

# Aristotle on Constitutionalism and the Rule of Law

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*At least since John Locke, writers have pitted power against lawfulness, championing the rule of law for its protection of the political order against both popular and governmental overreaching. Aristotle is often cited as the source of this opposition between power and lawfulness insofar as he takes law to constrain the overreaching characteristic of human nature, the rule of law to exemplify reason's moderation of desire, and the constitution to be the source of the rule of law. Offering an interpretation of Aristotle which challenges the opposition between reason and desire driving most formulations of the rule of law, this Article argues that Aristotle understands the rule of law as itself a practice of political power, issuing from practical wisdom, which combines reason and desire. Treating the rule of law, in this way, as the rule of men as well raises the possibility that the question of political authority, at the heart of debates about constitutionalism, is at the same time a question of political authorship and accountability — accountability to, and of, both a regime and a people.*

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## INTRODUCTION

In fall 1999, the Supreme Court of South Carolina decided that video poker in the state is illegal, and it ruled unconstitutional a referendum that would have left this decision up to the people. Many citizens of the state hailed the Court's decision as a victory for the rule of law. That same fall, amid debates about the NAACP decision to impose economic sanctions on South Carolina pending the removal of the Confederate flag from the State House in the capital city of Columbia, a prominent civil rights activist positioned himself against the NAACP boycott, arguing that the best place to decide the question of the flag was in a courtroom, which is governed by the rule of law rather than by the will of the majority.<sup>1</sup>

These examples suggest that the rule of law and, indeed, constitutions are opposed to the rule of the people and best safeguarded by the judiciary. In so doing they illustrate a puzzle central to contemporary debates in constitutional theory, a puzzle known as the "countermajoritarian difficulty," a phrase coined in 1962 by Alexander Bickel. Bickel remarked that insofar as it "thwarts the will of representatives of the actual people of the here and now," judicial review of governmental action can be called "undemocratic."<sup>2</sup> The countermajoritarian difficulty opens questions of jurisdictional authority as between courts and the people (or their representatives in legislatures). It also raises broader questions of constitutional authority and sovereignty. Do constitutions shore up democracies "by canalizing popular power and directing it in legitimate directions" or do they "undermine democracies by cannibalizing popular power, subjecting present populations to constraints they do not will and institutionalizing collective power in ways that settle into an alienating inertia or, worse, domination"?<sup>3</sup> These questions, in turn, lead to ontological and normative questions: What, after all, is a constitution? And what makes it binding over time? It is these questions of authority, sovereignty, and ontology that are the subject of this Article.<sup>4</sup>

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1 Kevin Alexander Gray, Editorial, *THE STATE, COLUMBIA, S.C.*, Oct. 18, 1999, at A9.

2 See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-18 (1962).

3 This language belongs to Bonnie Honig, *Legitimation, Constitutionalism and the Politics of Paradox in Democratic Theory* (Dec. 2005) (unpublished manuscript, on file with author). Honig attributes the term "canalize" to Stephen Holmes.

4 For a representative set of essays on these topics, see *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* (Larry Alexander ed., 1998).

Most contemporary constitutional theorists answer the ontological question by treating a constitution as the source of the rule of law and also as in itself a rule of law, the fundamental law of the land, so to speak. But that only takes us so far. For there is substantial disagreement about exactly what sort of fundamental law a constitution is and about what gives it its normative force. Legal positivists who follow H.L.A. Hart's influential *Concept of Law*<sup>5</sup> tend to treat the constitution as a rule of recognition, as, in other words, a socio-cultural fact, binding insofar as it has been accepted. Deliberative democrats, following Immanuel Kant, tend to treat it, by contrast, as a transcendent rule of right reason, regulative and binding as such. A third set of theorists differs yet again, treating it instead as the intentional production of a several or collective political will, binding because of its intentionality.<sup>6</sup> Despite their differences, all three approaches share two commitments: First, they insist that a choice must be made among their respective positions. Because they take fact, reason, and will to belong to separate and opposing justificatory and normative ontologies, a constitution must be understood existentially or rationally or volitionally, but not as all three together. Second, albeit in different ways, they take the constitution to stand opposed to and to set limits on power, both governmental power and the power of the people.

This Article challenges these shared commitments by turning to the writings of Aristotle. This may seem to be an odd choice for two reasons. For one, it is not obvious what a pre-modern like Aristotle might have to say to modern and contemporary constitutional theorists or why they should care. Second, even if it makes sense to treat Aristotle as an interlocutor for modern times, it is not obvious how Aristotle poses a challenge to the dominant contemporary approaches. On the contrary, he is often viewed as an authority for the commitments shared by those approaches, especially for the opposition they assume between law and power. I return very briefly to the first challenge at the end of this Article. The bulk of this Article focuses on the substantive issue, arguing that while there are good reasons for reading Aristotle as a champion of the rule of law *against* power, he also appreciates the role of power in establishing law, the rule of law, and, indeed, the constitution.

Aristotle champions the rule of law against power because he recognizes

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5 H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

6 For this mapping of the terrain of contemporary constitutional theory, see Frank Michelman, *Constitutional Authorship*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS*, *supra* note 4, at 64.

the dangers of overreaching of all kinds: whether on behalf of those who rule, the people, or the polity itself. Accordingly, he distinguishes categorically between political or rotational rule, on the one hand, and mastery, on the other, calling mastery (or absolute rule) inimical to a political life.<sup>7</sup> He is on the whole hostile to rule by the people, and particularly hostile to the sort of freedom as license he takes most forms of democracy to encourage.<sup>8</sup> Indeed, Aristotle treats the rule of law as a constituent feature of any regime worthy of being called a regime.<sup>9</sup> In Aristotle's view, however, law, too, must be moderated, for laws also, and all too often, aim at domination.<sup>10</sup> It is for this reason that he insists, following in the footsteps of Socrates, that unjust laws must be disobeyed. Insofar as he takes the justice of laws to depend on the individual practice of good judgment, Aristotle sees the rule of men, via their good judgment, as moderating excesses in the sovereignty of law. Aristotle, in other words, holds both that the rule of law, and especially, as we will see, the constitution, moderates the rule of men, and also that the rule of men moderates the rule of law, including the constitution.

This dual set of commitments is possible because, as I demonstrate in the Parts that follow, Aristotle understands a constitution as both a rule of recognition and as a rule of reason. And he takes a constitution to be binding because it is a product of citizen acquiescence and reason and also because of its intentional design. In these ways, Aristotle's constitutionalism brings together the three disjunctive ontological and normative answers offered by contemporary theorists, but with a twist. For as I show in Part I, through Aristotle's treatment of the figure of Theramenes in his *Constitution of the Athenians*, Aristotle understands social acceptance of, or citizen acquiescence to, a constitution not as a fact, but as an active and everyday practice on the part of citizens, informed by reason. And, naming the reason proper to politics practical wisdom, or *phronesis*, he takes reason to be regulative and, indeed, imperative,<sup>11</sup> not because it is transcendent or apolitical but because it is situation sensitive and responsive to context. As I show in Part II, through Aristotle's criticisms of the Spartan constitution in the *Politics* and through his celebration of the ancestral constitution and the Constitution of the Five Thousand in the *Constitution of the Athenians*, the intentionality Aristotle attributes to constitutions lies not in the will of a citizenry, severally or

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7 *Pol.* 1252a7-17, 1292a14-38, 1295b20-24.

8 *Pol.* 1317b10-15.

9 *Pol.* 1292a5.

10 *Pol.* 1324b7.

11 *NE* 1143a8.

collectively, but in the constitution itself.<sup>12</sup> Specifically, I argue that Aristotle understands good constitutions to intend the freedom of their citizens, freedom understood not as license but as self-regulation. In Part III, I show how these adjustments to contemporary constitutional theory bridge the tension between constitutionalism and democracy at the heart of many contemporary debates. They do so by orienting discussions about constitutionalism away from origin stories, founding moments, and authorship of a past, and toward constitution as an ongoing ethical, social, and political practice on the part of the same citizens that constitution governs, with a view to the future. The key to this bridging and to Aristotelian constitutionalism more generally is Aristotle's unique account of virtue — as itself a kind of power — that is at the heart of a political life. Aristotle's understanding of virtue allows him to treat men and laws and, indeed, constitutions as sites of power, which is to say as limiting and establishing power at the same time. Hannah Arendt owes much to Aristotle when she claims that "only power arrests power without destroying it, that is to say, without putting impotence in place of power."<sup>13</sup>

### I. THE RULE OF MEN: THE PRACTICE OF PHRONETIC JUDGMENT<sup>14</sup>

Aristotle maintains that citizens must have good laws and also that citizens must be habituated to abide by those laws.<sup>15</sup> For this reason, many Aristotle commentators, like many contemporary legal positivists, take the rule of law to represent a general habit of obedience on the part of a citizenry, a social fact of citizen acquiescence. Now, it is true that, to Aristotle, the rule of law represents and requires a habit of obedience. Without such a disposition, the force of law and the stability of the political order would always be in question. Indeed, it is because Aristotle understands the rule of law as a habit of obedience that he insists that laws should be changed only rarely.

Aristotle also insists, however, that the rule of law rests on sometimes withholding that obedience. To illustrate this latter commitment, consider his treatment of the figure of Theramenes in the *Constitution of the Athenians*.<sup>16</sup> There Aristotle describes Theramenes as playing an important

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<sup>12</sup> *Pol.* 1269b14, 1312b4.

<sup>13</sup> HANNAH ARENDT, ON REVOLUTION 151 (1963).

<sup>14</sup> Parts I, II, and III of this Article draw on and reproduce material in JILL FRANK, A DEMOCRACY OF DISTINCTION: ARISTOTLE AND THE WORK OF POLITICS 45-49, 112-17, 123-37, 142 (2005), and Jill Frank & S. Sara Monoson, *Aristotle's Theramenes at Athens: A Poetic History*, 9 PARALLAX 29 (2003).

<sup>15</sup> *Pol.* 1310a14-17.

<sup>16</sup> There is some controversy about the authorship of this text and about Aristotle's

role in Athens's constitutional development during a period of political turmoil in the later years of the Peloponnesian War. During this period, between 411 and 402 B.C.E., Athens underwent a series of rapid regime changes, from democracy to oligarchy to democracy to oligarchy and finally back to democracy again. Aristotle recounts that Theramenes supported Athens as both oligarchy and democracy, and he praises Theramenes for being loyal to each regime. Theramenes also, however, had a hand in changing Athens twice from democracy to oligarchy and in moderating the first oligarchy (the Four Hundred), although he was executed for his attempts to moderate the second (the Thirty). Commending Theramenes not only for abiding by the law, Aristotle maintains that he "worked for the good of any established government so long as it did not transgress the laws, and in this way showed that he was able to participate in governing under any kind of political setup, which is what a good citizen should do." Stressing that Theramenes would "rather incur enmity and hatred than yield to lawlessness," however, Aristotle saves his highest praise for Theramenes' refusal to follow, and active discouragement of, Athens's unlawful policies.<sup>17</sup>

Aristotle's commentary on Theramenes underscores that a disposition to follow rules may be actualized or withheld and that what guides that actualization or withholding is citizen judgment. To Aristotle, this means that the rule of law depends not only on a habit of obedience but also on active disobedience, when citizen judgment determines that a polity's policies are unjust. To those who call Theramenes a destroyer of all constitutions, Aristotle suggests that, by refusing to yield to Athens's lawlessness, by withholding his obedience, Theramenes was an exemplar of lawfulness and acted to preserve Athens's constitution.<sup>18</sup> Unlike contemporary legal positivists, who treat citizen compliance as a social fact, then, obedience to the law in Aristotle's view is not a fact but a practice, one that is guided by citizen judgment.

Not any and all citizen judgment is determinative of lawfulness, however.

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treatment of the controversial Theramenes. For convincing evidence that the author is Aristotle, see Gerald M. Mara, *The Culture of Democracy: Aristotle's Athenaiion Politeia as Political Theory*, in *ARISTOTLE AND MODERN POLITICS: THE PERSISTENCE OF POLITICAL PHILOSOPHY* 301, 310-11 (Aristide Tessitore ed., 2002); JOHN J. KEANEY, *THE COMPOSITION OF ARISTOTLE'S ATHENAION POLITEIA* (1992); JAMES DAY & MORTIMER CHAMBERS, *ARISTOTLE'S HISTORY OF ATHENIAN DEMOCRACY* (1962). For a discussion of why, unlike most of his contemporaries, Aristotle sees Theramenes in a positive light, see Frank & Monoson, *supra* note 14.

<sup>17</sup> CA 28.5.

<sup>18</sup> *Id.*

Knowing how and when to disobey the laws of one's regime, Aristotle insists, depends on good judgment.<sup>19</sup> Indeed, Aristotle attends to Theramenes' withholding or actualization of *his* disposition to follow rules because, in Aristotle's words, Theramenes was "outstanding in intelligence and judgment."<sup>20</sup> Citizen judgment, guided by reason, thus moderates the rule of law.

How does Aristotle understand the reason that guides good judgment in political matters? The intelligence he attributes to Theramenes he calls *phronesis*, or practical wisdom, and it appears on his list of the intellectual virtues in *Nicomachean Ethics* VI alongside science, theory, and philosophy. Unlike those intellectual virtues, in which reason knows a set of universal and invariable rules, Aristotle defines practical wisdom as knowledge of particulars grasped through experience.<sup>21</sup> In practical wisdom, he maintains, reason combines with desire to produce a rule of action that is given to the agent by the agent himself.<sup>22</sup> This rule of action is not invariable but contingent, situation sensitive, and responsive to context. If practical wisdom guides good judgment, what, in turn, guides practical wisdom? Properly discerning the particulars of a situation, Aristotle says, depends on moral character. This means that the intellectual virtue of practical wisdom and the judgment it guides depend on moral virtue as well. Specifically, Aristotle explains, they depend on the virtue of moderation, which, he claims, preserves or saves practical wisdom.<sup>23</sup>

The proper measure of law, therefore, is good judgment, guided by practical wisdom, itself a practice of intellectual and moral virtue. I analyze elsewhere Aristotle's distinctive treatment of virtue as a practice or activity rather than, say, as a faculty of mind or static trait of character.<sup>24</sup> It would be a mistake, however, to understand virtue, moral or intellectual, as an activity alone. For Aristotle insists that *dunamis*, variously translated as capacity, potentiality, or power, makes activity possible. *Dunamis* is the power that the activity of virtue has to regulate itself. In Aristotle's taxonomy, then, virtue is constituted by power and activity, which both generate and limit one another. When I act well, I do so because my power or habits so dispose me to act. And I become habituated to acting well in the first place by way of the actions I undertake. Power and activity, habits and actions, depend

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19 *NE* 1181a15-25.

20 *CA* 32.2.

21 *NE* 1142a14.

22 *NE* 1140b6.

23 *NE* 1140b11-12.

24 For discussion, see FRANK, *supra* note 14, at 45-49.

on one another in these ways, but they do not do the same work in the soul. Habits or power offer stability over time and generate rule-governed, because habitual, behavior. This is why Aristotle says that law "has no power to command obedience except that of habit, which can only be given by time"<sup>25</sup> and why, as we have seen, Aristotle insists that laws should be changed rarely. This link between law and habit means that "a readiness to change from old to new laws enfeebles the power of the law."<sup>26</sup> If law depends on the force of habit, it also, as the case of Theramenes makes plain, depends on activity. As Aristotle puts it, "[I]t is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars."<sup>27</sup> Activities either reinforce the habits that gave rise to them or resist these habits, altering them in the process. "Hence we infer," says Aristotle, "that sometimes and in certain circumstances laws should be changed."<sup>28</sup>

The dynamic and reflexive relation between the habits and actions, power and activity, that constitute virtue maps the relation between following the law and either making or unmaking it. Just as habits govern actions but do not and cannot fully determine them, so too do laws govern actions even as laws need sometimes to be changed by and in order to accommodate those actions. The result, as we saw in the case of Theramenes, is that citizens are subjects of law in two senses: they are subject to the laws and they are the laws' authors. They are governed by law even as they may modify it by activity. Following the laws (or not) matters: when laws are not followed, the activity of withholding the disposition to follow laws can unmake the laws; when the laws are followed, the disposition to follow, now actualized, remakes the laws.

If practical wisdom, as an intellectual and moral virtue, is, as such, an everyday practice of power, law is too, for Aristotle defines law as a rule proceeding from practical wisdom.<sup>29</sup> Consider again the case of Theramenes: he was executed, Aristotle reports, shortly after the regime of the Thirty began to worry that "he might become a leader of the people, *prostates*, and overthrow their regime."<sup>30</sup> Theramenes was executed, in other words, because the Thirty were concerned that the rules of law produced by Theramenes' practical wisdom would become the law of the land, thereby unmaking their

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25 *Pol.* 1269a20.

26 *Pol.* 1269a22-23.

27 *Pol.* 1269a10.

28 *Pol.* 1269a14.

29 *NE* 1180a21.

30 *CA* 36.1.

regime. Aristotle's rule of law is thus to be understood as the product of an active practice of citizen acquiescence or not, guided by practical wisdom and good judgment. But it is not all and only that. As I show next, the source of law is also the constitution.

## II. THE RULE OF LAW: WHAT THE CONSTITUTION INTENDS

"Laws are, and ought to be, framed with a view to the constitution," Aristotle states in the *Politics*.<sup>31</sup> The constitution is, in this way, the measure of a regime's laws. What might Aristotle have in mind when he invokes the constitution as the standard by which to measure a regime's laws? He identifies a polity's constitution with its government and defines a constitution as that which determines both a polity's arrangement of offices and its end or *telos*.<sup>32</sup> Reading Aristotle's definition of constitution in a purely positivist or descriptive manner, as saying that the constitution of a polity is simply its arrangement of offices, some scholars conclude that Aristotle's constitutionalism has no bearing on modern and contemporary normative concerns.<sup>33</sup> Aristotle's use of constitution as a standard for evaluating existing laws of varying regimes, along with his assessment of the constitutions of those regimes, demonstrate, however, that a positivist reading of Aristotelian constitutionalism is a mistake.

Aristotle's treatment of Sparta in *Politics II* offers a case in point. He is critical of Sparta's laws regarding women, property, common meals, and the ephorate.<sup>34</sup> Sparta's laws regarding women and the ephorate, he says, are too democratic. Its laws regarding common meals and property are too oligarchic. They are bad, he explains, because they "defeat the intention, *prohairesis*, of the constitution" and promote its "deterioration."<sup>35</sup> Aristotle's criticisms of Sparta's laws appear to suggest what would be constitutional laws in his view:

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31 *Pol.* 1289a13-17, 1282b10-11. Richard Bodéüs calls this the "principle of the constitutionality of the laws" and maintains that "when called on to judge the qualities of a political regime, [Aristotle] tended to place the accent, first and foremost, on the conformity of its laws with the orientation of its constitution." Richard Bodéüs, *Law and the Regime in Aristotle*, in *ESSAYS ON THE FOUNDATIONS OF ARISTOTELIAN POLITICAL SCIENCE* 234, 239 (Carnes Lord & K. David O'Connor eds., 1991).

32 *Pol.* 1279a25-27, 1278b8-10.

33 See, e.g., Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 *AM. POL. SCI. REV.* 853 (1962).

34 *Pol.* 1269b19-22, 1270a16, 1271a30-35, 1270b7-10.

35 *Pol.* 1269b14, 1270b17.

they would be neither too democratic nor too oligarchic but, rather, oriented to a mixed, that is, a democratic-oligarchic, constitution. Maintaining that "there is a true union of oligarchy and democracy when the same city may be termed either a democracy or an oligarchy," Aristotle points to the Spartan constitution as a model for this sort of union.<sup>36</sup> Laws blending oligarchy and democracy would thus be consistent with the intention of Sparta's constitution. They would thereby also preserve it. There is, this means, a bidirectional relationship between constitution and law: constitutions guide laws, and laws preserve constitutions.

If, in Aristotle's judgment, Sparta's existing laws are bad because they do not conform to its constitution, he is no less critical, in the end, of Sparta's constitution itself, calling its mixture of democracy and oligarchy a fusion of "both extremes."<sup>37</sup> Extreme democracies, according to Aristotle, teach citizens to understand freedom as license.<sup>38</sup> Extreme oligarchies, he claims, orient citizens to mastery and the enslavement of others.<sup>39</sup> The failure of Sparta's constitution, Aristotle explains, is that it "has regard to one part of excellence only — the excellence of the soldier, which gives victory in war."<sup>40</sup> Oriented by the excesses fused as Sparta's constitution, warlike virtue becomes a vice, moving the spirit of its citizens and of its laws toward conquest and domination. The constitution's failure to educate its citizens to self-regulating practices of power thus paradoxically orients Sparta's citizens and its laws and the city itself to unfreedom.<sup>41</sup> Sparta's constitution is bad, therefore, because its *telos*, or end, is unfreedom. Aristotle thus criticizes Sparta not only because its laws defeat the intention of its constitution but because its constitution itself defeats what a good constitution must intend, namely, freedom as self-regulation of its citizenry.

To explore a more promising set of constitutional arrangements, I return once more to the *Constitution of the Athenians* and, specifically, to the constitutions with which Aristotle associates Theramenes: the ancestral constitution and the Constitution of the Five Thousand.

Calls to return to governance by the "ancestral constitution" appear twice

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<sup>36</sup> *Pol.* 1294b14-15, 1294b20-35, 1265b34-1266a1.

<sup>37</sup> *Pol.* 1294b19.

<sup>38</sup> *Pol.* 1317b10-15.

<sup>39</sup> *Pol.* 1295b13 *passim*.

<sup>40</sup> *Pol.* 1271b2-4. For a terrific account of Aristotle's criticisms of this virtue, see Stephen G. Salkever, *Women, Soldiers, Citizens: Plato and Aristotle on the Politics of Virility*, in *ESSAYS ON THE FOUNDATIONS OF ARISTOTELIAN POLITICAL SCIENCE*, *supra* note 31, at 165, 172-74.

<sup>41</sup> *Pol.* 1333b11-1334a10.

in the *Constitution of the Athenians* in the course of Aristotle's discussion of the period from 411-402 B.C.E. Aristotle reports that, unlike those who invoked the ancestral constitution in the name of democracy and unlike those who did so with the aim of establishing oligarchy, a group of citizens led by Theramenes advocated the ancestral constitution in the context of the peace treaty negotiations between Sparta and Athens for something other than partisan reasons.

Aristotle specifically names the members of this group — Theramenes, Archinus, Anytus, Cleitophon, and Phormisius — to signal that it was comprised of both democrats and oligarchs. It may thus be understood to have been bipartisan, advocating a mix of democratic and oligarchic arrangements, acceptable, by means of negotiation and compromise, to members of either party. But bipartisanship is not what distinguishes Theramenes or the rest of this group of citizens. They are more accurately described as moderate in the mode of nonpartisanship. As we have seen, Theramenes consistently refused to act from set political predispositions. A prominent oligarch, he disobeyed both democratic and oligarchic policies when he deemed them unjust. Aristotle makes a similar claim about Archinus. A prominent democrat, he refused to follow not only oligarchic policies but also democratic ones, guided by what Aristotle calls his phronetic judgment.<sup>42</sup> Both are nonpartisan insofar as they practice the virtue of moderation, which preserves their practical wisdom.

Aristotle's association of Archinus and Theramenes with the ancestral constitution suggests that moderation is not simply an individual virtue but a constitutional virtue as well. Aristotle's discussion of the Constitution of the Five Thousand helps us to see how. The facts are as follows: In 411, an oligarchic regime, the rule of the Four Hundred, was abolished,<sup>43</sup> but Athens did not immediately swing back to a democratic political order. Instead, Theramenes and the hoplite commander, Aristocrates, led an effort to transfer the administration of the affairs of the city from the Four Hundred to the Five Thousand. Aristotle applauds the actions of these reformers for ushering in a period of good government,<sup>44</sup> though a brief one.

Aristotle explicitly mentions only two features of the Constitution of the Five Thousand. The Five Thousand were all to be capable of military service "with full equipment" (as hoplites) and "there was to be no pay

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42 CA 40.1-3.

43 CA 33.1.

44 CA 33.2.

for any public office."<sup>45</sup> These oligarchic features were accompanied by a set of democratic constraints, including public and deliberative institutions open to a broad group of citizens — the Five Thousand — and subject to scrutiny and ratification.<sup>46</sup> But the Constitution of the Five Thousand, unlike Sparta's constitution, did not simply blend these oligarchic and democratic features. Rather, Aristotle describes the Constitution of the Five Thousand as depending crucially on a "generally shared" capacity to practice virtue.<sup>47</sup> The Constitution of the Five Thousand, therefore, had the virtue of being both oligarchic and democratic but reducible to neither. It is only this mode of constitution, oriented to neither extreme because of its ethical and political moderation, that, in Aristotle's view, can both educate and preserve citizen freedom as self-governance, thereby actualizing a constitution's *telos*.

### **III. THE RULE OF LAW AS THE RULE OF MEN: CONSTITUTION AND SELF-SOVEREIGNTY**

I have argued that it is the everyday practice of law on the part of a polity's phronetic citizens that makes (or unmakes) its laws and that lawfulness is guided by a polity's proper constitution even as laws and lawfulness — themselves understood as practices of good citizenship — preserve that constitution. The rule of (good) law, so understood, dependent on the rule of (good) men, does not contradict popular sovereignty but, instead, promotes a political and citizen-oriented practice of law that, while guided by the constitution, also founds and refounds that constitution daily. Insisting that both the rule of law and the rule of men take their guidance from the constitution does not contradict popular sovereignty either, because the authority of the constitution, as the way of life of the people, lies in citizens' participating as makers and subjects of their own law. This politically-rich circularity affiliates the sovereignty of law with popular sovereignty, both being practices of citizenship regulated by the constitutions that those citizens authorize.

So understood, the constitution disciplines the power of the people, the power of those who govern, and the power of law itself. But it does so not by standing over and against a citizenry, or its rulers, or the polity, for the source of its disciplinary power does not lie outside those it regulates. Instead, the

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<sup>45</sup> CA 33.1-2.

<sup>46</sup> CA 29.1-2, 30.1, 30.2, 32.1.

<sup>47</sup> CA 32.1, 36.2-1.

constitution is itself a practice of self-discipline. Aristotle reconciles popular sovereignty with the rule of law by means of the dependence of both on virtue, specifically, as we have seen, the virtue of moderation. It is the individual and constitutional practice of moderation that is responsible for stemming the tendencies to overreach on the part of rulers, citizens, and polities. Most important, perhaps, is that moderation preserves or saves practical wisdom, whose imperative nature<sup>48</sup> generates the laws that guide and command citizens and rulers in much the same way that the rule of law guides and commands a political life.

If there is this direct relation between practical wisdom and law and practical wisdom gets its bearing from moral virtue, then the political analog of moral virtue, Aristotle seems to suggest, is the constitution. Just as virtue is comprised of sedimented habits, with no precise and identifiable source, that are generated by actions and that themselves generate but do not fully determine activity, so too is a constitution, as Aristotle's endorsement of the ancestral constitution implies, a product of long and unvarying habit, a "way of life of a people,"<sup>49</sup> generated by a series of actions that have, by repetition and acquiescence, acquired the force of law. If virtue "preserves" practical wisdom and so produces (even as it is guided by) good judgment and, thereby, lawfulness, the polity's proper constitution, by introducing predictability, pattern, and order into individual practices, safeguards and preserves lawfulness to produce (even as it is guided by) the common judgment of the community — its common sense or consensus. Deliberative democrats tend to treat the constitution as a rule of right reason and to reify and freeze it by locating it out of time, in an invariable realm that transcends that of human affairs. Positivists similarly reify the constitution by treating it as a "dead" rule for the future, a fact of social acceptance. In contrast, Aristotle's constitutionalism refers not to time immemorial nor to a specific founding moment, but rather to a way of life, whose origin is in the past but whose force lies in the everyday social, political, and ethical practices of its citizens. Aristotle's constitution, like the practices that produce and preserve it, is changeable, albeit in the form of the incrementalism and gradualism associated with changes in habit. In this way, it safeguards the stability of a polity and is also able to recognize and accommodate the variability of human affairs.

Aristotle's constitutionalism is able to do all these things because he treats a constitution as a *telos* and, as such, as the way of life of a people

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48 *NE* 1143a8.

49 *Pol.* 1295a41-b1.

in a regime. The tense of *telos* is futural, intentional, and aspirational. Its focus, however, is not on the future but on the present. Aristotle's account of the *telos* of human beings, living well and happily (*eudaimonia*), for example, concerns the practice of virtuous activities in the ongoing present of an individual life. His consideration of the eudaimonic constitution does the same, attending to the ongoing practices and institutions in existing regimes. If the *Nicomachean Ethics* investigates excellence so that human beings may become good,<sup>50</sup> the *Politics* and the *Constitution of the Athenians* investigate how Athens can attain its constitutional *telos* and become a good regime, which is to say, one that is both democratic and oligarchic and neither, a regime Aristotle, not surprisingly, simply calls, in the *Politics*, the constitutional polity or *politeia*.

Is Aristotle's constitutional polity beyond the liberal imagination? Insofar as Aristotle's *politeia* differs from modern liberal democracies with, in particular, their theoretical commitment to a fundamental separation of ethics from politics, the answer is yes. When, however, "liberal" is understood in its original relation to liberality and liberty and hence to generosity and freedom — etymological connections present in the Greek *eleutheriotes* (liberality) and *eleutheria* (liberty) as well — then thinking critically about modern constitutionalism demands the exercise of a liberal, which is to say, a generous and free, imagination. Drawing on a past to open possibilities for a future, a generous and free imagination recognizes the importance of translating old to new in light of both the signal discontinuities and the important continuities between past and present. Imagination, so understood, distinguishes a practice of history, critical to modernity, which Aristotle, in the *Poetics*, calls poetry.<sup>51</sup>

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50 *NE* 1103b27.

51 For discussion of this mode of history in Aristotle, see Frank & Monoson, *supra* note 14. For an "unhistoricizing" or "queering" of history that shares much with this mode, see Jonathan Goldberg & Madhavi Menon, *Queering History*, 120 *PMLA* 1608 (2005). There are, of course, many scholars who insist on a break between the old and the new, effected by modernity. It is worth noting that some of these scholars make their case using classical images, words, and concepts, which suggests that there are continuities even in rupture. See, e.g., REINHART KOSELLECK, *FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME* 3-20 (Keith Tribe trans., 1985) (1979).