow interest is linked to the permanent and aggregate interests. Both aspects of constitutional neutrality are grounded in and commensurate with individual survival, liberty, continued sociability, and beneficial innovation.

If popular sovereignty is a principle upon which to ground the coordination of many people pursuing common long-term interests through the mutual accommodation of short-term interests, then the characteristics of that self-governing people would seem to be crucial for successful coordination. Different peoples, despite their common human goals, differ in their characteristics in terms of history, geographical and social contexts, and habits of mind and action. Therefore, the rules of coordination that have a high probability of success will vary from people to people, which returns us to the fundamental Aristotelian notion that a constitution must be matched to the people.

Assuming a natural diversity among peoples and their respective circumstances, and assuming the need to match a constitution to the people and their circumstances, lead us to expect a wide variety of institutional designs among constitutional republics. A simple parliamentary-presidential dichotomy will thus hide more than it reveals when analyzing popular sovereignty. We will spend a later chapter discussing in detail what it means to match a constitution to the people, but at this point the discussion will move forward more fruitfully if we turn to explicating an operational definition of popular sovereignty

that will both lay out the constitutional elements that define the concept and allow us to engage in an empirical analysis.

Toward an Operational Definition of Popular Sovereignty

According to Saint Augustine, God is in the details. If God is the true sovereign who serves as the model for the earthly sovereign, then we find God in his earthly guise in the details of a constitution that creates popular control and then transforms popular control into popular sovereignty. That is, the first thing we should be able to discern from a constitution is the location of sovereignty, an expectation consistent with the first principle of constitutional design – create a supreme power. One problem with constitutions is that frequently they contain hortatory statements concerning sovereignty that are not reflective of the facts of sovereignty underlying the political system. It is necessary, therefore, to follow Bodin's dictum and search for the supreme power in the sum of the details in a constitution.

When we conduct such a search for the supreme power, it is necessary to read the document in its entirety and consider the total effect of its various interlocking provisions. We must be able both to identify and to evaluate the relevant provisions, which in turn requires that we have some provisional method for combining what we find into a reasonably meaningful conclusion. Our specific concern in the rest of this chapter is to devise a means for identifying the relative presence of popular control and then of popular sovereignty. In Chapter 1 we defined democracy as "a political system characterized by direct popular control." Popular control, in turn, is a situation where the people are the supreme power. In its pure form, the people gather together in the same place and pass all laws, and nothing is done by government until and unless such direct, popular authorization occurs. This pure form rarely occurs in the real world, so we are left with devising some way of estimating the degree to which this condition is approximated. We do so here by developing an Index of Popular Control, which permits a summary of the cumulative effect of relevant constitutional provisions toward approximating popular control.

A sovereign, however, is a limited supreme power, so popular sovereignty is popular control limited in some way. A Separation of Powers Index will be constructed in the based on the