

Principles of Constitutional Design

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certain priests chosen for their virtue. Strangely, there is no manifestation of the monarchic principle in the second best political system that is supposed to mix the monarchic and democratic principles.

Other important details reinforce the oligarchic basis of this second best political system, but the outline of his proposal is clear. The laws that rule in place of the philosopher-king do not flow from, support, or reflect anything resembling popular sovereignty. Although we may term this system constitutional, the arrangement of institutions does not create what we today term a constitutional republic despite the use of elections. There is an implicit principle of balance in Plato's constitution in the sense that there is some provision for a mutual adjustment of conflicting claims and interests, but the principle is applied only embryonically. Still, Plato has worked his way, perhaps halfheartedly, to the first clear principles of constitutional design – match a government to the people, establish rule of law, include institutions for expressing and balancing the interests of all citizens, and use elections to select and control those who govern. Still apparent by their absence is a comprehensive theory of citizenship, a developed sense of participation, and institutions for effectively balancing the interests of citizens. It is at this point that Aristotle takes over the historic development of constitutionalism.

Aristotle on Matching a Government and a People

In his *Politics*, Aristotle was the first to study constitutional design systematically. Political philosophers who study him often conclude that what Aristotle had to say is of limited use today because it derives from an examination of the Greek *polis*. There are several arguments generally used to dismiss Aristotle's applicability to current political systems. First, the classical Greek *polis* was very small compared with most of today's constitutional republics. Second, the Greeks at that time did not use or understand representation, and modern constitutional republics are by definition built around systems of representation. Third, the *polis* was by definition a political organization with a very deep moral and cultural content that is impossible to reproduce or use as a model in contemporary political analysis.

These objections can be dealt with relatively easily. First, as was shown in Chapter 4, at least twenty of the current seventy-five political

systems that can be categorized among constitutional republics are no larger in population than the Athens in which Plato and Aristotle lived. Many are much smaller. Either one arbitrarily concludes that principles of constitutional design are irrelevant for polities below a certain size, in which case we simply write off the relevance of countries like Iceland, or one concludes that analysis of small political systems has something to tell us about large ones, and vice versa.

Second, we are after general principles of constitutional design that are applicable to any constitutional system, including constitutional republics. We are most interested today in constitutional republics, but analysis of nonrepublican constitutions can throw light on the nature of representation by highlighting what this political form is not. Also, although it is true that a direct democracy is not a republic, Plato and Aristotle did not limit their respective analyses to democratic Athens but also engaged in analyses of other constitutional forms that included some form of election, and thus of some form of representation.

Third, it is traditional to emphasize the coherent moral content implicit in a *polis*, but Aristotle in particular examined the manner and extent to which even a *polis* might not require a unified moral content to survive and thrive. That is, because the *polis* did seem to require a high moral content, Aristotle was led to ask precisely what this meant. By rejecting the position he attributed to Plato that everything must be shared, he opened up a deeper analysis of the required minimal moral content of a *polis*, and thus of any political system. He concluded in part that any political system, including a *polis*, would inevitably (naturally) have distributed across its population different notions of equality and thus of justice. If it is natural and inevitable that a given population not include in its political morality a shared notion of equality and justice, then even the classical Greek *polis* did not have the very high level of shared morality that modern commentators are inclined to attribute to it. Aristotle did not say that there was no true justice or equality, but he did say that citizens invariably disagreed about what was just or equal. Indeed, Aristotle was led to suggest the mixed regime as the best possible constitution in the real world precisely because of the natural limits on any shared political morality.

This leads us to consider more carefully Aristotle's "mixed regime." The first thing to be said about this concept is that one cannot mix what

is not at least initially distinguishable or separate. Part of Aristotle's contribution to constitutional analysis is to distinguish conceptually three key principles – the monarchic principle, the aristocratic principle, and the democratic principle – and then to show how they can be utilized together to create what he termed the “mixed regime.” As indicated in an earlier discussion, “regime” is a translation of *politeuma*, which refers to those who write the *politeia*, or constitution, that defines the shared way of life. Those in the *politeuma*, or regime, have full political rights in that they can hold office as well as assist in the selection of those who hold office. A mixed regime is thus literally a mixture of several possible regimes.

Aristotle used the conventional Greek notion that the regime could be composed of one, a few, or the many. Ignoring for now his distinction between regimes types that sought the good of the regime as opposed to those that sought the common good, rule by one embodied the monarchic principle, rule by a few embodied the aristocratic principle, and rule by the many embodied the democratic principle. A mixed regime utilized all three principles so that the regime was composed of the one, the few, and the many. Speaking only logically, if one established a democracy, it would appear that the regime would include everyone, including any identifiable “few” or any identifiable “one.” There would then seem to be no need for any mixing. However, Aristotle rejected simple democracy for two fundamental reasons. First, he noted that each principle was attached to what is usually translated as a “class.” Second, he associated each principle with certain characteristics, and because the characteristics associated with each principle were all useful to a political system, he argued that a stable and successful constitution required the inclusion of them all and not just those associated with democracy.

As to his first reason for rejecting simple democracy, Aristotle began by noting that many constitutions were monarchies, and the royal class supported rule by one, the monarch. Other constitutions created oligarchies – rule by a few. Because a hereditary aristocracy invariably supported this kind of political order, Aristotle termed it an “aristocracy” with one critical caveat. “Aristocracy” is derived from the Greek word *aristoi*, which means “the best” or “the better sort” according to some standard of excellence. Aristotle did not accept that members of a hereditary aristocracy were necessarily better in any moral

sense of the term, so he distinguished between a theoretical aristocracy, where members of the regime did match the standard of excellence, and actual aristocracies, in which power was based on wealth rather than on merit: “So in fact the grounds of difference have been given wrongly; what really differentiates oligarchy and democracy is wealth or the lack of it” (1279b26).¹ This distinction led Aristotle to conclude that in real-world aristocracies the regime tended to rule for its own ends rather than for the common good. Democracy rested on rule by the many. Because most citizens are not wealthy but “poor” compared with those in the “aristocracy,” rule by the many would tend to support the needs and goals of the majority who are not wealthy. In sum, after Aristotle distinguished theoretically between the three principles, he then attached each principle to a naturally occurring class. Under this construction, a democracy did not include “the one” or “the few” but was instead just another regime working for some class good rather than the common good. One major goal of the mixed regime, then, was to prevent class domination through the inclusion of all three classes in the regime.

“Mixed regime,” then, does not imply a “melted regime” in which the parts become indistinguishable. Rather, the three principles are to be combined in such a way that all parts of the population will feel their citizenship. Aristotle suggests three possible kinds of mixing. In one, legislation favorable to everyone would be provided. However, because he notes elsewhere that mere laws are to be distinguished from a constitution, this form of mixing is descriptive of the effects of a properly operating mixed regime and not descriptive of a constitution per se (1289a11). The second form of mixing is more properly constitutional. Here he suggests that we consider how a given institution would be organized in an oligarchy, and then how it would be organized in a democracy, and then that we design the institution so as to find a middle ground or mean. In the next paragraph, however, he says that the defining feature of a mixed regime is that it is possible to describe the same constitution as oligarchic or democratic because both groups have the impression that it matches their expectations, and this definition undercuts the constitutional efficacy of the second

¹ Aristotle, *The Politics*, trans. T. A. Sinclair, rev. Trevor J. Saunders (Baltimore: Penguin, 1981).

method of mixing. We need only look at the one example of this form of mixing provided by Aristotle. He says that if in aristocracies there is an expectation that there should be a high property assessment for membership in the assembly, and in democracies there is an expectation that there be no property qualification, fixing an assessment midway between these two is a form of mixing. In fact, it is probable that neither side would be happy with this, especially the many nonwealthy who would still see the constitution as aristocratic. Such “blending” is not a very good way to “mix.” The third method of mixing that Aristotle suggests is to provide each class with an institution or set of institutions through which it could independently protect its respective ends. Thus, for example, one branch of government could be elected on the basis of property requirements, and another branch of government could be elected by lot. The key point is that Aristotle recognized that there is at least one irreconcilable division present in all polities that makes a simple democratic form of government both impractical and dangerous. The different principles must be mixed in some form within a constitution if alienation of some critical part of the population is to be avoided. The general implication for constitutional design is that major, irreducible divisions within a given population must be given institutional voice.

The second reason Aristotle rejected simple democracy rested on his sense of the natural empirical characteristics associated with each possible regime. Those among the wealthy had the leisure and means to obtain an education, or a much better education than could be obtained by the nonwealthy, who were too caught up in the need to earn a livelihood. The wealthy thus had more elevated tastes that tended to produce moderation and careful thinking. They also had more knowledge of the world at large, were experienced at dealing with large sums of money and with complicated issues, and tended to take a broad and long-term view of matters compared with those whose noses were kept by necessity close to the grindstone. The wealthy few were thus associated with knowledge, wisdom, and virtue. Virtue in this sense did not necessarily have a moral implication, although the aristocratic penchant for moderation was an essential moral virtue. Instead, Aristotle was thinking here more in terms of *aretē*, which was the notion of possessing practical virtues that made one excellent at some activity. The one activity at which “the few” excel is statecraft. By this is meant not only leadership

but also the conduct of foreign affairs and the operation of government in pursuit of complex economic and social goals.

The many “poor” or nonwealthy have their own virtues and characteristics. For one thing, their sheer numbers produce strength. Many political philosophers after Aristotle, including Machiavelli, would note the comparative advantage possessed by a state where the many fought in defense of their own liberty and citizenship. On the other hand, if they are not included in the regime, says Aristotle, “they inevitably constitute a huge hostile element” in the political system (1281b21). Their natural strength becomes a danger rather than an asset. The many are also the political system’s reservoir of honesty. He means this in the sense that they are both less easily deceived than a few and less easily corrupted (1281a39 and 1286a36). They are less easily deceived because they possess the lion’s share of *phronēsis*, or practical wisdom. Aristotle uses the metaphor of building and living in a house. Who knows better whether a house is good, he asks: the person who designed it or the people who must live in it? The much greater cumulative experience with living and solving practical matters gives the many nonwealthy an advantage when it comes to distinguishing fact from fancy. Although individual members of the nonwealthy class may not be good judges of what works and what doesn’t, when taken together the large numbers in this class overwhelm those of poor judgment – something that may not happen as easily among the few wealthy. The many nonwealthy are also less easily corrupted. “As a larger amount of water is less easily polluted,” says Aristotle, “so the multitude is less easily corrupted than the few” (1286a21). Thus, whatever may tempt an individual to error is much more difficult to induce in a large number than in a small: “It would take a lot of doing to arrange for all simultaneously to lose their temper and go wrong” (1286a21).

Finally, there are certain characteristics associated with “the one” that benefit any political system. The rule of one person is conducive to unity and coherence. Policy is subject to only one will, and thus can move in one direction without competition or dilution. This results in the second characteristic of one-person rule, speed. With only one person involved, decisions can be made quickly, and new circumstances can be responded to immediately. Finally, with only one person involved, there is no doubt who should be held responsible. There is no way to duck responsibility or to hide behind the ambiguity of a

complex process involving many heads. As a result, because he knows he will be held responsible, the “one person” will tend to act responsibly to protect his power and reputation. Again, as with aristocracy and democracy, Aristotle is careful to distinguish the monarchic principle from historical manifestations accidentally associated with the principle. There are several reasons why monarchy arose, he says, but almost always it was because one person was perceived to somehow be “the best” in some critical skill such as war or judgment. When that person was replaced by one of his children, however, monarchy came to be associated with inherited one-person rule. As Aristotle notes (1286b22), experience shows that “hereditary succession is harmful,” yet a king’s not giving his kingship to his children “expects too much virtue of human nature.” What he suggests we have learned from experience is that there are certain advantages to be gained from utilizing the monarchic principle but not from tying the principle to heredity.

The analysis of the three regime principles takes place within a larger discussion about what amounts to “sovereignty.” As noted in Chapter 2, Aristotle had a notion of some higher law that should serve as a standard against which to measure earthly political systems, which implies something similar to what Bodin meant by a sovereign. However, it is probably incorrect to translate the Greek word *kurios* as sovereign. Instead, it is best translated as “supreme power,” so that the opening passage in section x of book III (1281a11) should be rendered: “Another question is ‘Where ought the supreme power of the polis reside?’ With the mass of the people? With the rich? With the respectable? With one man, the best of all? Or a tyrant? There are objections to all these.” After rehearsing the objections to all of these, Aristotle discusses the benefits, though limited, of collective wisdom. There turn out to be reasons for including all of the natural factions described in the passage just quoted, which leads him to conclude eventually that the mixed regime, one that blends the monarchic, aristocratic, and democratic principles, is the least objectionable solution to the problem of where to place supreme political power. Each principle, in effect, represents the natural inclinations of naturally occurring divisions within any political system. A constitution that utilizes all three principles thus has two beneficial consequences. First, it protects the interests of all naturally occurring factions, and thereby contributes to the stability of the political system. Second, it incorporates the various

virtues and strengths possessed by each of these naturally occurring factions, thereby contributing to the effectiveness and future success of the political system. What is held in common is not a definition of equality and justice, but a constitution that effectively organizes the people for action in history, for “noble” actions by the people. This leads us to ask what else is held in common if a common constitution is to be possible?

Aristotle on What Is to Be Held in Common

Let us begin by laying out quickly the things that Aristotle says in discussions scattered throughout the *Politics* concerning what are and are not to be held in common by a people. He begins the book by noting that a people have the *polis* in common. This means that they share a way of life, and that way of life is based on a commonly held political association. He then says that in order to understand that common political association, we must break it down into its component parts. Through this analytic method, it becomes clear that we do not share the same household, the same gender, the same status, the same occupations, the same abilities, the same level of development in whatever abilities we inherit at birth, the same notion of equality, or the same notion of justice. All of these differences he terms “natural.” In thinking about these differences, however, we find that we do share the same desire for life that the household is designed to provide, the same need for sex that gender entails, the same need to express ourselves through the activity of occupations, the same need to develop our abilities in order to achieve the highest status we can, the same hope to be treated in accord with who we are, and the same hope for justice and the good life – receiving what is due to us as humans and as contributors to the common life. What we hold in common and what we do not thus flow from human nature and are natural.

But while human nature is common to all humans, humans do not all share the same way of life. Instead, humans are naturally divided into different peoples. By the end of section ix in book III Aristotle has set out a number of necessary and sufficient characteristics for a people. A people who share a way of life are necessarily defined by an interlocking set of relationships. Because these relationships require face-to-face encounters that cannot be extended over great distances, a