

Principles of Constitutional Design

Donald S. Lutz

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An Overview of the Constitutional Design Project

It is time to step back and consider how the various pieces discussed thus far fit together. We must consider first how they form a coherent project and then how the various principles are related and the ways they contribute. As a coherent project, constitutional design takes its form from political philosophy in general, because the constitutional project is historically the result of, and an offshoot from, Western political philosophy. This is not to say that constitutionalism is the central concern of political philosophy or that all political philosophers have contributed to constitutional thinking. Instead, constitutionalism is so deeply embedded in Western political philosophy that the content of constitutionalism and the method for pursuing it cannot be separated from Western philosophy. In large part, this resulted from the project being defined by early political philosophers as they engaged in defining the broader philosophical tradition. In Chapter 6 we considered some of Plato's contributions to defining and advancing constitutionalism, but it is to Aristotle we must turn for laying out the coherent project in which we are now engaged.

Political Philosophy as an Integrated Project

Aristotle notes in the *Politics* that political theory proceeds simultaneously at three levels: discourse about the ideal, about the best possible

in the real world, and about existing political systems (1288b21).¹ Put another way, comprehensive political theory must ask several different kinds of questions that are linked, yet distinguishable. In order to understand the interlocking set of questions that political theory can ask, imagine a continuum stretching from left to right. At the end, to the right, is an ideal form of government, a perfectly wrought construct produced by the imagination. At the other end is the perfect dystopia, the most perfectly wretched system that the human imagination can produce. Stretching between these two extremes is an infinite set of possibilities, merging into one another, that describe the logical possibilities created by the characteristics defining the end points. For example, a political system defined primarily by equality would have a perfectly inegalitarian system described at the other end, and the possible states of being between them would vary primarily in the extent to which they embodied equality. An ideal defined primarily by liberty would create a different set of possibilities between the extremes. Of course, visions of the ideal are invariably more complex than these single-value examples indicate, but it is also true that, in order to imagine an ideal state of affairs, a kind of simplification is almost always required since normal states of affairs invariably present themselves to human consciousness as complicated, opaque, and, to a significant extent, indeterminate.

Some conclude that the creation of these visions of the ideal characterizes political philosophy. This is not the case. Any person can generate a vision of the ideal. One job of political philosophy is to ask the question, Why is this ideal worth pursuing? Before this question can be pursued, however, the ideal state of affairs must be clarified, especially with respect to conceptual precision and the logical relationships between the propositions that describe the ideal – what can be termed “pretheoretical analysis.” In effect, we must first answer the question, Is this vision coherent? Pretheoretical analysis raises the vision of the ideal from the mundane to a level where true philosophical analysis, and the careful comparison with existing systems, can proceed fruitfully.

¹ Portions of this section have been revised from an earlier version, “Political Theory and Constitutional Construction,” chapter 2 in Edward Bryan Portis, Adolf G. Gunderson, and Ruth Lessl Shively, eds., *Political Theory and Partisan Politics* (Albany: State University of New York Press, 2000), pp. 33–49.

The process of pretheoretical analysis, probably because it works on clarifying ideas that most capture the human imagination, too often looks to some like the entire enterprise of political philosophy. However, the value of Rousseau's concept of the general will, for example, lies not in its formal logical structure, or in its compelling hold on the imagination, but on the power and clarity it lends to an eventual comparison with actual political systems. Among other things, an analysis of the general will as a concept allows Rousseau to show that anyone who wishes to pursue a state of affairs closer to that summed up in the concept of the general will must successfully develop a civil religion.

Once the ideal is clarified, the political philosopher will begin to articulate and assess the reasons why we might want to pursue such an ideal. At this point analysis leaves the realm of pure logic and enters the realm of the logic of human longing, aspiration, and anxiety. The analysis is now limited by the interior parameters of the human heart (more properly the human psyche) to which the theorist must appeal. Unlike the clarification stage where anything that is logical is possible, there are now definite limits on where logic can take us. Appeals to self-destruction, less happiness rather than more, psychic isolation, enslavement, loss of identity, a preference for the lives of mollusks over that of humans, to name just a few possibilities, are doomed to failure. Much of political philosophy involves the careful, competitive analysis of what a given ideal state of affairs entails. This realm of discourse, dominated by the logic of worthwhile goals, requires that the theorist carefully observe the responses of others in order not to be seduced by what is merely logical as opposed to what is humanly rational. Moral discourse conditioned by the ideal, if it is to be successful, requires that political theorists be fearless in pursuing normative logic, but it also requires that theorists have enough humility to remember that if a nontheorist cannot be led toward an ideal, the fault may well lie in the theory, not in the moral vision of the nontheorist. Constitutional design is always conditioned by some vision of the ideal, but institutions rest on real people in an actual world. It is not helpful, and usually dangerous, to attempt to actualize the ideal that informs a constitution. Human institutions are inevitably prone to imperfect results, and when the institutions based on speech and coordination fall short of the expected ideal, there is a great temptation to use force to command perfect compliance.

Asking why an ideal is worth pursuing thus inevitably leads us to ask how closely the ideal can be approximated in the world of ordinary humans. This level of discourse requires what Aristotle terms *phronēsis*, or practical wisdom, and is largely a matter of coming to understand the nature of the limits imposed by the world of politics. In the past, political theorists have relied on a careful study of political history to develop *phronēsis*, and this is not a bad habit to preserve; but, because the limits faced by a particular political system will vary by time and location, experience in that particular setting is an important part of the platform on which political theory is erected and requires careful attention to the deeper structure of what political experience tells us. What a political theorist has to say to us at this level amounts to an analysis of apparently contradictory and opaque experience where the discourse is limited not only by the imperatives of the human psyche but by the logic of limits and conflicting values and goals. The conversation is still informed by the ideal and motivated by a vision of the best, but it is now proceeding under the assumption that the ideal can only be approximated, not achieved, in politics, as well as under the assumption that, at least in principle, an analysis of limits can lead us to the “best possible.” These limits result from the construction of the human psyche, from the empirical facts of human existence, and from the value complexity inherent in any worthwhile vision of the ideal.

The human psyche is so constructed that we have hopes as well as needs. Our hopes lead us to seek something better, something other than what we have, while human needs lead us to prefer states of affairs that satisfy those needs. Because the current state of affairs has been successful to some extent at meeting our needs for food, shelter, protection, companionship, self-development, and self-expression, most of us are also led to seek the preservation of the current state of affairs, or at least to place our hopes in the context of our needs. Political philosophy, and thus constitutionalism, always finds itself stretched between the ideal and the actual, which leads us to seek improvement that is in fact an improvement and not some retrograde “progress” that will lead us to be less well off as a result of the changes induced by our hopes.

We are also limited by the facts of human existence. If there really were such a thing as a “free lunch,” or if resources spent in an attempt to achieve greater equality, for example, did not use up resources that could be used for achieving some other good, then we could simply

advance in every direction at once. The brute facts of human existence imposed by limited resources, time, space, and attention make us pay a price for our decisions. Time spent trying to make more money is time spent away from human relationships of family and friends. Distance limits our ability to develop high-quality relationships with everyone, and the length of a day plus the need to sleep limits our ability to develop all human relationships to the same degree. The need to engage in activities directed at ensuring food and shelter gets in the way of the need for self-expression. All of this seems obvious but needs repeating in the face of attempts to achieve perfection on Earth. *Phronēsis* reminds us that life is lived in a context of limits, and the relative absence of *phronēsis* too often leads to fanaticism in political philosophy as well as in politics.

Finally in this regard, responsible political philosophy as well as responsible constitutional design must face an important implication from the two previous sources of limits – we invariably want many things and not just one. Another way to say this is that the value complexity inherent in human hopes leads us to want a state of affairs characterized by many values, not just one, and these values are often contradictory in theory and in practice. Seeking unbridled liberty at some point gets in the way of equality, and vice versa. We like comfort as well as excitement, safety as well as danger. I can think of no other reason to explain, for example, why sane human beings who are materially comfortable would want to strap long skis of wood to their feet and jump over cliffs. That ideal polities comprise a number of values that conflict in the real world means that, when carefully analyzed, such ideal polities are self-limiting in any political process involving humans. Thus, it is not uncommon for ideologues to fasten upon one or another of these values and press for its perfection alone. It is a tacit admission that to do otherwise would cause us to moderate our move toward the ideal. For these various interconnected reasons, in the end we are left to ponder the best possible polity we can attain with respect to the ideal polity that informs it.

After considering the coherence of an ideal, why we might want to pursue it, and how closely we might possibly approximate it, we are moved to ask, What are the facts of the situation we face? Another way of putting the question is, Given the continuum we have thus far described, where is this actual political system situated with respect

to the best possible regime? Contemporary political science has often attacked the perceived lack of a systematic empirical component to classical political philosophy. Sometimes these political scientists speak as if the only theoretical questions worth asking have to do with empirical relationships. It must be remembered, however, that Aristotle collected well over a hundred “constitutions” and used these descriptions of existing regimes as the empirical grounding for his analysis. His example, and that of others after him, serves to remind us that empirical theory is part of the total project. We now understand that empirical description is always the first step in the discovery of empirical regularities. As such regularities are uncovered, they hold out the possibility of answering at a more advanced level the next question posed by political theory: How do we arrange things so that we can move closer to the best possible political system? That is, it makes little sense to seek empirical knowledge if it is not to be used. If it is to be used, how is it to be used – that is, toward what ends? If voting behavior can be reduced to a set of regression equations, and this allows us to manipulate institutional variables so as to enhance certain outcomes, which outcomes do we choose to enhance? The so-called new institutionalism is essentially predicated on the marriage of empirical and theoretical approaches that are nested in the broader philosophical framework just outlined.

Empirical political theory is limited by the logic of empirical evidence, as well as by the logic of effectiveness (an ends-means logic), but it is ultimately justified by the logic of human hopes and aspirations as well as by the logic of the possible. If it were not, then, an empirical political science focused on the preservation of the status quo, the manipulation of the masses for the benefit of the few, or the pursuit of humanly degrading states of affairs might well be our legacy.

In recent years we have witnessed an increasingly loud set of voices that has leveled just this charge against empirical political science. Critical political theory has worked from a variety of perspectives against empirical political science, from the left as well as the right. To the extent this critique has attacked empiricism *per se*, to that extent it is an attack on all of political philosophy, because the questions asked by empirical political science are an important and necessary part of the entire enterprise. To the extent critical political theory has attacked a free-floating empiricism isolated from the broader enterprise, it has properly sought to reintegrate the enterprise.

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