

# Principles of Constitutional Design

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### The Constitutional Democracy Model

Covenant theology did result in some attempts to create constitutional democracy, particularly in colonial North America, but the most prominent theory of this type also belongs to the secular strain in sovereignty theory. Jean Jacques Rousseau is the most prominent among these secular thinkers, and it is worth a brief discussion of his theory to appreciate the difficulties inherent in creating popular sovereignty using the Constitutional Democracy Model.

Rousseau looks at first to be reasonably similar to Locke. Civil society, by aggregating the sum of personal forces, ensures self-preservation, which Rousseau terms the first law of human nature;<sup>22</sup> preserves liberty by transforming natural freedom into civil freedom;<sup>23</sup> reconstitutes sociability among people who, in a state of nature, found such relationships subordinated to relationships between things;<sup>24</sup> and produces greater utility for each individual, the only reason, Rousseau says, for alienating any natural freedom.<sup>25</sup> Whereas Locke saw humans as naturally equal, however, Rousseau says humans are equal only because the contract makes them so, and the contract makes them so because everyone gives his entire self.<sup>26</sup> Also, whereas Locke saw superior force as defining what is right, Rousseau says that force can never create right.<sup>27</sup> The social contract substitutes right for force, which leads him to conclude that majority rule, rather than resting on its being the greater force, is instead a convention established by the contract with no inherent basis in right.<sup>28</sup> Popular sovereignty is conditioned on the replacement of force by right.

Rousseau is therefore dealing with the very question on which Locke is silent – is there a standard of right that is not only independent of force but also objectively true? Rather than attempting to lay out the limits to action by a supreme force that results in its transformation into a sovereign, as did Bodin, Rousseau defines a process that will uncover

<sup>22</sup> Jean Jacques Rousseau, *On the Social Contract*, ed. Roger D. Masters, trans. Judith R. Masters (New York: St. Martin's Press, 1978), pp. 47, 52–53.

<sup>23</sup> *Ibid.*, p. 56.

<sup>24</sup> *Ibid.*, p. 50.

<sup>25</sup> *Ibid.*, p. 47.

<sup>26</sup> *Ibid.*, p. 53.

<sup>27</sup> *Ibid.*, pp. 48–49.

<sup>28</sup> *Ibid.*, p. 52.

what is right in every instance. That which is objectively true is called the general will. Seeking the general will rather than particularistic goods determines the characteristics of the process. The process itself, as well as the general will the process uncovers, constitutes the limits on supreme power. The result is popular democracy resting on the strongest version of popular sovereignty – no law is enacted except by the unanimous consent of a constantly participatory people.

The people are a supreme power that no longer needs to use force, because the process of seeking the general will transforms them into a morally connected entity that cannot do harm to those not in the majority. Those not in the majority automatically recognize the moral force of the majority's conclusion precisely because the majority is seeking the general will and not enforcing its own will in pursuit of its own interests. Majority rule is a convention, therefore, with no particular force since, as Rousseau says, "what generalizes the will is not so much the number of votes as the common interest that unites them" (those in the minority and in the majority).<sup>29</sup> As long as the majority (and the minority) is seeking the general will, the people are acting as a sovereign. If they instead make decisions based on particularistic ends, they are acting merely as a supreme power, what Rousseau terms an "absolute power."

Rousseau's vision of a sovereign as a limited supreme power is consistent with the usage of all other sovereignty theorists. Furthermore, he is clear that even though the popular sovereign does not need to use force in reaching its decisions, it is still a supreme force with "absolute power over all its members."<sup>30</sup> While this, the first face of sovereignty, is necessarily part of popular sovereignty, why is absolute power still necessary if right has replaced force? The answer is that in any community there will always be a few who will not pursue what is right and will instead pursue particularistic ends rather than the general will. These individuals Rousseau terms rebels and traitors, and absolute power must be used on these individuals to preserve the community. The penalty for such actions is death. Rousseau's logic is that, because in the social contract everyone consents to pursue the general will so as not to become the victim of a murderer, one has consented to be

<sup>29</sup> *Ibid.*, p. 63.

<sup>30</sup> *Ibid.*, p. 62.

killed if one turns into a murderer. Every person has thus consented to have the collective force used against him if he becomes an “enemy” to the community by failing to pursue the general will. The answer to the problem, then, lies in creating such a strong sense of community with such homogeneous values that the political problem supposedly solved by the general will is in fact solved by effectively eliminating the moral diversity on which the problem usually rests. If this sounds like a very strong form of political correctness, it is apparently the price to be paid for a highly participatory popular sovereign. Among other things, it explains the need for the civil religion that Rousseau later describes. It also explains the need for the censorial tribune that uses censorship of ideas to preserve the mores underlying the constitution.<sup>31</sup> A proper socialization with highly communitarian content is a necessary part of the overall solution, as is continuous monitoring of ideas expressed by the citizens.

Another essential part of the solution is that while the people are deliberating they do not talk to each other and thereby do not activate associations of citizens based on partial or particularistic interests. It is surprising how little attention the secondary literature gives to this need for the absence of communication. Rousseau in effect tells us that, in order to discover the general will, citizens must police their thoughts even after they have been highly socialized to community values. Citizens are not supposed to communicate during the deliberation process, but what about between bouts of deliberation? Is it reasonable to expect that citizens who have been communicating about their particularistic attachments on a regular basis can forget about these conversations when called upon to act as legislators? Obviously not, so we are left to wonder if, in order to seek the general will, political discussion outside of the citizen legislature must cease as well. This certainly solves the problem of protecting free speech since there will no longer be any politically relevant speech.

One could make the argument that Rousseau’s ideal citizen in civil society strongly resembles the solitary human in the original state of nature – no consciousness of self, no speech, no strong attachments to any particular humans, and no connections to things (property). One does not have to read Rousseau this way in order to recognize

<sup>31</sup> *Ibid.*, book IV, chap. VII.

how difficult it would be to achieve the conditions necessary for the general will to be pursued. Without the general will, Rousseau's vision posits an even greater danger of majority tyranny than Locke's. With the general will, Rousseau's vision generates a convincing picture of a complete popular sovereignty, but one subject to Rousseau's own conclusion about democracy – "If there were a people of Gods, it would govern itself democratically. Such a perfect government is not suited to men."<sup>32</sup>

If one establishes a political system in which all decisions are to be reached by the people directly, and the limits on the people result primarily from a universally shared set of "correct" attitudes, it follows that any constitution describing the system will lack institutional limits of any sort. The constitution Rousseau implicitly describes is largely limited to ensuring that the executive can do nothing more than enforce the policies reached by the people-as-legislature. There is discussion of a legislator whose job is to frame the question put to the people, but who is otherwise prohibited from using either coercion or persuasion during the deliberative process. The constitution for Rousseau's Constitutional Democracy will therefore be brief and minimalist in content. Rousseau does speak of an extraconstitutional body called the *Tribunate*. The job of the *Tribunate* is to veto or block actions contrary to the constitution created by the social contract and thereby preserve the terms of the agreement. However, because similar institutions elsewhere have grown too powerful, he suggests making the *Tribunate* an episodic body with limited duration that meets only infrequently. Because the *Tribunate* is not actually part of the constitutional structure, the people can convene it as they wish without impairing the constitution. How this body would block anything during the long periods when it is off duty is left to the reader to imagine.

Rousseau lays out the problems of a strong Democratic Constitutionalism grounded on the strongest version of popular sovereignty so clearly that few have been willing to design such a system. Instead,

<sup>32</sup> *Ibid.*, p. 85. This page lists the conditions needed for a successful democracy and concludes that these conditions are virtually impossible to achieve or maintain. Comparison with the conditions needed to produce a people capable of seeking the general will, which Rousseau lays out on page 74 in particular, and in book II, chapters VIII–X in general, shows these conditions to be identical with those for a successful democracy.

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.<sup>33</sup> Consequently, humans are always in the process of learning from their

<sup>33</sup> 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.