Principles of Constitutional Design

This book is written for anyone anywhere sitting down to write a constitution. The book is designed to be educative even for those not engaged directly in constitutional design but who would like to come to a better understanding of the nature and problems of constitutionalism and its fundamental building blocks – especially popular sovereignty and the separation of powers. Rather than being a "how-to" book that explains what to do in the sense of where one should end up, it instead explains where to begin – how to go about thinking about constitutions and constitutional design before sitting down to write anything. Still, it is possible, using the detailed indexes found in the book, to determine the level of popular sovereignty one has designed into a proposed constitution and how to balance it with an approximate, appropriate level of separation of powers to enhance long-term stability.

Donald S. Lutz is a professor of political philosophy in the department of political science at the University of Houston, where he has been teaching since 1968. He received his Ph.D. from Indiana University. He is the author of eleven books, including *Colonial Origins of the American Constitution: A Documentary History* (1998), *A Preface to American Political Theory* (1992), and *The Origins of American Constitutionalism* (1988), as well as numerous articles published in the *American Political Science Review*, *American Journal of Political Science*, *Journal of Politics, Publius: The Journal of Politics, Social Science Quarterly*, *Annals of Political Science and History*, and *Western Political Quarterly*, among others.

Principles of Constitutional Design

DONALD S. LUTZ
University of Houston

CAMBRIDGE
UNIVERSITY PRESS

In memory of Daniel J. Elazar

In memory of Charles S. Hyneman

With thanks for the continuing presence of Vincent Ostrom

Contents

Preface

What follows will disappoint those looking for a "how-to" manual on constitutional design. Certainly there is much here that can be used by those writing or rewriting a constitution, but the major intent of this book is to help us understand constitutional design rather than lay out guidelines for constitutional construction – to help us think about the constitutional project rather than direct us toward specific institutional or constitutional outcomes. Even if one wanted to provide a set of instructions for those framing a constitution, it would be unwise for an outsider to do so. A fundamental fact about constitutional design is that there is no optimal model, no clear set of rules for matching a people and their situation with a set of institutions, and no inherently stable or superior constitutional system. We do know a great deal more about institutional design than Aristotle did, and even a good deal more than we did half a century ago. The empirical knowledge we now possess, however, tends to be piecemeal, theoretically unfocused, and sometimes contradictory. As important as the contributions of empirical and analytic approaches have been over the past half century, there is no substitute for just backing off and asking, How do we go about thinking about constitutionalism and the design of constitutions as an integrated project? That is the deep focus of this book, and that is why it is best to think of it as an exercise in political theory.

The book is aimed at political theorists, especially students of constitutionalism and institutional design, as well as those in the field of comparative politics. Portions may interest those working in international

ix

relations, particularly Chapter 2 on the concept of sovereignty. Chapters 3, 4, 5, and 8 present empirical analyses of a cross-national data base using several newly developed indexes. Among other things, the parliamentary-presidential dichotomy is completely recast. It is hoped that anyone wrestling with the nature of constitutionalism, the definition of democracy, the design of democratic institutions, or democratization will find something of value. Still, this book is an extended exercise in political theory, which is reflected in the analyses drawn from Plato, Aristotle, Jean Bodin, Thomas Hobbes, John Locke, Baron de Montesquieu, James Madison, and a number of other political thinkers that inform the arguments of every chapter. Overall, constitutional design is approached as a project that recapitulates the structure of political philosophy as laid out in Chapter 7. As befits political theory properly pursued, the project of constitutional design brings together the various methodological strands of modern political science – normative, analytic, and empirical – that have tended to become isolated from each other. In the integrated project we term constitutional design, precise definitions matter, actors may or may not be "rational," human values guide empirical analysis, statistical analyses support propositions from great political theorists who continue to inform our thinking in fruitful ways, power and justice interact with culture, and many voices from a variety of political science subfields chant together – sometimes in harmony, sometimes not.

One basic premise of this book is the contention that constitutionalism, properly conceived, inevitably implies at least de facto popular sovereignty, which in turn implies at least some minimal separation of powers, properly conceived. These connections result in large part from the invention of a written constitution. Although constitutionalism is now heavily predicated on the existence of such a document, there are constitutional systems without a written constitution – witness Great Britain and Israel. Also, even though almost every nation now has a written constitution, most of these nations are not constitutional, and thus their respective peoples are not sovereign in terms of what we will call "the second face" of sovereignty. Therefore, it will be argued here that de facto popular sovereignty is coterminous with constitutional democracy – with or without a written constitution.

Because popular sovereignty will be linked with constitutionalism, and because almost every nation now has a written constitution,

independent nations that are sovereign in the constitutional sense will be distinguished from nations that are not. In particular, we will be interested in distinguishing the nature of those limits which make the ultimate power a sovereign so we can determine the extent to which a nation is using the strongest form of sovereignty – popular sovereignty – and which version of popular sovereignty it is using. The ability to make such determinations is one of several reasons why the theoretical portions of the book should be of interest to those working in comparative politics, primarily those working with what are now termed "democracies" but which I prefer to call constitutional republics.

Although inevitably the analysis will involve comparative constitutionalism, its ultimate aim remains to contribute to our theoretical understanding of constitutionalism, principles of constitutional design, and what is termed democratic theory. The book ends by arguing that designers of what initially appear to be highly varied constitutional democracies tend to reach broad solutions that display theoretically explicable regularities, even though the designers themselves do not consciously use these theories. That is, under conditions of liberty, people across cultures seem to arrive at constitutional solutions that display a shared underlying logic despite an astonishingly wide array of institutional arrangements. Institutional diversity reflects a logic of accommodation to the history, culture, circumstances, and hopes of the various peoples living in constitutional democracies. The underlying logic running through constitutional design, on the other hand, reveals the operation of a human nature that is collectively rational in terms of maximizing popular sovereignty, properly understood; or perhaps it is better to speak of minimizing the distance from an ideal of popular sovereignty. The multileveled logic of constitutional design tends to support rational-actor theory in general but illustrates how rationality must be carefully contextualized. That is, in constitutional and institutional design rational-actor analysis must be based on the maximization of goals and values established by historical peoples and not assumed ad hoc by the person doing the analysis.

Framers of constitutions seem to do surprisingly well on their own without assistance from design "experts." Enhancing our understanding of constitutional design may well tend to reassure us that the design process is best left to the people who will live under the constitution

being framed. The principles examined in this book all point toward
such a conclusion, and the author hopes that as we learn to think
more deeply about constitutional design, we will be led to conclude
that popular sovereignty and not mere technical expertise is, finally,
the best political technology we have available to us, no matter how
expert the experts are.

Acknowledgments

As is the case with any book, the debts owed by this author are deep and multiple. Instead of providing a long list of names, however, I need to give special thanks to three men and two organizations. First, I need to thank the Earhart Foundation of Ann Arbor, Michigan, which provided, between 1988 and 2002, two grants that relieved me from the need for summer teaching. During the first grant period I wrote the first half of the book (Chapters 1–4), and during the second grant period I wrote the second half (Chapters 5–8). It is difficult to exaggerate the impact of this efficient, open, gentle, and effective grant process. Without these grants, this book would not have been written. Between 1980 and 2002, Liberty Fund of Indianapolis, Indiana, involved me in a number of colloquia that allowed me to discuss with varying combinations of the finest academic minds in America texts by Plato, Aristotle, Cicero, Bodin, Althusius, Montesquieu, Hobbes, Milton, Locke, Sidney, Rousseau, and Tocqueville, among others; and to discuss constitutionalism as expressed in more than one hundred specific constitutions written between 1800 and 2000, in North America, South America, central and western Europe, and Asia, as well as such constitutional concepts and principles as popular sovereignty, separation of powers, natural and civil rights, rule of law, parliamentary government, civil society, and constitutional amendment. Liberty Fund afforded me what amounted to a second education. For this continuing education I am deeply grateful.

Charles Hyneman first set me to the study of state and national constitutions in the autumn of 1965. He continued to serve as my mentor on this and related topics until his death in 1984. As Hyneman set me off on my quest, Vincent Ostrom began my education in public choice theory and principles of institutional development, an education that continues to the present. In 1978 Daniel J. Elazar first set me to examine covenantal theory in particular and federalism in general. From then until his death in 1999, Daniel Elazar was a constant friend and colleague whose teachings on constitutionalism are reflected throughout this book. Although any mistakes must be accorded my own, whatever may flow from this book that is useful and original must be considered a synthesis and extension of the work of three men on whose shoulders I stand and to whom I dedicate this book. Finally, and far from least, and for more than will fit here, I would like to give my deepest thanks to Linda Westervelt, my wife, compatriot, and coconspirator.

Principles of Constitutional Design