

# Principles of Constitutional Design

*Donald S. Lutz*

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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

way of life is limited in space by the common human needs for economic exchange, social intercourse, and friendship (*philia*). This requires that “they occupy the same territory and intermarry.”

It is notable that when Aristotle describes what he means by social intercourse, he speaks of various “brotherhoods,” various religious beliefs, and various “civilized pursuits of life.” A political system in his view does not require a common kinship, religion, social memberships, or occupations. Aside from a common territory, however, he does see the ability to intermarry as crucial. Friendship rests on ties of affection that crosscut and bind the various networks of association. One critical aspect of a people, then, is that they are able to intermarry across all of the natural differences. If there is a line across which marriage cannot take place, then we have at least two peoples, and no *polis*. Thus, when it comes to matching a government to a people for purposes of constitutional design, the relative absence of barriers to intermarriage across a population may be a very important consideration. Prohibitions on intermarriage, or high barriers designed to dissuade intermarriage across ethnic, religious, cultural, or racial lines argue against the creation of a people capable of being brought under a common political system. Either one must attempt to match the span of a political system with a highly homogeneous population, or else one must find or legally induce circumstances where intermarriage across all major lines of difference is possible and reasonably well accepted. It is notable that, even in the supposedly highly homogeneous populations of the ancient Greek city-states, Aristotle emphasized that the marriage pool must be held in common in the face of population differences that he held to be significant.

Another thing that must be held in common is the ability of citizens to hold office and take part in political associations. In Aristotle’s day this usually implied that citizenship was restricted to only a portion of the adult population. However, his best possible political system in the real world, the mixed regime, clearly implied a very broad definition of citizenship. In today’s constitutional republics, with all that we have learned over the past twenty-five centuries, the recommendation implicit in Aristotle’s mixed regime would seem to argue that citizenship should be held in common by all adults.

Finally, for purposes of our discussion here, Aristotle argues that a common citizenship makes education a public concern. His discussion

at the beginning of book VIII is so clear and efficient, that it will save time to simply quote him directly.

No one would dispute the fact that it is a lawgiver's prime duty to arrange for the education of the young. In a [*polis*]<sup>2</sup> where this is not done the quality of the constitution suffers. Education must be related to the particular constitution in each case, for it is the special character appropriate to each constitution that set it up at the start and commonly maintains it, e.g. the democratic character preserves a democracy, the oligarchic an oligarchy. And in all circumstances the better character is a cause of a better constitution. And just as there must be preparatory training for all skills and capacities, and a process of preliminary habituation to the work of each profession, it is obvious that there must also be training for the activities of virtue. But since there is but one aim for the entire [*polis*], it follows that education must be one and the same for all, and that the responsibility for it must be a public one, not the private affair which it now is, each man looking after his own children and teaching them privately whatever private curriculum he thinks they ought to study. In matters that belong to the public, training for them must be the public's concern. And it is not right either that any of the citizens should think that he belongs just to himself; he must regard all citizens as belonging to the *polis*, for each is a part of the [*polis*]; and the responsibility for each part naturally has regard to the responsibility for the whole. (1337a11)

If citizenship is to be held in common, so must education be held in common. This education should inculcate common attitudes, primary among which must be the ability and willingness to pursue the common good.

So where has Aristotle taken us? The basic proposition seems to be that in order to match the government to the people we must first distinguish between what a people holds in common and what they do not. Some of what they hold in common results from their being human and is shared with people everywhere. Other commonalities are limited to the given people to which they belong. Some of the things not held in common need to be taken into account constitutionally, whereas other things not held in common do not. The matching exercise requires that we clearly distinguish all four categories and that we take each into account.

<sup>2</sup> T. A. Sinclair translates the word *polis* as "the state." This modern term, with its European statist implications, is not quite correct. "Political system" would probably be better, but in this instance as elsewhere the original term *polis* is retained.

### That Which Is Held in Common by All Humans

The distinction between what is held in common by all humans and what is held in common by the people of a given political system reminds us that any constitution must take into account basic human needs. This seemingly obvious observation is too often the rock upon which a constitutional order founders. Humans cannot be molded by a constitution into something contrary to human nature. A constitution may elicit and encourage any number of possible human responses, but it cannot eliminate any of these possibilities. Aristotle is here the complete realist, and as a result demonstrates his understanding of a deep principle of constitutional design. When one attempts to match a constitution to a people, one must remember that one is dealing with humans and not a completely malleable creature whose natural repertoire of behaviors can be shaped to relegate what is undesirable to the dustbin of history.

Scattered throughout Aristotle's analysis are trenchant observations that lay out these common needs. All humans have a need for self-preservation, which includes the need for order and thus for secure expectations, for families, and for comfort. All humans have a need for sociability, including the need for some minimal level of respect when conducting social interactions. This sociability expresses itself in all kinds moral, economic, and kinship exchanges. He codifies this minimal respect as *philia*, or a friendship that leads one to see oneself in the other. Humans have a need for liberty, including the need for self-expression. Finally, humans have a need for beneficial innovation so that they can look forward to a better life for themselves and their descendants. Aristotle demonstrates one form of beneficial innovation in his creation of a mixed regime but codifies the concept with the phrase "the good life," which is an open-ended set of possibilities that extend into all aspects of life. Aristotle provides a clear argument in favor of private property that flows from the need for self-preservation, the need for family, the need for self-expression, and the need for exchanges grounded in *philia*.

### That Which Is Held in Common by a Given People

Aristotle expands upon Plato's insights when it comes to what a people share that make them a people. They share a location with its