

Constitutions and the Classics: Coke, Blackstone, and Rousseau

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Introduction

This workshop constituted the final session in the series designed to highlight constitutional paradigms and insights in sixteenth, seventeenth, and eighteenth century writers. In this workshop, three writers whose contribution to constitutional thought is not a matter of consensus were discussed: Edward Coke, William Blackstone, and Jean-Jacques Rousseau.

Edward Coke – the Pragmatic Radical

Ian Williams, *University College London*

Ian Williams opened proceedings with his paper on Edward Coke, which explores the ambiguities in Coke's contribution to constitutional theory and practice. Coke's biography, pronouncements, and actions do not always reflect the image constructed by contemporary legal scholars and historians. Partly, this is due to the fact that his most controversial contributions come to the fore as a judge, and in that sense, he was an actor more than a writer. So controversial, in fact, were these contributions that they led to his dismissal from the bench by King James I, unprecedented for the fact that this was not for misconduct, but for disagreeing with the King. On the other hand, he was a prolific writer, and his reports on Parliament, the role of the courts, and the power of the sovereign cover eleven volumes. The tension between his judicial decision-making and his grand constitutional theorizing would not have been so significant were it not for the fact that the latter was somewhat an outcome of the former. Coke's thinking seems to develop incrementally, as a response to particular cases.

Perhaps the clearest example of this tension is Coke's reputation (or even notoriety) as a resister, a radical, and even a martyr who was sanctioned for his progressive constitutional positions, especially on the issue of judicial independence. However, as Williams explains, Coke's positions were not grounded in an abstract ideal of judicial independence, but rather in a claim to expertise and particular skill. The *Case of Prohibitions* and *Peacham's Case* both led to a confrontation between Coke and James I.

In the *Case of Prohibitions*, Coke rejected James's attempt to resolve a jurisdictional dispute between common law and ecclesiastical courts. Coke denied the King any judicial role, explaining that he lacked the 'artificial reason' of those trained in the law. After James undertook legal training, however, the rationale for Coke's position (relying as it did on meritocratic, and not institutional or constitutional, foundations) was undermined. In *Peacham's Case*, a case involving charges of treason and regicide, Coke objected to James's request to consult with the judges individually. Though understood as an act of judicial independence, Coke did not, in fact, object to the practice of consultation itself, but only to *individual* consultation. Such consultation offers the opportunity to deliberate collectively and to reach a unanimous decision before presenting reasoned assessment. For this reason, Coke explained, the quality of advice offered to the Crown would be

impaired. This notion of expertise is a deeply embedded one, and is central to James Madison's argument in the *Federalist No. 10*.

A different type of historical exaggeration of Coke's role lies in his characterization as the paradigm example of the 'common law mind' who developed the idea of the 'ancient constitution', an English constitution which had similarly existed unchanged beyond the memory (and records) of man. Coke indeed recognized a 'fundamental law' that consisted of, but was not limited to, the Magna Carta, and that was central in its ability to determine constitutional questions. Far from being unique in this respect, the idea of a 'natural law' that emerges spontaneously and is part of the collective consciousness, was a fairly common one in the seventeenth century. Like the social contract for Locke, the ancient constitution for Coke was an historical artifact, thus encompassing the law as it is and the law as it should be. Moreover, there is a strong relation between the concept of the fundamental law and the discussion noted above: implicit and inherent in that notion of fundamental law is the belief that the King's powers are limited and that individual rights are protected. But the fundamental law is also the law that grants the King's powers. These two are not contradictory as they may seem. Rather, the limits of each, not the source of each, were precisely what people were fighting over.

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Finally, these ideas seemed to lead naturally to Coke's position regarding parliamentary supremacy or, perhaps, the supremacy of law. If the fundamental law is indeed fundamental, then even the King could not act contrary to it. And in the *Case of Proclamations*, Coke seems to suggest that the King cannot alter the common law by issuing proclamations under the royal prerogative. His position placed the Crown within the ambit and control of the law, rather than outside it. And if the King granted an unlawful monopoly, for example, the courts could not enforce it. Here, as well, Coke's position was at once both quite familiar and quite extreme for his time. His justification rested on ideas concerning the fundamental law, as discussed above, and the body politic. The idea of the body politic was

common discourse since at least the twelfth century, when John of Salisbury referred to the state in those terms: the head is King, the soul is God, the feet are the people, etc. Coke understood the *body politic* not only in a metaphoric sense, but also in a corporate sense. In this respect the King was like other corporate bodies that operate by record, and as such, cannot give or take but by matters of record. Williams shows how Coke's approach not only led to concrete conclusions on matters of law, but also suggested a broader idea: that the King was integrated into the legal system, rather than outside it.

In sum, we find that it is not in his celebratory pronouncements that Coke should be considered a transformative figure, but rather in his particular judgments which, regardless of whether their *justification* was unprecedented, re-drew the lines between the power of the monarch and the power of the people.

Blackstone and the 'Free Constitution of Britain'

Wilfred Prest, *University of Adelaide, Australia*

Like Coke, William Blackstone's contribution to constitutional theory is not straightforward. His most recognized magnum opus, *Commentaries on the Laws of England*, does not include the term 'constitution' on the title page or in the consolidated index. And yet, as Wilfred Prest explains, Blackstone had always been concerned with the institutions and practices of government (or as we might say today, with constitutional and public law), as well as with the rules and procedures of private law.

And, indeed, his impact on American constitutional thought is widely appreciated. Duncan Kennedy wrote that Blackstone's writing 'was the single most important source on English legal thinking in the 18th century and ... has had as much (or more) influence on American legal thought as it has had on the British.'¹ Robert Ferguson goes further, suggesting that:

*All of our formative documents — the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall — were drafted by attorneys steeped in Sir William Blackstone's Commentaries on the Laws of England. So much was this the case that the Commentaries rank second only to the Bible as a literary and intellectual influence on the history of American institutions.*²

Blackstone also shares with Coke some biographical traits: both were Oxbridge graduates, both elected as Members of Parliament, and, later on, both served as judges on the King's Bench. The ability to see 'law in action', from Parliament and from the court, not only 'on the books', was undoubtedly of importance in the development of their ideas regarding the way law works. This inductive reasoning may partly explain the notorious omissions in Blackstone's writing on constitutional issues. Besides taking the role of God for granted, he states that Parliament is absolute in its powers but doesn't explain why, and he makes a number of claims for representation of the people in Parliament. It may well be that issues that did not reach him as a Member of Parliament or

were not raised before him as a judge received less, or no, attention in his writings.

As with Coke, some of his ideas appear contradictory. His theory seems to arise, at points, from a secular and liberal premise, but at other times, Blackstone posits the individual as secondary to God and country. In Lockean vein, he argues that the purpose of the constitutional machine is to protect the rights and liberties of 'every Englishman', which were 'formerly, either by inheritance or purchase, the rights of all mankind...'; that is to say, 'the right of personal security, the right of personal liberty, and the right of private property...'.³ He suggests that this 'spirit of liberty' is so 'deeply implanted in our constitution, and rooted even in our very soil, that a slave or negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes eo instanti a freeman.'⁴ Moreover, Blackstone adds to this list of security, liberty, and property, additional 'auxiliary subordinate rights' that must be accorded constitutional protection, if the three great primary rights are not to remain a 'dead letter of the law'. These were five in number: the 'constitution, powers and privileges of parliament'; 'the limitation of the king's prerogative'; the right to seek justice in the courts; the right to petition the Crown, or parliament, for redress of grievances; and the right 'of having arms for their defence, suitable to their condition and degree...'.⁵

And yet, at the same time, Blackstone argues for the quintessentially Hobbesian idea that 'there is and

must be ... a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside'. And he asserts Parliament's 'sovereign and uncontrollable authority ... to do everything that is not naturally impossible ... what they do no authority on earth can undo'.⁶ As Prest notes, why exactly this should be so does not explicitly appear. Blackstone clearly regarded this 'frame of government' as a coherent artifact of human devising, but also as one that, protecting liberty in such a unique fashion, originated with 'the supreme being [who] formed the universe'.⁷

So we find an analogy within the theoretical justification: just as God created the universe and imposed upon it 'eternal, immutable laws of good and evil ... the rule by which particular districts, communities, or nations are governed' is 'prescribed by the supreme power in a state';⁸ that is to say, the legislature. But Blackstone is also governed by a more mundane concern, for, like Hobbes (but somewhat different from Locke) he dreaded the possibility that, if the people demanded a devolution of power following the legislature's abuse of their trust (perceived or real), the consequences would be a wholesale return to the original state of nature, and the end of both government and the constitution.

Another parallel with Coke's construction is found in Blackstone's metaphor of the three distinct powers in mechanics that are meant to illustrate the various forces of the legal and political process. In a manner similar, but not identical, to Coke's 'body politic', the

combination produces a well ordered balance, which 'jointly impel the machine of government in a direction different from what either, acting by themselves, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community'.⁹ And yet, just as each of these forces is separately identifiable and independent, Blackstone insisted on a rigorous separation of Parliament's legislative powers from the executive powers of the Crown. As for the judiciary and its relation to the Crown, Blackstone has notably less to say about the matter than Coke. Yet it seems that Blackstone, heavily influenced by Montesquieu, regarded the judiciary as a vital third force, mediating between the legislative and the executive powers. For although judges were appointed by the Crown, the King was not the 'author or original of justice'. 'The original power of judicature, by the fundamental principles of society, is lodged in the society at large'.¹⁰ Like Coke, Blackstone argues that the courts derive their powers from the Crown, but once entrusted with this power, they are 'bound by oath to decide according to the law of the land'.¹¹

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The General Will Constitution: Rousseau as a Constitutionalist

Ruzha Smilova, Sofia University, Bulgaria

Like the great social contractarians of the seventeenth and eighteenth century, Rousseau's central focus of investigation is the problem of political authority: how the rule of someone over others can be justified. Ruzha Smilova shows how his answer differs from that offered by Thomas Hobbes and John Locke, the English philosophers who are usually seen as developing a political philosophy drawn from the same paradigm, and is much more ambiguous than theirs. Yet, as ambiguous and contradictory as his theory may be, his most famous and enduring insight is straightforward: people are *not* in fact, ruled by others. Rather, the people, as a collective, are the sovereign and *rule themselves*, fully preserving their freedom and equality. Individuals, therefore, are dependent not on another's will, but on their own *general* will, which is the associates' own combined will as civic-minded citizens of a free and equal association. This is where the theory becomes somewhat blurred and, to some, fascinating.

First, it is pertinent to ask: how is the general will achieved? Rousseau explains that the transformation from the egoistic, self-centered savage to the civic-minded, socially responsible citizen leads, in effect, to the transformation of society as a whole as one governed by the general will. This general will only appears to control 'private' wills. In fact, it is every citizen controlling herself. Unlike Coke, the entity charged with drafting the laws for this new civic-minded society — the god-like Legislator — is placed outside the body politic. Only thus can the Legislator achieve the necessary impartiality. He explains:

*This office, which constitutes the republic, does not enter into its constitution; it is a special and superior office, having nothing in common with human jurisdiction; for, if he who rules men ought not to control legislation, he who controls legislation ought not to rule men; otherwise his laws, being ministers of his passions, would often serve only to perpetuate his acts of injustice; he would never be able to prevent private interests from corrupting the sacredness of his work.*¹² (SC II.7: 181)

The Legislator has a two-pronged portfolio: in constructing the laws of the nation, he must direct himself towards the general will, which is always

right. In addressing the public, he must convince them of that fact (that the general will is always right) and, moreover, 'the public must be taught to understand what they want' (SC II.6: 180). If the role of legislator and educator is not sufficiently complex, Rousseau adds to it a couple of constraints: the task must be done with no recourse to violence or to reasoning. Rather, the general will may reign in nations involved in festivities, rituals, collective games, and so forth, thus creating a nation with patriotic zeal and moral affect among compatriots.

Smilova identifies the most difficult aspect of the Rousseauvian argument: to what degree are citizens free and independent, while simultaneously so patently coerced not only into acting in certain ways, but also into believing in particular ideas? And with the prominence afforded the natural law aspect of the general will (linking the law as it is with the law as it should be, albeit a different 'natural law' for each nation), what possibility is there to reject the Legislator's pronouncements? It is easy to see how Rousseau's famous paradox — 'whoever refuses to obey the general will shall be constrained to do so by the whole body; which means nothing else than that he shall be forced to be free' (SC I.7: 166) — may lead to despotic regimes. Indeed, whether or not they embraced him explicitly, despots through the ages have nurtured remarkably similar justifications.

It is here that the constitution's role comes in. Rousseau views the constitution as providing the necessary safeguards to protect this delicate structure and to counteract the degeneration of society into a mere aggregate of individuals. Smilova distinguishes between two types of constitutional safeguards: cultural-educative and institutional. The cultural and educative aspect of the constitution is probably more controversial for contemporary readers. It consists of the elements mentioned above — rituals, ceremonies, games, distribution of public honors, and the like — which might be construed as evidence of a sovereign manipulating citizens so as to prevent serious reflection and deliberation on the issues of the day. Rousseau is quite ambiguous when discussing the trust awarded to citizens to rationally discuss and debate the issues. While declaring public deliberation as an issue of central importance, he also warns that too much or the wrong kind of deliberation may threaten socializing practices.

Turning to the institutional safeguards of Rousseau's constitution, we find that the foundational element in his proposed structure is the institute of the sovereign. For Rousseau, the sovereign is the ultimate source of political authority. It is thus indivisible, legislates through the general will, distinct from the (notably limited) government, and directs the government in its activities. The only way to preserve this indivisible, unrepresentative sovereign, Rousseau admits, is in small 'republics'. Large nation states, such as England, must sacrifice this important principle and settle for a representative Parliament. For Rousseau, the system of representation and parliamentary sovereignty 'renders the loss of liberty well-deserved'. (SC III.15: 221).

Unlike the sovereign, government is limited by the simple fact that it is subordinate to the sovereign (and placed in check by magistrates) as well as by its representative form (which will render it inevitably weak and often corrupt). However, Smilova notes that Rousseau's account of the separation of powers has been criticized not only by those who object to the way absolute authority is entrusted to one entity (the sovereign), but also from the reverse perspective, by those who saw absolute power (albeit with no moral authority, a particular distinction, to say the least) invested in the government. The government, then, is normatively subordinate to the sovereign, but as the sovereign is granted no real (as opposed to moral)

power, it is not altogether clear if such subordination leads to effective control of the sovereign over the legislature.

When considering the two safeguards — the educative-cultural and the institutional — in the light of the general thrust of Rousseau's argument, the former is of much higher value than the latter in his theory. The social and cultural elements are necessary to keep the Rousseauian edifice intact. It is here that the theory is most tantalizing, original, and controversial. The institutional elements appear to be less significant, filling in the blanks of the political philosophy, and lacking in clarity and robustness. If the social and cultural prescriptions are abided by, the legal and institutional elements will hold. But if they do not, the constitutional outline will surely unravel. In this Rousseau follows Aristotle, who argued that 'when men are friends they have no need of justice'¹³ (read: for institutions, or for law). The institutional elements, an issue so central for constitutional theorists, are almost superfluous for Rousseau.

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Finally, the feature of Rousseau's project that has caused the greatest anxiety for liberals is the threat to civil and political rights that may be realized by the 'tyranny of the majority'. Smilova notes that Jeremy Waldron offers a more charitable and nuanced approach, which somewhat mollifies the threat. Waldron suggests that, even when the minority does not see its desires realized, this does not mean that its interests are not taken into account. This is patently true, but does not seem to alleviate the basic worry: it is not that individuals living under Rousseau's general will may not realize all their rights. This is, after all, often the case in a liberal, constitutional democracy. It is that their interests are silenced, because pluralism is anathema to the whole project. Minority opinions are defeated on a daily basis in the liberal marketplace of ideas. The threat is that, in Rousseau's structure, they will not be deemed worthy of seeing the light of day.

Conclusion

This workshop assessed the ideas of three theorists who have several features in common. First and foremost is the fact that, though their contribution to Western thought cannot be overestimated, they are not commonly thought of as constitutional theorists. They touch upon particular constitutional issues, but cannot be seen as offering a grand, structural, and yet detailed, proposition.

Perhaps for this very reason they are of considerable interest. By offering a different perspective to constitutional scholars of the era, they may challenge basic conceptions or particular aspects of the more notable, familiar theories. The parliamentary and judicial experience of Coke and Blackstone lead them to address particular issues that they were exposed to and were fascinated by.

Rousseau's political philosophy encompasses constitutional issues in a manner that forces us to take account of the social and educative roles of the constitution (broadly understood) and not only of its institutional elements.

There is also a philosophical commonality among the three: the two Englishmen were deeply invested in the 'fundamental law' tradition and the idea of the 'ancient constitution', which can well be seen as a manifestation of Rousseau's general will. Underlying all these cases is the idea that an objective, perhaps 'natural', law exists, which conflates the law as it is with the law as it ought to be. Bearing this in mind, it is not surprising that the role of a divine entity — God — makes recurring appearances in the writings of the three scholars presented in this session.

Notes

1. Kennedy, D. (1979) 'The Structure of Blackstone's Commentaries', *Buffalo Law Review*, 28: 2.
2. Quoted in Bader, W. (1995) 'Some Thoughts on Blackstone, Precedent and Originalism', *Vermont Law Review*, 19.5: 8.
3. Blackstone, W. (2003 [1884]) *Commentaries on the Laws of England*, ed. Thomas M. Cooley. Clark, NJ: Lawbook Exchange Ltd., 125.
4. *Ibid.*, 122-23.
5. *Ibid.*, 125, 136-39.
6. Lieberman, D. (2006) 'The mixed constitution and the common law'. In: M. Goldie and R. Wokler (eds.) *The Cambridge History of Eighteenth-Century Political Thought*, pp. 318-346: 333. Cambridge: Cambridge University Press.
7. Blackstone, *Commentaries*, 122, 38.
8. *Ibid.*, i., 48-49, 38-40, 44, 46.
9. *Ibid.*, i., 151, 153.
10. *Ibid.*, i., 257.
11. *Ibid.*, iii., 69.
12. Rousseau, J. J. (2002 [1762]) 'The Social Contract, II.7'. In: Susan Dunn and Gita May (eds.) *The Social Contract and the First and Second Discourses*, p. 181. New Haven, CT: Yale University Press.
13. Aristotle, *Nicomachean Ethics*, Book VIII. Available at: <http://classics.mit.edu/Aristotle/nicomachaen.8.viii.html>

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