25
CONSTITUTIONS AND SOCIAL CONTRACTS

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The importance of constitutions and social contracts for eighteenth-century political philosophy cannot be overestimated. Since attempting to offer a comprehensive treatment within the scope of a single chapter risks breadth at the expense of depth, I will instead provide an overview of the topic by way of three interconnected discussions of issues that I take to be especially significant or revealing. Taken together, these discussions will give a sense of the intricacies and variations – as well as the promise and the limitations – of eighteenth-century theorizing about constitutions and social contracts.

In the following section, I explore the anachronisms that arise in attempting to reread contemporary notions of constitutionalism back into the eighteenth century. My goal is not simply to debunk such approaches, by showing that the familiar view of the eighteenth century as the origin of modern constitutionalism is mistaken and misleading. Instead, I aim to make the content and the complexities of the concept of a constitution in the eighteenth century clear, as well as to provide an idea of how much the concept developed over the course of the century. Then, I explore the role of absolutist political theorizing in the eighteenth century, focusing on the ways in which some eighteenth-century thinkers tried to improve or reform the absolutist doctrine from within, as it were, rather than rejecting it outright. Finally, I turn to the developments in non-absolutist political thought that led to the theoretical differences between the philosophical foundations for the Glorious Revolution in England at the end of the seventeenth century and those of the French and American Revolutions at the end of the eighteenth century. Here, I show how the former were fundamentally and massively transformed into (or maybe even replaced by) the latter by way of the development of a particular kind of political discourse – a universalistic discourse of human rights. Finally, I conclude by briefly addressing the limits of and contradictions in this new discourse, by considering its exclusion of women.

Constitutions and constitutionalism: some conceptual and historical issues

Though twenty-first-century political, legal, and philosophical theories face no shortage of debates about constitutionalism, there is general consensus regarding

certain basic understandings of the concept and a generally accepted account of its history, in particular its roots in eighteenth-century political theory and practice. Consider an uncontroversial and representative working definition of the term constitutionalism in contemporary political philosophy: "Constitutionalism, generally understood," C. L. Ten (1995: 394) explains, "usually refers to various constitutional devices and procedures, such as the separation of powers between the legislature, the executive and the judiciary, the independence of the judiciary, due process or fair hearings for those charged with criminal offences, and respect for individual rights, which are partly constitutive of a liberal democratic system of government." As Ten's definition makes clear, constitutionalism has come to be understood as a cluster of commitments, ranging from separation of powers to the rights of criminal defendants, all within the context of modern liberal democracy. Constitutions can be understood as a collection of provisions that stipulate how a particular government will be organized, the ends it is to pursue, and the means it may employ in pursuing those ends. More specifically, constitutions are the set of fundamental laws or principles that assign distinct powers to the various organs or branches of government and protect individual rights. If it does all of this in one authoritative text, we can speak of it as what James Bryce (1901: 200) called a "documentary Constitution" (which he opposes to the "old common law Constitution"). In present-day discourse, most allow that constitutions can also be unwritten, as in the cases of the United Kingdom, New Zealand, and Israel. However, written or unwritten, constitutions are most importantly understood to have supreme status vis-à-vis ordinary legislative acts of law-making. This is why it makes sense to think that a law or statute or act of government can be *un*constitutional.

According to received wisdom, Western constitutional theorizing and constitution-making in the eighteenth century was a special moment in the development of this modern conception. For example, Frederick Whelan (2004: 123) notes that the eighteenth century is "sometimes called the golden age of constitutionalism in the English-speaking world, extending from [the Glorious Revolution in] 1689 … to the framing of the U.S. Constitution a century later," representing the triumph of individuality, liberty, and the democratic consent of the governed over tyranny and despotism. It was the century in which constitutionalism was born – beginning with the Glorious Revolution in England and working its way to America (culminating in the American Revolution and the American Constitution) and moving east onto the European Continent (culminating in the French Revolution and the Declaration of the Rights of Man and of the Citizen). Non-specialist academics and educated citizens of contemporary Western democracies tend to recognize this glorification of the eighteenth century in the development of modern liberal constitutional democracies in the West. (This is not to say that Athens and Sparta, for example, did not have constitutions; but the Greek word *politeia* was not regularly translated as *constitution* until the nineteenth century.)

Many of the tenets of this working definition of constitutionalism reflect the core principles that have come to typify contemporary liberal democracy: the idea of individual persons as naturally free and equal, for example, which in turn leads to the need for governors to represent and acquire the consent of the governed, on the one hand, and to protect individual rights, on the other. These core principles are also recognizable tenets of social contract theory that developed in seventeenth- and eighteenth-century political thought.[1] Given this connection, and the flurry of

constitutional theorizing and constitution-making that took place during these same eras, it is hardly surprising that the eighteenth century is typically credited as providing the foundations for our understanding of the bases of modern liberal democratic government. Montesquieu and Madison are two of our most cherished constitutionalist heroes from history; Kant and Rousseau have a special place in the hearts of contemporary contractarians; and Locke does double duty in this regard.

It is thus tempting to highlight particular debts that modern constitutionalism and modern contract theory owe to their eighteenth-century forebearers – even at the expense of competing narratives. After all, there were many important philosophical and political developments that happened during that period, without which modern constitutionalism and contractarianism would not exist or at least would not exist in the forms familiar to us. But this temptation should be resisted, as it fails to do justice to the century on its own terms – as it impacted a wide swathe of countries, not simply Britain and America – and it obscures much of what is both distinctive and fascinating about the eighteenth century in this regard.

There are a number of problems with the received narrative. First, the issues preoccupying many of the eighteenth-century theorists for most of the century (that is, before the American and French Revolutions) were different from the issues we identify as important today. For example, during the eighteenth century, many theorists simply assumed that there would be a monarch in the government (even Jeremy Bentham was a monarchist when he wrote the works for which he is best known). The debates were about the role of that monarch vis-à-vis other bodies of government. Of course, one of the achievements of eighteenth-century political and philosophical movements was the ultimate decisive overthrow of *absolute* (as opposed to *constitutional*) monarchy. But throughout the first roughly three-quarters of the eighteenth century many argued for the supreme nature of kings, on the Continent but also in Britain with the Jacobites. So, while Ten and others associate modern constitutionalism with liberal democracy and offer up the eighteenth century as the origin of this concept, for most of the century, even those who advocated for incorporating a democratic element into government assumed that the democratic element would exist alongside a hereditary, non-elected king or queen. There were also heated debates about the proper place of the nobility or aristocracy in various regimes. These facts bring into stark relief one of the differences between the eighteenth-century discussions about constitutionalism and our own and so call our attention to the problems with the straightforward, uncomplicated origin story – the existence of a politically powerful, even if limited, hereditary monarch is utterly contrary to liberalism, as we see it today. The ideas that there would be a branch of government with real power that was a result of a hereditary line of succession or that representatives would represent the people without actually being elected by them offend our constitutional sensibilities.

The assumption of monarchy is perhaps the most obvious and telling example of how the majority of constitutional thinking in the eighteenth century differs from our own; but there are others. For instance, there were serious debates about what counted as properly constitutional. Some (for example, English jurists such as William Blackstone as well as the framers of the United States Constitution and the authors of the French Declaration of the Rights of Man and of the Citizen) incorporated the rights of the accused in their constitutional theories. Others, like Jean Louis

Delolme, denied that issues concerning criminal justice (for example, the question of trial by juries) were properly speaking constitutional issues, though he admitted that they were importantly related.[2] Notice that Ten lists the rights of criminal defendants as included in basic notions of constitutionalism, but one simply cannot take this for granted in the eighteenth century.

Similar issues arise around the question of the independence of the judiciary. An independent judicial branch is now often taken for granted, though in America it is at least recognized as originating most importantly in the 1803 US Supreme Court case *Marbury v. Madison*. But the status of the judiciary vis-à-vis the other branches of government was contested in the eighteenth century. Montesquieu's argument that an independent judiciary is necessary for the establishment and maintenance of a free society is perhaps the most famous of the time, but Blackstone, Paley, and even Edmund Burke made the case for the independence of the judicial branch. Others disputed the claim. To give just one example, Thomas Rutherforth argued that "Judicial power was plainly nothing else but a branch of the executive power" (quoted in Lieberman 2006: 334). Finally, the idea of representation – that is, the idea that political rulers must represent the people they rule – was hotly contested during the eighteenth century: some thought representation could and should be virtual or indirect representation; others insisted that it must be actual and/or direct. While the former would not require elections, for example, the latter would.

There is an even deeper problem: the familiar story primarily addresses the American experience, not the story of the period as a whole. The eighteenth century was a period of transformation for the concept of constitution, as is evidenced by the fact that some people had been praising the English constitution for decades when some (most famously, the American revolutionaries) asserted that the English simply did not have a constitution at all. To make sense of this disagreement over the meaning of the term "constitution" and for the sake of conceptual clarity, we need to pay closer attention to the history of the usage of the term.

The development of the term or concept "constitution" is complicated, but it is clear that the meaning of the term has shifted massively over time. As historian Gerald Stourzh (1988) demonstrates, in the sixteenth and seventeenth centuries, constitution had numerous senses – it connoted the health or goodness of a particular government, for example, or the enactments, decrees, and regulations of a ruler or sovereign – but the sense of constitution familiar to us was not among them. Beginning in the eighteenth century, the term constitution was invoked more often in political theorizing, but often in a general or unspecified way. For example, there are many British and European discussions of the so-called "English Constitution." We find the term used when, for example, in 1727 Roger Acherley, an English lawyer, expressed admiration for the "*Britannic Constitution* [because] it secures to *Britons*, their Private Property, Freedom and Liberty, by such Walls of Defence, as are not to be found in any other Parts of the Universe" (Acherley 1727: vi). In the introduction to his 1771 book entitled *The Constitution of England*, Delolme, originally from Geneva, heaped similar praise on his subject matter, referring to it as a "model of perfection" (Delolme 1771). Examples abound of people who extolled the virtues of the British system of government, some referring to the object of their praise as a constitution, others calling it by another word, others just praising Britain. Yet, that

some praised the English model of government without using the word constitution suggests that constitutionalism in the modern sense was not taken for granted, and that the term constitution did not *have to be* used to describe this commonwealth.

Notable attempts to provide explicit definitions of the term, rather than simply invoking it in some general way, were given by Viscount Bolingbroke and Emmerich de Vattel. Distinguishing it from government, Bolingbroke (1733: II, letter 10; 88) defines a constitution as "that assemblages of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed." The English constitution, in other words, included both fundamental principles and rights and the existing arrangement of governmental laws, customs, and institutions. Bolingbroke's definition seems descriptive; it suggests that constitution refers to how a given polity is ordered, *whatever* that might be, and *however* the polity and its institutions had evolved over time to assume their present form. But even this view was not intended to be without normative content. Bolingbroke goes on to say that a good government exists when the administration of affairs is wisely pursued "and with a strict conformity to the principles and objects of the constitution." Vattel in 1758 says that a constitution of a state is "the fundamental settlement that determines the manner in which public authority shall be exercised" (quoted in Stourzh 1998: 35). Montesquieu distinguishes three forms of government (republics, monarchies, and despotisms), and uses the term "constitution" to refer to all three (while also using the term in other ways). Here again, we see the difference between how eighteenth-century theorists used the word and how we use it today. Put crudely, to say "democratic constitution" in modern parlance is simply redundant. Put more precisely, we could say that a constitution that is *not* democratic would now be seen as co-opting a democratic form in order to appear legitimate.[3] Either way, the opposite was the case for the eighteenth-century theorists; even those who supported abolishing the monarchical element of government did not take this for granted.

The diversity of ways in which the term "constitutionalism" was used helps to explain the puzzle to which I alluded above. Many had praised the English constitution for decades – indeed, such praise was common parlance in many circles. Then, Paine, Madison, and others charged that England *lacked* a constitution. As Thomas Paine declared in the *Rights of Man*, "there is no constitution in England" (1791: 124). How can we explain this? Well, it is clear that Paine meant something different in making this claim than did those who praised England's constitution. The English generally took a constitution to be the entirety of government, the whole complex of government or something like that – fundamental rights plus the way in which the government was *constituted* or put together (as opposed to one written document that served as *the* authoritative text specifying how government was to be organized or which liberties were to be protected). The Americans, by contrast, created their own meaning of constitution, holding in mind the written document that stood above ordinary law. The English constitution was not written,[4] but also it was taken by some to be identical – or coextensive – with the legislative power, meaning that there was no separate or higher determination of it or checks on it. Blackstone, for example, famously professes a doctrine of parliamentary supremacy that makes this latter point explicit. For the American revolutionaries, a constitution was understood

not to be a part of government at all. Instead, it was taken to be a written, founding document *distinct from* and *superior to* all the operations of government. It was, as Paine puts it, "a thing *antecedent* to a government, and a government is only the creature of a constitution." Paine continues his definition saying, "It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and, in fine, every thing that relates to the compleat organization of a civil government, and the principles on which it shall act, and by which it shall be bound" (122). The constitution thus could never be an act of the legislature or of a government; it had to be the act of the people themselves. Paine, Madison, and others grounded this charge in large part on the basis of the Septennial Act of 1716 in which the English Parliament extended its own term limits. Since the Americans thought of a constitution as a deliberately framed agreement that was paramount to government, superior to ordinary legislative enactments, that imposed effective limits on the exercise of political power, they concluded that England lacked a constitution.

The point is simply that our current understanding of the term constitution is a product of the *end* of the eighteenth century; it does not characterize the century as a whole. The term was used more often and associated with the structure and principles of government in some general way as the eighteenth century wore on, though the health analogy can be found in the Federalist Papers. But it was not until the very last decades of the eighteenth century – with the framing and founding of the US Constitution – that the term took on a meaning recognizable to its current one. In other words, throughout the eighteenth century, even as the term constitution gained traction, no one understanding of the term was dominant, let alone uncontested (and certainly not our present understanding).

Careful engagement with eighteenth-century constitutional thinking thus requires that we suspend many of our preconceptions about what constitutional thinking entails and about what the notion of a social contract covers, includes, and excludes. The notion of a constitution as a written document that stood above government and enumerated the rights and powers of citizens and various branches of government, built in with a device to ensure that supremacy was "*the* great innovation and achievement" of the particular American experience (Stourzh 1988: 47). In order to understand the experience of *a wider geographical territory* – that is, Europe, not just England but also the Continent, and to understand the century *as a whole* – not just the narrow time period surrounding the American constitutional debates (1776–80), we need to be cautious, turning our attention to understanding the way in which constitutions, constitutional issues, and social contracts were discussed, debated, modified, and sometimes overthrown in the eighteenth century *in its own terms*.

The development of absolutist ideology and politics in the eighteenth century

Absolutism as a political philosophy enjoyed its heyday in the sixteenth and seventeenth centuries, most famously, in the work of Bodin, Hobbes, and Pufendorf.

Though there were variations on it, the core commitments were to the existence of one all-powerful sovereign, the denial that sovereignty could be limited or divided, and the rejection of the idea that the sovereign could be in any way accountable to the people, such that the sovereign needed to be elected by them or they had rights that they could exercise *against* the sovereign. Virtually all of those who espoused absolutist principles were proponents of monarchy, though some acknowledged other forms of sovereignty as examples of absolutism.

Absolute monarchy would seem to represent, in the most fundamental ways, the antithesis of everything for which modern-day constitutionalism stands.[5] Nonetheless, it is, I contend, essential to understanding the background and development of constitutionalism in Western political thought in the eighteenth century. To begin, notice that absolute monarchy can be understood as a kind of constitution or constitutional principle. If we understand constitution in its most "minimal" sense – that is, simply as the "set of rules or norms creating, structuring and defining the limits of, government power or authority" (Waluchow 2001) – then absolute monarchy clearly counts as a variant.[6] The defining principle of this variant is something like the following: all political authority rests with an all-powerful monarch, who enjoys unlimited and undivided power. This is undoubtedly a position in logical space, i.e. a *possible* way of *constituting* government (though most people nowadays think of it as an undesirable way).

We need not worry about anachronism here because, during a period in which the meaning of "constitution" was both contested and in flux, absolute monarchy was among those structures that were commonly understood as a kind of constitution. First, in this "generic sense [of constitutions]," as Stourzh (1988: 44) refers to it, "of regulations and rules," it appeared in several of the documents of the early British settlers in North America. Even in the earliest uses of the term in the early modern period we can find evidence that absolute monarchy was understood as a kind of constitution. For example, "the legal dictionary of John Cowell [1607] refers to 'the nature and constitution of an absolute monarchy' with 'nature' and 'constitution' meaning basically the same thing" (Stourzh 1988: 40). Further, though he was one of its harshest critics, Montesquieu (1989: 21) understood absolute monarchy, or what he called "despotism," not simply as a position in logical space but as an *actual* description of past and present regimes. Montesquieu includes it in his typology of forms of governments and defines it as the unchecked rule by one person's "will and caprice." He characterizes despotic regimes – not to be confused with tyrannical regimes – as driven by fear and by the absence of fundamental laws and, consequently, of their repositories. Nonetheless, as loathsome as he found it, he treated despotism as one of the three "natural" forms of government.[7] To put the point another way, for Montesquieu, absolute monarchy is (descriptively) a kind of constitution; it is just that it is (normatively) a bad one.

There are a number of ways in which absolute monarchy persisted on the political and philosophical stages throughout much of the eighteenth century. First, it remained in political form (that is, as a way of *constituting* government); France, Prussia, and Austria, purported to be constituted as absolute monarchies. Second, it was recognized as a valid contender for a plausible, even dominant, political theory, and royal absolutism in particular was theorized and retheorized in response to political and philosophical pressures. The divide that emerged among defenders of royal

absolutism is an important example of this process. While one strain of thought tried to reformulate traditional notions of the patriarchal divine right of kings, another re-envisioned royal absolutism almost completely as "enlightened absolutism." Nevertheless, from a contemporary vantage point, absolutism was the political and philosophical target that those figures who we *now* most often associate with constitutionalism took themselves to be opposing.

Absolutist, virtually absolutist, or claiming-to-be-absolutist politics and ideology constituted the reigning state of affairs in many European countries for much of the eighteenth century. Supreme royal power and prerogative were realized to some significant extent on much of the Continent. Intermediary institutions such as the French *parlements* had been effectively stripped of all their actual political power. The clergy had been subdued in Prussia and Austria.[8] Moreover, actual kings claimed this kind of authority – for example, King James I and Charles I in early seventeenth-century England; the various King Louis (Louis XII–XVI) in France throughout the seventeenth and eighteenth centuries (until the demise of their dynasty in the French Revolution); Catherine the Great of Russia; Frederick the Great of Prussia; and Joseph II and Maria Theresa in Austria. Both divine right absolutism and enlightened absolutism were philosophical positions advanced by theorists; and both were also invoked by a number of these important monarchs.

The tradition of patriarchal divine right

In France, the kings claimed to rule as divinely ordained fathers of their subjects. This claim was part of French political genealogy, at least on one popular understanding of it. France's *Ancien Régime* was imagined by many along Filmerian lines, where absolute sovereignty was granted to Adam to govern over the earth, Eve, and their offspring. Popular discourse reflected a reciprocal or reflexive understanding of the family as a monarchy and the monarchy as a family – in both cases the patriarch had all the power and was seen to rightly rule over those who were naturally and divinely ordained to be subordinate and subservient. Kings – and there were only kings in France because Salic law excluded females from inheriting the throne – were granted absolute prerogative from divine ordination rather than human convention or agreement, and so were accountable only to God. But kings were entrusted with such immense power ultimately in order to govern in a fatherly manner; the people were entrusted to their care as children are to their fathers. The family model of French monarchy served to invalidate claims to the contractual or conventional basis for government as well as attempts to assert that royal authority might be limited, divided, or properly resisted.

Jacques-Bénigne Bossuet, tutor to the Dauphin (the French Prince) from 1670 to 1681, in his 1709 treatise *Politics Drawn from the Very Words of Holy Scripture* (*Politique tirée de l'Écriture sainte*) provides a classic expression of the theory of the patriarchal divine right of kings and the earliest philosophical analysis of absolutism in the eighteenth century. Bossuet qualifies his glorification of the French king with a seemingly small but ultimately crucial caveat: the king must of course rule justly and well in the best interests of his subjects, lest he fear God's wrath when he must account for his actions.

Bossuet offers a vision of "royal authority" saying "Behold an immense people united in a single person; behold this holy power, paternal and absolute; behold the secret cause which governs the whole body of the state, contained in a single head: you see the image of God in the king, and you have the idea of royal majesty" (Robinson and Beard 1908: 4–8). His grounds for believing that this is the correct conception of political authority involve two central claims: first, that "all power is of God"; and second, that rulers act as the ministers of God and as his lieutenants on earth – it is through them that God exercises his empire. His evidence here is the doctrine of St. Paul. The ruler, says St. Paul, "is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil."

According to Bossuet, a number of tenets follow from these claims. First, the power of the king is unlimited and he is unaccountable to those he rules: "The royal power is absolute. … The prince need render account of his acts to no one." Second, attacking the king is never legitimate, because "the person of the king is sacred, and … to attack him in any way is sacrilege." This not only rules out regicide but also figurative attacks (for example, criticisms or disputing the king's power). Any resistance at all to the exercise of royal authority is illegitimate: "the only protection of individuals against the public authority should be their innocence."

The brief but important subtext in Bossuet's analysis of royal power reminds the king that while he is not beholden to the people, he is beholden to God. He says, "But kings, although their power comes from on high, as has been said, should not regard themselves as masters of that power to use it at their pleasure … they must employ it with fear and self-restraint, as a thing coming from God and of which God will demand an account." He uses this to administer a powerful admonishment to kings not to abuse their immense power: "O kings, exercise your power then boldly, for it is divine and salutary for human kind, but exercise it with humility. You are endowed with it from without. At bottom it leaves you feeble, it leaves you mortal, it leaves you sinners, and charges you before God with a very heavy account." For Bossuet, the Crown comes not only with a heavy burden to bear, but also with a frightening one. "Kings should tremble then as they use the power God has granted them; and let them think how horrible is the sacrilege if they use for evil a power which comes from God. We behold kings seated upon the throne of the Lord, bearing in their hand the sword which God himself has given them. What profanation, what arrogance, for the unjust king to sit on God's throne to render decrees contrary to his laws and to use the sword which God has put in his hand for deeds of violence and to slay his children!" Contemplating the eternal fate awaiting the king who uses his power unjustly is to inspire unimaginable dread, which serves as the *only* check on his power as he chooses to exercise it in his temporal lifetime. Not surprisingly, in many cases, this led to fraught relations with the clergy, who thought that God's eternal check on divine power ought to be mirrored by a strong clerical presence in political institutions. In order to guarantee the absolutism of monarchical power, Bossuet argued that the government should be tightly knit and centralized, with local powers, especially the nobility, brought under the control of agents of the king. Many of Bossuet's recommendations were applied largely successfully during the reign of Louis XIV in France.

There were varied reactions to this patriarchal divine right model of absolutism among those living under it. Some clearly accepted it. Some critics, such as Locke and Montesquieu, took the time to offer sustained arguments against it (though Montesquieu's criticism of despotism is not limited to its patriarchal divine right formulation). Others simply rejected it outright. Those who did not even take it seriously enough to argue against it, or who were engaged in efforts to forge political theories based on fundamentally different premises, often simply ignored the case for it or dismissed it as not a viable position at the start. Others tried to provide alternative readings of French history in order to make the case that France had a tradition of some sort of limits on royal power. Arguably, Voltaire employs both of these last two strategies, though he eventually abandoned the latter in favor of the former.

The debate around absolute monarchist authority was complex, and cannot easily be divided into proponents and opponents. Some reformists accepted the theological and patriarchal discourse contained in the justification for absolute monarchy while reformulating it in order to advocate for social and political change, on both an institutional and a local level. For instance, the French parlementaires, who were recalled from exile in 1732 by Louis XV, issued a variety of remonstrances against the policies and practices of the French King. Historian Jeffrey Merrick (1991: 317–30) details the ways in which the French parlementaires employed traditional discourses of patriarchalism in order to advocate for local reforms (such as changes in grain policy) and institutional change (for example, regular meetings of the French parlements). The parlementaires drew on the familial analogy in two important ways. First, they used its language, appealing to the king's "paternal tenderness for subjects whose affection makes you regard them as your children." By appropriating the language of kingly fatherhood and the duties it implied, they emphasized the obligations of kings as well as the obedience of subjects. They pointed out that excessive taxation was causing destitution and appealed to the king's fatherly concern to care for his people and provide them with the means of survival.

Perhaps most importantly, they tried to entrench a place or role for themselves as "intercessors and intermediaries" between the French people and the French Crown – necessary to convey information from the populace to the king, so he could perform his divinely ordained duty. In keeping with their role as "children," the parlementaires' remonstrances against royal policies were formulated to be "humble and respectful," never opposing the king's absolute claim to authority. They compared the "language of subjects to their sovereign and children to their father" and claimed that "filial respect is not at all opposed to legitimate complaint," though tears "are the only arms that subjects may use against their sovereign." Working within the traditional absolutist discourse of divinely ordained, patriarchal right, the parlementaires willingly granted that the king had "*all* the authority of a sovereign" (emphasis added), but they reminded him that he was also supposed to have "all the tenderness of a father" for his people. By implying that the king was neglecting his paternal duties, they were able to combine a professed submissiveness with aggressive criticism of tax policy, clergy, and so on. In so doing, they purported to demonstrate their value as "humble" intermediaries. As such, the parlementaires ultimately offered a dramatically new vision of the divinely ordained patriarchal nature and foundations for royal power.

This strategy did not work. The king ignored their remonstrances virtually all of the time. In what Merrick calls a "rhetorical tug-of-war" the king fought back, in part by reminding the parlementaires of their duty to set an example for the kingdom as a whole by being models of filial submission, and pointing out that their constant complaints gave the lie to that duty. This tug-of-war failed both to engender the intended reform and to resolve any of the disputes or conflicts over the constitutional nature of French royal absolutism. Yet, their example, even if unsuccessful on its own terms, serves to demonstrate just how far removed were eighteenth-century *practices* of patriarchal divine-right monarchy from the Filmerian vision of divine right in previous centuries. These developments are distinctive not only for their variety, but for the surprisingly transformative potential that reformists were able to find *within* a seemingly simple and oppressive framework.

The theory of enlightened absolutism

The other distinctive feature of absolutist thought in the eighteenth century occurred in the development of theories of "enlightened absolutism" (also called "enlightened despotism" or "benevolent despotism"). Before we can distinguish between the numerous variations on this theme that developed over the course of the eighteenth century, we must distinguish between those who argued for a strong monarch within a mixed constitution, such as Delolme, and those who advocated overarching monarchical power, even while refusing to grant that power some transcendental grounding (such as divine right). The latter, and not the former, are the focus of my discussion.

"Enlightened" and "enlightenment" had a number of meanings during the period, though they tended to coalesce around a couple of strands of thought – namely, the importance of rational and informed government, the need for reasoned understandings of the public good to take priority; and an overriding desire to separate politics and government from religion, superstition, and clerical influence. At the same time, enlightened *absolutists* were united in their distrust of both democracy and the figure of the common man. Thus, proponents of enlightened absolutism advocated a notion of overarching monarchical power that was not subject to externally imposed limitations or accountable to the people, even while eschewing any notions of naturally or divinely ordained absolute power. Reason and attention to the common good, rather than monarchical self-interest, were expected to provide both sufficient and appropriate checks on monarchical power and, at the same time, ensure the best possible outcomes for the polity as a whole. The rich variety within enlightened absolutism can be demonstrated best by considering the approaches of three of its most important advocates: Abbé de Saint-Pierre, Voltaire, and Beccaria. All three attempted to cast royal absolutism in a positive light, although, under that light, it bears little resemblance to the royal absolutism that had traditionally been practiced and that currently existed in France.

Abbé de Saint-Pierre was one of the first in the eighteenth century to offer this alternative kind of theory of absolutism. He simultaneously combined a consequentialist argument against divided government with the stipulation that the absolute sovereign must rule in a rational manner. Saint-Pierre insisted that effective

government was necessarily despotic, but he added the stipulation that this despotism be *enlightened* – that is, that the unbridled power of the ruler be employed in a fully informed and rational manner. As he describes, "when power is united with reason, it cannot be too despotic for the greater utility of Society" (quoted in Kaiser 1983: 635).

Despite his suggestion that political power be as despotic as possible, Saint-Pierre's intention was to rationalize French law and he insisted on numerous and drastic reforms, both in taxation schemes and in institutional structures. He argued for depersonalized, decentralized, and transparent governance, advocating that the king consult various representatives of the public and "seek always the greatest public utility" (quoted in Kaiser 1983: 637). But as liberal or progressive as Saint-Pierre's proposed government might seem, he is ultimately best understood as part of the absolutist tradition. He had no faith at all in democracy, believing that the French people lacked the capacity for self-rule; rather his emphasis was on the reform of the monarchy. But his reformed monarchy was still not subject to external limits and he explicitly granted the king the power to revoke privileges to various magistrates at will. For this reason, he is rightfully characterized as a proponent of absolute monarchy.

Voltaire was perhaps the most famous of the proponents of enlightened absolutism. Voltaire thought the masses were ignorant, irrational, and superstitious. "The populace," according to Voltaire, "are oxen who need a yoke, a goad, and hay." He declared that he would prefer "to obey a fine lion much stronger than himself to two hundred rats of his own species!" (quoted in Artz 1968: 76). He believed in man, viewed in the abstract, provided man was educated and used his reason. The common man that Voltaire saw around him, though, fit neither criterion.

Voltaire preferred enlightened absolutism both to democracy and to the kind of limited monarchy that was supposed to exist in England and which Montesquieu and others praised at such great lengths. According to Voltaire, what we might describe as a rational, benevolent dictator was most desirable because such a ruler would be most effective at ruling well and at instituting the kinds of reforms Voltaire and others thought France so desperately needed. But there were limitations (of a sort) on this despot; after all, despotism was only justified if it was enlightened. Louis XV, under whom he lived, was the exact opposite of everything Voltaire endorsed. His government did not act according to the law, it passed bad laws, it was extravagant and spent too much money on wars and palaces; the taxation system was corrupt and unfair, and the church was abusing its power free from government interference. In these timely political critiques of existing kings, we can see how eighteenth-century proponents of absolutism seem to be moving away from their sixteenth- and seventeenth-century predecessors.

Voltaire is significant in the history of constitutional thought for a number of reasons. For our present purposes, however, it is important to note that he was part of the early eighteenth-century movement in political theory, which held that different conditions made different countries more suitable for one kind of government over another. Voltaire himself thought the French were too ignorant for republican democracy and that adopting the English model would only perpetuate feudalism and church abuses. So, Voltaire's is not a *principled* defense of absolutism per se. He simply thought the other forms of government on offer would not work for France.

Since he rejected utopianism, he did not present a political theory that would be good in general or provide a model for the organization of government as, say, Locke did. Monarchy or democracy would be good or bad depending on the circumstances. However, he did advocate for freedom of the press and religious toleration on principled grounds. Similarly, his arguments for civil rights (such as the right to a fair trial) and religious toleration were of a different kind – those things were *always* good and should be instituted no matter the form of government.

Finally, a third significant articulation of enlightened absolutism can be found in the work of Italian philosopher and politician, Cesare Beccaria. While he was attacking what he chose to describe as intermediate despotism, he was in fact recommending what would be called enlightened despotism or absolutism. In *Dei delitti e delle pene* (*On Crimes and Punishments*) (1764: 53), he said, "How happy humanity would be if laws were being given to it for the first time, now that we see beneficent monarchs on the thrones of Europe! They are rulers who love peaceful virtue, the sciences and the arts; they are fathers of their people, citizens who wear the crown. … enlightened citizens [should] desire more ardently the continued increase of their authority." Like Voltaire, Beccaria recognized the potential for what he called "humane princes" to enact drastic and much needed reform. It is neither surprising that Beccaria's writings were cited by Catherine II, who famously claimed that "the Sovereign is absolute, for no other than absolute Powers vested in one Person, can be suitable to the extent of so vast an Empire," nor that he was given employment under the rule of Maria Theresa and Joseph II. In fact, it is the extent to which these rulers actually adopted Beccaria's proposals for substantial changes to the criminal law that is most striking.

There are at least three lessons we can draw from this discussion of absolutism in the eighteenth century. First, absolute monarchy, often understood as an external foil or opponent to constitutionalism, can instead be read as a variant within it. Second, we cannot associate absolutism versus non-absolutism with good versus bad rule. Consideration of the corruption in England's "mixed monarchy" – which was widely known and the subject of much complaint – and the admirable policies of at least some of the enlightened despots on the Continent, especially in terms of religious toleration, tax reform, provisions for the poor, and education, prohibit us from drawing any sort of neat evaluative dichotomy. Third, the so-called "enlightenment," with its emphasis on the reason of mankind, did not come with an immediate commitment to democracy. The enlightened absolutists do not link ideas of enlightened reason and political reform with a commitment to democracy/popular sovereignty and constitutionally limited government. In fact, they link some of the most important principles we associate with liberal democracy (religious toleration, legal and penal reform) with a distrust of popular sovereignty and an endorsement of strong state power.

Additionally, it is worth noting the fate of these doctrines both philosophically and politically. In France, attempts to reform absolutist doctrines of patriarchal divine monarchical right and the idea of a beneficent dictator failed on the political level. That is, first, the attempts to reform systems that implemented or espoused these doctrines and the implementation of the reforms failed. Second, the doctrines themselves, especially in the case of patriarchal divine right, proved to be impervious to successful reformulation or improvement. It took the incredible and shattering events of the French Revolution to completely overhaul it, destroying not only

monarchy in France, but also rejecting the idea of unlimited, unchecked government power in itself.

Absolutism, in the hands of theorists of enlightened despotism, took on a different meaning than the received understandings of the term at that time. These theorists had significant, lasting concerns about non-absolutist forms of government. But the grounds they provided for the superiority of royal absolutism were consequentialist or utilitarian, rather than divine, natural, or conceptual. Theirs was not a principled defense of absolute monarchy as such: absolute power was only legitimate if it was enlightened. Their justifications lay in the character of the individual rulers and their policies and not some legitimacy-granting mechanism for absolute rule by itself. To the extent that a particular despot was *not* enlightened, these theorists were often ferocious critics of the rule (or they provided the resources for ferocious criticisms, even if they themselves only inconstantly actually provided those criticisms at the time). But they all wanted to divorce the idea of despotism from the idea of rule by whim or caprice (that is, from Montesquieu's definition of it).

Worries about absolutism per se (separate from its association with monarchy) remained in the debates in England over the role of Parliament. Indeed, Blackstone's famous doctrine of parliamentary supremacy was criticized as a reinstantiation of absolutism, the very thing to which the post-Revolution English model was supposed to stand in opposition. Moreover, in England, commitments to absolute monarchy remained popular in some circles until the defeat of the Jacobites in the mid-eighteenth century. As Goldie (2006: 46–47) points out, even Filmerian patriarchalism and old monarchical theories of divine right popped up in the oppositions to the revolutions and at various points in England by the Jacobites. Even into the nineteenth century, Bentham made criticisms of divided government. We can even see remnants of the idea of the beneficent dictator in Bolingbroke's mid-century notion of the perfectibility of princes. Neither Bentham nor Bolingbroke was a proponent of governments having completely absolute power, of course, yet their remarks reveal how insights drawn from pieces of absolute ideology lingered in England long after the abolition of a monarchy that could claim *any* significant power, let alone absolute power. Such insights included concerns over divided power, as well as the idea that monarchs, if they existed, should and could serve as a powerful force for good. Thus, various commitments associated with absolutist ideas persisted, though the doctrine as a whole never recovered from its decisive political defeats, first in England in the seventeenth century then in France at the end of the eighteenth century.

Though there is much more to be said, I hope both to have provided a sense of how multifaceted and intriguing the story of early modern absolutism is and to have given a sense of the complexities and importance of its legacy. As a philosophical theory of government, the model of royal absolutism undergoes a series of transformations as its (philosophical) advocates attempt to defend it from the increasingly prominent and powerful critics and alternatives. Some of these attempts are quite valiant, and deserve attention not only for the philosophical perseverance they so clearly demonstrate but because they represent a very real challenge to many of the fundamental tenets and assumptions underlying non-absolutist theories of government. Nonetheless, absolutism was ultimately defeated as decisively philosophically

as it was politically in the West. Its primary legacy is as foil to the champions of constitutionalism, understood as precursor to the modern notion.

The end of the eighteenth century represents the defeat of absolutist monarchy as seen through the American and, most significantly, the French Revolution. This moment is significant not only for what ended, but for what took its place. At the beginning of the century, the only viable alternative to absolute monarchy was the English model. By the end of the century, the political geography of Europe looked very different. We can understand this change by tracing the fortunes of the political concepts of contract and consent, and their shifting role in the philosophical foundations offered for limited government.

The rights of "man" and men

There is no doubt that the eighteenth century saw a radical change in theorizing about constitutionalism and social contracts. One need only juxtapose the arguments for the Glorious Revolution in England at the end of the seventeenth century with those of the American and French Revolutions at the end of the eighteenth to see how the primary arguments shifted to a focus on a purportedly new, universalistic discourse of abstract principles, including human rights. While the English Bill of Rights of 1689 referred to the "ancient rights and liberties" established by English law and deriving from English history, by contrast, the American Declaration of Independence of 1776 insisted that "all men are created equal," possessing "unalienable rights" and the French Declaration of the Rights of Man and of the Citizen of 1789 proclaimed that "Men are born and remain free and equal in rights." These rights referred to in the latter two documents are universal, meaning, as historian Lynn Hunt explains, "[they apply to] not French men, not white men, not Catholics, but 'men,' which then as now means not just males but also persons, that is, members of the human race. In other words, sometime between 1689 and 1776 rights that had been viewed most often as the rights of a particular people – freeborn Englishmen, for example – were transformed into human rights, universal natural rights, what the French called *les droits de l'homme* or 'the rights of man'" (Hunt 2007: 21–22). In this section I highlight some of the most important and radical changes that were brought about over the course of the eighteenth century, but I also call attention to an equally important continuity: the preservation of many systems of hierarchy and exclusion.

The story of eighteenth-century constitutionalism (in its non-absolutist form) begins in England. The constitutional regime in England resulted from a long process, but the key moment was the Glorious Revolution. This regime – at least as it existed in theory (what happened in practice is another story entirely) – was admired and praised by those inside and outside of England. In particular, admirers of the "English Constitution" noted the ways in which the abuse of government power had been thwarted, from certain institutional arrangements, such as a mixed or balanced constitution or the separation of powers, to the explicit protection of the rights and liberties of individuals. Despite continuing debates over how the system – and structure – might be reformed, the English regime remained both stable and admired.

Interestingly, as much as the English model was admired and as much as people in other countries emulated it and longed for similar institutional changes and specific reforms to be instituted in their own countries (France is the obvious example), the English model appeared to be virtually impossible to generalize. There are at least two main reasons for this: first, there was a specificity inherent in the genesis and development of this model; and second, there was the rejection and devastating critique of the philosophical foundations of this model, namely, its certain conception of the social contract, its perfectionist thinking about politics, and the corresponding shift to an empirical study of constitutions. Both made it nearly impossible for would-be reformers in other countries to agitate for the adoption of something like the English model and the limits on government power and protection for individual rights and liberties that they so wanted.

The English model was grounded in customs, conventions, and traditions that were specific to England. Both the common law and the various political documents – from the Magna Carta to the Petition of Right – provided for the protection of individual rights and liberties, but they provided for those protections to Englishmen qua Englishmen. And certain political events, such as various monarchs agreeing to limits on their power or acknowledging the power of other political bodies – such as Parliament – established limits on what the English government could legitimately do. The Englishman's right to a fair trial was provided by the ongoing development and evolution of English common law and not, for example, a universal right to the same. Everything was specific and indexed to English history. These were not arguments that there was a universal right to, say, a fair trial, or that non-monarchical bodies in general should have real political power and are not beholden to the king no matter what. Thus, the French reformer who wanted the French government to change such that it looked more like the English government could not appeal to the Magna Carta, the Petition of Right, or the King-in-Parliament model.

These specificities alone might have been enough to explain the apparent singularity of the English example. But the Glorious Revolution was not only justified by appeal to the particularities of English history and custom. In fact, a whole complex philosophical apparatus was available for potential use by anyone arguing for limited government, etc. The social contract tradition (with its concomitant conceptions of natural law) as well as the utopianism and perfectionism of Harrington and More, provided more than enough resources for people to argue for drastic reform. Yet, in an ironic twist, some of the strongest admirers of the English model were precisely those whose critiques of contract undercut the philosophical foundations of that model, eschewing the philosophical resources for limited government, protection of individual liberties, and so on, that were on offer. We see this almost paradoxical turn most clearly in Montesquieu, Bentham, and Hume.

Though the idea of a social contract has always faced criticism, the eighteenth century witnessed an especially powerful and organized attack on its very foundations, an attack from which it would never entirely recover. The target of these attacks was not social contract theory in general (which, after all, had a history stretching back to ancient times) but that of the seventeenth century in particular: the contract theories of Grotius, Hobbes, Pufendorf, and primarily Locke – or at least the received or popularized versions of these theories. Despite their differences, these seventeenth-century

theorists all held persons to be naturally free and equal, subject only to that political authority to which they consent. The elements that were seen as most salient were a cluster of ideas about contract and consent that followed from this basic tenet – the idea that government was founded or justified by a contract or that contractual considerations were at the heart of understanding politics, and so forth. The idea that a person's obligation to obey the laws of the state was grounded in contract served to define and limit (or not) that obligation, establish the government's duties to the subjects, and provide constitutional guidelines for the organization of (and possible limitations of) state power.

Of the eighteenth-century critics, Hume offered the most famous attack on social contract discourse, notorious in part for its devastating nature.[9] In both his essay "Of the Original Contract" (1748) and in Book 3 of the *Treatise of Human Nature* (1739–40), Hume disparages the idea that political societies could be understood as originating in some sort of foundational contract. In a nutshell, Hume's point was that the notion of an original contract was historically inaccurate, philosophically incoherent, and ultimately untenable. He claims that his arguments are based on appeals to history, reason, and experience. Hume points out that governments simply were not formed in the way Hobbes and Locke seem to describe – that is, by people living in a "state of nature" coming together to form a contract instituting a political society/government. The story is, of course, more complicated, and while *some* sort of consent might have come into play at some stage for *some* societies, to posit an original contract as the basis for government in general is both underdetermined (if not disproven) by the historical evidence and philosophically unwarranted. Hume does seem to admit that England has some sort of contract between rulers and ruled but takes England to be the exception. Moreover, Hume argues, even if tribal chiefs had exacted some sort of consent from each other or those over whom they held power, this would not be binding on future generations.

The idea that government originated in contract is not only historically inaccurate, Hume concludes, it is philosophically preposterous. Hume systematically dismantles Lockean notions of natural law and right and Hobbesian ideas about the contractual basis for promise-keeping. With regard to the latter, Hume endorses an argument given by Shaftsbury that it makes no sense to say that the duty to keep one's promises is established by a contract – how could a contract have established such a duty if it did not already exist? (See Shaftesbury 1711: 51.) Rather, the best way to understand such things – to the extent that this is even a question worth asking – is in terms of utility and certain sentiments. Social and political institutions are grounded in, justified by, and sustained by their utility and the accompanying "sentiment of approbation" that is felt by people living under peaceful, stable governments.

Hume's conclusions were convincing to and taken up by others as the century progressed. Bentham, at the end of the century, said in his critique of Sir William Blackstone's use of the idea of an original contract: "As to the Original Contract … The stress laid on it formerly, and still, perhaps, by some, is such as renders it an object not undeserving of attention. I was in hopes, however, till I observed the notice taken of it by our author, that this chimera had been effectively demolished by Mr Hume. I think we hear not so much of it now as formerly. The indestructible prerogatives of mankind have no need to be supported upon the sandy foundation

of a fiction" (Bentham 1776: 153–54). Bentham's words are a testament to how persuasive Hume was to those who were amenable to the position.

Bentham also adopts Hume's eagerness to demolish the idea that political obligation cannot be founded in contract but rather is a result of habit and utility. Because governments provide peace, security, and the possibility of commodious living, it is in our interests to give them our allegiance. It is their utility also that gives them legitimacy, not some notion that we "agreed" to be ruled. The origin of political societies does not emerge as the result of some sort of contract or promise, rather their origins must be cashed out in terms of what he calls "habits of obedience." We can hear Hume's voice when Bentham makes claims such as, "When a number of persons (whom we may style *subjects*) are supposed to be in the habit of paying *obedience* to a person, or an assemblage of persons, of a known and certain description (whom we may call *governor* or *governors*) such persons altogether (*subjects* and *governors*) are said to be in a state of *political* SOCIETY" (Bentham 1776: 137). Note that this quotation identifies two separate issues: the best explanation for the origin of political societies, on the one hand, and the philosophical or conceptual derivation of political obligation, on the other. Bentham and Hume reject both contractarian explanations for – and justifications of – the origin of political societies, political authority, and political obligation.

Though, as I will discuss shortly, social contract theory was resuscitated at several points over the course of the eighteenth century, newer versions were equally unable to satisfy their critics. Like Bentham, Burke also rejects the contractarian imagery but without the accompanying appeal to utility (see *Reflections on the Revolution in France* [1790]). Notice that being an outspoken critic of social contract theory was not correlated with the rest of one's political theory or commitments. Bentham was a reformer while Burke, and to a lesser extent Hume, had more conservative leanings.

The philosophical attack on social contract theory was not unconnected to a methodological turn we find in the eighteenth century. Montesquieu and Hume were both engaged in what we might call a proto-sociological project – that is, in trying to account for the general causes of different kinds of societies. The perfectionism and utopianism embedded in the question that preoccupied many seventeenth-century theorists – namely, what was the *ideal* form of government? – gave way to a focus on questions about how certain kinds of governments arose and flourished in certain kinds of conditions, and not others. This was largely an empirical project, with discussion of population size, climate, soil conditions, and the like. Indeed, it is not insignificant that, while Hume takes it upon himself to argue explicitly and systematically against the contractarian-origin theory of government, Montesquieu simply ignores it – a telling omission.

This new found empirical preoccupation was not without a normative component. Montesquieu still thought that liberty was best protected under a system like that of England. That is, these new empirically minded theorists were not committed to – or trying to argue for – the claim that all regimes were created equal. A well-functioning monarchy was not just as good as a well-functioning republic; that is, they still wanted to make moral distinctions between kinds of regimes. So, although this new approach was not without a normative component (its proponents could distinguish between well or badly functioning monarchies, on the one hand, and better and worse republics, on the other) their analysis of extant regimes, both past and

present, simply did not lend itself easily to calls for radical reform, let alone for revolution. For example, it did not lend itself to the French being able to argue for the institution of a more English-like model of separation of powers. The more contrasting one does between various differences in history, geography, etc., the less one will be inclined to say there is anything like a single model that is even generally *applicable*, let alone generalizably *best*.

Thus, there were three related reasons why the English model could not be adopted easily by those agitating for such reforms in other countries. First, it was based on an appeal to specifically *English* history, traditions, and conventions that by their very nature did not generalize. Second, the criticisms of social contract theory deprived people of the use of potentially generalizable notions linking consent and legitimacy. Third, it was followed by a move toward empirical/sociological study of governments and the corresponding rejection of utopian or perfectionist thinking of other potentially generalizable grounds for theorizing reform. It is hardly unreasonable to situate the differences between the philosophical foundations for the French and English Revolutions in terms of these three factors. And certainly, whatever the ultimate causes might be, there was a marked difference between the two. Given how thoroughly the concept of contract had been critiqued and demolished by attention to *specificity* (whether practically, in aborted attempts to generalize the English model, or philosophically, in the proto-sociology of Hume and Montesquieu), it is hardly surprising that, when contract theory enjoyed a brief revival, in the latter half of the century, the reborn contract focused not on the specific but on the *universal*. The "move to universalization" is evident both in the American and French revolutionary documents and in the revised social contract theory, especially as the latter was articulated by Kant – who, in turn, was influenced greatly by Rousseau.

While there were defenders of contractarianism in France before him, Rousseau unquestionably occupies the foreground in contract theory's revival in the 1760s. He was the first to resuscitate and re-imagine the *idea* of a social contract in such a way as to form a new tradition of contractarianism. What is particularly striking about this new tradition is how easily the contract itself fades into the background, overtaken by the decidedly more abstract concepts it is intended to represent – namely, the natural freedom and equality of those who partake in the social contract. The concept of *contracting* was limited to the justification for political obligation in general, and not the structure and nature of particular institutions. Furthermore, Rousseau also introduced the notion of *goodness* alongside the concept of *will*, as philosophical foundation and justification for political legitimacy. Thus, political institutions were explained and justified in terms of political virtues, especially republicanism. Not surprisingly, given the complexity of Rousseau's contractarianism – if, indeed, the term is appropriate, given the limited and secondary role assigned to contract – there remain debates about where (if anywhere) he belongs in the history of the contract tradition.

The universalism already evident in Rousseau becomes most striking in the political philosophy of Kant. For Kant, influenced by Rousseau, the social contract is "an ideal of reason." Social contracts and the idea of general will are, for Kant, arguably nothing more than methods for capturing and illustrating abstract moral claims: respect for persons, and the idea of a kingdom of ends. Ultimately, it is the moral claims themselves that justify and legitimize a political regime, and from which rights

are derived. (See Kuehn's Chapter 35 on Kant and Hanley's Chapter 34 on Rousseau, for a detailed examination of Kant's and Rousseau's views.)

Whether we want ultimately to describe the political philosophies of Kant and Rousseau as contractarian or not, there is no doubt that the eighteenth century saw a rise in a universalist discourse, one that banked on the idea that there were certain rights which human beings have *as human beings*. They held these rights by virtue of having reason or some other characteristic but the key is that it was not tied to their status as, say, Englishmen. Moreover, these rights served as a limitation on the justifiable use of state power and the motivation for certain reforms.

Given the importance of universal human rights discourse for the twentieth century, it is easy for contemporary eyes to see the changes wrought to constitutionalism and contract theory in the eighteenth century as an obvious improvement: patchwork particularist specificity replaced by strongly normative univeralist discourse. But to assume as much is to overlook an important way in which eighteenth-century univeralism is false universalism. It excluded women and other groups including Protestants, Jews, people of color, actors, executioners, and many non-property-owning white males from political membership, and this exclusion was noticed and met with charges of hypocrisy and calls for inclusion. A number of important themes emerge from a consideration of the various ways in which people (mostly women but some noteworthy men) argued for women's equality or the improvement in the status of women.

Most notably, ideas about natural sex difference were retained by people making proto-feminist arguments. For example, in his 1790 essay, "Sur l'admission des femmes au droit au cité" ("On Giving Women the Right of Citizenship") Condorcet famously champions the rights of women, even while he admits that they might not be as suitable as men to serve as elected officials. His argument for the latter claim rests on an appeal to what is "natural" for women. He says, "It is natural for a woman to nurse her children and for her to look after them when they are young. Forced by this to stay at home, and weaker than men, it is also natural that she lead a more secluded, more domestic life. Women therefore fall into the same category as men who need to work for several hours a day. This may be a reason not to elect them, but it cannot form the basis of a legal exclusion" (Condorcet 1790: 338).

Relatedly, there was a marked emphasis put on the effects of socialization and the corresponding demand for improvement in women's education. Such claims had become relatively commonplace by the middle of the eighteenth century and they were advanced even by those who did not advocate for women's emancipation. But notice how, for example, Condorcet links claims about women's nature with a demand for her inclusion in political life:

> It has been said that, despite being better than men, gentler, more sensitive and less subject to the vices of egoism and hard-heartedness, women have no real idea of justice and follow their feelings rather than their conscience. There is more truth in this observation, but it still proves nothing since this difference is caused, not by nature, but by education and society which accustom women, not to the idea of justice, but to that of decency. They have no experience of business, or of any matter which is decided by positive laws or rigorous principles of justice; the areas which concern them and

> where they are active are precisely those which are governed by feelings and natural decency. It is quite unfair to justify continuing to refuse women the enjoyment of their natural rights on grounds which are plausible only precisely because they do not enjoy these rights.
>
> (Condorcet 1790: 337)

Even in the work of Olympe de Gouges, we see claims for equality alongside reaffirmation of difference. Outraged that the French Revolution did not lead to a recognition of women's rights, de Gouges published the *Déclaration des droits de la femme et de la citoyenne* (*Declaration of the Rights of Women and Citizens*) in 1791. Modeled on the 1789 "Declaration of the Rights of Man and of the Citizen" ratified by the National Assembly, de Gouges's Declaration echoed the same language and purposefully extended it to women. But while de Gouges asserted woman's equal capacity for rationality and morality, she also invoked the feminine virtues of emotion and feeling and their role as mothers. The Declaration of the Rights of Women and Citizens follows the seventeen articles of the Declaration of the Rights of Man and of the Citizen and has been aptly described by Camille Naish as "almost a parody … of the original document" (1991: 137). The first article of the Declaration of the Rights of Man and of the Citizen proclaims that: "Men are born and remain free and equal in rights. Social distinctions may be based only on common utility." The first article of Declaration of the Rights of Women and Citizens states that "Woman is born free and remains equal in rights to man. Social distinctions can be founded only on general utility." De Gouges also points out that women were fully punishable under French law, yet denied equal legal rights, declaring in article 10 that, "Woman has the right to mount the scaffold; she should likewise have the right to speak in public" (Cohen and Fermon ed., de Gouges 1791: 357). Unfortunately, de Gouges was subject to the former fate and not the latter. She was arrested and sent to the guillotine in 1793. Women were not granted the rights she enumerated until the adoption of the 1946 Constitution of the French Fourth Republic.

Conclusion

The eighteenth century saw a number of important developments on the topic of constitutions and social contracts. For the first time, the term "constitution" gained real traction in political theorizing – though it was used equivocally, and only took on a meaning familiar to contemporary American theorists in the last quarter of the century. Over the course of the century, constitutional theorizing in Europe was transformed from an approach that emphasized the particularities and specificities of states to a universalistic discourse of human rights. The notion of a social contract underwent a similarly major transformation: it withered under the critical scrutiny of the first part of the eighteenth century, and was then resuscitated by the likes of Kant and Rousseau. But in its new guise, it embodied characteristics that were importantly different from the seventeenth-century idea of the social contract that it replaced. Even though the social contract discourse also headed toward universalistic rights discourse, arguably the universalistic rights discourse took the place of more traditionally contractualist language in determining the legitimacy of states.

The move toward universalism is one of the most distinctive features of the development of political thought in the eighteenth century. It is also arguably the most important part of its legacy. But while such ideas about universalism and abstract human rights carried the crucial promises of liberation and democracy, those promises remained unfulfilled (even within prominent articulations of the new universalism). The philosophies of Kant and Rousseau as well as the French and American constitutional doctrines promised an equality (Kant 1784, 1793, 1795, 1797; Rousseau 1755a, 1755b, 1762a, 1762b, 1770/1771) that they simultaneously denied. They professed ideals of equality and liberty for all, while at the same time excluding more than half the population. The inconsistencies, contradictions, and hypocrisies of this promising, but ultimately false, universalism were quickly noticed and exposed. Thus, the eighteenth century ended on a contradictory and even tragic note – at least in the case of events in France.

A modern-day universalist may well be discomforted by looking squarely at the origins of these admittedly powerful deeds: their original proponents appear unable – and indeed unwilling – to face the moral implications of what their theories had, so to speak, uncorked. But the genie could not be put back into the bottle, and the torch of expanding, universal rights was taken up in Britain (and eventually elsewhere), where it spawned a movement for full equality that continued for the next two centuries, and – insofar as full substantive equality for *all* persons as potential rights-bearers remains a distant horizon – still continues today in discourses of human rights, civil liberties, and feminism. But the developments of the eighteenth century get credit for setting those wheels in motion and ensuring that the subsequent fight for the fulfillment of the promise of liberty and equality for all would be undertaken with powerful and substantial conceptual resources. The uses to which these ideas and arguments have been put by subsequent generations, namely, to ensure that women and minorities in Western countries would enjoy the rights that we do today, would make de Gouges, Condorcet, and the like smile – even if, on the face of Kant (1784: Ak VIII, 35) and Rousseau, that smile might resemble a grimace.[10]

Notes

1 As Patrick Riley (2006: 347) puts it: "it is generally agreed that the golden age of social contract theory was the period 1650–1800, beginning with Hobbes's *Leviathan* (1651) and ending with Kant's *Rechtslehre* (*Metaphysics of Morals*, 1797)." Notice how reminiscent this is of Whelan's characterization of roughly the same time period with regard to constitutionalism; both even refer to the period as the "golden age." However, the story is more complicated with social contract theory. Contemporary scholars who identify as contractarians – either in moral philosophy or in political philosophy (or both) – tend to be more careful about characterizing their historical heritage. There are a number of possible explanations for this. For example, contractarianism as a philosophical position is nowadays one among many competing theories of its kind, unlike constitutionalism, which is really the only game in town.

2 As David Lieberman (2006: 342) explains, "Criminal justice, Delolme revealingly reported at the outset of three chapters devoted to the topic, was strictly not 'part of the powers which are properly constitutional'; yet an area of law that so concerned 'the security of individuals' and 'the power of the state' had necessarily to be considered."

3 Thanks to Hugh Baxter for this point.

4 In England in the 1640s and 50s, there were two short-lived codified documents – the "Instrument of Government" which was replaced by the "Humble Petition and Advice." But neither was thought of as a "constitution" and Stourzh (1988: 43) makes it clear that it was not until the Glorious Revolution that "the golden age of the 'British Constitution' must be dated."
5 We can distinguish defenses of absolutism in general, as a theory of sovereignty, from defenses of a particular kind of absolutist government, namely, absolute monarchy. Because the debates over absolutism of the time virtually always focused on absolutism in its monarchical form (as opposed to absolutism as a general theory of sovereignty), my discussion here focuses on absolute monarchy.
6 Understood in this way, of course, the idea of a constitutional regime is tautological; as Waluchow (2001) puts it "all states have constitutions." He contrasts the minimal sense with the rich sense saying, "Constitutionalism in this richer sense of the term is the idea that government can/should be limited in its powers and that its authority depends on its observing these limitations." Waluchow also draws on this distinction in his book, *A Common Law Theory of Judicial Review: The Living Tree* (2007). The distinction seems to have originated in Raz (1998: 153–54), who talks about the difference between a "thick" and a "thin" sense of the word.
7 This should not be surprising coming from Montesquieu, given his project and methodological commitments. One of the distinctive things about the eighteenth century was the focus on empirical constitutions as the centerpiece of political theory – at least, or especially, in the first half of the century. That there existed absolute monarchies (or close to it) made it natural for Montesquieu to discuss them. He was interested in the sociological or explanatory project of providing an account of how and why different kinds of government arose and/or flourished in different kinds of circumstances. In this vein, he sought to explain how the various kinds or forms of rule could be improved or corrupted. I return to this issue in the third section.
8 For an excellent overview of this, see Sommerville (1996).
9 There were criticisms of social contract theory from many sides, camps, and directions – divine right theorists such as Sir Robert Filmer, of course, were virulent critics of social contract theory, especially the idea that people are born free and equal. And there were non-contractarian theories of government on offer – Adam Smith, for example, gives an account of politics that appeals to accord with the laws of commerce. Smith and others were not especially interested in explicitly arguing for the untenability of social contract theory; however, by providing a viable alternative, such theories could be understood as critical of social contract in some way.
10 For both critical and generous discussions of Rousseau and Kant from a feminist perspective, see the essays in Lange (2002) and Schott (1997).

References

Acherley, R. (1727) *The Britannic Constitution: or, The Fundamental Form of Government in Britain. Demonstrating, the Original Contract Entred into by King and People, According to the Primary Institutions Thereof, in this Nation. Wherein is Proved, that the Placing on the Throne King William III. was the Natural Fruit and Effect of the Original Constitution. And, that the Succession to this Crown, Establish'd in the Present Protestant Heirs is de Jure, and Justify'd, by the Fundamental Laws of Great Britain. And Many Important Original Powers and Privileges, of Both Houses of Parliament, are Exhibited*. London: Bettesworth, Osborn, and Longman.

Artz, F. (1968) *The Enlightenment in France*. Kent: Kent State University Press.

Beccaria, C. (1764) *Dei delitti e delle pene* [*On Crimes and Punishments*]. D. Young (trans.). Indianapolis: Hackett, 1986.

Bentham, J. (1776) *A Fragment on Government*. F. C. Montague (ed.). Oxford: Clarendon Press, 1891.

Bolingbroke, V. (1733) *The works of Lord Bolingbroke: With a life, prepared expressly for this edition, containing additional information relative to his personal and public character, selected from the best authorities*. Philadelphia: Carey & Hart, 1841.

Bryce, J. (1901) *Studies in History and Jurisprudence*. New York: Books for Libraries Press, v. 1.
Condorcet, J.-A.-N. C., Marquis de (1790) "Sur l'admission des femmes au droit au cite" ["On Giving Women the Right of Citizenship"]. In I. McLean and F. Hewitt (trans. and eds.) *Condorcet: Foundations of Social Choice and Political Theory*. Cheltenham: Edward Elgar, 1994, 335–40.
de Gouges, O. (1791) *Déclaration des droits de la femme et de la citoyenne* [*Declaration of the Rights of Women and Citizens*]. In M. Cohen and N. Fermon (eds.) *Princeton Readings in Political Thought: Essential Texts since Plato*. Princeton: Princeton University Press, 1996, 356–61.
Delolme, J. L. (1771) *The Constitution of England; or, An Account of the English Government*. D. Lieberman (ed.). Indianapolis: Liberty Fund, 2007.
Goldie, M. (2006) "The English System of Liberty." In M. Goldie and R. Wokler (eds.) *The Cambridge History of Eighteenth-Century Political Thought*. Cambridge: Cambridge University Press, 40–78.
Hume, D. (1739–40) *A Treatise of Human Nature*. Oxford: Clarendon Press, 1978/2007.
——. (1748) "Of the Original Contract." In *Essays Moral, Political, and Literary*. E. F. Miller (ed.). Indianapolis: Liberty Press, 1985.
Hunt, L. (2007) *Inventing Human Rights: A History*. New York: W. W. Norton.
Kaiser, T. E. (1983) "The Abbé de Saint-Pierre, Public Opinion and the Reconstitution of the French Monarchy." *Journal of Modern History* 55 (4): 618–43.
Kant. I. (1784) "Beantwortung der Frage: Was ist Aufklärung?" ["An Answer to the Question: What is Enlightenment?"]. Ak VIII, 35–42. In J. Schmidt (ed.) *What Is Enlightenment?: Eighteenth-Century Answers and Twentieth-Century Questions*. Berkeley: University of California Press, 1996, 58–63.
——. (1793) "Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis" ["On the Common Saying: 'This May Be True in Theory, but It Does not Apply in Practice'"]. Ak VIII, 275–313. In H. S. Reiss (ed.) and H. B. Nisbet (trans.) *Political Writings*. Cambridge: Cambridge University Press, 1970, 61–92.
——. (1795) "Zum ewigen Frieden: Ein philosophischer Entwurf" ["Perpetual Peace: A Philosophical Sketch"]. Ak VIII, 343–86. In H. S. Reiss (ed.) *Political Writings*. Cambridge: Cambridge University Press, 1970, 93–120.
——. (1797) *Die Metaphysik der Sitten* [*The Metaphysics of Morals*]. Ak VI, 205–493. M. Gregor (trans. and ed.). Cambridge: Cambridge University Press, 1996.
Lange, L. (ed.) (2002) *Feminist Interpretations of Jean-Jacques Rousseau*. University Park: Pennsylvania State University Press.
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*. Cambridge: Cambridge University Press, 317–46.
Merrick, J. (1991) "Patriarchalism and Constitutionalism in Eighteenth-Century Parliamentary Discourse." *Studies in Eighteenth-Century Culture* 20: 317–30.
Montesquieu, C. de (1748) *De L'esprit des lois* [*The Spirit of the Laws*]. M. Cohler, B. Miller, and H. Stone (eds. and trans.). Cambridge: Cambridge University Press, 1989.
Naish, C. (1991) *Death Comes to the Maiden: Sex and Execution 1431–1933*. London: Routledge.
Paine, T. (1791) *Rights of Man, Common Sense, and Other Political Writings*. Oxford: Oxford University Press, 1995.
Raz, J. (1998) "On the Authority and Interpretation of Constitutions: Some Preliminaries." In L. Alexander (ed.) *Constitutionalism: Philosophical Foundations*. Cambridge: Cambridge University Press, 152–93.
Riley, P. (2006) "Social Contract Theory and Its Critics." In M. Goldie and R. Wokler (eds.) *The Cambridge History of Eighteenth-Century Political Thought*. Cambridge: Cambridge University Press, 347–75.

Robinson, J., and C. Beard. (1908) *Readings in Modern Europe History: A collection of extracts from the sources chosen with the purpose of illustrating some of the chief phases of the development of Europe during the last two hundred years*, v. 1. Boston: Ginn & Company.

Rousseau, J. J. (1755a) *Discours sur l'origine et les fondemens de l'inégalité parmi les hommes* [*Discourse on the Origin and Foundations of Inequality among Men*]. In V. Gourevitch (trans. and ed.) *"The Discourses" and Other Early Political Writings*. Cambridge: Cambridge University Press, 1997.

——. (1755b) *Economie politique* [*Discourse on Political Economy*]. In V. Gourevitch (trans. and ed.) *"The Social Contract" and Other Later Political Writings*. Cambridge: Cambridge University Press, 1997.

——. (1762a) *Émile ou De l'éducation* [*Emile: or, On Education*]. A. Bloom (trans.). New York: Basic Books, 1979.

——. (1762b) *Du contrat social* [*The Social Contract*]. In V. Gourevitch (trans. and ed.) *"The Social Contract" and Other Later Political Writings*. Cambridge: Cambridge University Press, 1997.

——. (1770/1771) *Considérations sur le gouvernement de Pologne* [*Considerations on the Government of Poland and its Proposed Reformation*]. In F. Watkins (ed. and trans.) *Political Writings*. Madison: University of Wisconsin Press, 1986.

Schott, R. M. (ed.) (1997) *Feminist Interpretations of Kant*. University Park: Pennsylvania State University Press.

Shaftesbury, A. A. Cooper, Third Earl (1711) *Characteristics of Men, Manners, Opinions, Times*. D. D. Uyl (ed.). Indianapolis: Liberty Fund, 2001.

Sommerville, J. P. (1996) "Absolutism and Royalism." In J. H. Burns and M. Goldie (eds.) *The Cambridge History of Political Thought, 1400–1700*. Cambridge: Cambridge University Press, 347–73.

Stourzh, G. (1988) "*Constitution*: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century." In T. Ball and J. G. A. Pocock (eds.) *Conceptual Change and the Constitution*. Lawrence: University of Kansas Press, 35–54.

Ten, C. L. (1995) "Constitutionalism and the Rule of Law." In R. E. Goodin and P. Pettit (eds.) *A Companion to Contemporary Political Philosophy*. Malden: Blackwell, 394–403.

Waluchow, W. (2001) "Constitutionalism." In E. N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/entries/constitutionalism>.

——. (2007) *A Common Law Theory of Judicial Review: The Living Tree*. Cambridge: Cambridge University Press.

Whelan, F. (2004) *Hume and Machiavelli: Political Realism and Liberal Thought*. Oxford: Lexington.

Further reading

B. Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991); C. Bertram, *Rousseau and "The Social Contract"* (London: Routledge, 2004); K. Flikschuh, *Kant and Modern Political Philosophy* (New York: Cambridge University Press, 2000); P. Guyer, *Kant's System of Nature and Freedom* (Oxford: Oxford University Press, 2005); L. Lange (ed.) *Feminist Interpretations of Jean-Jacques Rousseau* (University Park: Pennsylvania State University Press, 2002); C. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947); S. M. Okin, *Women in Western Political Thought* (Princeton: Princeton University Press, 1979); C. Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988); J. Rawls, *Lectures on the History of Political Philosophy*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 2007); R. M. Schott (ed.) *Feminist Interpretations of Kant* (University Park: Pennsylvania State University Press, 1997); J. Shklar, *Montesquieu* (Oxford: Oxford University Press, 1987).