

Principles of Constitutional Design

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Critical political theory works from the logic of deficiency. It attacks the actual state of affairs in the name of human aspiration for that which is in some sense better. To denounce something as deficient is to compare that reality with an ideal, or else there is no grounding to the critique. In this way, critical theory returns us to the total logic of the continuum. A critical stance is natural for political philosophy and expresses the inevitable conflict between political philosophy and politics as practiced. It is a healthy, necessary antidote to politics as usual inside Plato's cave and, when practiced well, serves as a means of motivating us to work on the entire project. Practiced badly, critical theory is only the contemporary manifestation of the age-old pathology of political philosophy to seek the creation of the ideal in an actual world that will not bear the weight of the enterprise without seriously harming the human aspirations that political philosophy exists to serve. Practiced badly, critical theory also needlessly undermines respect for all institutions, including those that are basically healthy and helpful. The hallmark of the latter pathology is the sophistic stance that there are no discoverable truths transcending culture and ideology upon which we can rest institutional design. This stance, ostensibly in the service of the downtrodden and marginalized, leaves us with no arguments with which to contest the assaults of the powerful against the poor and marginalized. In the long run, such sophistry quietly justifies the rule of the stronger and demoralizes those who would oppose and tame raw power with enduring principles of justice, now reduced to mere expressions of competing ideologies. On the other hand, a political philosophy that serves the integrated questions just outlined leaves open the possibility that political theorists may contribute to the marriage of justice with power by providing arguments, grounded in human aspiration as well as in empirically supported analysis and philosophically sound logic, that will be convincing to political actors as well as to academics.

Constitutional Design as an Integrated Project

As an offshoot of political philosophy, constitutionalism rests on a complex set of normative, analytic, and empirical considerations similar to those just outlined. Like philosophy, constitutionalism does not consist of a set of settled answers, but is instead an ongoing process of questioning and learning. The project of constitutional design, an important part of constitutionalism in general, is thus embedded in a

complex set of normative, analytic, and empirical considerations that together define an integrated process of continuous thought and action. For a number of reasons, then, it is hazardous to introduce the notion of “principles” of constitutional design. The unwary might be led to conclude that things are settled, when in fact we are, in medias res, in a long-term historical conversation. Some may be induced to expect a singular solution, when in fact there is no one ideal constitutional design appropriate for all peoples, or even for a given people over time. Given the “plug and play” mentality of the modern world, others may expect that a set of principles allows us to custom-design a constitution using prefabricated pieces from some giant political Lego set. Still, if we are to lay out systematically what we think we know now, some provisional ordering is required; and if the previous provisos are kept in mind, as well as the one to follow, laying out some set of “principles” will do no harm and may do some good.

The term “principles of constitutional design” is potentially misleading in the current context of political studies where emphasis is placed on the discovery of a cumulative body of knowledge modeled after that developed by physics or biology. In the physical sciences a “principle” is an empirically supported proposition that has two characteristics: the empirical test supporting the proposition has been repeated so many times by so many people that it is seemingly “proven”; and the proposition is of such a nature that it logically connects a number of propositions that would otherwise seem to be unconnected. Since we do not yet have in the social sciences a set of cumulative, logically interconnected, empirically supported propositions worthy of being called “principles,” to speak of “principles of constitutional design” is to imply something that sounds much like a science. This cannot be the case because, whereas normative questions concerning how or whether to use the knowledge of science lie outside of science as such, the study of politics necessarily involves normative considerations within the enterprise itself. Furthermore, whereas in science the empirical can be completely separated from normative considerations at the highest levels of scientific discourse, the study of politics, rooted in philosophy, is such that the empirical and normative become more inextricably linked as the level of discourse becomes more complex.

When we study constitutional design, several levels of principles emerge as well as different types. That is, there are different levels of complexity and generality within empirical, analytic, and normative

discourse. If we look at empirical discourse, for example, some statements are simple in a straightforward sense. An example of this level might be, Single-member electoral districts tend to produce a two-party system, whereas multimember districts tend to produce a multiparty system. The statement is empirically testable and might be termed a “simple empirical hypothesis.”

A second level of principles combines a number of these simple empirical hypotheses into a more complex hypothesis that, while still subject to empirical support, rests on a much more complex chain of theoretical reasoning. An example might be, A consensual political system is better at dealing with a heterogeneous population than is a majoritarian political system. We can test this more complex proposition empirically, but only after engaging in a number of careful definitional or analytical exercises, and after testing a number of hypotheses embedded in the general hypothesis. So, here, we first need to determine what is meant by a “consensual system,” which turns out to be a combination of institutions including the electoral system, party system, type of legislature, type of executive, type of executive-legislative relationship, and a certain set of decision rules. We also need to determine what is meant by “heterogeneous population” as well as what is meant by “better.” Are we speaking of religious, ethnic, economic, cultural, racial, or ideological heterogeneity? Is it the case that all types of heterogeneity can be handled the same way? Finally, this matter of “better” moves us toward the peculiarity of social science principles as opposed to principles in the physical sciences. In the social sciences “better” has an initial empirical referent, or set of referents, but ultimately a normative component. In the case of the principle under discussion, the person who penned the statement meant by “better” that the better system is more effective at distributing material benefits, and thus more stable, and thus will last longer. We can create a scale that measures the level of heterogeneity in a country, and then develop scales to rank “consensual” and “majoritarian” political systems to see how long they have lasted, how often there has been domestic violence, and so on. Note that this requires empirical measurement of a number of variables. A number of political scientists would consider this to be an example of a principle of constitutional design, but it is in fact only a “complex empirical hypothesis.”

Hidden within this complex empirical hypothesis are a number of normative assumptions, such as, A good constitution is one that creates

a government that is efficient at reaching decisions, and effective at distributing material benefits. Others might counter that efficient government is dangerous, because speed in decision making is not as important as achieving justice. Or they might argue that government is not as good at economic distribution as is the economy itself, so government intrusion into economics is not a good per se but is a supplement to economic inefficiencies and inequities. Regardless, the example used here is designed to show the manner and extent to which normative considerations invariably underlie complex empirical hypotheses and not to argue for one normative position over another.

At a level of analysis one step higher in terms of complexity and generality than complex empirical hypotheses, we consider how to think about constitutional design in a way that includes empirical, analytic, and normative considerations. This level of analysis is also neutral with respect to the outcome. That is, principles or statements at this level do not incline us toward any particular constitutional design. These principles rest on prudential calculations reached by careful students of constitutional design who draw on the history of experience with all kinds of constitutional systems, and these are what should most properly be termed “general principles of constitutional design.” Some of these principles are outlined here, along with the topics and considerations to which they lead.

General Principles of Constitutional Design

By this point the principles laid out in this section should all be familiar. These general principles are guidelines for thinking about the overall project rather than dicta to which designers of constitutions must adhere.

Match the Government to the People: All Government, Constitutional or Not, Rests on the “Virtues” of the People

- Analyze the characteristics of a people – use history to evaluate common goals, interests, and values as well as the diversity in these – remember the crucial role of political culture in general (including the use of a political myth), and the attitude of “rule of law” in particular.