

# Principles of Constitutional Design

*Donald S. Lutz*

CAMBRIDGE

CAMBRIDGE

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

### 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

geographical characteristics such as climate, soil, and relative security from neighbors. They share an identity as a people that results from some level of a shared culture, including language, religion, and customs. Left unsaid is the extent to which these must be shared, although there are some hints. Whereas Plato in his *Laws* suggests that private expressions of religion must be prohibited so that only a common, publicly expressed religion is allowed, Aristotle has no such prohibition. Instead, he speaks of religions in the plural. Thus, while there is no argument in favor of freedom of religion, multiplicity of religions is assumed. It also seems to be assumed that religion belongs to the family and is thus outside of politics per se. Later thinkers such as Thomas More, Machiavelli, and Rousseau speak of the need for a civil religion, either a bland and generalized public worship that does no violence to the multiplicity of private expressions or else an explicitly political nonreligious substitute for a common religion sanctioned by the political system. Successful constitutional republics have tended to use the latter formulation whereby certain shared political principles and basic laws serve as a common “religion.” Such an approach is implicitly sanctioned by Aristotle’s emphasis upon the need for *philia* among the people that leads to a mutual respect for differences.

Whereas Aristotle is less than clear with respect to religion, he is quite clear that a people must share social networks. That is, they must be free to pursue unregulated exchanges of all types, especially the possibility of intermarriage. This shared gene pool is fundamentally related to the common citizenship that defines a people and has implications for the nature of that citizenship. On one hand, a people result from a myriad of face-to-face interactions through which citizens come to know or at least recognize each other. Intermarriage is one result of people interacting freely and often. On the other hand, all humans, regardless of where they come from, are capable of sexual intercourse and thus of intermarriage. In principle, then, members of a people can intermarry with those who are not citizens. Because frequency of interaction is associated with the probability of marriage, citizens are highly likely to marry other citizens. What happens, however, if for some reason a citizen marries a noncitizen? In the United States this is sufficient grounds for making the noncitizen a citizen. The possibility of intermarriage thus makes differences in religion, ethnicity, and customs secondary in importance. It also, by law, makes noncitizenship a

secondary consideration unless the laws distinguish between marriage to a citizen and a noncitizen.

Which brings us to another thing that Aristotle argued must be held in common, the laws, including the constitution. Implicit in Aristotle's treatment of religion is that common laws can dictate the place of religion among a people. Likewise, the laws held in common determine the effects of marriage, including inheritance. Many thinkers since Aristotle have held that citizens must have laws in common, and because today we recognize all adults among a people as citizens, then the people must have laws in common. Rule of law is implicit in common laws, which means in part that the rulers are subject to the same laws to the same extent as everyone else. This in turn implies a constitutional order.

For Aristotle, common laws and a common constitution did not describe something external to the people, but a natural extension of that people. He tried to capture the basis for this natural extension in the concept of *philia*, a basis for political relationships that was expressed in the nature of everyday interactions. That is, the laws and constitutional order rested on something that Montesquieu would later term "the spirit of the laws." Bodin speaks similarly of the laws being undergirded by "the natural temperament of a people," and Tocqueville speaks of the "habits of mind" of a people. A constitution, as well as the laws passed under it if that constitution is matched to the people, is a natural expression of how a people tend to think. This in turn is a natural product of their shared history, which includes the institutions already in place, the political culture shared by potential as well as actual political elites, how the critical political problems faced by a particular people have been resolved, the shared memory of past events, as well as what might be termed the dominant "political myth." All peoples have some sense of how they came to be a people, how they got to where they are, and the sense of this coming to be is often encapsulated in a "narrative" that is in the form of a myth. A myth is not something that is literally true, but a story that captures some deeper truth. The story of Romulus and Remus served as a founding myth for the Romans, and the tradition of George Washington and his cherry tree, along with the story of the Pilgrims and their first Thanksgiving, serves something similar for the United States. A good place to look for the basis of such a myth is in early documents that describe or codify

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