

Principles of Constitutional Design

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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.

- Analyze the material and environmental circumstances.
- Identify the “critical political problems,” especially the nature and intensity of factions – localism versus cosmopolitanism, for example.

The Ideal Political System Will Not Work on Earth, So Seek the Best Possible under the Circumstances

- Work from a realistic theory of human nature.
- Consider the difference between the common good and permanent and aggregate interests.
- Distinguish rational-actor coalitions (cost-benefit analysis) versus ideological ones (value analysis).

Political Power Is an Unavoidable Danger That Must Be Understood and Faced If the Design Is to Succeed

- The concept of sovereignty and its offspring, popular sovereignty, must be reflected and/or embodied in a constitution.
- In assessing elite versus popular sovereignty, think realistically about equality, the inevitability of elites, and the means for controlling them.
- Evaluate majority rule versus minority and individual rights, permanent versus temporary majorities, and apathetic versus intense majorities and minorities.

The Idea of a Constitution Is to Marry Justice with Power

- What is a constitution and what are its functions and purposes?
- What belongs in a constitution and what does not?
- What are the different meanings of limited government, and which do we use?

A Critical Problem in Constitutional Design Is the Distribution of Power

- Why should we distribute power, and how should we do it?
- Consider separation of powers, federalism, institutional complexity, and accountability.

- Evaluate basic constitutional models: the parliamentary model (constraint by tradition) versus the separation of powers model (constraint by institutional complexity); the mixed regime model (balance) versus the presidential model (legitimate force); the framework model (process over content) versus the code model (content over process); and the covenant model (communitarian civic relationships) versus the manifesto model (communitarian transformational relationships).

The Process of Collective Decision Making Should Be Viewed as a Complete System of Interlocking Institutions

- Consider the nature of institutions.
- Evaluate systems analysis.
- Evaluate the purpose of collective decision making and the stages in the process.

The System of Institutions Should Be Grounded in a Coherent Theory That Should Be Apparent from the Behavioral Implications of the Institutional Design

- Constrain the behavior of relevant political actors into broadly predictable patterns: the organization of the legislative, executive, and judicial functions, and their mutual relationships in a deliberative process.
- Select and monitor political actors through electoral systems, public opinion, theories of representation, theories of participation, and mechanisms of accountability.
- Evaluate the science of politics (knowledge) versus the art of politics (prudence).

A Constitution Rests Not Only on the History and Present Circumstances of a People but Also on Probable Future Developments

- Provide means for amending, altering, and replacing constitutions.
- Consider the “redemptive” view of politics versus the “realistic” view.
- Distinguish between projection (artful empiricism) and wishful thinking.