

Principles of Constitutional Design

Donald S. Lutz

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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

an ideal city in speech. This reading of Plato would be profoundly anticonstitutional. On the other hand, one can read Plato ironically, in which case the *Republic* is a philosophical cautionary tale against such an anticonstitutional approach. If one sees Plato as using the first way of framing the question, where one takes a neutral view of the relative status of the two entities and engages in what amounts to only a logical exercise, one is engaging in a profoundly nonconstitutional exercise.

A great deal is at stake in deciding which frame to use. If humans have an essence, something without which they would not be human, then any attempt to alter humans so that they conform to the requirements of some political system is potentially an attack on humanity. Today, any philosophical perspective that views humans as having a nature, or an essence, is termed “essentialist.” There has been a sustained attack on essentialist philosophy during the modern era. Racists and ethnocentrists have denied that all humans share a single nature and have either emphasized the effects of culture on human identity or argued for genetic or “blood” differences between groups of humans. Moral relativism under various guises, including its recent manifestation as “postmodernism,” has attacked essentialism as a cover for privilege and elitism. Although it is true that some elitists have misappropriated essentialist ideas for their own political ends, it is difficult to see how any position that argues for an inherent psychological and moral similarity among humans can support either elitism or moral relativism. It is also difficult to see how one can establish and maintain any political order approaching constitutional republicanism without resorting to some minimally essentialist position. Indeed, modern constitutionalism began with, and continues to rest upon, a notion of human equality that is grounded in one essentialist position or another. Within this philosophical frame humans exist and are fully human prior to any government, so the government must always be matched to the people.

However, Plato was not a modern. In his view, humans could not be fully human outside of a political system. Humans, *qua* humans, have a potential that, although natural, requires development if it is to flower in its fullest form. He considered government, along with family and other sociocultural institutions, as an essential agent for helping humans to develop fully what is in their nature. This view, one held by Aristotle as well, still takes human nature as a given and

government as an instrument in the service of humans. However, Plato recognized immediately that because all political systems rest on power, and because power has its own nature with certain inherent tendencies, it is easy for those in power to slip into another frame where human nature recedes into a malleable substance at the service of those holding the reigns of power. The essentialist perspective makes the matching between a people and their government a deeply problematic enterprise. A nonessentialist perspective, on the other hand, can take a neutral position with respect to matching a people and a government. Both are malleable, and matching them is a straightforward and reasonably simple enterprise. The nonessentialist perspective, by avoiding or ignoring any discussion of what is or is not “natural,” is profoundly nonconstitutional at its best. This becomes clearer, and Plato’s contributions to the discussion on constitutionalism become more apparent, if we consider for a moment the implications of the term “constitution.”

The word “constitution” has an interesting etymology that seems to cut across the essentialist-nonessentialist argument. The term comes from a Latin word with the broad, nonpolitical implication of determining the nature or character of something. At the same time, it implies the action of making or establishing something. “Determining the nature of a thing” implies that a constitution is somehow involved with something that has an essence, an unchanging character. On the other hand, the “action of making or establishing something” implies that what is created is not “natural” in the sense of existing prior to human intervention but is, instead, a conventional artifact. When we get to the term’s explicitly political meaning, “the system or body of fundamental principles according to which a political system is governed,” it simultaneously implies something that is natural in that it has an essence that makes it what it is, and something that is created and therefore not natural in the sense that it does not exist outside of human action. Cicero explicitly recognized that the failure to include the first part of this seemingly paradoxical concept led to the idea of a constitution losing its normative basis and becoming a simple creation of human will. Such a creation would be merely descriptive of a set of institutions, and the description would become unstable because it could be interpreted in any manner decided upon by those in power at a given moment. His famous solution was to suggest that there is an

existing order to which the good political system must conform, a natural law, and the essence of constitutionalism is tied to its conformity with this higher law. The political instrument termed a constitution is thus a human creation that is supposed to reflect an existing order against which it is judged. The very meaning of constitutionalism raises ontological issues about what exists by nature, and what it means to say that something exists or that something is natural.

Plato wrote within a political culture that assumed a natural relationship between three things – a *polis*, a *politeia*, and a *politeuma*. *Polis* may be defined as “a way of life,” which also implies a way of life that is shared and has a moral content. Because “a people” is essentially defined as those who share a way of life, to the extent the *polis* is a creation and not natural, to that same extent “the people” are a creation and not natural. *Politeia* may be translated as “a plan for a way of life.” It may also be viewed as the fundamental principles guiding a way of life, or a constitution in the modern sense. Plato did not, and could not, title his book the Republic because *res publica* is a Latin term not used in classical Greece. Instead, his book is actually entitled *Politeia*, which suggests his project in this long dialogue is generally constitutional rather than supportive of a particular constitutional form.

Politeuma may be defined as “those who write the plan for a way of life.” We now commonly translate *politeuma* as “regime,” although twentieth-century implications associated with regime make the term less useful than it once was. In classical Greece, when the regime was usually a small part of the population, the resulting political system was considered an oligarchy if the rules benefited the portion of the population that designed the *politeia*, or an aristocracy if it benefited the common good. When the *politeuma* was the body of the people, it was called a democracy if the *politeia* they created benefited the many poor, or a polity if it served the common good. If the *politeuma* was a single person, the *politeia* defined either a tyrant or a monarch, again depending on whom it benefited. The multiplicity of possible regimes suggested to the Greeks that the form of the political system was not natural, although the existence of a *polis* was considered natural because it flowed out of human nature to the extent that they could not think of humans, *qua* humans, living outside of a sociopolitical community. Only deities or beasts could live outside of some political organization. Beasts lack language and reason, and thus cannot create

a political system. The deities are immortal and self-sufficient, thus beyond any need for sustaining life. Humans are by nature equipped for creating a *polis*, and by nature in need of creating one. Humans are also by nature inclined to think about turning mere life into the good life, and a political system is instrumental for both. For these reasons the Greeks viewed the *polis* as natural, because it flowed from and helped to perfect human nature. Hence, humans could not be fully human outside of a *polis*.

Plato began by appealing to all of these Greek beliefs, and he also appealed to the belief that the relationship between *polis*, *politeia*, and *politeuma* is a natural one. That is, just as it is natural for humans to exist as members of a people in a polis, it is natural that the way of life for these people has guiding principles set down by someone.

However, Plato raised the ante by suggesting that, contrary to the standard Greek understanding taught by the sophists, there is some way of life among the possible alternatives that is natural – that is, some way of life in accordance with some standard that transcends political creation. The constitution created by human will, therefore, can be held up to some higher natural standard of justice that exists independent of human will. In this sense Plato's project looks very much in accord with constitutionalism. Using the "*polis* as man writ large" approach, Plato constantly asks what is natural for a ship's captain, or doctor, or trainer to do. That is, what would they do without any help from human-made guidelines?

It is difficult, after a careful reading of the text, not to conclude that Plato's ideal city in speech is deeply ironic. After removing all impediments to perfect justice, Plato concludes in book VIII (546 a–e) that even in the city in speech perfect justice is still unknowable to the best among us. The almost comedic equation for justice he describes in this section expresses the mystery entailed in the incommensurability among the elements of perfect justice. The dialogue ends in book X with the Myth of Er, and in this myth it seems that justice is something to be chosen or rejected by individuals rather than achieved through a properly designed political system. Although Plato seems to be telling us that perfect justice on Earth is not possible, his final words in the Myth of Er seem to ultimately reject the constitutional project altogether. Still, one thing Plato appears to be telling us is that seeking perfect justice on Earth is not a constitutional project, and, combined

with what Aristotle will later teach us, this cautionary tale does lay out a fundamental principle of constitutionalism: seek what is possible through our *politeia*, not what is perfect.

Plato takes up the constitutional project again in his longest dialogue, the *Laws*. Many students of political philosophy find this dialogue disappointing, because it lacks the flights of originality and memorable images found in the *Republic*. Still, it is in this work that Plato lays out his sense of how to match a *politeia* to flesh-and-blood people who live in a world that is not simply an exercise in formal logic.

In the *Republic*, Plato uncovered the most general principles underlying society. He saw society as resting naturally on a mutual exchange of services that contributed cumulatively to the creation of personal happiness when the exchange rested on virtue. Virtue, in turn, rests on knowledge of the good, and knowledge is conceived of as analogous to the exact, deductive procedure of mathematics to which factual knowledge contributes nothing beyond illustration. Because rulers in the ideal state are to be the most virtuous, the relationship between the rulers and the ruled amounts to one between the learned and the ignorant. Entirely missing from the political equation of the *Republic* are laws, since there is no room for the gradual growth of wisdom through experience and custom. Instead brilliant and virtuous leaders intuit the proper response to any political matter that arises.

In the appropriately named *Laws*, Plato lays out his view on “the second best” political system, one in which laws substitute for philosopher-rulers. That Plato felt such a dialogue was necessary supports an ironic reading of the *Republic*, and thus supports the notion that human nature must be taken as a given. We are not very far into the *Laws* when it becomes apparent that empirical considerations have reentered his analysis through an examination of history. The Athenian stranger, who serves in the role played by Socrates in the *Republic*, rehearses the history of several existing political systems. Each becomes understandable in terms of its respective history seen as a developing experience embodied in laws, customs, religion, myths, and shared events; and conditioned by underlying physical (geographic location, climate, and soil), economic, and social factors. Implicit in this part of the discussion is the evaluation of a government in terms of its appropriateness for the people living under it – matching the government to the people. Still, Plato strains toward some set of principles that will

be appropriate for all peoples regardless of how these principles are expressed institutionally.

A lengthy analysis of why certain political systems fail concludes that invariably it is because of a lack of moderation. More specifically, Persia exemplifies how monarchy invariably decays into tyranny, and Athens exemplifies how democracy invariably decays from an excess of liberty. The solution is to combine the principles of monarchy and democracy in a “mixed” government that replaces the rule by one or the many with rule by laws. To this extent his new project is more explicitly constitutional, but only in a partial sense since popular sovereignty is sidestepped in a peculiar fashion. Most of the inhabitants will not be citizens.

The second best political system, the best that can be achieved in the real world, is still informed by the ideal political system laid out in the *Republic*. In order to minimize the effects of economic class on politics, the land is divided into equal allotments that can be neither divided nor alienated. Slaves will do the actual agricultural work on these allotments, and the produce will be consumed in common at public meals. Private property is permitted, but the extent of private property is limited to four times the amount represented by an allotment. Citizens may not engage in trade, business, crafts, or industry. These activities will be engaged in by nonresidents who are freemen but not citizens. Nor is there to be possession of gold or silver, and interest for loans is prohibited. In a certain sense, Plato here ducks an essential problem faced by any constitutional order, participation, by sharply restricting citizenship. Whereas in the *Republic* all inhabitants were citizens, in the *Laws* Plato creates what is in effect an oligarchy where “the people” are only a portion of the many, and thus where popular sovereignty is proscribed.

The mixed government expresses the democratic principle by having the citizens elect a council of 360. For this election citizens are divided into four classes, each class owning one-fourth of the total wealth, and one-fourth of the council comes from each class. In addition, the chief board of magistrates, termed “the guardians of the law,” are elected in a three-step balloting. The first vote elects 300, from which 100 are then elected, and on the third vote 37 are elected from this 100 to become the chief board of magistrates. Finally, there is a Nocturnal Council comprised of the ten oldest magistrates, the director of education, and

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