

# Principles of Constitutional Design

*Donald S. Lutz*

CAMBRIDGE

CAMBRIDGE

[www.cambridge.org/9780521857789](http://www.cambridge.org/9780521857789)

early events in the history of a people. The implicit or explicit values, norms, expectations, hopes, and ideas found in these early documents are often later shaped by a people to explain themselves and their place in history and to serve as the basis for their view of themselves as a people.

### **Things Not Held in Common by a People but of Constitutional Importance**

The discussion to this point has emphasized those things held in common by all humans and those things held in common by a given people. Each of these must be taken into account in constitutional design. A third category consequential for constitutional design is the category of things not held in common by a people. These include, but are not limited to, the sources of wealth; the distribution of wealth and the resulting class structure; the relative prevalence of ethnic, racial, and religious divisions; and the content and distribution of ideological divisions, especially with respect to views on equality and justice. In sum, constitutional design requires careful attention to the structure of interests and therefore the nature of factions. Constitutional design should also take into account the probable consequences of the design itself for future factional alignments.

In classical Greece wealth resulted primarily from ownership of land and slaves. James Madison in *Federalist Papers* 10 argues that viewing wealth as simply a division between those who are wealthy and those who are not is inadequate for purposes of analyzing factional alignments. Landed wealth has different interests from that achieved through manufactures. Both have interests different from those held by men and women engaged in trade and commerce. The interests of those who lend money to manufacturers for production differ from those who must borrow. New and relatively undeveloped industries have different interests from developed industries that can compete on world markets without protection. Owners of small businesses differ in their interests from owners of large businesses. Speculators in land and capital have still another set of interests. Steel companies compete with aluminum and concrete companies for construction. Spice farmers differ in their needs from corn or wheat producers. In sum, the class of wealthy people is not homogeneous and monolithic. Diversity in sources of

wealth is both an opportunity and a problem for writers of constitutions. Diversity in sources of wealth makes the task easier, because the resulting class structure will be much less polarized. The task is made harder by the various wealthy factions maneuvering to achieve relative advantage through the process of writing a constitution. Sometimes, as happened with a proposed new constitution for Texas in the 1970s, the combined opposition by these various factions who fear to lose some specific relative advantage can result in the document not being adopted. This is one argument for designing a constitution that has as little policy content as possible. The alternative is to constitutionalize enough policy issues that the factions who see their respective interests safeguarded are sufficient in strength to support the proposed document.

A simple, highly polarized class structure presents one kind of problem, whereas a complicated and fluid distribution of wealth presents another. There are no simple rules for responding to different types of class structure, but careful analysis is called for if the future operation of the political system is not to be destabilized.

In recent years there has been an automatic tendency to emphasize the relative prevalence of ethnic, racial, and religious divisions in a political system. To a certain extent, we may now overemphasize these sources of faction. Certainly these divisions are sometimes extremely important, but a well-designed constitution can fairly easily mitigate such divisions. For example, if the divisions tend to align themselves geographically, a federal structure may well be a good solution. Conso-cinational arrangements may otherwise be a prudent solution. In general, however, it is probably best not to encourage the hardening of such divisions by writing them into the constitution. Aristotle's reference to intermarriage points toward another set of solutions.

Ideological divisions are inevitable, and probably healthy, as long as there does not seem to be a more or less permanent majority ideology as well as a permanent minority. If such a pattern manifests itself, it is probably grounded in some other division, such as religion or ethnicity, and should be dealt with in terms of its source. There always seems to be a party in favor of change and another that wishes to minimize change. As long as the decision-making process is reasonably fair, it is best to just let these factions work out their conflicts in the future operation of the institutional structure.

In the end, constitutional design can take into account the structure of interests and the probable structure of factional alignments, but it cannot resolve these differences. That is what politics is all about, and only the people living under the constitution have a right to decide the eventual outcomes. The job of constitutional design amounts to avoiding the unfair advantaging or disadvantaging of any major, identifiable faction.