

Principles of Constitutional Design

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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.

Thomas Hooker and Roger Williams codified this split and made covenant theology the explicit grounding for civil government. Popular sovereignty still rested on a theological characterization of human nature, but now popular consent, mixed government, and the political covenant were secular in application. As long as the population generally believed in biblically based religion, there was no need to seek a secular grounding for these political institutions. Also, the covenant basis for political communities assured that popular control was actually popular sovereignty, because the sovereign people were limited by the laws of the actual sovereign, God.

As powerful as these ideas were, and as efficacious the political institutions they produced, the continued dominance of religious assumptions was not tenable in the face of continued immigration and waning devoutness. Civil government in America, despite continuing impetus toward a democratic model, devolved toward the less rigorous Constitutional Republic Model and gradually came to require a theory of popular sovereignty grounded on secular principles. By 1776 that secular grounding was essentially borrowed from John Locke, although Locke's theory was put forward primarily by Protestant ministers who correctly saw that the same institutions generated by covenant theology could be justified by Lockean theory in the context of a covenantal society. They were correct in their institutional analysis, but Locke's theory was in fact a competitor to the religious strain of thought with considerably different implications in the long run.

Locke's theory is well known and need not occupy us for long, but the implications for popular sovereignty must be explicated. First of all, the equality undergirding popular sovereignty is for Locke the result of our equally strong inclination toward self-preservation, and our equal ability to calculate what does or does not conduce to preservation. However, because this basic equality leads to each person becoming the judge and executor of the law of nature, self-preservation, his or her basic equality eventually devolves into an equal ability to harm each other. In this regard he is little different from Hobbes. Whereas Hobbes saw a bloodthirsty human nature, however, Locke saw an essentially neutral, minimal human nature that took on differing characteristics depending on the particular demands made by the individual's environment. In the original state of nature, humans are cooperative and trusting of other humans. The primary threat comes from nature. Humans

living at the subsistence level have nothing to steal and no reason to hurt each other. The state of nature is a state of natural liberty guided by the law of nature. The law of nature, which is summed up by the natural inclination for self-preservation, has no moral content as does natural law for Bodin. Instead it is composed of inevitable human inclinations – today we might term them innate behavioral tendencies. In the state of nature we therefore find a strong inclination toward individual self-preservation, a natural condition of liberty, and an inclination toward sociability when our “own self-preservation comes not in conflict.”

Locke also sees a natural inclination for innovation, which results in the introduction of agriculture, and then the invention of money. Unfortunately, innovation, which has initially beneficial consequences, also has other, unintended consequences. The mix eventually turns the state of nature into a constant state of warfare. The solution to the new, reflexively generated human environment, is the innovation of a civil society created by a social compact. The social compact is a point where the natural inclinations for liberty, self-preservation, sociability, and innovation come together and are simultaneously satisfied. Civil society is the culmination of these natural tendencies, as well as the means for extending their satisfaction in a coordinated, beneficial manner.

On the one hand, civil society seems to be a human artifact rather than a natural condition, as Aristotle saw it. On the other hand, Locke’s theory of human history seems to make civil society an inevitability resting on natural tendencies. Contrary to what some critics like David Hume had to say, there is no need for Locke to prove that a state of nature ever existed or that there was an actual social compact. From the point of view of rational actors already living in civil society, and understanding the natural, empirical inclinations of humans, Locke’s state of nature need be nothing more than an act of the imagination to conjure up what would happen if we dissolved civil society. What we would do in such a situation is create a social compact under the terms Locke describes, for the reasons he gives. And what he describes is no more or less than what non-social contract theorists like Bodin say we do when we write and adopt a constitution.

Locke’s experiment in thought, like that of Mornay, Althusius, Lawson, and Sidney before him, is to uncover and describe the essence of constitutional government grounded in popular sovereignty. Human

equality no longer has a theological grounding, although a Deist could say that God made humans with these empirically observable inclinations before retreating into some corner of the universe. Political power is not limited by God's natural law, as Bodin had it, but by the law of nature – which can be the result of divine will, evolution, or anything else one chooses to read in as the cause. It is no wonder that ministers in the eighteenth century could become the primary conduit of Locke's thought into American political thought, or that the first state constitutions and the Declaration of Independence could use Locke's terminology and refer to "nature and nature's God." The strength of the position is that natural rights rest on what humans are inclined to do anyway – we simply describe these inclinations as rights. One can view Locke's theory as an early version of John Rawls's "original position." Under conditions of liberty, equality, and insecurity, humans will naturally choose civil society as Locke describes it. Locke's secularized view of popular sovereignty also has the clarity and strength of Hobbes's theory. At the beginning of the *Second Treatise*, in section 3, Locke identifies political power in terms that make it recognizable as supreme power: "Political power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defence of the common-wealth from foreign injury; and all this only for the common good."²¹

Bodin would not quarrel with anything in this sentence, except for Locke's meaning of "right." Any sovereign must first be a supreme power in the manner Locke describes. Nor would Bodin and the other traditionalistic theorists of sovereignty disagree with Locke when he says later in paragraph 96 that the community must act with one will, and that will is determined by the majority because it is "the greater force": or when Locke says in paragraph 139 that "even absolute power, where it is necessary, is not arbitrary by being absolute, but is still limited by that reason, and confined to those ends, which required it in some cases to be absolute." Locke also paraphrases earlier traditionalistic theorists in paragraph 149 when he speaks of governmental agents having a "fiduciary power" from the people who are the

²¹ See any edition of John Locke, *The Second Treatise of Government*, chap. 1, par. 3.

“supreme power.” The primary difference between Bodin and Locke lies in Locke’s limiting the supreme power by rights that amount to the majority’s natural, self-executing human inclinations with no moral content. In effect, whatever the majority does, for whatever reasons, is a matter of right. While this means the majority can prevent arbitrary rule by its agents in government, it also means that the majority may not be easily subject to limits, although Locke provides us with some hints in this regard.

Locke sees the government, and therefore the majority behind it, as limited by the ends for which government was established. The presumption here seems to be that no majority would allow a government to engage in actions contrary to what is implied by self-preservation, liberty, sociability, and beneficial innovation. That is, those in the majority would protect the deep interests of the minority in the process of protecting their own interests. In the real world, however, we see that this is often not the case, so the majority’s being limited by “that reason” which led to government in the first place might mean that the majority, composed of rational actors, will not permit the introduction of a policy that severely hurts individuals in a minority because the principle involved in the policy might be turned against members of the majority in the future. A rational-actor perspective is suggested at many places in the text – for example, in paragraph 13 when he says, “for no rational creature can be supposed to change his condition with an intention to be worse.” Perhaps, but the fact remains that Locke gives us good reason to suppose he has solved the problem of arbitrary government, but not what is now termed majority tyranny.

Part of the difficulty, undoubtedly, is that Locke’s civil society is, in comparison with the civil society projected by religiously grounded sovereignty theorists, rather anemic. Liberal theory has often been charged in recent years with failing to create a sense of community built around commonly held, society-enhancing values. Locke may be open to the same charge, although it is more likely that his strong majoritarianism may instead result in the imposition of majority values on dissenting minorities. That is, Locke’s apparent lack of concern with community values that might serve as a limit on majority actions or could result in a community that lacked commonly shared values; or else, if there are any values, the majority could shove them down everyone’s throats. As a dissenting Protestant in England, it is doubtful

Locke would be inclined to support any “moral majority,” especially in light of his later essays on religious toleration. Locke simply does not address the problem in any explicit way here.

What Locke does is support popular sovereignty of a kind that makes the monarch, Parliament, and all other governmental agents subordinate to popular will. If Locke was an apologist for Parliament in its struggle with the crown, and thereby a proponent of what came to pass in the Glorious Revolution, his theory unfortunately renders “parliamentary sovereignty” a nonconcept. Parliament is not sovereign, the people are, and Parliament becomes at most the primary filter for popular opinion – an agent of popular will that may, through its deliberations, clarify and soften the supreme power of the people into a true sovereign.

It is fair to say that while Locke was a constitutionalist, there is almost nothing in his theory about constitutional design. The best that can be said is that he seemed to advocate a separation of powers by placing different functions of the political process in different hands. The people were to have the constitutive power but not the policy formulation power, which was placed in the hands of agents. The majority exercises the supreme power of the people only after the government has been dissolved, he says in paragraph 149; however, he also holds out in paragraph 154 the probability that the people will also act periodically in elections, which implies that at each election the government is at least symbolically dissolved. This minimal separation of powers is perhaps supplemented by a natural division of powers into the legislative, executive, and federative. Yet Locke says in paragraph 148 that, although the latter two are quite distinct, “they are hardly to be separated, and placed at the same time, in the hands of distinct persons.” If this theoretical distinction does not necessarily result in separate agents, the distinction between legislative and executive powers is likewise cast into doubt in this regard. None of the major secular theorists provide much in the way of specific constitutional methods for limiting or hemming in popular will. Ironically, though we today look to the likes of Locke for theories of popular sovereignty, most of the constitutional mechanisms we now use around the world for limiting popular will so as to turn it into popular sovereignty were developed by religiously grounded theorists of popular sovereignty, whether Protestant or Catholic.

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;²² preserves liberty by transforming natural freedom into civil freedom;²³ reconstitutes sociability among people who, in a state of nature, found such relationships subordinated to relationships between things;²⁴ and produces greater utility for each individual, the only reason, Rousseau says, for alienating any natural freedom.²⁵ 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.²⁶ Also, whereas Locke saw superior force as defining what is right, Rousseau says that force can never create right.²⁷ 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.²⁸ 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

²² 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.

²³ *Ibid.*, p. 56.

²⁴ *Ibid.*, p. 50.

²⁵ *Ibid.*, p. 47.

²⁶ *Ibid.*, p. 53.

²⁷ *Ibid.*, pp. 48–49.

²⁸ *Ibid.*, p. 52.