

Principles of Constitutional Design

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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*

droit des Magistrats (*Right of Magistrates*, 1574); Philippe du Plessis-Mornay, *Vindiciae contra tyrannos* (*Defense of Liberty against Tyrants*, 1579); Richard Hooker, *The Laws of Ecclesiastical Polity* (1597); Juan de Mariana, *De Rege et Regis Institutione* (*On Kingship and the Education of a King*, 1599); Francisco Suarez, *De legibus, ac Deo legislatore* (*On Law and God the Lawgiver*, 1603); Johannes Althusius, *Politica* (1603); Robert Cardinal Bellarmine, *The Power of the Pope in Temporal Affairs* (1610); James Harrington, *The Commonwealth of Oceana* (1656); George Lawson, *An Examination of the Political Part of Mr. Hobbs His Leviathan* (1657) and *Politica Sacra et Civilis* (1660); Benedict [Baruch] de Spinoza, *Tractatus Theologico-Politicus* (1670); John Locke, *Two Treatises of Government* (1690); and Algernon Sidney, *Discourses Concerning Government* (1690).

In addition to these better-known works, other political tracts written by men little known today, but who had considerable impact on the thinking of their contemporaries, developed the theory of popular sovereignty to its highest level. In seventeenth-century England, the Levellers substantially contributed to this development, although their doctrine failed to catch hold in England.⁴ Harrington, Locke, and Sidney synthesized the best of their ideas into coherent, though less radical theories. Among the more noteworthy in this movement, we can identify Henry Parker, *Contra-Replicant* (1643); Richard Overton, *A Defiance against All Arbitrary Usurpations or Encroachments* (1646); John Lilburne, *Englands Standard Advanced* (1649); Isaac Penington Jr., *The Fundamental Right, Safety and Liberty of the People* (1651); and Henry Vane, *A Healing Question* (1656).

Perhaps more important than their cousins in England, because their ideas and political institutions took root and became the dominant perspective, theologically based thinkers in colonial America combined advanced thinking on popular sovereignty with successful design of political institutions grounded on the concept. There were many proponents of a highly participatory version of popular sovereignty at work in the American colonies.⁵ The more prominent

⁴ See, for example, the discussion in Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988).

⁵ The creation of institutions of popular sovereignty in the British colonies of North America, and the extent to which the constitutionalism it engendered was based on

among them were Richard Mather, *Church-Government and Church-Covenant Discussed* (1643); Thomas Hooker, *A Survey of the Summe of Church-Discipline* (1648); Roger Williams, *The Bloudy Tenant of Persecution for Cause of Conscience* (1644); and William Penn, *A Brief Examination and State of Liberty Spiritual, and The Frame of Government of the Province of Pennsylvania in America* (1682). It is notable that these men were frequently responsible, as Penn was, for the creation of consent-based government that embodied popular sovereignty. Thomas Hooker was involved with the framing and adoption of The Fundamental Orders of Connecticut (1639), and Roger Williams with the Acts and Orders (Rhode Island, 1647), both of which established highly democratic representative governments. Penn's Pennsylvania began as the most democratic of the colonies and continued to be the most democratic state with the most robust sense of popular sovereignty after the American Revolution.

Excluding the Levellers, we can list each of these men according to which one of the four models of popular sovereignty they supported.

Leviathan Model, in which popular sovereignty is temporary and transitional: Thomas Hobbes

Traditionalistic Model, in which the people are superior to and therefore create the king: Johannes Althusius, Robert Cardinal Bellarmine, Theodore Beza, Jean Bodin, Richard Hooker, François Hotman, Juan de Mariana, Francisco Suarez, Philippe du Plessis-Mornay, and Benedict Spinoza

Constitutional Republic Model, in which the people erect and judge a supreme legislature: James Harrington, George Lawson, John Locke, Richard Mather, William Penn, and Algernon Sidney

Constitutional Democracy Model, in which the people are directly active and participatory: Jean Jacques Rousseau, Thomas Hooker, and Roger Williams

covenant theology, is a large topic that can only be summarized here. For more extensive discussion, see Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988); Joshua Miller, *The Rise and Fall of Democracy in Early America, 1630–1789* (University Park: Pennsylvania State University Press, 1991); and Barry Alan Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought* (Princeton, N.J.: Princeton University Press, 1994).

Although we have grouped these thinkers, there is considerable variation within a given group. Althusius, Bellarmine, and Suarez defended a more developed, stronger sense of popular sovereignty than did Bodin, even if they did not draw what we would today consider the logical conclusions of their respective theories. Harrington, Lawson, Locke, and Sidney are listed in alphabetical order, but the same order describes their respective closeness to the second and fourth definitions of popular sovereignty. Sidney came closest, marginally, to Constitutional Democracy, and Harrington was closest to the Traditionalistic version.

Before moving on to discuss the Constitutional Republic and Constitutional Democracy models, the diverse group of theorists collected under the Traditionalistic label needs to be examined more closely. This category is defined by a continued attachment to monarchy, and the consequent lack of emphasis on a legislature as the primary agent for popular sovereignty. Still, working within what seems to us today as a restricted range of institutional possibilities, the Traditionalists developed modern popular sovereignty theory to a level for which we usually credit people like John Locke. Two men in particular, Mornay and Althusius, are worthy of our attention.

Philippe du Plessis-Mornay was the first to use covenant theology as the grounding for popular sovereignty, and his formulation not only solved the problem of how to create an organized singularity out of a people who could then act independently; it also imported into popular sovereignty an inherent egalitarianism that would lead to the highly democratic expectations we now take for granted. Althusius took Mornay's insight and developed it into the first comprehensive political theory based on covenant theology.⁶ Mornay begins by rejecting Bodin's cultural basis for the people's supremacy: "And now we say

⁶ Althusius refers frequently to Mornay, and Mornay took his basic idea from Heinrich Bullinger's *De testamento seu foedere Dei unico et aeterno* (*The One and Eternal Testament or Covenant of God*, 1534). Bullinger's work is available in English as the second part of a book by Charles S. McCoy and J. Wayne Baker, *Fountainhead of Federalism: Heinrich Bullinger and the Covenantal Tradition* (Louisville, Ky.: Westminster/John Knox Press, 1991). A slightly abridged translation of Mornay's *Vindiciae* can be found in Julian H. Franklin, trans. and ed., *Constitutionalism and Resistance in the Sixteenth Century* (New York: Pegasus, 1969). The Frederick S. Carney translation and edition of Althusius's *Politica* has recently been reprinted by Liberty Press (Indianapolis, 1995).

that it is the people that establishes kings, gives them kingdoms, and approves their selection by its vote. For God willed that every bit of authority held by the kings should come from the people, after Him, so that kings would concentrate all their care, energy, and thoughts upon the people's interests."⁷

Mornay cites as his authority for this proposition Deuteronomy 17:14–15. Deuteronomy, which along with Genesis contains the most explicit, sustained discussion of covenant in the Bible, especially in its application to political organization, would become the standard text for those theorists establishing a religious basis for a strong sense of popular sovereignty. Mornay combines biblical exegesis with logical analysis.

And since no one is born a king, and no one is a king by nature; and since a king cannot rule without a people, while a people can rule itself without a king, it is clear, beyond all doubt, that the people is prior to the king and that kings were originally established by the people.⁸

Since kings, then, are created by the people, it seems to follow that the people as a whole is greater than the king. This is an implication of the term itself, since one who is created by another is considered his inferior.⁹

Mornay compares the people to the owner of a ship of which the king is not the captain but the pilot. The people is also likened to a river that it is perpetually renewed so that unlike a king it never dies. Mornay in this fashion establishes that only the people as “a corporate entity” possess the defining characteristics of a sovereign – absolute, unlimited, perpetual power. Men create kings, he says, for their own advantage, and

they would not have surrendered their natural liberty, which they prize like any other animal, had they not anticipated great advantages. The foremost of these is the guarantee of justice by the king. . . . When the people began to feel the need for equal laws, they were prepared to accept them from a just and honorable individual. But men like that are scarce, and the outcome was very often different. In most cases the only semblance of law was the discretionary power of the king, which spoke differently to different persons. This was the point at which learned men, together with the other magistrates, invented laws,

⁷ Philippe du Plessis-Mornay, *Vindiciae Contra Tyrannos*, as reproduced in Franklin, *Constitutionalism and Resistance in the Sixteenth Century*, p. 158.

⁸ *Ibid.*, p. 160.

⁹ *Ibid.*, p. 161.

which were to be the same for all. Henceforth the first obligation of the king was to be the guardian, minister, and protector of the laws.¹⁰

Because not all eventualities can be predicted, the king has some discretion to supplement the laws from time to time, drawing upon natural equity. But to protect against kings doing violence to the laws, the “people appointed notables as associates of the king.”¹¹ A king receives the law from the people when he takes his coronation oath. An oath is by definition a covenant, since a covenant is any agreement to which God is a party or a witness. Mornay calls it a “compact” and says that “In all legitimate governments a compact is always to be found.”¹² The people in turn take an oath not to obey the king, but to obey the crown, which is defined as a legitimate and therefore limited king. The king cannot make law. Laws are made by an assembly that has deliberated and approved them. Mornay then defines law as reason freed from passion and says that to be subject to a king without the law is the same as being subject to a “beast.” The image of an illegitimate king as a beast has important theoretical implications as we learn in a striking passage a few pages later.

In the first place, nature instructs us to defend our lives and also our liberty, without which life is hardly life at all. If this is the instinct of nature implanted in dogs against the wolf, in bulls against the lion, in pigeons against the falcon, and in chickens against the hawk, how much stronger it must be in man against another man who has become a wolf to man. To fight back is not only permitted, but enjoined, for it is nature herself that seems to fight here.¹³

Any man who acts out of passion rather than the reason embodied in law is a beast, and potential prey must be expected to resist like any other beast. If the bestial grounding for Hobbes’s Leviathan is clearly prefigured here, Hobbes’s solution is not. As Mornay says in an earlier passage, absolute power is virtual tyranny, and no human being can exercise it, nor can any sensible man want to have it. Yet the great benefits to be derived from a supreme power lead men to create it, and the same reasons that lead to the creation of a supreme power lead to its limitation as well. The king is limited, but the fountain of law, the

¹⁰ *Ibid.*, p. 169.

¹¹ *Ibid.*

¹² *Ibid.*, p. 181.

¹³ *Ibid.*, pp. 187–188.

people, is a supreme power also capable of acting like a beast. Mornay's implicit solution is to separate the supreme power, the people, from those who make laws, the assembly and other magistrates. Enforcing the law is separated from the assembly and put in the hands of the king. The separation of powers works to the extent the people are relatively inactive.

The covenant or compact through which legitimate power originates rests on the natural "instincts" of humans as animals. Although Mornay says that the people can rule themselves without a king, he does not discuss any covenant among the people that would remove them from what is clearly a state of nature and create an organized, singularity termed "the people." Their status as an organized entity, as far as his theory goes, is assumed. The notion of a foundational covenant witnessed by God is implicit, but the nature and implications of that covenant are not discussed. Mornay evidently assumed that his readers would be familiar with covenant theory as first explicated by Bullinger and reiterated over the years into a commonplace by 1579. The implications of covenant for political organization are many and powerful. Mornay's reference to its implicit egalitarianism is an example, but it is left to others to develop the synthesis fully.

Prominent among these others was Johannes Althusius. Infrequently read today, Althusius was highly regarded and widely cited during the seventeenth century. His *Politica* was apparently written as a detailed rebuttal of Bodin, much the way Locke and Sidney wrote in rebuttal of Filmer. Bodin is specifically mentioned many times by Althusius, invariably in the negative. Yet Althusius could not have written his treatise without Bodin's theory, and in the end the two do not end up that far apart.

Althusius viewed society as virtually flooded with covenants. The Latin word for covenant is *foedus*, from which we derive the term federalism. Althusius was a complete covenant theorist not only because he used covenant as the most fundamental tool for the creation of a popular sovereign but also because his "complete sovereign" was erected on a federal structure much as the United States was originally created by the people of thirteen states. Althusius speaks of a "universal association," which he also terms a "polity," a "commonwealth," or a "realm," built up from many smaller associations that have a prior

existence. There are many “private, natural, necessary and voluntary societies” that go into the forming of families, cities, and provinces, which in turn are the building blocks for the commonwealth. The people thus are organized for action prior to the creation of a commonwealth, but they are initially organized into a number of smaller natural peoples rather than into a single people. These smaller units constitute themselves into a “universal association” for common ends. “The bond of this body and association is consensus, together with trust extended and accepted among the members of the commonwealth. The bond is, in other words, a tacit or expressed promise to communicate things, mutual services, aid, counsel, and the same common laws (*jura*) to the extent that the utility and necessity of universal social life in a realm shall require.”¹⁴

The use of terms like consensus, tacit and express consent, and utility, when combined with his concept of federalism, mark Althusius as the fountainhead of much of modern political theory. To speed our analysis along, and to connect him efficiently with both previous and later consent theorists, we let him speak in his own words.

Such are the members of the realm. Its right is the means by which the members, in order to establish good order and the supplying of provisions throughout the territory of the realm, are associated and bound to each other as one people in one body and under one head. This right of the realm (*jus regni*) is also called the right of sovereignty (*jus majestatis*). . . . What we call this right of the realm has as its purpose good order, proper discipline, and the supplying of provisions in the universal association. . . . Therefore, the universal power of ruling (*potestas imperandi universalis*) is called that which recognizes no ally, nor any superior or equal to itself. And this supreme right of universal jurisdiction is the form and substantial essence of sovereignty (*majestas*) or, as we have called it, of a major state. When this right is taken away, sovereignty perishes. . . . The people, or the associated members of the realm, have the power (*potestas*) of establishing this right of the realm and of binding themselves to it. . . . Without this power no realm or universal symbiotic life can exist.¹⁵

¹⁴ Frederick S. Carney, trans., *The Politics of Johannes Althusius* (Boston: Beacon Press, 1964), p. 62. Carney’s translation is of the third edition of Althusius’s book published in 1614. That the book was in its third printing after only eleven years, especially in the context of the early seventeenth century, is testimony to its popularity and wide readership.

¹⁵ *Ibid.*, pp. 64–65.

Much of what underlies the theoretical propositions on sovereignty introduced in Chapter 1 are here efficiently laid out by Althusius in relatively few words. He then describes sovereignty as indivisible, incommunicable, and interconnected so that “whoever holds one holds them all.”¹⁶ Althusius attacks Bodin for saying that sovereignty is above the law and perpetual, and he implies that Bodin meant above natural law. Bodin, of course, said just the contrary. Althusius then says neatly what took Bodin many pages to articulate. “Universal power is called pre-eminent, primary, and supreme not because it is above law or absolute, but in respect to particular and special subordinate power that depends upon it, arises and flows from it, returns in time to it, and is furthermore bound to definite places.”¹⁷

Like Bodin and other sovereignty theorists, Althusius notes that while supreme in a particular place and time on Earth, the sovereign and its agents are still limited by and inferior to natural law and divine equity. The sovereign people and their agents are also limited by the fundamental law of the realm, *the lex fundamentalis regni*, and the terms of the covenant. These limits are basically the same as those laid out by Bodin. Althusius also says later that a king is mortal, whereas the universal association is immortal, and therefore perpetual, as Bodin argued.¹⁸ Althusius was not the first or the last to use a straw man in order to make his key points. The irony is that while Althusius is attacking Bodin, we who can look back over subsequent political theory and recognize that he is actually arguing against a fifteen-year-old Englishman who will not publish his major work for another half century – Thomas Hobbes.

Althusius repeatedly notes that the supreme power, or sovereign, is also by definition limited by those ends for which the universal association was originally organized. These ends are “order and the utility and advantage of the people.” Prominent in the definition of utility is the supplying of economic goods. Order is necessary for economic activity to occur, and the protection of economic activity is the ultimate reason why men form a sovereign. Bodin’s list of sovereign powers also

¹⁶ Ibid., p. 66.

¹⁷ Ibid., p. 69.

¹⁸ Ibid., p. 117.

clearly indicated that the sovereign is supposed to provide the order and universal laws required for economic activity to proceed. Like Bodin, Althusius sees economic exchange as part of the voluntary, private activity of society, and not subject to direction from above. One important difference between Althusius and Bodin is the way Althusius emphasizes the subordination of the king to the people.

But by no means can this supreme power be attributed to a king or optimates, as Bodin most ardently endeavors to defend. Rather it is to be attributed rightfully only to the body of a universal association, namely, to a commonwealth or realm, and as belonging to it. From this body, after God, every legitimate power flows to those we call kings or optimates. Therefore, the king, princes and optimates recognize this associated body as their superior, by which they are constituted, removed, exiled and deprived of authority. . . . For however great is the power conceded to another, it is always less than the power of the one who makes the concession, and in it the pre-eminence and superiority of the conceiver is understood to be reserved.¹⁹

As he says later, the magistrate is called supreme only because he exercises the supreme power of the realm of which he is temporary minister.²⁰

Statements like the ones quoted from Mornay and Althusius became common intellectual currency during the period 1570–1700 in political theories written in France, Britain, the British colonies in North America, Switzerland, the Netherlands, Spain, and various political entities in what is now Germany. The striking connection among this disparate literature was the extent to which it was based on religious principles and, except in Spain, on the emerging covenant theology of the more radical Protestant sects. The relevance of covenant theology for popular sovereignty is not a matter of mere historical interest. Just as Christian theology grounded the basic development of popular sovereignty in Bodin and the others who developed the Traditionalistic Model, covenant theology grounded the development of the Constitutional Republic and Constitutional Democratic models. Indeed, without covenant theology these more developed models probably would never have emerged in Europe and America, just as the absence of

¹⁹ *Ibid.*, pp. 67–68.

²⁰ *Ibid.*, p. 115.

covenant theology elsewhere in the world helps explain why popular sovereignty is a European-American invention.

The Constitutional Republic Model

Mornay and Althusius, working from Bullinger's comprehensive codification of covenant theology, took sovereignty theory to the brink of the Constitutional Republic Model. Working from the same theological assumptions, Richard Mather developed a detailed design for church government, which, when applied to the New England theocracies, institutionalized a very strong Constitutional Republic Model that verged on constitutional democracy. Mather argued that church communities rested on the voluntary consent of equals. Equality rested on the equal ability of all humans to say yes or no to God's grace, and therefore upon their moral indistinguishability. His plan for church government was essentially Aristotle's conception of a mixed government, which blended monarchy, aristocracy, and democracy. In Mather's view, Christ represented the monarchic element, the church elders represented the aristocratic element, and the church members the democratic element. Popular consent had a central though circumscribed role in church government. In practice, the minister rendered most church decisions, but the people were supposed to ensure that the elders, who selected and oversaw the minister, abided by scriptural rules in their administration. No significant action was to be taken without popular consent. The elders could be viewed as a legislature closely controlled by the people. Such an arrangement came close to the Constitutional Democracy Model because popular consent was active rather than passive. In effect, the Constitutional Democracy Model is distinguished from the Constitutional Republic Model in the following way. Constitutional republicanism adheres to the injunction, As long as we do not say no, you may assume tacit consent and proceed, whereas constitutional democracy works from the injunction, Until we expressly say yes, you do not have our consent and may not act. In theory, Mather's political system assumed the latter injunction, but the arrangement of institutions resulted in the former injunction describing actual practice.

As the number of nonchurch members increased in New England communities, a *de facto* separation of church and state occurred.