Charles McIlwain: *Constitutionalism: Ancient and Modern*

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1 Citation

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2 Abstract

McIlwain responds to the turmoil on the eve of WWII by delivering six lectures in which he traces the emergence of the modern conception of constitutionalism as a limitation on political power. He concludes by making a strong case against the modern Montesquieuian constitutionalism emerging from the American and French Revolutions, comprised of functional separation of powers, by positing that it weakens constitutional government and thereby facilitated the rise of Fascism. Instead, McIlwain endorses the more ancient, British conception of constitutionalism, whose underlying spirit can be traced to the Roman Republic, where individual liberties are safeguarded but government is permitted extensive administrative authority.

3 Details

Charles McIlwain's *Constitutionalism: Ancient and Modern* comprises a set of six lectures he delivered at Harvard University, where he was Professor Emeritus of Government, on the eve of World War II. "The world is trembling in the balance between the orderly procedure of law and the processes of force which seem so much more quick and effective," he wrote; and consequently, it seemed "reasonable... to retrace the history of our constitutionalism... as dispassionately [as possible], though it is only fair that I should frankly confess at the outset that my own personal convictions are overwhelmingly on the side of law and against force" (McIlwain 1947: 1).

McIlwain focuses on tracking the historical emergence of a post-American Revolution and post-French revolution conception of constitutionalism from Ancient Greek times through the early 20th century. This modern notion is one where the constitution comprises the "conscious formulation by a people of its fundamental law," as opposed to the much more ancient notion of the constitution as the "substantive principles to be deduced from a nation's actual institutions and their development" (ibid: 3). Modern conceptions, like Thomas Paine's, see the constitution as "antecedent," in the sense of being both fundamental and a "definitive historical compact" temporally prior to the operation of the state (ibid: 11-12). This is in contrast to the British conception of constitutionalism as captured by the writings of Bolingbroke, which is more proximate to ancient understandings of the term: Here, by "antecedent" we mean only "fundamental" and not temporally prior. Although 19th and 20th century history has shown the adoption of the notion of a written constitution as an act of deliberate founding, McIlwain is more sympathetic to the British understanding, wherein "limitations on arbitrary rule have become so firmly fixed in the national tradition that no threats against them have seemed serious enough to warrant the adoption of a formal code" (ibid: 14).

McIlwain then proceeds to trace the evolving concept of constitutionalism through time, focusing particularly on the element that is common to all conceptions: the fact that it must in some sense capture something "fundamental," that is, something unalterably by the ordinary judicial process (ibid: 21). The classical Greek conception is the most ancient: captured by the word *politeia*, "it means above all the state as it actually is ... its whole economic and social texture as well as matters governmental" (ibid: 26). It was a description of fundamental facts, not a basis for judicial deductions (ibid: 28). The limitation of this

conception is that while it may "warrant one in saying that a particular enactment is bad," it can never take the further step of stating "that it is not legitimate" (ibid: 36). This extra step was taken by the Roman Republic, wherein *lex*, or law, was the source of political authority (ibid: 44). The seed for modern constitutionalism was laid here, for "of the theory of the Roman constitution we can have no doubt: the people, and the people alone, are the source of all law," and this "fundamental doctrine underlying the Roman state" was so strong "that Justinian's commissioners, even in the sixth century, could not delete [it] from the legal sources" (ibid: 46; 57). Hence while Ulpian's postulate that what the prince commands is law was eagerly picked up by Justinian in his compilation of his famous *Corpus Juris Civilis*, the underlying source of this authority lay with the people. It was via the influence of the Justinian Code that this seed for modern constitutionalism would diffuse further, this time to England.

The definitive text of middle age English Law - the beginnings, that is, of the common law - was compiled by Henry of Bratton, or Bracton. While all of the cases contained therein are of English law, the spirit of the book, and the jurisprudential principles running through it, were likely obtained from Roman Law. Like Ulpian, Bracton believed that the monarch's orders constituted binding law, but this is limited to "acts in conformity with its solemn promises... includ[ing] an engagement to govern according to the laws which the people have chosen" (ibid: 72). But Bracton's treatise, and the common law which followed it, was more subtle than this: it made a distinction between *jurisdictio*, or jurisdiction, by which he meant the disposal of justice following principles of natural law (often taking Roman jurisprudential principles of property and contracts), and *gubernaculum*, or the administration of government (ibid: 86-87). For Bracton, and under medieval common law, the monarch had an absolute authority vis-a-vis *gubernaculum*, but his power was limited vis-a-vis *jurisdictio*.

Of course, the "fundamental weakness" of this medieval constitutionalism "lay in its failure to enforce any penalty, except the threat or the exercise of revolutionary force, against a prince who actually trampled under foot those rights" captured by *jurisdictio* (ibid: 93). What forced a transformation was the religious schism and the protestant reformation, for "in such a case it was inevitable that religious groups of every faith, if brought under the king's penalty for nonconformity, should come to regard the ruler not as a true king but as a tyrant, who by fighting against God had abdicated his lawful authority" (ibid: 96). This comprised the source of efforts to reign in the monarch's administrative power in the realm of *gubernaculum*. With the end of Tudor rule and the ascendance to the throne of the Stuarts, who had many Catholic connections, the Parliamentarians invoked the principle of consent underlying all political authority in the Roman Republic that had been channeled by Bracton and medieval British constitutionalism (ibid: 115). But what emerged as new in the Glorious Revolution of 1688 and the deposition of James II was not this principle, but its modern corrolary: "that the voice of parliament is the voice of the people" (ibid: 116). By 1689 "the king was made responsible in government as well as in jurisdiction, and responsible not merely to God, as had been held before, but to the law and to the people" (ibid: 131). Hence the post-1688 settlement comprised the modern articulation of a fundamentally ancient ideal.

In subsequent years, and largely in response to Parliamentary abuses of power, the Montesquieuian doctrine of functional separation of powers, which had no historical antecedent, emerged and quickly became hegemonic. McIlwain interprets this as a most displeasing development: "Few are worse than the extreme doctrine of separation of powers... there is a lack of discrimination between the legal checks for which our history gives such strong support and the political balances for which... there is little historical background... Political balances have no institutional background whatever except in the imaginations of closet philosophers like Montesquieu" (ibid: 141). For McIlwain, the separation of powers doctrine weakens government, whereas the legal limitation of powers need not do so - it may actually empower it in the realm of *gubernaculum* - all the while an independent judiciary can be charged with guarding *jurisdictio* by protecting individual rights (ibid: 140). This is of fundamental importance to McIlwain, who attributes the rise of Fascism in Europe to the "incompetence of constitutional governments" (ibid: 144). By replacing the functional separation between judiciary, executive, and legislature with the *gubernaculum-jurisdictio* distinction, the modern world is ensured "the negative limitation of the sphere of government already mentioned," but also "the full political responsibility... to the whole people for all positive acts of government within its proper sphere, [for] without adequate power there can be no such responsibility, and if the power is not concentrated and obvious to all, there can be neither the fixing nor the enforcement of this responsibility" (ibid: 144). These should be the fundamental principles of modern constitutionalism: "the legal limits to arbitrary power and a complete political responsibility of the government to the governed" (ibid: 146).