

Principles of Constitutional Design

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of popular control as other forms of supreme power. The empirical evidence supports the efficacy of the long-standing theoretical usage of sovereignty, as well as the almost universal penchant of those who design constitutions to seek something other than simply more democracy. Thus, if popular sovereignty is the *sine qua non* of constitutionalism, and separation of powers converts popular control into popular sovereignty, separation of powers is also at the heart of constitutional design.

Some Further Considerations

Although it has been argued here that *de facto* popular sovereignty underlies all political systems centered around popularly elected representatives, popular sovereignty is often not part of the theory used to explain or justify what are unquestionably constitutional republics. For example, in the United Kingdom a doctrine of popular sovereignty was explicitly rejected during the 1688 convention that produced the Glorious Revolution, and for the past three centuries the concept of “parliamentary sovereignty” has been official constitutional doctrine. Elsewhere, statist assumptions sometimes hold sway. The reification of the state has resulted in the notion of the state as sovereign, and many would argue that this is the proper view of sovereignty. Political theorists holding to a statist perspective would probably argue also that the limits identified here are not designed to limit popular sovereignty but to limit “state sovereignty.”

Bodin suggested that a realistic analysis requires us to push our analysis through the chain of power until we come to the entity that first grants power and that has ultimate control over the chain of power holders and power grantors. According to Bodin’s method, if the people have the ability to elect and remove those who are at the top of the chain of power, they are in fact sovereign regardless of the legal or constitutional doctrine used to explain and justify the operation of the political system. Suppose, on the other hand, we for some reason prefer another theory that assigns the word “sovereign” to parliament or to the state. The theory under development here does not require agreement on which entity should be termed “sovereign” legally, which is why the phrase *de facto* popular sovereignty has been used. The fact remains that constitutional republics worthy of the name, regardless

of who or what is called sovereign, markedly tend toward de facto popular sovereignty.

The second statist argument is more interesting, in part because it is true. Constitutional republics do develop constitutional limits and the separation of powers to protect the people against governmental tyranny, but this is only part of the picture. James Madison, in an attempt to develop a comprehensive theory of tyranny, distinguished between majority tyranny and governmental tyranny. In this view, the dangers of creating a sovereign became doubled when the sovereign was the people itself. He dealt with majority tyranny in *Federalist Papers* 10, where he famously developed the theory of the extended republic. In this theory, he argued that small republics were prone to majority tyranny because there was a high probability that a majority faction existed from a widely held local interest, and it was easy for this already existing majority to organize itself for action because distance was not a factor. His solution was twofold. Representation, he argued, tended to elevate cooler-headed, wiser, and more statesman-like people to office. Such representatives could resist passionate majorities asking for policies that were inimical to both minority interests and the permanent and aggregate interests of the whole. Aside from noting that “statesmen will not always be at the helm,” he also expressed doubts that representatives seeking reelection would be up to the task without ancillary precautions. If a republic were large enough, it would encompass enough diversity of interests such that standing or natural majorities would tend not to exist, and the distances associated with a large republic would make it difficult for a passionate majority both to discover its strength and to organize for action. Representation helps, but the extended republic is the major solution to the problem of majority tyranny. Left unsaid was what we should do when the republic was not extensive in size, as is the case with most constitutional republics today.

In *Federalist Papers* 51, Madison summarized the solution to governmental tyranny as involving the division of governmental power into a number of competing institutions such that ambition would be made to counteract ambition. The total package of separated powers, which then also allowed for the possibility of multiple checks and the three great “balances” of bicameralism, different modes of election, and different terms of office, together prevented governmental tyranny. Often

unremarked in analyses of the Madisonian model is that, in the absence of an extended republic, the separation of powers also comprised the primary ancillary means for preventing majority tyranny. That is, a government that could not easily organize to tyrannize over the people was likewise constrained from easily translating popular majorities into tyrannical policies no matter how passionate the majority was. James Madison works out this connection between a separation of powers and both governmental and majority tyranny in *Federalist Papers* 63. Although his discussion is generally about the U.S. Senate, it is here that he points out the combined consequences of bicameralism, different modes of election, and different terms of office – the three great “balances” – that a separation of powers makes possible.

It is helpful to parse out how the theory worked. Assume the existence of a passionate majority bent on gaining policies contrary to the permanent and aggregate interests of the people. Such majorities, in pursuing apparent short-term interests, would in fact be operating against their long-term interests. In order to gain the policies they think they want, but in fact do not, the majority would need to capture more than a single representative body. In order to capture the government for its purposes, the majority would need to first capture a majority in the House of Representatives. Even if it was successful on the first try (an unlikely occurrence), the majority could, at best, capture only one-third of the Senate. This would require that it wait two more years for the Senate, as well as for the president. That still left the Supreme Court with its life tenure, but the impeachment process was available at the cost of more time. Madison did not seem to see the Supreme Court as much of an obstacle to popular will, which our summary of the behavior of supreme courts around the world since World War II tends to confirm. Still, a majority must wait at least four years, and probably longer, to get its way.

During the four years or longer it takes the majority to get its way, the passion in the majority must be maintained, and Madison expected that such enforced waiting would cause the passion in the majority to burn out, so that the people would come to understand its true interests. The system of delay requires several key assumptions. The first is that given enough time the people can distinguish policies that are in the permanent and aggregate interests from those that are not. This requires the deeper assumption that once the distinction is made,

the people will tend to choose that which is in their permanent and aggregate interests. This in turn requires the deepest assumption of popular sovereignty, that the people are “virtuous”; that is, that they possess the characteristics necessary for self-government. Any popular political system based on majority rule must make this deep assumption or else it makes no sense to establish popular government in the first place. A prime characteristic for republican government is that the people be able and willing to pursue the common good, which was termed during the seventeenth and eighteenth centuries “republican virtue.”

The institutions of delay introduced by the separation of powers in the United States had specific American twists to them. First of all, as originally designed, each separated function had a different constituency, different mode of election, and different term of office (including staggered elections for the Senate as part of these last two characteristics). The resulting institutional structure required that the majority first elect a majority of the House from many small districts, each of which had specific, local interests that required appealing to a wide range of interests overall. The Senate was elected by the state legislatures, which meant the national electoral majority first had to capture a majority in the House and Senate in a majority of the states. Federalism, in this and in other ways, was an integral part of the separation of powers. Finally, capturing the Supreme Court required capturing both the presidency and a majority of the U.S. Senate. At this point the different terms of office came into play.

The separation of powers in the United States was designed to slow down significantly the capture of government by a majority. One does not have to duplicate or even approximate this institutional design to achieve the same effect. A wide array of possible institutional arrangements can and have been developed to introduce the complexity of separation of powers. Even if such institutional complexity is introduced and justified in terms of preventing governmental tyranny, it also tends to control the effects of passionate majorities. Thus has the separation of powers been introduced in a variety of institutional guises around the world. Larger constitutional republics can use the effects of geographical size to help convert popular control into popular sovereignty in addition to a separation of powers and the institutions of delay thereby created. Smaller constitutional republics, on

the other hand, are left entirely with the creation of institutional complexity for handling both majority and governmental tyranny. There is no way to introduce any form of institutional complexity without first generating some separation of powers, which is why “separation of powers” is used to identify the entire complex of institutions used to convert popular control into popular sovereignty.

An interesting consideration is that framers of constitutions have not needed to be taught to do so, or convinced to do so. The paradox of sovereignty, and thus of popular sovereignty, seems to be implicitly understood by careful framers of national constitutions. Thus, this is not a normative recommendation to constitution framers. In constitutional republics some institutional form of the separation of powers just tends to happen. Much like the “cube root rule,” where constitutional framers tend to reach a size for the lower house or unicameral legislature that approximates the cube root of the population without being taught the principle, so too separation of powers just tends to emerge. Despite a hiatus in understanding sovereignty and the paradox of sovereignty among academics in recent years, the logic of constitutional design under conditions of *de facto* popular sovereignty seems to result in similar results using a wide variety of institutional designs.

The discussion thus far has illustrated the possibility of studying constitutionalism empirically as well as analytically and normatively. The discussion thus far has also emphasized the cumulative effect of many constitutional provisions. We will now turn to study empirically an important aspect of popular sovereignty in order to emphasize the interlocking effects of institutions in a constitution – the amendment process.