Aristotle Divides ‘Laws Correctly Laid Down’ from ‘Laws Necessarily Just’
ABSTRACT.
Aristotle’s Politics addresses issues of relevance to the federal constitutional conventions of 1776-1777 and 1787; the Continental Congress supplies the effort in the first instance, with the latter being a stand-alone affair. Each charter qualifies as a “certain arrangement of those who inhabit the city,” Aristotle’s definition of politeia; in English ‘constitution.’ Quotations from Books III and IV illustrate Aristotle’s definitions of unconstitutionality. Book III of the Politics, at 1282b1 - 1282b12, also lays out the distinction between rules made in inventory and rules/decisions made just in time. “It is proper,” Aristotle declares, “for the laws when rightly laid down to be sovereign, while the ruler or rulers in office should have supreme powers over matters as to which the laws are quite unable to pronounce with precision because of the difficulty of making a general rule to cover all cases.” He then turns his attention to the “particular character a code of laws correctly laid down ought to possess.” Aristotle’s reference to ὀρθῶς κείμενους νόμους literally ‘correctly laid down laws’ is translated by Our Constitutional Logic as ‘laws correctly sourced.’

KEY WORDS: unjust laws, just laws, unjust constitution, just constitution, laws correctly sourced.

A. INTRODUCTION. The Athenian Boule has deliberated a law, but missed some essential step required for the enrollment of same among the correctly sourced laws of the polis. Such a law would be unconstitutional, thereby answering the question, ‘when is a “law” not a law?’

It should not be surprising that a “certain arrangement of those who inhabit the city,” Aristotle’s definition of politeia – read ‘constitution’ – entails an analysis, at each law-making: have the functionaries (who should be on guard in these matters) observed that formal requirements were overlooked or violated? [1]

This is one of those points that traverses national or temporal boundaries. (The reader will recall ‘how a bill is passed’ graces, in large print, the classroom where Civics is taught in high-school.) Since 1789 the Secretary of the Senate and the Clerk of the House of Representatives have fulfilled this role for the federal government under
Constitution II. [2] What’s constitutionally assigned to these worthies is the task/s of managing their rolls and scrolls and proclaiming the results of a search for seals and signatures affixed thereto. The reader should not ignore the last half of that sentence; archival science has a distinguished pedigree and has saved more official bacon than it takes credit for.

Aristotle, in a ‘by the way,’ draws the distinction which is the subject of OCL’s effort: The passage below, embraced within 1282b1 through 1282b12, is quoted in the principal table to Aristotle’s Got Talent, 2 OCL 727.

But the difficulty first mentioned proves nothing else so clearly as that it is proper for the laws when rightly laid down to be sovereign, while the ruler or rulers in office should have supreme powers over matters as to which the laws are quite unable to pronounce with precision because of the difficulty of making a general rule to cover all cases. We have not however yet ascertained at all what particular character a code of laws correctly laid down ought to possess. (emphasis supplied)

Aristotle references ὅρθως κειμένους νόμους correctly laid down laws, which OCL translates herein as ‘correctly sourced.’ The expression ‘formal validity,’ is not employed, but is reserved to the issues that concerned James Madison in TF No. 44 at Part 6. See Madison’s Search for Categorical Syllogisms in The Federalist No. 44, 2 OCL 401.

B. ENTER THE CLERK AND THE SECRETARY. The House of Representatives Journal observes, as to the enactment of the first law ever passed by Congress, dated to June 1st, 1789:

A message was received from the president of the United States, notifying, that the president approves of the Act, entitled, ‘An act to regulate the time and manner of administering certain oaths,’ and has this day affixed his signature thereto; and the messenger delivered in the said act, and then withdrew.

The reader may question whether the formalities of law-making are as straightforward as Aristotle makes them out to be. He assumes that one may determine ‘laws correctly laid down.’

OCL now has the sad duty to inform the reader that, 2000 years since The Politics, things have gotten dodgier. What should be determinate, turns out to be less determinate.

JHU’s editors to the Legislative Journal’s Introduction compare the efforts of John Beckley, first clerk of the House of Representatives, and Samuel Otis, first
secretary of the Senate, “the latter with the soul of a modern archivist.” [at vii] The facts relating to the accomplishments of John Beckley “have often driven the staff of this editorial project to the point at exasperation,” which is (I presume) a send-up of John Quincy Adams’ observations on the editorial efforts he devoted (as Secretary of State) to preparing Jackson’s Journal for the press.

C. DESPAIR AND EXASPERATION: ARCHIVISTS AND EDITORS TALK ABOUT THEIR FEELINGS. The point of departure for any investigation of the Journals of the federal convention must be the editorial accomplishment of Adams, who reconstructed Jackson’s Journals in 1819. “[T]he books and papers deposited by President Washington [with Secretary of State Pickering in 1796], were so imperfect, and in such disorder, that to have published them, as they were, would have given to the public a book useless and in many respects inexplicable.” [3] The tie-in to restoring the House Legislative Journal is made explicit in Adams’s Memoirs, which describes (from his diary) his “protracted and unprofitable ... toil” in doing the job for which Jackson had been named Secretary of the federal convention.

Adams solicited Madison’s help (by letter) for the purpose of completing the entries for September 15th and September 17th (which Elliot supertitled Madison’s Minutes). Adams also brought William Jackson to the State Department and interviewed the former Secretary of the Convention, but without obtaining any further insight into the lacunae which mar Jackson’s text. [4]

Major Jackson, having “looked over the papers,” tendered him, failed to supply the Secretary of State with “any recollection of them which could remove the difficulties arising from their disorderly state ... .”

This cues the editors of the The House of Representatives’ Journal (1977) to embrace their fellow investigator Adams (1819), reaching as they did their conclusion that “most of the documents missing from the House records today were deliberately destroyed while John Beckley was clerk.”

OCL observes that, as to editorial difficulties, J.Q. Adams was followed by Max Farrand to credit the Secretary of State’s “exercise of no little ingenuity” in repairing Jackson’s Journal while Beckley has acquired, as accuser, De Pauw et al. whose judgment is a frank condemnation of Beckley’s modus operandi which bordered on the criminal.

D. SAILORS AT WORK. The reader is asked to reflect on this passage from the Sixth Century, which is an early instance of meta-law and again, reveals those who get their hands dirty, talking about their work.
All peoples too are ruled by laws which we have either enacted or arranged. Having removed every inconsistency from the sacred constitutions, hitherto inharmonious and confused, we extended our care to the immense volumes of the older jurisprudence; and, like sailors crossing the mid-ocean, by the favour of Heaven have now completed a work of which we once despaired.

It is one of the last passages in Law Latin (from the Eastern Roman Empire) and worth quoting as such:

Et cum sacratissimas constitutiones antea confusas in luculentam ereximus consonantiam, tunc nostram extendimus curam et ad immensa prudentiae veteris volumina et opus desperatum, quasi per medium profundum euntes, caelesti favore iam adimplevimus.

(The Institutes were last published on November 21, 533 AD and promulgated with the Digest on December 30, 533. Fordham University’s website has the English translation. The Catholic University of America Latin and English.[5])

E. WHEN THINGS GO RIGHT. Wm. Blackstone reminds us that archiving judicial effort can be reduced to a science.

But here a very natural, and very material, question arises: How are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depository of the law; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the laws of the land. Their knowledge of that law is derived from experience and study; from the “viginti annorum lucubrationes,” which Fortescue mentions: and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of records, in publick repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, and the determination of which form of precedence may give light or assistance. [6]

Presumably the efforts of rule-makers deserve no less attention than that of decision-makers. Hence, Blackstone has given us the clue that unlocks the commitment of legislators to fund preservation and access to the records of official experience in writing laws or deciding cases. When O.W. Holmes wrote that the “life of the law is not logic, but experience,” archivists – again – may take their bows. Lacking preserved and
accessible public history, there is no past official experience for present generations to exploit. [7]

F. ARISTOTLE’S DOWN BY TWO. Has he overlooked the possibility that those whose duty it is to record the laws have failed in this enterprise? Let’s look at the nature of the activity involved in getting it right.

One can distinguish that which is correctly sourced from that which is constitutionally valid. The latter (involving considerations of justice) is much more the Aristotelian enterprise. When we examine the correctly sourced laws (this is one or several generations afterwards and we lack the ability to wave down Wm. Jackson or James Madison as one would hail a taxi in Manhattan) we investigate the kinetic activity of a clerk and a secretary. (This is a bicameral operation, in our example.) These functionaries are obliged to dip quill into ink and to record speech events in their proper place, to make deliveries of parchment and foolscap, and to receipt for documents and so forth.

Quality assurance suggests that the reader may peruse the text of the Legislative Journal and may follow how many times each chamber concerned itself with ‘how do we transmit messages back and forth.’ That’s the management of QA at work.

In other words, at one remove, legislators concern themselves with the procedures of correctly sourcing laws. The many instances in which a message from one chamber to the other is read out loud (in House) is a demonstration that the process of getting procedures right and this demonstration is itself a kinetic activity. There is plenty of ‘time and motion’ exhibited in the pages of the Legislative Journal.

As OCL has said (and this was 1997), the portal to understanding both judicial and deliberative action is through ISO 2000. Someday someone will ask ‘Is your court system/legislature ISO certified?’ and get an answer.

G. THE AESTHETIC AGAINST THE KINETIC. On the other hand, when you venture the question of constitutional validity, you’ve engaged yourself to an investigation of what happened. Back to the aesthetic and its perceived virtues:

[T]he judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.[8]

*The Politics* makes this point at the conclusion to 1282b1-12:
for necessarily the laws are good or bad, just or unjust, simultaneously with and similarly to the constitutions of states (though of course it is obvious that the laws are bound to be adapted to the constitution); yet if so, it is clear that the laws in conformity with the right constitutions must necessarily be just and those in conformity with the divergent forms of constitution unjust.

The investigator may (in passing) overlook the validity of a law, taken by itself, since “laws are bound to be adapted to the constitution” πλὴν τοῦτό γε φανερόν, ὅτι δεῖ πρὸς τὴν πολιτείαν κείσθαι τοῖς νόμοις. Laws can be judged just or unjust depending on that quality judged of the constitution itself. That is the focus, the terminus, of one’s inquiry.

In the following passage from Book IV Aristotle makes clear that correct sourcing does not close out the analysis at all. (Jeremy Bentham should have paid more attention to this point, when he asserted that all sovereign commands were law.)

For the laws should be laid down, and all people lay them down, to suit the constitutions—the constitutions must not be made to suit the laws; for a constitution is the regulation of the offices of the state in regard to the mode of their distribution and to the question what is the sovereign power in the state and what is the object of each community, but laws are distinct from the principles of the constitution, and regulate how the magistrates are to govern and to guard against those who transgress them.1289a15.

The observation that “the constitutions must not be made to suit the laws” is another way of trashing the excuse that dictators love to prattle, as in the Reichstag decrees, that power was given to them and exercised by them in a formally valid manner. It is also thoroughly wrong to truncate the analysis at that point: that is, to fail to ask, ‘is the constitution just?’

H. **Unjust Constitutional Provisions.** Consider the unjust provisions of the Early Constitution. In fulfillment of these provisions, Congress malapportions the House of Representatives in 1792 to carry into effect the disenfranchisement of African-Americans in southern states; this malapportionment also overweighs the voting strength of white citizens of these states and underweighs the voting strength of all voters in other states.

Just as Aristotle asserted, the law is unjust because it conforms to an unjust constitutional provision, even if the Act of April 14, 1792, 1 Stat. 253. c. XXIII has never been challenged as not correctly sourced, i.e., enacted.

**Chap. XXIII.**—*An Act for apportioning Representatives among the several States, according to the first enumeration.*
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the third day of March one thousand seven hundred and ninety-three, the House of Representatives shall be composed of members elected agreeably to a ratio of one member for every thirty-three thousand persons in each state, computed according to the rule prescribed by the constitution; ...

The phrase “computed according to the rule prescribed by the constitution” rightly lays off accountability for this atrocity to the writers of our Philadelphia Constitution. This history can be reduced to a syllogism.

I. Conclusion. Aristotle’s take on this point stands. If kinesis is enjoined to functionaries whose job it is to see that laws are correctly sourced, that is, adopted with all trappings and trimmings that will relieve the despair and exasperation of future editors, then laws are determinate creatures.

Moreover, you should know what the law is, that is, correctly sourced, because you then are enabled, when issues of the day arise, to do no more or less than to “to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.” [8]

Or that’s how it should work, if OCL reads Aristotle and Justice Roberts the right way. This discussion bleeds over into this notion of one generation owing another generation an accounting of its activity. The action in question, with respect to any particular law, surrenders its features to a record of kinetic activity. Generations frequently (indeed fervently) imagine that their aesthetic effort is more valuable to posterity than it really is.

Il maestro retains his laurels, not the least for having pointed out that it is just as difficult to reform a constitution to remove an unjust clause or five, as it is to get it right in the first place. 1289a3.

All of this will be upended when the Organon, or rather James Madison’s take on ‘predicaments,’ comes in for close consideration in 2 OCL 401. At that time, we will consider what the study of formal validity and formal invalidity entail, Madison having asserted that there is a preferred ‘form’ to the Necessary and Proper Clause.

At this juncture, one may credit the long-suffering archivists and editors who preserved our past for our edification. It is, I suppose, therefore incumbent on us to permit archivists and editors to recite their aporia on entering into the course of their duties, made more difficult by a previous generations’ inattention to its Aristotle.
“J ustitia est constans et perpetua voluntas ius suum cuique tribuens.” Justice is the constant and perpetual wish to render every one his due. This quote opens Book I of the Institutes and has ennobled the voluntas, the will, to get it right. The sweat involved in fulfilling our desire to do justice deserves recognition as well.

J. Resources. For online Aschenbrenner’s articles, tables and charts see purdue.academia.edu/PeterAschenbrenner or works.bepress.com/peter_aschenbrenner/

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O. References.


After the journal of yesterday, I resumed the arrangement and preparation of the Convention journals for the press. It is truly " in tenui labor" — the longer I brood upon it the more protracted and unprofitable the toil becomes. The journals and papers were very loosely and imperfectly kept. They were no better than the daily minutes from which the regular journal ought to have been, but never was, made out. At 385.


[5] See

fordham.edu/halsall/basis/535institutes.asp

faculty.cua.edu/Pennington/Law508/Roman%20Law/JustinianInstitutes.htm
