

Principles of Constitutional Design

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Matching a Government to a People

Some Initial Considerations

Constitutionalism and constitutional design are not defined by some set of principles that can be listed, memorized, and then mechanically applied. Nor are they to be discovered through some straightforward logical technique such as that based on rational-actor analysis. Constitutionalism and its attendant design principles have resulted from a centuries-old discussion aimed at understanding how to marry justice with power; how to blend hopes for a better future with the realities of the present; how to construct an order that takes into account human irrationality as well as rational actors; and how to recognize principles that are useful everywhere despite the inevitable diversity among successful political systems. If we are to understand constitutional design, then, it is essential that we reprise some of that conversation for the simple reason that the project does not rest as much on a set of principles as it rests on the reasoning implicitly contained in those principles. That is, constitutionalism and constitutional design rest on a way of looking at the world and on a method of thinking that proceeds from that perspective. The principles are thus important to us primarily to the extent they help us produce a constitutional perspective, and to achieve this perspective it is extremely useful to consider what has been rejected as well as accepted by earlier thinkers who together discovered and developed constitutional thinking. Any list of such thinkers would have to include, at a minimum, Plato, Aristotle, Cicero, Machiavelli, Althusius,

Bodin, Spinoza, Locke, Hobbes, Rousseau, Montesquieu, Blackstone, Hume, Madison and Hamilton, Tocqueville, and Benjamin Constant. At times these thinkers are analyzed explicitly in this book, such as Montesquieu in Chapter 1 and Bodin in Chapter 2. Often their thinking is only implicit in our analysis. A systematic march through the history of political philosophy would be both tedious and too lengthy for one volume. Also, such an approach is often associated with what amounts to an appeal to authority – because a great thinker said something, it must be true. The strategy in this book is to utilize from past thinkers whatever has proved to be useful and defensible given what history and empirical analysis tend to support. Thus, for example, Bodin’s thinking is developed at length because of its importance for understanding a central concept, sovereignty, and because a fundamental principle implicit in his analysis turns out to be empirically supportable.

The move from a very contemporary empirical analysis in the previous two chapters to an examination of long-dead political philosophers in this chapter may still strike some as peculiar. A more complete explanation for this move will be laid out in the [next chapter](#). For now, suffice it to say that part of what we need to do in order to understand the principle of matching a government and a people is to reprise what some of the greatest thinkers of the past have to suggest on the topic. As it turns out, part of what they can contribute is the manner and extent to which this principle is connected to the seemingly unrelated question of what a people must share, and what they need not share, if they are to be considered “a people” suitable for matching with a constitution. Addressing this question, however, requires that we raise again the matter of popular sovereignty, in part to illustrate how the various principles of constitutional design analyzed in this book are interlocking and mutually supporting.

One aspect of popular sovereignty that recommends itself to us is its efficiency at matching a government with the characteristics and circumstances of humans in general, and for the specific people in question. One critical aspect of popular sovereignty, the amendment process, allows constitutional republics to preserve this match as the people and its circumstances change. Resting the creation and continued operation of the constitution and the institutions it defines on the consent of the people is a safe way to avoid constitutional and institutional design that will not work because it violates in some important

way the history, culture, expectations, or abilities of the people who will live under it. The early lawgivers Draco and Solon gave classical Athens two historically important constitutions, and there are those who still think that wise men are the proper source of good constitutional design. However, it should be remembered that no constitutional system from classical antiquity lasted as long as has that of Britain, the United States, Switzerland, or any other modern constitutional system older than about a hundred years; and modern constitutions are invariably designed by committees, commissions, parliaments, or conventions.

Experience in the modern era has also shown us the high failure rate of constitutions handed down by individuals such as Lenin, Hitler, Mao, Pol Pot, and a whole host of lesser “philosopher-kings.” Popular sovereignty is our best way of preventing the imposition of ideologically driven ideas that attempt to change the people rather than accommodate them as humans with differing histories, cultures, demographics, geographical settings, and values. A genie has been let out of his lantern and cannot be pushed back in – the expectation that government should rest on popular consent, at least to the extent that there are free and fair elections. This common expectation, when it is present among a people, must be accommodated, and the result looks invariably like *de facto* popular sovereignty even when it is not *de jure* popular sovereignty.

Popular sovereignty, however, implies that the people are limited in some way as the ultimate force, which in turn almost always implies a constitution to encode such limits. Popular ratification of the constitution then amounts to the initial self-limiting that defines a sovereign. These limits can be viewed as resulting from a prudential calculation that a given individual will not always be in the majority, and thus must protect his or her interests as a possible member of a future minority whenever they are part of a majority. This is a reasonable argument, but another argument offers an important supplement. The average human being is a realist and not an idealist. She or he wants to lead a better life but does not expect to achieve perfection on Earth. The essential honesty and realism that result from large numbers of people engaging in political discourse tend strongly to undercut utopian ideas or proposals. Hence, a tiny minority, the revolutionary vanguard of right or left, secular or religious, has always imposed overly idealistic

constitutions, whereas popularly approved constitutions tend strongly toward a less than ideal *modus vivendi*.

One implied principle of constitutional design emerging from this discussion is that a constitution must be written by those who will live under it and not by some outside team of “experts,” and must also be approved by the people who will live under it and not by some philosopher-king or cadre of vanguard thinkers. Another principle is that, when designing institutions to produce popular sovereignty, one can only seek the best that is possible under the circumstances, since the ideal political system will not work on Earth, and seeking it will produce only fanaticism, not justice. Because these principles are more complex and more thoroughly grounded than the discussion to this point might indicate, a consideration of Plato and then of Aristotle is helpful.

Plato on Matching a Government and a People

The question of how to match a government and a people recurs throughout the history of Western political thought. Indeed, it is present at the birth of political philosophy. However, even though matching a government to its people is a fundamental principle of constitutional design, constitutionalism may or may not have been present at the birth of political philosophy depending on how one reads Plato. A brief explication of Plato in this regard is instructive for understanding both what constitutionalism is and what it is not.

The matching exercise may proceed within one of several possible frames. Note how it is framed in the first sentence of the preceding paragraph – how to match a government and a people. This way of framing is neutral with respect to the relative status of the two entities – “a government” and “a people.” In the second sentence of the preceding paragraph constitutionalism is identified with matching a government *to* its people. In this framing the people have priority over government, and government is considered malleable and subservient to the people. A third way of framing the issue is to think about matching a people to a government. Government now has priority, and the people are viewed as malleable and subservient to the requirements of some ideal political system. One could read Plato’s *Republic* as working within this third frame as Socrates and his fellow inquirers construct