5

Was the American Revolution a Change of Regime?

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On the 250th anniversary of the American Revolution, the language of politics and political science reveals some hesitation to call it a change of government, as does the Declaration of Independence. The phrase "change of regime," implying something more fundamental, has come into fashion; or rather, since "regime" translates a Greek word used in classical political science, it has returned to favor. In that political science, regime means a kind of rule, whereas modern, liberal political science makes a distinction between government and society that limits government, with the aim of preventing rule that combines government and society. The renewed sense of regime is aimed directly against liberalism and the liberal understanding of the American Revolution.

Which view is correct? The brief framing given above needs to be elaborated, because the classical idea of regime, long abandoned, is not well understood today, and liberal limited government, once intended as an alternative and replacement for the regime, has lost its original clarity as a distinction. Which type is "big government," for example—is it still properly limited or a regime? Working toward a clearer understanding of the difference between the classical conception of regime and the liberal ideal of government could help us better grasp the significance of the American Revolution—and the kind of constitutional government it ultimately brought into being.

The Classical Regime and the Common Good

The regime is at the heart of classical political science and was shown to be at the heart of politics itself by the two grand masters of that science, Plato and Aristotle. The Greek word *politeia* appears as "republic" in Plato's *Republic*, the dialogue in which Socrates discusses the nature of justice. And it appears as "regime" or "constitution" in Book 3 of Aristotle's *Politics*—the most important part of that essential work.

Aristotle says a human being is by nature a *political* animal, not merely a familial or social one. He also says a human being is a *rational* animal, one who gives reasons for his desires. These reasons are directed to other human beings to convince them to agree that they would have acted as the speaker acted. By giving a reason, one states the principle by which another would act; merely stating one's desire is not enough. The speaker's principle should rule the situation. Ruling takes its origin in speech or rational justification: What I did should be the rule for you, too, whether you are superior, inferior, or equal. Reasoning thus leads to ruling, and the sociability of communication implied by human rationality leads to politics. A political animal is a ruler. Even a person who says he decides for himself, not for others—a typical liberal today—wants that principle to rule society as well.[1]

The regime is the rule of the whole of society by a part of it, which, because it rules, gives a characteristic stamp and style to that society. Aristotle identifies three types of regimes, defined by their number of rulers—one, few, and many. Monarchy, oligarchy, and democracy define the rule of the whole by the part ruling it, so that, for example, the result of rule by the many is a democratic society, a certain way of life. There are different democracies depending on the character of the demos, but all are democracies by virtue of being ruled by the many. No society stays together without rule; it must be ruled by some part of itself. And in Aristotle's formulation, the part that rules does not represent the whole, as with modern representative government, but rather makes the other parts contribute to its rule.[2]

This rule shows itself in the most open and public ways, each a kind of display of who is in charge. The ruling part is the most powerful one and always the most publicly visible. There are parts kept private in every society, but the reason they are hidden is that they are less powerful than the part that doesn't have to hide. The ruler of any society is always its most respectable power, and, vice versa, the most respected is the most powerful. The Communist Party in the former Soviet Union, the mullahs in the Islamic Republic of Iran, and the American electorate are three diverse examples of rule by the most powerful and respected part. Thus, the most impressive fact of politics everywhere is who rules.

The Greek word for rule, *archē*, also means the beginning or principle of rule. An *archē* is both a beginning in accordance with a principle and a rule according to a beginning. This beginning is never from a state of nature with no rule or regime. The state of nature with no government invented by modern liberalism is not possible for Aristotle, since man is a political animal by nature, not by consent or contract. Ruling is participating, taking part, taking *one's* part in a whole. The ruling part is partisan on behalf of its principle, as every regime moves in a certain direction in accordance with its principle. This principle is reflected in its form or structure of government, one of the three types mentioned above or a mix of them.[3]

Though the regime is fundamentally partisan, there is a common good of the whole. But the difficulty is that there are two common goods that Aristotle offers in two formulations: the *common benefit* and the *benefit in common*.

The common benefit is common to all as individuals, especially to their bodies, to which each and all must give attention in private. This common good is public and constitutes a community, because it is *universally* private. Being universal, it is democratic, and its principal material is that of bodies. It describes the goods we all require by virtue of our humanity.

The benefit in common comes from superior human beings who benefit the community through their superiority, especially in intellect, character, or soul. These are the nondemocratic few who contribute to

the community more than others do and claim honor rather than bodily sustenance as compensation. In our democracy, such individuals are not oligarchs but rather celebrities honored with more money than most. They democratize oligarchy and infuse democracy with it, producing a kind of mixed regime. We need what they have to offer, but they do not offer something we all need to possess—only something we need to benefit from.

This fact suggests the possibility of a mixed regime that would secure a whole without a partisan ruling part. But Aristotle thinks this happy result very unlikely and declares that regimes typically are either democratic or oligarchic, aiming at either the common benefit or the benefit in common. Each of these types has a basis in human nature, one claiming that people are more or less equal in body and the other claiming that they are marvelously unequal in soul or intellect. Yet these two claims are only half-truths about human nature with contrary implications, and so they are very hard to put together without emphasizing one more than the other.

Democracy needs the few but accommodates their superiority to its own needs, and in reverse, the dependency of oligarchy on the many is made to serve the domination of the few. A perfect democracy would be universal, since there would be no reason to prefer the material of one body over that of another. Similarly, oligarchy would rule over all souls according to the principle of superiority it fancies and supports, ending in a monarchy of the one most superior individual. But in fact, democracy divides into multiple democracies, each nationalistic or patriotic for its own self-defined version of democracy and each thus partisan. Oligarchies base which is better on some superiority contest—in bygone Massachusetts, this occurred among those belonging to different ethnicities, such as the Yankees, the Irish, and the Italians—and they too fall into partisan divisions.

The rulers of a regime, then, have a certain awareness of their direction toward an end that they claim to be just. They are led to this awareness by the democratic or oligarchic form of their communities, each leading to a

conforming way of life. As partisans, the rulers do not have full awareness of the whole they aim at, yet with partial awareness, they take responsibility for the character of their regime. They blame and denounce their enemies, foreign and domestic, and they praise and extol their own regime, all the while insisting on its contrast with the other and the superiority of their own. Every regime has a self-definition that is partisan and that shows itself in a partisan change—or revolution.

According to Aristotle, there are three kinds of revolution. He presents the first two as a contrast between an uprising (*stasis*)—which is a change in personnel—and a change of regime, constitution, or form. The contrast shows that a regime depends not on certain named individuals but on a principle. (Napoleon was an individual who made a revolution of regime we can call Napoleonic because it applies to others besides himself.)[4]

A third definition of revolution, according to Aristotle, is its literal meaning—cycle (*kyklos*). Being partisan, regimes overlook or mismanage what they do not understand. In America, our principle is in the Declaration of Independence and its assertion that all men are created equal. We try to manage obvious inequalities in honor, talent, and wealth by claiming they benefit everybody—or at least those who are least advantaged. Sooner or later, though, the bias toward equality, with its partial truth, will catch up to our regime and bring it to an end. No regime is perfect; none rules in accordance with the complete truth of human nature. The likely result is a return to the beginning so we can make the same mistakes all over again. Nature permits us the freedom to choose among possible regimes but limits us to imperfect results. Mere survival cannot be the goal of politics, because no regime can survive forever. Most regimes, when speaking of survival, mean the survival of their regime, not of individual human beings. Regimes survive individuals, but neither regimes nor individuals survive forever.

Or is it possible for a very wise individual—say, a philosopher—to found a permanent regime by avoiding the bias of regimes and finding a true whole rather than a partisan one? Aristotle says the most virtuous

humans are the least likely to rebel. These are philosophers, but they are few. To effect a revolution, they have to find allies among the not so wise, whether those are few or many. With undependable allies like these, philosophers must live with bias rather than remove it. They may even make things worse, since error will now have their stamp of approval. It is true that Aristotle had a remedy for the partiality of the regime—the mixed regime. But this remedy was not a cure for partiality, because it depended on persuasion to make the mix, requiring its elements to be persuadable. Here we find the same difficulty that defeats the utopian regime of philosophy.

Nonetheless, despite the classical philosophers' profound doubts, the modern philosophers we now call liberals tried their best to find, and their followers to found, an impartial regime that would not be subject to partisan bias. For America, these philosophers were John Locke and Montesquieu, and the American founders (including those who wrote the Constitution) were their followers.

Liberalism Against Regimes

The American Revolution was part of the modern revolution—made by modern philosophy, led by modern philosophers, and begun by Niccolò Machiavelli. According to him and thinkers thereafter, the most virtuous are, contrary to Aristotle, the *most* likely to rebel. These modern thinkers envisage a permanent improvement in the status of humanity, a new regime that will actualize their philosophic thought. This improvement would not happen all at once but rather by stages pointing in a single direction, each more radical than the one before. Take, for instance, the British, the American, the French, the Russian, and the Chinese revolutions. The direction does not and cannot change, and Aristotle's revolutionary cycle of regimes is replaced by the modern notion of flattened-out linear progress that does not return to the beginning to start over. This means that the limits set by human nature no longer apply, for men are

more malleable than the classical thinkers supposed. There may not be a human nature, nor even nature itself.

The American Revolution is part of this modern revolution. It began with a "shot heard round the world"[5] and led to the American founding proclaimed on the first page of the Federalist Papers to be the work of "reflection and choice" and an experiment on behalf of mankind.[6] This political wonder appears to be not a change in regime but rather a change in the *notion* of regime to make it impartial. Liberalism, in the political science of Locke and Montesquieu, begins with hostility to a certain regime, the rule of the church. But hostility to this regime was enlarged to become hostility to the very notion of rule by regime.

Religious wars in the 17th century exposed rule as the rule of a faith that subjected worldly power to the next world, with the consequent harms of both cruel fanaticism when human necessities were denied and feeble pacifism toward the enforcement of human justice. Dissatisfied with ad hoc compromise between church and state, modern philosophers sought a permanent, theoretical remedy in politics to make human sovereignty as clear as possible. The assertion against the church on behalf of human necessities led to the rejection of Aristotle's regime, which, with its emphasis on rule, was the foundation of domination by the church.

The early modern rejection of Aristotle's notion of regime determined the basic form of liberalism still standing today, though it is now much qualified, as we shall see. Replacing the duties demanded by a regime that rules, liberalism placed individual rights before duties. Instead of man's being by nature political and rational, man is reduced to an original state of nature in which nobody rules and all war against all. To escape the conflict that nature imposes, government must be installed through contract by consent as a correction of nature's imposition of insecurity and penury. Men are neither naturally inclined to politics nor rational enough to think their way to peace. They must be governed by appeal to the bodily passions of fear and desire, not by the aspirations and visions of the soul. Your self needs to be preserved in its rights, rather than your soul saved

by obeying its duties, and the purpose of government becomes "to secure these rights."

To do this, government must be limited to protecting individual rights, leaving their exercise to individuals living freely in society. In this new function, government does not rule society; in Aristotelian terms, the regime does not form a certain way of life. Instead, government represents society. Representative government in this new sense is the invention of liberalism: Government does not rule but represents. It has a common good that benefits all individuals equally—in Aristotle's political science, the common benefit based on the body rather than the benefit in common that forms the soul. The gist of liberal political science is given in Locke's *A Letter Concerning Toleration*, where he says that the magistrate (the government) cares for bodies and not for souls.[7]

Liberalism is a formal doctrine. It does not tell you how to live. It tells you to pursue happiness but does not define it; that's for you to do. Instead, liberalism tells you how to arrange to get what you want, individually, for yourself. Government is limited in its scope and must respect the difference between what it can do and what society can contain. Government can hold elections but not tell you how to vote; it can protect your right of free speech but not tell you what to say.

Liberalism is vulnerable to attack from both right and left. The right declares that liberal self-preservation is paltry and cowardly, whereas the left declares that liberalism ignores the weak and the poor. Both complain that in abstracting the individual from an actual way of life, liberalism is too comfortable and complacent. But in the liberal framework, this abstraction saves individuals from the impositions of a regime they have not consented to, originally the church and now those who have unconsciously inherited the church's ambition. Going back to Aristotle for a change of regime would be submitting to a rule that liberals like to call authoritarian.

Liberalism wants a distinction between government and society so individuals can live a life of choice, not one imposed by a regime. In the best case, this would be choice together with reflection, as Alexander

Hamilton put it. But reflection on choice tells us that political life is often directed to "accident and force," the very conditions from which choice is distinguished by Hamilton.[8] According to Aristotle, choice does not control the ends that are given to us; we can choose only the means to those ends. For example, health is not an end we can ignore; that would be irresponsible. Choice has to be responsible, and you must take responsibility for keeping yourself healthy.

Politically, a country that wants to live by liberalism needs to be large and have a heterogeneous population and a spirit of interest and ambition favorable to liberty. These are the conditions of the American republic that help prevent it from falling into the partisan divisions that have ruined all previous republics. What the founders did was constitutionalize these necessities, bringing them into the republican system so political choices could be responsible. For example, the American Constitution contains provisions for largeness in its federalism, by which the states have a semi-independence allowing them to choose differently from one another. A republican *system* such as America's can be distinguished from a republican *regime* by its lack of rule over the whole. The parts do not fit under a sovereign ruling part, each determined by the whole, but combine freely to achieve one end together, without a single principle of rule.

Constitutionalized necessities are those conditions for liberty that we would like to wish away, such as size, division, and self-interest, but instead choose responsibly to accept. To be responsible is a coin of two sides: on one side to be accountable for one's own actions and on the other, more virtuously, to be willing to take charge when the problem is not your fault. The American Constitution has some parts that encourage stability, such as the Senate and the courts, and some that ask for energy, such as the executive. Stability and energy are necessary to all governments but are achieved in republics with well-chosen institutions calling separately for both. To choose means to choose well and, in the sense of the American republic, responsibly. Responsibility is a favorite American virtue not on Aristotle's list of moral virtues.

A Liberal Regime?

We now have a picture of the basic structure of liberalism that centers on a distinction between government and society, a system of choice that accounts for necessities. It admits that you can't have everything you wish but insists that everything can be addressed and, in a reduced sense, chosen responsibly. This structure leaves an empty center where Aristotle's regime places a principle of rule. Or, one could say, liberalism has a principle of liberty in a form empty of content, to be filled not by the government but by civil society. Its life is in a formality and needs to be kept formal against the critics from the left and right who want to take hold of that center. Liberals need to maintain free speech without defining it and elections without saying who should be elected.

The trouble with liberalism is that its empty center has a tendency to fill, arising from the very exercise of free speech that liberalism wants to respect. This fill-up comes from the way one choice leads to another—from the parties that develop under liberty, from the virtues necessary to liberty, from the religion that both sustains and endangers it, and from wars and other accidents.

Those who have rights have the freedom to exercise them, either as individuals or through government. But once one makes a choice, that choice limits future choices, such as with marriage. Often today, people want to avoid this result by "keeping their options open," as they say. But that, too, is a choice, because one has passed up making a choice that may not reappear. As with Aristotle's regime, every new regime or movement toward one must reckon with the leftovers from the previous regime. So, too, American liberalism after its victory in the Civil War had for a long time to deal with remnants of the Confederacy. Liberalism's freedom is obliged to deal with its history of choices made and paths taken. Liberalism is based on rights, which means on the independence of formality, but what starts as a formality in a liberal constitution becomes, through progress in the exercise of choice, a substantive limitation on choice. The empty center becomes what is called the private

sphere, a whole separate from the formal public sphere yet under it and regulated by it.

Between the public and private spheres are political parties that come from the private sphere but contend for the offices in the constitution. For Aristotle, partisanship, which is rule by a part—for example, the rule of the demos in democracy—characterizes the regime as a whole. But the few remain as both challenging the rule of the demos and contributing to it. Aristotle's regime is for the most part single-party domination, at times qualified and various according to the particular character of the few and the many. Liberal choice, however, opens the door to parties.

Thomas Jefferson's Democratic (or Democratic-Republican) Party claimed to be the sole truly republican party, but in time, perhaps in the administration of Martin Van Buren (from 1837 to 1841), the respectability of two opposed parties was recognized. The civil society of liberalism now normally contains a liberal and a conservative party or set of parties that alternate with one another according to the choice of the voters. This everyday fact has become a kind of formality under the constitution and is usually called a party system, meaning an organized choice. Although the original liberal philosophers Locke and Montesquieu did not speak of party systems, they were well acquainted with the facts of human partisanship and careful to accommodate them.

Our two parties today, liberal and conservative, stand for the formal principle of liberal diversity. This requires that each party make way for the other when it loses an election and refrain from annihilating the other when it wins. Liberal diversity requires that one subordinate one's own party to the maintenance of rivalry by means of the liberal virtue of toleration. Yet toleration cannot work if it is purely formal toleration of any person or principle that is merely different. There has to be something of value in diversity besides diversity itself. Consider the virtues of the two parties in America today.

Democrats stand for inclusiveness; they want to include everybody in a whole composed of individuals made equal by the demands of their bodies. They turn their attention to those who are excluded or marginalized

and therefore vulnerable in the whole by either design or neglect. Democrats like to say they care for them, using "care" to signify the virtue of compassion or empathy that they praise and claim for themselves.

Republicans, for their part, want a variegated whole in which some are held more valuable than others. They are more valuable because they contribute more: the wealthy through their investments and tax payments, the military through their service, and others by excelling in some useful or remarkable way. Republicans praise those who take risks and prefer looking up in admiration to looking down with compassion. They think of themselves as givers rather than takers but present themselves as normal folk who earn their living rather than living off the government and the taxpayers.

Each party prefers its own virtue but will have, when pressed, some appreciation for the other's—an understanding that results in toleration. That understanding has a basis in human nature, for men are both equal in having bodies and, thus, vulnerable and unequal in their souls, which range from the level of Aristotle's down to that of a moron's.

Liberalism works best in a sizable country not united by a single nationality or sect, and hence it does not work in one featuring a traditional or classical republican virtue such as Spartan self-sacrifice. Self-interest must come to the fore.

Liberal Virtue

But self-interest alone does not suffice, because it can be in your interest to be a free rider on others' exertions or to be content with an average performance. Liberalism in America has always wanted a certain greatness in the honor of being mankind's first successful republic. America's founders were great men who taught its people a respect for greatness and virtues that bring them in reduced form down from George Washington into civil society. I will mention two teachers of liberal virtue to the American republic: Benjamin Franklin and Publius, the fictive author of the Federalist Papers.

Franklin offers his fellow Americans a defense of bourgeois virtue, though without the pejorative sense that Max Weber and D. H. Lawrence attach to it.[9] Bourgeois virtue differs from naive, honest republican virtue by being based on self-interest, but Franklin shows that self-interest does not preclude public-spiritedness. Though he believed in liberty, he did not think that how it is exercised should be left to chance. Rather than the private education favored by Locke, Franklin wanted public education in public schools. In his autobiography, he shows a virtue that is sociable and conversational, never harsh or abrasive. He was for utility but, unlike later utilitarian philosophers, utility with style. Style consists mainly in never "presenting one's self as the Proposer of any useful Project," thus keeping oneself out of sight. Yet he soon presents himself pursuing "the bold and arduous Project of arriving at moral Perfection."[10]

Franklin offers a list of 12 or 13 virtues that, in comparison with Aristotle's list of 11 moral virtues, omits ambition and substitutes frugality for generosity. That substitution one could call the very soul of the bourgeois. Franklin was a generous man—but he did not want to present himself as such. "Sincerity" he describes as "us[ing] no hurtful Deceit."[11] In his autobiography, he records his success in rising from poverty and obscurity to greatness by doing good to his fellow citizens. That is how a great man can survive and be held up as great in a republic among the many who are not great. What a guy! Thus can liberal society borrow greatness without having to achieve it and gain a reputation for morality by relaxing it.

Publius, whose name masks Hamilton and James Madison (with a touch of John Jay) in agreement, also authored a book. And in him we again see a new republican virtue suitable for greatness—ambition, a virtue Franklin omitted (but Aristotle included). Ambition is the motive that runs the new Constitution; in the most famous of Publius's phrases, "Ambition must be made to counteract ambition."[12] Where ambition cannot be concealed, as Franklin has it, it must be put to use in opposing the ambition of others. Publius says a man's ambition must be connected to the interest of his office; for instance, the ambition of a senator is as

a member of the Senate. Ambition is thus regulated by being constitutionalized, hence serving the government and powering the republic. This ambition requires an expenditure of energy that distinguishes it from ordinary self-interest, to say nothing of free riding.

Sure enough, energy is a new word and an important factor in the Federalist Papers. Energy in office will get you seen, in the mode of Franklin, as more than excusable and positively praiseworthy. Energy includes responsibility, the other new word used by Publius. Responsibility is taking charge of an office or a situation and executing or fixing it for others with actions they could not have performed themselves.

With these virtues set forth by Franklin and Publius, America, so proud of its democracy, opens itself to greatness. Greatness does not figure in the basic structure of liberalism, which is seemingly designed to discourage the "extensive and arduous enterprises" that Publius claims to set in view for the advantage of the American republic.[13] A successful republic finds greatness, one could say, because it sets an example for mankind. Both Locke and Montesquieu had made England their model constitution to show that liberty could be set in order and kept instead of merely wished for. Republican greatness implies that a people can be great, but that seems to occur only or mainly when the people follow great leaders who enlist their cooperation in an enterprise, in peace or war, that can be considered great. The possibility of cooperative greatness between the few and the many in a republic alleviates the danger that the many may fear from the few. As we see in the two fundamental texts of American democracy, the Federalist Papers and Alexis de Tocqueville's *Democracy in America*, the American founding is based on the fundamental need to address the tyranny of the majority.[14]

In a democracy, the majority—understanding itself as composed of equals and calling itself the people—tends naturally to fear the few, who are outstanding in some way, usually in wealth but also in talent and virtue. The majority fails to appreciate the risk that they themselves will oppress the few by despoiling them or stifling their ambition. Disappointed ambition may turn one of the few to lead the majority against the rest of the

few—in the role known as demagogue. Here we encounter today's enemy known as elitism.

Elitism means that a certain few take the side of the elite against the rest. Those opposed to elitism alternate between denying the worth of any elite and alleging that the people suffer under an unjustified elite that is harmful. These anti-elitists have been for some time in charge of American education. They are themselves an elite, one united against elitism. They deny any danger from majority tyranny but pose it themselves. They politicize American education, leading it to transform civil society from nonpartisan independence into partisan conformity. Their accusation of elitism amounts to a would-be majority tyranny on their part. Liberals can agree with Machiavelli that the few are the ministers of the few. In seeking power for themselves, however, the few can also be ministers of the many in greatness or tyranny.

The American Constitution gives representation to the people, but it gives opportunity mainly to the few, so their ambition can counteract ambition. By itself, representative government would endorse majority tyranny, but when it takes account of the fact that the representatives are an elite few and that democracy has its own elitism, the avenue to greatness—and let's not forget common prosperity—is opened. Ambition has its peak in "the love of fame, the ruling passion of the noblest minds," a phrase that has itself gained fame as the expression of the highest passion in the noble mind of Hamilton.[15] But ambition can reach far down the ladder of meritocracy to activate the desire to get ahead among ordinary folk. "Getting ahead" means getting ahead of where you would be if not touched by ambition and ahead of others, as in a race.

Thus, the effectual truth of democracy is meritocracy. Human beings are divided into few and many by nature, so an egalitarian society in which all are equals can be achieved only by flattening the high to the level of the low. Yet merit is not intellectual only, and it is distributed among the many as well as concentrated in the few. Democratic freedom can release this multifarious merit from arbitrary inherited or traditional restrictions to yield a society teeming with satisfied ambitions that are respectable,

if not grand. A plumber brings relief to his customers and, in doing so, earns well-paid contentment for himself. His competence is qualified by its scarcity, value, and honor in comparison with other competences to make a stratified society.

A society defined by such an idea has a certain cast that is neither empty, as in the basic structure of liberalism, nor flat, as in egalitarian democracy. Each individual is in company with others, as in Tocqueville's American democracy of associations that are voluntary or involuntary and guided by the art or science of association. This is Tocqueville's modification of liberalism based on a single social contract that yields an empty society. His associations, amounting to a new kind of liberalism, "a new political science," are designed to forestall a mass of undifferentiated individuals who readily come together to constitute the tyranny of the majority.[16] A salutary meritocracy with stratified professions, occupations, jobs, and families—less rational than Hegel's civil society but moved by ambitions of all sizes and limits—brings liberalism out of its basic structure toward the way of life of Aristotle's regime. Liberalism's rule of law is no longer impartial to allow choice but rather partial toward the certain kind of society that its choices have developed—a sociable society rooted in a principle of merit. Such a society is liberal in its tendencies, but it is a regime in the classical sense.

Liberal Prudence, Liberal Truth

A principle of merit can help deepen the politics of a free society. But can such a society exist without a principle of religion? Aristotle suggested that such a principle is necessary, but that might not quite mean what we imagine.

According to Aristotle, the rule of law does two contrary things: It holds us down and keeps us up. It holds down our desire to be gods over other men and keeps up our pride in living by law rather than by bestial instinct. In the latter aspect, laws are chosen by human beings who are

rulers of the regime; laws come from and serve the regime that makes them. A democracy makes democratic laws. Does this rule of men over laws not endanger the impartiality of law?[17]

In the former aspect, however, it is possible that the men who make the laws will do so in a spirit of lawfulness. In that case, we have men over laws and lawfulness over men—an in-between situation that keeps both aspects alive and active.

Where does the lawfulness of men come from? Aristotle explains that to put lawfulness over men requires that we believe in the sacredness or sanctity of certain laws.[18] This is religion understood as custom, which means the priority of unwritten over written law. This sort of custom reflects the power of habit over the power of reason. Somehow, there are writers who approve of unwritten law and reasoners who approve of the power of habit. To say the regime makes the laws means that the regime, with its prudence, can decide to use discretion or follow the law. The status of discretion is raised and made equal with the rule of law, thus releasing human prudence.

But it appears that prudence needs a standard to guide it—a law—and law needs discretion to make necessary exceptions. Neither prudence nor law can do without the other. To sum up this brief argument from Aristotle, we may identify three features of the rule of law. First, law comes from above, from God or from the divinity in us; second, law is based on custom or habit; and third, it allows, more or less, for prudence.

The modern revolution against Aristotle denies these three features. First, it establishes the sovereignty of man in the world, so that law acquires its impartiality by being universal rather than by coming from above. The Declaration of Independence speaks of "the Laws of Nature and of Nature's God" as the source of the rights of man. Nature is a universal source, and nature's God works through it with a divinity not peculiar to America. These laws do permit America to seek a "separate and equal station" from other peoples, but not, in this reasoning, one chosen providentially by God. Second, laws are made, not found in custom. Custom

from the English common law has to be validated in America through legislation. And third, prudence tends to lose its status. It is divided into reason and will, and both are universalized. Reason is universal, and will is anyone's. Thus the modern rule of law is divided into legalism of reason and realism of will—a pale version of Aristotle's dualism of the best man versus the best laws. For Aristotle, there is no solution to the dualism; for the modern rule of law, there is only a never-ending dispute between two schools of interpretation.

America, however, puts Aristotle's dualism into its Constitution. Legalism is found in the legislature, whose premise is that law is enough, while realism is the doctrine of the executive, arguing that legislation is never enough. The judiciary is left to resolve the dispute without ever ending it. Aristotle's dualism makes sense of the checking-and-balancing function dear to liberalism by showing it to be inherent in politics rather than merely one arbitrary decision checked by another. Arbitrariness, meaning freedom from law, can be good when it is necessary to discretion; it can be bad when it is the compromised result of checking. Liberalism's separation of powers is open to an Aristotelian interpretation that makes it wiser than the freedom it would rather promote.

Religion in America lives with the distinction (albeit not quite the separation) between church and state that is characteristic of liberalism. Under this condition, religion is a private belief and activity of civil society whose free exercise, according to the First Amendment, is to be neither established nor prohibited by law. These limits prevent the foreclosing of religious choice by the rule of either religion or atheism. When set down at the time of the American Revolution, this distinction corrected America's Puritan founding of religion joined with democratic political theory (as Tocqueville put it). This was the ruling religion of a regime, set down in Nathaniel Hawthorne's *The Scarlet Letter*. But "Nature's God" in the Declaration worked through nature, not against it, and spoke in self-evident truths rather than divine revelation. Preachers of that era would have disagreed with Jefferson's deist formulation, but Jefferson's word rather than the Gospel was the official Declaration.

There was, then, nothing sacral about or behind the laws that would be made under the Constitution. Laws themselves would be so tenuous as to be subordinated to the power of making laws—the openly political legislative process of human beings, neither unwritten nor revealed from God.

Aristotle would want to know whether laws so readily changeable will be obeyed. In the Federalist Papers, Publius worried that laws made by that process would be mutable and proposed that the Senate would tend to lessen that evil. One could add the independence of the judiciary and the influence of lawyers educated in the law as elements that work for needed durability. In our day, however, "the law" is a mass of particles left after an explosion in which "Nature" as expressed in the Declaration is hardly recognizable among regulations, decrees, mandates, and statutes passed by Congress and state legislatures, not to mention "letters of guidance." Running through the legal profession like a virus is the theme of legal realism, the argument that something other than law is stronger than law.

Our statesmen disagree over whether one should obey an unjust law. Abraham Lincoln thought so, but Martin Luther King Jr. disagreed.[19] Somehow, the American people, unruly as they are, obey most of the time—and liberalism survives.

The American Regime

To say liberalism survives, however, requires that one apply the standard of success for a regime, for which one must resort to Aristotle's political science or some other that equals or surpasses it.

What is the content of law that fills the empty center of liberalism? That is the question liberalism cannot answer on its own without violating its basic structure. The liberal constitution can pronounce on only how we must decide—the correct process—not what we should decide. Machiavelli professed an effectual truth that reduced the formalities of morals and politics to their outcomes. This is the sort of thinking, hostile

to liberalism, found in legal realism. In this view, the empty center is an arena for princes and other power seekers.[20]

But what do they want to do with their power? Aristotle brings up the good life: virtue and the conditions of virtue. Liberalism is the regime of the anti-regime that must be judged according to the standard of the regime it opposes. Beginning as a denial of the good life, it must defend the goodness of the life it delivers instead. If America measures up to that standard, it has always lacked a theory of itself that consistently helps it demonstrate its greatness. The American Revolution did launch a regime, and a great one, yet one that has always struggled to articulate the character of its greatness.

Notes

1. Aristotle, *Politics* 1.2.1253a2–18, 29–39.
2. Aristotle, *Politics* 3.6.1279a25–9.1280b34.
3. Aristotle, *Politics* 1.2.1252a24–30.
4. Aristotle, *Politics* 5.1.1301a28–3.1303b10.
5. Ralph Waldo Emerson, "Concord Hymn," Poetry Foundation, https://www.poetryfoundation.org/poems/45870/concord-hymn.
6. *Federalist*, no. 1 (Alexander Hamilton), https://guides.loc.gov/federalist-papers/text-1-10.
7. John Locke, *A Letter Concerning Toleration and Other Writings*, ed. Mark Goldie (1689; Liberty Fund, 2010), 18.
8. *Federalist*, no. 1 (Hamilton).
9. Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (George Allen & Unwin, 1930); and D. H. Lawrence, *Studies in Classic American Literature* (Thomas Seltzer, 1923).
10. *The Autobiography of Benjamin Franklin* (Heritage Press, 1951), 102, 106.
11. *The Autobiography of Benjamin Franklin*, 108.
12. *Federalist*, no. 51 (James Madison), https://guides.loc.gov/federalist-papers/text-51-60.
13. *Federalist*, no. 72 (Alexander Hamilton), https://guides.loc.gov/federalist-papers/text-71-80.
14. Alexis de Tocqueville, *Democracy in America*, ed. and trans. Harvey C. Mansfield and Delba Winthrop (University of Chicago Press, 2000), 235–49.
15. *Federalist*, no. 72 (Hamilton).

16. Tocqueville, *Democracy in America*, 7.

17. Aristotle, *Politics* 3.16.1287a–b.

18. Aristotle, *Nicomachean Ethics* 5.6.1134b–7.1135a.

19. Abraham Lincoln, "Speech on the Dred Scott Decision" (speech, Springfield, IL, June 26, 1857), https://teachingamericanhistory.org/document/speech-on-the-dred-scott-decision-3/; and Martin Luther King Jr., "Letter from Birmingham Jail," April 16, 1963, https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

20. Niccolò Machiavelli, *The Prince*, 2nd ed., trans. Harvey C. Mansfield (University of Chicago Press, 1998), 61.