

BLACKSTONE AND THE 'THEORETICAL PERFECTION' OF ENGLISH LAW IN THE REIGN OF CHARLES II

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In the final chapter of the final volume of his magisterial *Commentaries on the laws of England*, Sir William Blackstone sketched the 'rise, progress, and gradual improvements of the laws of England'. Nearing the end of that chapter, he laid it down as his considered opinion 'that the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by law, in the reign of king Charles the second'.¹ Now this is not a self-evident truth, for that reign is more likely to conjure up in our minds (along with Nell Gwynn and other not strictly legal relationships) unhappy visions of *quo warranto* proceedings against borough charters; the perjuries of Titus Oates; the double jeopardy of Stephen College; and Sir William Scroggs and Sir George Jeffreys blaspheming their undignified and brutal way through the pages of the *State trials*. Why should Blackstone have felt impelled to say such a patently silly thing?

The *Commentaries* make up a very long book, and we are told that Blackstone wrote with a bottle of port on the table, whereby he 'found his mind invigorated and supported in the fatigue of his great Work';² but to stop there would leave us with a rather short article. Besides, Blackstone had made it clear that he was aware of the dark side of the Restoration era:

It is far from my intention to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestible is this; that *by the law*, as it then stood, notwithstanding some invidious, nay dangerous, branches of the prerogative have since been lopped off, and the rest more clearly defined, the people had as large a portion of real liberty, as is consistent with a state of society.

He then reinforced the original dictum in an emphatic footnote:

The point of time at which I would choose to fix this *theoretical* perfection of our public law, is the year 1679; after the *habeas corpus* act was passed, and that for licensing the

¹ Sir William Blackstone, *Commentaries on the laws of England* (hereafter cited as *Comm.*) (12th edn, Philadelphia, Pa., 1825), IV, 439. Page references are to a system which became conventional as a means of providing uniformity among the many posthumous editions.

² James Boswell, *The life of Samuel Johnson, LL.D.*, s.v. April 15, 1781.

press had expired; though the years which immediately followed it were times of great *practical* oppression.³

Sir Ernest Barker noticed this passage some years ago and attributed it to Blackstone's notorious conservatism and admiration for the *status quo*. I will not here attempt to deny him these qualities – Dicey long ago made his name synonymous with 'old toryism' – but although he is not the only eighteenth-century conservative, he appears to be unique among them in his admiration for the 1670s.⁴ Barker posed the obvious eighteenth-century response to Blackstone's dictum: 'An ardent Whig might naturally interject, "But what of the year 1688?"' He imagines Blackstone's reply: "'You are forgetting, Sir," he would say (if one may paraphrase his argument) . . . the great reforms which were quietly achieved by the lawyers in the reign of Charles II.'" ⁵ But we may *not* so paraphrase his argument; if we study his dictum in its context, it is clear that when he says the 'constitution' and 'public law' were perfected, he means much more than mere technical reforms. He had made this point two pages earlier:

though the monarch, in whose person the royal government was restored, and with it our ancient constitution, deserves no commendation from posterity, yet in his reign, (wicked, sanguinary, and turbulent as it was) the concurrence of happy circumstances was such, that from thence we may date not only the reestablishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, since its total abolition at the conquest.⁶

This remarkable claim is founded upon two particular statutes, 12 Car. II, c. 24, which abolished feudal tenures ('slavish tenures, the badge of foreign domination'), and 31 Car. II, c. 2, the *habeas corpus* Act. 'These two statutes with regard to our property and persons, form a second *magna carta*, as beneficial and effectual as that of Running-Mead.' These statutes were anything but quiet technical reforms, and the importance Blackstone attaches to them here is confirmed by other references throughout the book. In what way, then, did they 'perfect' English liberty and public law?⁷

³ IV *Comm.* 439 and n.

⁴ Sir Ernest Barker, 'Blackstone on the British constitution', *Reflections on government* (Oxford, 2nd edn, 1953), 133–4; A. V. Dicey, *Lectures on the relation between law and public opinion in England during the nineteenth century* (London, 2nd edn, 1914), 62. Blackstone's own politics are those of the Oxford University and 'country' toryism of the 1740s and 1750s. He was in no sense a seventeenth-century cavalier: his references to the royalist apologists of the Restoration era are uniformly hostile, and there is no sign that he was influenced by – if indeed he had read – David Hume's *History*.

⁵ Barker, p. 134.

⁶ IV *Comm.* 438.

⁷ Cf. II *Comm.* 77, where 12 Car. II, c. 24, is 'a greater acquisition to the civil property of this kingdom than even *magna carta* itself'; I *Comm.* 137, where the Habeas Corpus Act is 'that second *magna charta*, and stable bulwark of our liberties'. The perfection that Blackstone claimed to find in the Restoration era must influence our interpretation of his notorious assertions that the law and constitution of his own day were perfect – as at I *Comm.* 172 and n., where that perfection too is defined as theoretical rather than practical and accompanied by a good many faults in detail. Moving the origins of this perfection back before 1688 changes the nature of our exegetical problem: either Blackstone was saying something really spectacularly foolish, or he meant by 'perfection' something different from, and more carefully thought out than, the complacent Revolution whiggism that most writers, even recent ones, attribute to him.

The reference to 'property and persons' suggests an answer, which is confirmed in another part of the book. In the notoriously illiberal and intolerant chapter 'Of offences against God and religion' (tracing the growth of the Englishman's freedom to be an episcopalian), he discussed the statute 29 Car. II, c. 9, which abolished the writ *de haeretico comburendo*, and once again praised the perfection of liberty in the reign of Charles II: 'in one and the same reign, our lands were delivered from the slavery of military tenures; our bodies from arbitrary imprisonment by the *habeas corpus* Act; and our minds from the tyranny of superstitious bigotry'.⁸ This last appears to be in praise of intellectual liberty, but it is something more: as Blackstone saw it, the abolition of *de haeretico comburendo* meant the end of the last means by which an Englishman could be put to death for an offence not strictly defined by law.⁹ If we attach this importance to the statute, then Blackstone's praise of the reign becomes comprehensible: it perfected English public law by providing security for that familiar trinity of English rights, life, liberty, and property: those 'absolute rights of every Englishman' which are 'founded on nature and reason'; which make the Englishman 'perfectly free'; and the preservation of which is the 'direct end' of the English constitution.¹⁰

Grant that this was so in theory; yet the ejected fellows of Magdalen, or the victims of the Bloody Assize, or the imprisoned seven bishops, might have felt that theoretical perfection was in practice somewhat cheerless. Remedies for such 'practical oppressions' had to wait upon the Revolution. Let us ask the ardent Whig's question again, and press a little harder for an answer than Barker did: what of the year 1688? Blackstone's description of the Revolution settlement lists the familiar acts – the Bill of Rights, the Triennial Act, the other great constitutional statutes – and characterizes them in these terms: they

asserted our liberties in more clear and emphatical terms . . . confirmed, and exemplified, the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution . . . maintained the superiority of the laws above the king.¹¹

Civil and political liberty, which had been 'thoroughly and completely regained' in the reign of Charles II, were 'acknowledged and defined' at the Revolution.¹² James II's abuse of his authority did not prove that the constitutional defences of liberty were inadequate under the old dispensation; the Revolution itself was proof that the members of society already had 'sufficient power, residing in their own hands, to assert and preserve that

⁸ IV *Comm.* 49. For the dispute over this chapter, see *The palladium of conscience* (Philadelphia, Pa., 1773); Sir William Holdsworth, *A history of English law* (Boston, Mass., 1938), XII, 713–14.

⁹ IV *Comm.* 42; cf. I *Comm.* 45–6. The emphasis here is upon certainty, which is central to Blackstone's conception of freedom under law: 'whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and . . . whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it' (I *Comm.* 133).

¹⁰ I *Comm.* 127, 144–5.

¹¹ IV *Comm.* 440.

¹² IV *Comm.* 442–3; cf. I *Comm.* 213: the Revolution saw 'the bounds of prerogative and liberty better defined . . . the rights of the subject more explicitly guarded'.

liberty, if invaded by the royal prerogative'. The Revolution defined and clarified liberty, but did not enlarge or perfect it, for 'the people' already had 'as large a portion of real liberty, as is consistent with a state of society'. If 1688 had done more, it would have done too much.¹³

Let us ask, what – as we read these passages – did *not* happen in 1688? Life, liberty, and property were not set free. No fundamental constitutional change took place. The original contract was not broken. Society was not dissolved, and its members did not sit down together to create a revolutionary new one based on natural law. In short, the gospel according to John Locke is apocryphal. These are not casual consequences of Blackstone's doctrine; I think they are the reason for the doctrine. The reign of Charles II restored 'our ancient constitution' and brought 'the complete restitution of English liberty, for the first time, since its total abolition at the conquest', so that 1688 need not.¹⁴ The moving spirits of the Revolution had themselves

avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of king James amounted to an *endeavour* to subvert the constitution; and not to an actual subversion, or total dissolution of the government, according to the principles of Mr Locke; which would have reduced the society almost to a state of nature . . .¹⁵

There was no need for the Revolution to resort to 'wild extremes' because the great Restoration statutes had already completed

the work of our ancestors for generations, to redeem themselves and their posterity into that state of liberty, which we now enjoy . . . a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman.¹⁶

In this repeated use of the term 'ancient constitution', readers of J. G. A. Pocock's *The ancient constitution and the feudal law* will find Blackstone apparently locating himself within one of the major currents in seventeenth-century historical thought – ironically, one that had come under serious attack in the reign of Charles II. The dominant myth of seventeenth-century constitutionalism, most thoroughly articulated by Sir Edward Coke, that the English constitution and laws were immemorial, antedating the authority of kings, had been subjected to devastating historical criticism by Sir Robert Filmer and later (following Sir Henry Spelman's demonstration that the constitution and laws were largely feudal in origin and therefore later than the coming of the Norman kings) demolished by the powerful royalist propagandist Robert Brady.¹⁷ The increasingly apparent inadequacy of the 'ancient constitution' as a historical justification of English liberties may have been the reason for Locke's attempt to replace it with a purely philosophical theory of liberty.¹⁸ Locke's approach, however, found little favour at the time of its publication and only began to

¹³ IV *Comm.* 440–1. In some ways the Revolution and its consequences *did* go too far in altering the balance of the constitution (I *Comm.* 213, 336–7); but the greater danger was in the false conclusions which might be drawn from it about the legitimacy of revolution (I *Comm.* 213–14).

¹⁴ IV *Comm.* 438.

¹⁵ I *Comm.* 213.

¹⁶ IV *Comm.* 420.

¹⁷ J. G. A. Pocock, *The ancient constitution and the feudal law* (Cambridge, 1957), chapters vi–viii.

¹⁸ John Dunn, *The political thought of John Locke* (Cambridge, 1969), p. 101.

come into its own two generations later. The Revolution allowed the triumph, instead, of a debased version of the 'ancient constitution' in which liberties were 'gothick' imports; in particular, of William Petyt's doctrine that parliament had originated in the Anglo-Saxon *witenagemot*, so that parliamentary supremacy, rather than the common law, became the basis of the ancient constitution and rendered irrelevant all uncomfortable questions about the origins of particular laws. The entire problem of origins became secondary, since the Revolution had provided a satisfactory basis for modern liberties and the new coronation oath had redefined the 'original contract' beyond ambiguity or doubt; the definition of liberties by appeal to the distant past was no longer necessary. Precise and rigorous historical argument on Spelmanist lines smacked of pedantry or enthusiasm, not to mention absolutism.¹⁹

At first Blackstone, with his encomiums upon gothic liberties and the 'mighty genius' of King Alfred, his insistence on the antiquity of parliament and his quaint denial that there was, legally speaking, any such thing as a Norman Conquest, appears to reproduce this shopworn version of the ancient constitution; but on a closer look his approach is a remarkable departure from it. In the first place, since he denied that what had happened in 1688 was of fundamental importance, he could hardly use the Revolution as a device to avoid serious historical argument. The constitution had been perfected in the reign of Charles II as the culmination of a historical process, the restoration of ancient liberties; the exact nature and historical development of those liberties therefore became a matter of pressing importance.²⁰ In the second place, Blackstone was too good an historian to rest content with the bromides of Petyt and Bolingbroke. He had read Spelman carefully and had absorbed much of his teaching on the feudal origins of English law; he had also read Sir Matthew Hale and learned from him that English law was the product of a long and complex process of historical change. Finally, he had studied Montesquieu (*The spirit of the laws* was a new and undigested book in England when Blackstone began his lectures); and instead of justifying the ancient constitution merely on the grounds that it was ancient, he insisted that it had survived from antiquity because it was both rational and functional.²¹ His argument can be summarized as follows: there is no contradiction between the ancient constitution and the feudal law. The ancient constitution *is* feudal; early Germanic society in England, as on the continent, was essentially feudal in structure as well as libertarian in spirit. This early feudalism was by no means despotic; feudalism was 'originally intended as a law of liberty'.²² What

¹⁹ Pocock, chapter x; David Douglas, *English scholars, 1660-1730* (London, 2nd edn, 1951), pp. 272-84.

²⁰ I *Comm.* 35; II *Comm.* 44.

²¹ *The spirit of the laws* was first published in English in Thomas Nugent's translation in 1750; Blackstone began his lectures at Oxford in 1753, although he did not become Vinerian Professor until 1758.

²² IV *Comm.* 413; cf. I *Comm.* 238, 'The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe; though gradually driven out and overborne, by violence and chicane, in most of the kingdoms on the continent.' The 'language of our ancient constitution and laws' was that (he paraphrases Bracton) '*rex debet esse sub lege, quia lex facit regem*' (239); this 'feudal' principle remained legally unchanged by the Norman Conquest.

happened after 1066 was not the importation but the perversion of feudalism: 'good' English feudalism was supplanted by a 'bad' Norman version. The ancient feudal constitution contained the origins of English liberties and also of the mechanisms by which, in Montesquieu's analysis, those liberties had been preserved. Properly understood, it was a rational structure which made sense in terms of modern political science. Blackstone appears to be the first writer to have attempted a historical account of the English constitution based upon such a synthesis of Spelman, Hale, and Montesquieu; the result, while not entirely convincing, is a major improvement on what had gone before.

Blackstone was aware of some of the inaccuracies in Montesquieu's description of the English constitution; he placed less emphasis than Montesquieu on the separation of powers and more on the balance of social forces within parliament. What he found most important in Montesquieu was his emphasis on an institutionalized social structure as the only means of preserving a government both stable and free. Montesquieu believed that true liberty could be found only in a 'moderate' government where 'power should be a check to power'.²³ The only free government is a 'monarchy' in which a king governs by fundamental laws which are maintained by 'intermediate, subordinate, and dependent powers' acting as 'intermediate channels through which the power flows'; of these, the most 'natural' is the nobility.²⁴ He expressed some doubt that England was a 'monarchy' at all in this sense (rather than a republic), but Blackstone has no such doubts; his England is a 'free monarchy' in which the king executes the laws and the aristocracy forms the necessary 'intermediate state between the prince and the common people'.²⁵ English society is a pyramid in which the nobility and possessors of landed estates 'support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both'; they are, he says (with a certain loss of control over his metaphor), the 'pillars, which are reared from among the people, more immediately to support the throne'. They provide the structure without which England's unique combination of order and liberty would be impossible.²⁶

This all-important pyramid was largely the work of Alfred, the 'mighty genius' who organized the kingdom into 'one regular and gradual subordination of government, wherein each man was answerable to his immediate superior'.²⁷ He created a military organization based on a hierarchy of shires and hundreds, with the men of each unit led by the great landowners of the locality;

²³ Montesquieu, *The spirit of the laws* (New York, 1949), Bk. xi, c. 4 (the same translation that Blackstone used). ²⁴ Montesquieu, Bk. ii, c. 6.

²⁵ Montesquieu, Bk. ii, c. 4, and Bk. v, c. 19; Robert Shackleton, *Montesquieu: a critical biography* (Oxford, 1961), p. 287 and n. 4; *IV Comm.* 414.

²⁶ *I Comm.* 157–8; cf. *IV Comm.* 105. Professor Richard Posner appears to have been the first to recognize the importance of Blackstone's attempt to combine Montesquieu's analysis of 'the social function of law considered in the abstract' with a detailed study of the laws themselves in order to demonstrate 'how these laws operated to achieve the economic, political, and other goals of the society': Richard A. Posner, 'Blackstone and Bentham,' *Journal of Law and Economics*, vol. 19, no. 3 (Oct. 1976), 572. Posner does not pursue this theme with reference to feudalism or the 'ancient constitution' debate. ²⁷ *IV Comm.* 411; cf. *I Comm.* 115–16.

he set up a hierarchy of courts, so that justice flowed 'in large streams from the King, as the fountain . . . being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed' – an elaboration of Montesquieu's image – in a system 'that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy'.²⁸

Saxon institutions, thus conceived, formed a rational structure of mutual dependence; what is not clear so far is that it was also a feudal structure. For Blackstone, feudalism grew out of the German tribal organization described by Tacitus; the organization the Germans imposed on their new kingdoms at the break-up of the Roman Empire was already feudal. The events of the Carolingian era, so vital to our conception of feudalism, are but the distortion of feudal institutions which had already been transmitted to England in their pristine form. This early feudalism was libertarian; 'the limitation of the regal authority was a first and essential principle in all the Gothic systems of government'. The seventeenth-century assumption that if law were feudal in origin it derived from, and might be revoked by, the king as feudal overlord, was anachronistic:

the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers.²⁹

The origins of feudal law were military: the German tribes, wherever they conquered, parcelled out land in feuds (originally *beneficia* rather than *precaria*) and so created a bond of mutual protection between giver and receiver. Mutual obligation between superior and inferior is the necessary mark of a free society; feudalism created a 'proper military subjection' of command and obedience, and a system in which each man fought for his own property 'but also in defence of the whole'. The fief gave each man the ability to defend his own; it also obligated him to defend his fellows. The greater the fief, the greater the obligation; each man's contribution to society was proportional to the benefits he drew from it.³⁰

True, the complexities of fully developed feudalism are not to be found in Alfred's England; these first appeared on the continent after the emigration of the Saxons. What Alfred brought to perfection in England were the basic principles of feudal law. Each Saxon landholder was a link in the military and administrative structures created by Alfred; his only specific obligations were military service and suit of court.³¹ Much of the feudal law described by Spelman is admittedly Norman; but this is not the essence of English feudalism, not the 'primitive moderation and simplicity of the feodal law' found among

²⁸ III *Comm.* 30–1; cf. Montesquieu, Bk. II, c. 4.

²⁹ I *Comm.* 238; II *Comm.* 52.

³⁰ II *Comm.* 46; IV *Comm.* 413. Cf. II *Comm.* 68 and IV *Comm.* 106.

³¹ II *Comm.* 54.

the Saxons.³² The later history of feudalism is the history of its perversion by the Normans, who for power and financial gain replaced the 'more homely, but more intelligible, maxims of distributive justice among the Saxons' with 'chicanes . . . metaphysical subtleties . . . narrow rules and fanciful niceties of metaphysical and Norman jurisprudence'.³³ The 'complicated and extensive slavery' of feudal incidents, especially the conversion of land tenure based on 'certain and determinate' services into precarious tenures with uncertain services, was a Norman trick; 'the most refined and oppressive consequences were drawn from what was originally a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence'. It had taken centuries of struggle to restore the ancient constitution; the culmination of this process was the statute 12 Car. II, c. 24, which abolished the Norman tenures and replaced them with 'free and common socage . . . sprung from the same feudal original', but with certain and determinate services; the socage tenures of 1660 were 'the relics of Saxon liberty' now restored at last.³⁴

This is an ingenious, if not entirely convincing, attempt to reconcile the reality of feudal law with the ideal of the ancient constitution. We have lost something of the eighteenth century's enthusiasm for Alfred and the Goths, but what is original with Blackstone rather than the common property of eighteenth-century historiography, his detection of feudal elements in pre-Norman England and his awareness that Norman feudalism was heavily fiscal in character from the outset, would find rather more favour today than they would have a generation ago. Blackstone would have had little trouble accepting the substance (if not the tone) of Warren Hollister's aphorism that 'the feudalism of William the Bastard . . . was already a bastard feudalism of sorts'.³⁵

Medieval history fascinated Blackstone, and Montesquieu gave him the tools with which to fashion 'philosophical history' out of the materials provided

³² II *Comm.* 48, 59–77; IV, 413. Contrast Maitland's warning that our assumptions about primitive societies must not 'lead us to believe that law was a simple affair, that it consisted of just the great primary rules of what we think natural justice': F. W. Maitland, *The constitutional history of England* (Cambridge, 1908), p. 4.

³³ IV *Comm.* 417–18.

³⁴ II *Comm.* 58, 77–81.

³⁵ C. W. Hollister, *The making of England* (Boston, Mass., 1966), p. 102. A writer who played an important part in Blackstone's synthesis of the ancient constitution and the feudal law (and who would no doubt have played an important part in Pocock's book had he chosen to continue his detailed examination beyond the 1690s) was Sir Martin Wright, whose *Introduction to the law of tenures* (1730) preceded Blackstone in detecting feudal institutions in pre-Norman England and in deriving these from the customs of the Germanic tribes on the continent. Blackstone's discussion of the origins of feudal property makes clear his debt to Wright (II *Comm.* 45 ff.). It should be noted that in his insistence on the feudal, and therefore hierarchical, origins of English society Blackstone is killing two birds with one stone: the development of feudalism from the Germanic *comitatus*, elective war-chiefs, etc., not only destroys the 'Norman Yoke' theory of feudalism as something alien and despotic; by discovering in Anglo-Saxon England a structured hierarchy of status groups with differentiated legal rights and judicial and military functions, he also denies the notion of primitive Saxon egalitarianism. The feudal theory of the constitution offers a *via media* between the extremes of the advocates of 'slavery' on the one hand and of 'faction' on the other: I *Comm.*, 251.

by Hale and Spelman. As he refused to write off feudalism as a 'law of slavery', so did he refuse to spurn the middle ages as a time of barbarism, devoid of philosophic interest or relevance. He would never have said of the middle ages, as Bolingbroke did, that 'to be learned about them is a ridiculous affectation to any man who means to be useful to the present age';³⁶ on the contrary, the medieval origins of English law were 'a most useful and rational entertainment to students of all ranks and professions': this was part of his justification for lecturing on the subject at Oxford. The feudal origins of England's unique law of property, in particular, were a study not 'altogether void of rational entertainment as well as use':

as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendour.³⁷

Blackstone's appreciation of the middle ages set a standard that goes well beyond what we used to expect of the eighteenth century. He was led to it by his legal studies, and we should be wary of making him a proto-Romantic; but I think that few people reading the following passage would guess him to be the author:

Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.³⁸

Well before Burke, Blackstone was attuned to the effectiveness of the ancestral country-house as a metaphor of the constitution and a summons to civic responsibility:

To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom, as are delegated by their country to parliament . . . a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.³⁹

By integrating feudalism into the ancient constitution – by bringing the ancient constitution once more into line with what appeared to be the known facts of English history – Blackstone made it intellectually respectable once again. After a period of aridity and neglect, the ancient constitution emerged

³⁶ Bolingbroke, *Works* (Philadelphia, Pa., 1841), II, 239.

³⁷ I *Comm.* 36; II *Comm.* 44.

³⁸ III *Comm.* 268. How compatible this image may be with that of the rational study of the draught of the ruins of Athens or Balbec, I will not here inquire; it is perhaps not entirely fair to Blackstone to demand scrupulous consistency between metaphors occurring nearly eight hundred pages apart.

³⁹ IV *Comm.* 443. Note that, unlike Burke, he does not call it an 'entailed inheritance'; perhaps he had spent too much time explaining how to break an entail, and how it might be desirable to do so (II *Comm.* 360, 'unrivetting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth'; cf. II, 112–17 and 174).

in the late eighteenth century renewed and strengthened for use by Burke and other romantic conservatives in the age of Revolution; and Blackstone, I think, should be credited with a major role in this revitalization.⁴⁰

Observe, in the passage quoted above, that it is in parliament that the political duty of the aristocracy chiefly lies; it is in parliament that the long struggle to restore and preserve the ancient constitution had been (and will be) principally carried on.⁴¹ Parliament had begun as the centre of the Saxon web of 'feudal' service and mutual responsibility; it became the institution that best embodied Montesquieu's vision of an intermediate power guarding the fundamental laws – although including the king and representatives of 'the people' in a body intended to protect each from the other is not exactly what Montesquieu had in mind.⁴² Nor is the attempt to make such a parliament a part of the ancient constitution Blackstone's history at its best. We should not, however, fall into the trap of assuming that he believes in, what his theory seems to require, an aboriginal balance of king, lords, and commons. His theory of the balanced constitution does not in fact require that parliament in its modern form date back to the dawn of history – only that its early form contain a balance of interests as they existed in the society of that time. For Blackstone, as for his mentor Hale, what was important in the history of parliament was not details of the origins of its component parts – 'it is not my intention here to enter into controversies of this sort' – but the continuity of an organized legislative framework within which change, including change in the legislature itself, could take place.⁴³ The Saxons, he thought, had no hereditary nobility and therefore no separate estate of peers; and there was at that time no trading interest important enough to require representation.⁴⁴ Parliament began as an assembly of 'the principal and wisest men in the nation . . . not yet reduced to the forms and distinctions of our modern parliament',⁴⁵ but containing all the major interests of the time; and this principle was applied when a mercantile interest developed later. These assemblies developed with no breach

⁴⁰ Pocock, *Ancient constitution*, 243–4, modified now by 'Burke and the ancient constitution', *Politics, language, and time* (New York, 1973), pp. 227–31.

⁴¹ I *Comm.* 9; cf. I *Comm.* 127.

⁴² Montesquieu himself was not entirely consistent; cf. Shackleton, *Montesquieu*, 266; Corinne C. Weston, *English constitutional theory and the house of lords, 1556–1832* (New York, 1965), pp. 124–6. We must be careful to observe Blackstone's distinction between branches of the government and branches of the legislature; the lords and commons are not branches of government, as Weston appears to make them: *ibid.* pp. 2, 127.

⁴³ I *Comm.* 149; Sir Matthew Hale, *The history of the common law of England*, ed. Charles M. Gray (Chicago, 1971), pp. xxviii–xxix. Blackstone goes beyond Hale in linking the development of parliament (including the franchise) to the development of new forces in society. This means that parliament is not frozen; it is capable of still further development if need should arise. The power to make changes in its own composition is implicit in the idea of parliamentary sovereignty (I, 161); and 'if any alteration might be wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people' (I, 171–2). This does not make Blackstone a democrat; his concept of 'the people' includes only 'free agents' and excludes those who 'have no will of their own' in a way that would satisfy any of C. B. Macpherson's possessive individualists.

⁴⁴ I *Comm.* 399–400; IV, 419–20, 428, 434–5.

⁴⁵ IV *Comm.* 412–13.

of continuity (not in 1066 and not in 1688) into the sovereign legislature of king, lords, and commons. An institution organized to meet the specific needs of the Anglo-Saxons turned out to be the ideal response to the general needs of society in modern times as in ancient; for in 'this aggregate body, actuated by different springs, and attentive to different interests', the 'sovereignty of the British constitution' came to be lodged 'as beneficially as is possible for society'.⁴⁶ These forces balance each other; in another quasi-scientific metaphor, they 'jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each . . . a direction which constitutes the true line of liberty and happiness of the community'.⁴⁷ The liberties of England depend upon the preservation of this balance, and an increase in the power of one branch at the expense of another would make it a threat to liberty. A king able to override the two houses could become a tyrant; a house of commons able to override king and lords would tend, as in 1642, toward anarchy, and 'there would soon be an end of our constitution'; for anarchy is 'a worse state than tyranny itself, as any government is better than none at all' – an opinion central to Blackstone's theory of government.⁴⁸ Parliament is the embodiment as well as the representative of society; political change that altered the relationship between its parts would end in social revolution.

The legislature would be changed from that, which . . . is presumed to have been originally set up by the general consent and fundamental act of the society; and such a change, however effected, is, according to Mr Locke (who perhaps carries his theory too far) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.⁴⁹

– with no guarantee that the new one would follow the 'true line' of English liberty. This equation between 'state of anarchy' and 'state of nature' must be read in conjunction with his declaration that anarchy is worse than despotism. The antiquity of the balanced constitution and the libertarian nature of English feudalism are asserted to protect English liberties not only from their enemy Robert Brady, but still more from their dangerous friend John Locke.⁵⁰

⁴⁶ I *Comm.* 51.

⁴⁷ I *Comm.* 155.

⁴⁸ I *Comm.* 52, 157.

⁴⁹ I *Comm.* 52, citing Locke, *The second treatise of government*, para. 212; cf. the edition by Peter Laslett (Cambridge, 2nd edn, 1967), pp. 425–6.

⁵⁰ According to John Dunn, the *Second treatise* was much commended but little read before the 1760s and was generally assumed to be a standard defence of the Revolution; Blackstone was one of many who found 'tensionless ideological comfort' in it. Serious intellectual analysis which split the 'airy Whig consensus' began only in the last thirty-five years of the century, over the question whether Locke could be used to justify a future revolution as well as a past one: John Dunn, 'The politics of Locke in England and America', in J. W. Yolton, ed., *John Locke: problems and perspectives* (Cambridge, 1969), pp. 58–60. As the text makes clear, Blackstone found very little ideological comfort in Locke; and I would see the *Commentaries* as a document of some importance in opening the period of serious controversial study. Locke is the only 'radical' writer whom Blackstone mentions by name.

Why is Blackstone so hostile to the Lockean approach to revolution as a means of preserving liberty? Why is he so determined to appeal to the ancient constitution from the Lockean vision of natural rights protected by 'reason' in the state of nature and by the social contract in civil society? The answer is that he rejects Locke's view of 'nature' and 'reason', and in particular his equation of 'reason' with the 'law of nature'. The law of nature is for Blackstone originally the law of God; it can be known both by revelation and by reason, but revelation is the safer guide – 'the other is only what, by the assistance of human reason, we imagine to be that law'. We must not make the mistake of assuming that the fallible notions of the unassisted individual thinker are the precepts of the law of nature:

if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance . . . we should need no other guide . . . But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.⁵¹

This is the basis for a wholesale rejection of that doctrine which is the starting point for Locke's rationalist alternative to the ancient constitution: 'The *state of nature* has a law of nature to govern it, which obliges every one: And reason, which is that Law, teaches all mankind, who will but consult it, that . . . no one ought to harm another in his life, health, liberty, or possessions.'⁵² Blackstone is much less sanguine about the ability of men to consult the law of reason or their willingness to obey it in observing the rights of others. Natural liberty unsupported by civil liberty – reason unsupported by institutions – is a very weak reed.

This distrust of political rationalism does not mean that Blackstone abandons reason for religious obscurantism; it could hardly be said that the ancient constitution was based in detail upon revelation. In the multitude of particular cases, to meet the 'peculiar exigencies of each individual' or the needs of different societies, it is 'still necessary to have recourse to reason'; and the laws of England are founded on 'reason and nature'; but 'reason' for Blackstone is something other than 'a chain of metaphysical disquisitions', and natural law something other than 'that moral system, which is framed by ethical writers, and denominated the natural law'.⁵³ Blackstone's approach to natural law is historical rather than logical: the laws of a society are 'reasonable' and 'natural' if they are appropriate to the nature of that society.

⁵¹ I *Comm.* 41–2.

⁵² Locke, *Second treatise*, para. 6 (Laslett, p. 289).

⁵³ I *Comm.* 42 (so the second and subsequent editions, sharpening the contrast he had made in the first edition: 'than what we generally call the natural law'). For Blackstone's debt, or lack of it, to other natural-law writers, see Paul Lucas, 'Ex parte Sir William Blackstone, "plagiarist": a note on Blackstone and the natural law', *American Journal of Legal History*, vii (1963), 142–58. Lucas rejects the familiar canard that Blackstone's ideas about natural law were a series of platitudes cribbed from Jean-Jacques Burlamaqui. He believes that Blackstone's view of the relationship between natural and positive law is derived from Hobbes, but it is hard to see how the feudal law as Blackstone conceived it (and which is no part of Lucas's concern) can be called Hobbesian; so I have preferred to dwell upon Blackstone's debt to Montesquieu.

He had learned from Montesquieu that laws differ from one society to another because these have different natures. As they develop according to their own climates, geographies, and historical pasts, the development of each may be equally natural: 'the government most conformable to nature is that which best agrees with the humour and disposition of the people in whose favour it is established' – the general rule that explains and justifies England's special case.⁵⁴ The civil law, for example, has great merit, 'considered . . . as a collection of written reason', but 'we must not prefer the edict of the praetor, or the rescript of the Roman emperor, to our own immemorial customs . . . unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate'.⁵⁵ The language of the common law may be technical and arcane, its logic 'artificial', but it is not absurd; it grew out of early feudal society, and its basic principles are as natural as those of the society which created it.

The rationality of a law is to be judged by two standards, neither of which is philosophically 'rational': the circumstances of its origin, and the end towards which it works. We cannot properly evaluate a law unless we understand both its immediate purpose in its own time and its long-term effects. In case after case, laws that seem irrational or unjust can be shown to have origins that made good sense in feudal society and that therefore came to be accepted as part of the customary law: for instance, the preference given to male over female heirs to landed estates 'must be deduced from feudal principles',

for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established.⁵⁶

There are many other customs – such as the exclusion of the half-brother from an inheritance – in which 'there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the feudal law, may not be quite obvious to every body'.⁵⁷ Furthermore, a well-designed law (the custom of primogeniture is the most important example) will continue to work for the good of society even after its immediate purpose has been achieved, or forgotten. Such a law, strange or outdated as it may seem, will in fact fulfil the ultimate law of nature, ordained by God – 'this one paternal precept, "that man should pursue his own true and substantial happiness"'. This is the foundation of what we call ethics, or natural law.⁵⁸ Positive law is judged by the efficacy with which it aids man in the fulfilment of this natural law; 'to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation'.⁵⁹ Here is the reason for much of the

⁵⁴ Montesquieu, *Spirit of the laws*, Bk. 1, ca. 3.

⁵⁵ I *Comm.* 5; IV *Comm.* 26; cf. *Spirit of the laws*, Bk. XIV, ca. 13, 'Effects arising from the climate of England'.

⁵⁶ II *Comm.* 214.

⁵⁷ I *Comm.* 71–2; cf. II, 230–1.

⁵⁸ I *Comm.* 41. The words 'true and substantial' were added to the eighth edition.

⁵⁹ I *Comm.* 38.

ambiguity in Blackstone's use of 'reason' and 'nature': for all his references to the laws of mechanics, he is still fundamentally an Aristotelian, not a Newtonian. He still regards the 'reason' of a law as its end, its final cause, rather than its origin; the pursuit of the goal of happiness is the divinely ordained governing law of human nature. A human institution is to be judged by its contribution to this end of 'human felicity' rather than by its own intrinsic rationality; the laws of England, peculiar as they may seem, 'continue in perfection' because, unlike those of any other state, they have liberty, the prerequisite of happiness, as their 'direct end'.⁶⁰

Not that an origin justifiable in feudal terms necessarily suffices to make a law good for all time – Blackstone says no such thing – but a law originating in immemorial custom or feudal practice, which continues to have beneficial effects and so to 'answer the end of its formation', is presumed to be reasonable until proven otherwise. The burden of proof is transferred to its critics.

And hence it is that our lawyers . . . tell us that the law is the perfection of reason . . . Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniencies that have followed the innovation.⁶¹

The 'perfection of reason' that has developed through the centuries is a complex and detailed body of positive law, but consonant with the few and simple maxims of natural justice; like the law of nature known through revelation, it is more authoritative than 'that moral system, which is framed by ethical writers', and also not infrequently superior to the private reason of those who have proposed to modify it by statute.

The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties.⁶²

⁶⁰ I *Comm.* 145, referring to *Spirit of the laws*, Bk. xi, ca. 5. On the pursuit of happiness, see now Garry Wills, *Inventing America* (New York, 1978), chapters 17–18. The pursuit of happiness as a 'law' of nature was not an unfamiliar idea in the eighteenth century, but there is no evidence that Blackstone was influenced by modern sources; his treatment appears to be based on that of the sixteenth-century lawyer Christopher St German, whose account in *Doctor and student* (first published in 1523) in turn drew heavily upon scholastic sources, especially Gerson: Christopher St German, *Doctor and student*, ed. T. F. T. Plucknett and J. L. Barton (London: the Selden Society, 1974), pp. 12–13.

⁶¹ I *Comm.* 70; cf. I, 78; *Doctor and student*, pp. 56–9.

⁶² I *Comm.* 10. Blackstone urges again and again that good law is the result of experience and practical wisdom and is more likely to be damaged than improved by 'speculative reason'; the terms in which he described the Norman and scholastic perversions of Saxon feudalism could equally be applied to his fears for the eighteenth-century constitution under the knife of Lockean

Parliament may be sovereign, but it is not infallible; and the education of future members of parliament to a knowledge of the true nature of English law was one of Blackstone's principal reasons for undertaking the *Commentaries*.

If a law is not patently unreasonable, it is said to be reasonable; if a positive law does not patently violate the natural law, it is consonant with it – let us ask at this point, does Blackstone *really* mean to say that the law of England is the law of nature? This would, on the face of it, be an enterprise both difficult and unrewarding, for the law of England declares, among other things, 'that the goods of the wife do, instantly upon marriage, become the property and right of the husband'; that all dead must be buried in woollen garments; that lineal ancestors are barred from inheriting from their descendants; and a host of other such 'regulations' that have been 'censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice'.⁶³ Nevertheless, it has become the conventional wisdom – and a principal reason for refusing to take him seriously as a legal thinker – that he does indeed mean to say exactly this; that the law of England is, in detail, the law of nature.

The British constitution, with all the laws which had produced it and which it had produced . . . reflecting at one and the same time the universal principles which governed the universe and the rational intelligence of the men who created it . . . was a supreme example of the works of man harmonizing with the works of God. The laws of England, because they were part of this natural and rational constitution, were bound to echo the laws of nature. Of them it could be said, as of the universe itself, that 'whatever is, is right'.⁶⁴

It 'can be said' only by a serious misreading of 'natural and rational' in Blackstone's thought, and he himself never says any such thing; but this interpretation is very important in establishing his 'complacent conservatism' and his enthusiasm for the *status quo* – justifying the common law by 'rationalizing, at every turn, its many particular details'.⁶⁵ But we must be careful here. In these particular instances Blackstone does rationalize (and defend) the laws; but in many other cases he does not;⁶⁶ and we must in any case remember that he does not, strictly speaking, equate reason with the law of nature. He makes very clear the distinction between the law of nature and positive law; and in the above cases, the treatment of the wife's property has

analysis: 'There is an active principle in the human soul, that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age, and country it may happen to find itself engaged' (IV *Comm.* 417). For a persuasive defence of Blackstone's concept of 'reason' in the common law against Jeremy Bentham's famous attack, see Sir Rupert Cross, 'Blackstone vs. Bentham', *Law Quarterly Review*, xcii (Oct. 1976), 516–27.

⁶³ I *Comm.* 55, 58; II, 210.

⁶⁴ Derek Jarrett, *Britain, 1688–1815* (London, 1965), pp. 359–60.

⁶⁵ Paul Lucas, 'Blackstone and the reform of the legal profession', *E.H.R.*, lxxvii (July 1962), 484.

⁶⁶ Cf. IV *Comm.* 4: 'were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians', and other criticisms based on his reading of Beccaria.

'no foundation in nature'; it is 'merely created by the law, for the purposes of civil society'.⁶⁷ The burial of the dead in wool is not a 'natural duty' but a 'positive' one, and the breach of the law a *mala prohibita*, not a *mala in se*;⁶⁸ these are 'things indifferent' which the state has the right to regulate, and the important thing about them is that the law be certain and known, not uncertain or arbitrary; so long as this is true, no injustice is done. In case after case, the natural law prescribes only in general terms, without specifying the means by which its precepts are to be carried out; in others, it does not prescribe at all. There is a very large number of such 'indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits'.⁶⁹ These 'indifferent points' include, as we shall see, virtually the whole of the law of property. In all such cases it is the right and the duty of the legislature to prescribe as it 'sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life'.⁷⁰ Positive law may in some cases implement the natural law and determine how it is to be applied; in others it makes regulations which do not specifically follow natural law, but which work for the benefit of society and so may be said to be in accord with natural law. This is a long way from saying that such regulations are 'laws of nature'. Parliamentary sovereignty is best suited to the end of human felicity, but individual enactments may be, and not infrequently are, unwise and unjust; the laws of England are not necessarily, or even usually, laws of nature. They pursue a natural-law end; but that is a very different matter. To say that

⁶⁷ I *Comm.* 55.

⁶⁸ I *Comm.* 57–8.

⁶⁹ I *Comm.* 42.

⁷⁰ I *Comm.* 55. As with the pursuit of happiness, Blackstone's treatment of 'things indifferent' is drawn from sixteenth-century Anglican discussions of *adiaphora* in religion rather than from eighteenth-century natural-law thinkers: contrast Richard Hooker, *Of the laws of ecclesiastical polity*, II, iv, 4–5 (ed. Georges Edelen, Cambridge, Mass., 1977, pp. 154–6), with Burlamaqui (whom Blackstone had read, but whose position he did not take), *The principles of natural law* (London, 1748), p. 83. For a somewhat different approach to Blackstone's use of 'things indifferent', see Paul Lucas, 'Ex parte Sir William Blackstone', *American Journal of Legal History*, VII (1963), 142–58: Lucas argues that Blackstone used the doctrine of *adiaphora* to destroy the concept of specific natural rights which the state must protect, and to smuggle a clandestine Hobbism into the English constitution. This is certainly true (though I doubt Blackstone saw himself as a Hobbist) in the case of property; but, as we shall see below, Blackstone made no attempt to conceal his view that the natural right to property was severely limited, and his account of the origins of property is quite different from Hobbes's. In the case of life and liberty, the matter is quite different: Blackstone *does* believe in the existence of absolute natural rights not the creation of human law – 'natural rights, such as are life and liberty, need not the aid of human laws to be more effectually vested in every man than they are' (I *Comm.* 54). He *also* believes in legislative sovereignty. The legislature can (and, alas! often does) violate the natural rights of its subjects: 'there may be unlawful methods of enforcing obedience even to the justest laws' (IV, 10). Nevertheless, 'I would not be understood to deny the right of the legislature in any country to enforce its laws by the death of the transgressor . . . The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant' (IV, 11; cf. IV, 28). There would be no dilemma here for a Hobbesian: all rights are civil rights which are created by the legislature. There is a dilemma for Blackstone, and one which he fails to resolve; no one who reads the first chapter of volume IV can fail to perceive the emotional intensity with which he felt his intellectual plight. Natural rights exist before, and independently of, legislation; nevertheless the survival of society depends upon the sovereignty of the legislature. His choice is not so much Hobbes's as Hobson's.

Blackstone equates the laws of England, in detail, with the laws of nature is to misunderstand the importance of 'things indifferent' in his theory.

Given this approach to positive law as the non-rational but beneficent creation of civil society, we shall not be surprised to find that Blackstone does not share Locke's relatively sanguine view of the state of nature. In fact, Blackstone's view can be summed up very simply: there is no such thing. At least, there is no such thing as a 'state of nature' in the history of primitive man, because 'Man' was formed for society; and . . . is neither capable of living alone, nor indeed has the courage to do it.'⁷¹ The nature of man requires that he live in society; it would be absurd to believe, 'with some theoretical writers', that

there ever was a time when there was no such thing as society, either natural or civil . . . This notion, of an actually existing unconnected state of nature is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards.⁷²

Society is as old as mankind; it is the natural state of mankind. Formally organized civil society was preceded by a natural society of extended family or tribe, not by the philosophers' state of nature composed of autonomous, equal, 'unconnected' individuals.

If the Lockean state of nature is unhistorical, it follows that a theory of the social contract deduced from it is an unrealistic and unsafe basis for civil liberties. If we cannot accept an 'actually existing unconnected state of nature', then we cannot accept that 'from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor' – not perhaps a scrupulously fair representation of what Locke actually said. Blackstone's theory of the social contract is quite different from Locke's description of a deliberate, rational act among consenting adults. The transition from tribal society to formally organized civil society took place in a variety of ways: as population grew and land became scarce, tribes which had formerly lived in relative isolation were forced to combine – 'sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact' – but still by the combination of groups, not of individuals. 'Society had not its formal beginning from any convention of individuals.' When Blackstone uses the term 'original contract' he means not 'first' or 'aboriginal' but 'fundamental':

the original contract of society . . . though perhaps in no instance has it ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together.

This fundamental agreement is the necessary consequence of men's awareness

⁷¹ I *Comm.* 143.

⁷² I *Comm.* 47; the words 'either natural or civil' were added to the eighth edition. Note that this view separates Blackstone's theory of the origins of society from Hobbes's as well as Locke's.

that they cannot live apart from society: the universal and inevitable assumption that

the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community.⁷³

In this sense it would be hard to say that any given society did *not* have a contract, or could avoid having one if it wanted to.⁷⁴ Any government may be assumed to offer a minimum of protection, though perhaps in return for a maximum of obedience; it is the good fortune of Englishmen that the fundamental contract of their society is a feudal contract, in which the mutual obligation between the community and each individual member guarantees liberty as well as protection: 'an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole'.⁷⁵ Reciprocity is central to Blackstone's conception of government, and English liberties are based upon the particular kinds of reciprocity built into the constitution by the 'original contract' of its feudal origins: 'these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared that king James had broken the *original contract* between king and people'. Since, however,

the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ,

it was 'judged proper' at the Revolution to 'reduce that contract to a plain certainty'; and so 'the terms of the original contract between King and people' are now embodied in the 1689 coronation oath, 'most indisputably a fundamental and original express contract; tho' doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after'. That is, the Revolution contract does not abrogate the one which preceded it. Before as well as after the coronation oath of 1689, the king was bound by the 'original contract' of England, not merely to govern, but to govern according to law; 'and this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an

⁷³ I *Comm.* 47–8.

⁷⁴ I *Comm.* 48. J. W. Gough, *The social contract* (Oxford, 2nd edn, 1957), pp. 189–90, charges that Blackstone ostentatiously denies the existence of a social contract and then smuggles it back as an 'implicit' contract. He does indeed speak of an implied contract – 'that original contract, which in *all* states impliedly, and in ours most expressly, subsists between the prince and the subject' (I *Comm.* 237, my emphasis) – but this is little more than a truism. If the Turk and his subjects can be said to have an implicit contract, it can only be that mutual obligation of protection and obedience which is synonymous with government, however tyrannical. Turkey is a complete, France a partial despotism (I, 269); but Blackstone never says, as Locke does, that they are not legitimate governments. An implicit contract of this sort is irrelevant to any more generally accepted sense of 'contract' as a guarantee of liberties.

⁷⁵ II *Comm.* 46; cf. II, 57: 'the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service'.

express part of the common law of England, even when prerogative was at the highest'.⁷⁶ In this sense, the original contract is to be found in the common law; the king governs with powers vested in him by the original contract which 'do not intrench any farther on our *natural* liberties, than is expedient for the maintenance of our *civil*'.⁷⁷

If England is the only country in which the king is thus bound by the original contract to protect the liberties of his subjects, the question follows: does a violation by the sovereign of the rights of Englishmen constitute – as Locke says it does – a breach of trust (Blackstone will say 'contract') that absolves his subjects from their obligation to obey the sovereign's commands?

Blackstone's attitude toward rebellion is highly ambiguous. Different sections of the *Commentaries* offer what appear to be quite contradictory doctrines of resistance. In the chapter 'Of the absolute rights of individuals' he introduces a 'natural right of resistance . . . when the sanctions of society and laws are found insufficient to restrain the violence of oppression';⁷⁸ and one discussion of the Glorious Revolution ends with the invocation of 'those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish'.⁷⁹ These passages were useful to American colonists seeking to justify resistance to British authority;⁸⁰ but elsewhere, when he discusses not royal tyranny but parliamentary sovereignty, Blackstone is much less enthusiastic about the right of rebellion. In the chapter 'Of Laws in General' he had declared that 'no human laws are of any validity' if they violate natural law; but in the chapter 'Of the parliament' he insisted that 'what the Parliament doth, no authority upon earth can undo'. The king, though he possesses executive sovereignty, is under the law and may act illegally; parliament possesses legislative sovereignty, and its acts are by definition legal, 'this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms'.⁸¹ Can we reconcile these contradictions?

Even in the case of a tyrannical king, Blackstone will allow rebellion only as a last resort. The right of resistance may be found in natural law, but it is not and cannot be found in positive law. The king is under the law; nevertheless, he is sovereign, and this means that no tribunal, foreign or domestic, has the authority to compel him. If 'the two houses of Parliament, or either of them,

⁷⁶ I *Comm.* 233–6.

⁷⁷ I *Comm.* 237.

⁷⁸ I *Comm.* 144.

⁷⁹ I *Comm.* 245.

⁸⁰ This passage was quoted by John Mackenzie, 'To Freeman' (28 Sept. 1769), in Robert M. Weir, ed., *The letters of Freeman, etc.: essays on the non-importation movement in South Carolina* (Columbia, South Carolina, 1977), pp. 52–3; cf. James Otis, 'A vindication of the British colonies . . .' (1765), in Bernard Bailyn, ed., *Pamphlets of the American Revolution, 1750–1776* (Cambridge, Mass., 1965), pp. 558–9. For these uses of Blackstone, see Gerald Stourzh, 'William Blackstone: teacher of revolution', *Jahrbuch für Amerikastudien*, xv (1970), pp. 185, 189. It should be noted, however, that the anti-revolutionary content of the *Commentaries* was also recognized by Americans, especially James Wilson, before the Revolution broke out: Julius S. Waterman, 'Thomas Jefferson and Blackstone's Commentaries', *Illinois Law Review*, xxvii (1933), 629–59, reprinted in D. H. Flaherty, ed., *Essays in the history of early American law* (Chapel Hill, North Carolina, 1969), pp. 451–88, esp. p. 478.

⁸¹ I *Comm.* 41; 160–1.

had avowedly a right to animadvert on the king . . . the balance of the constitution would be overturned',⁸² as in the 1640s, and either oligarchy or democracy would prevail, 'a worse oppression than any they pretended to remedy'.⁸³ Therefore 'the supposition of *law*' is that the king can do no wrong, 'since in such cases the law feels itself incapable of furnishing any adequate remedy'.⁸⁴

Does this mean that English subjects are 'totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions'? By no means; 'the law has provided a remedy in both cases'.⁸⁵ The aggrieved individual has the well-defined protection of the courts, from the *habeas corpus* Act all the way back to the famous 'due process' clause of Magna Charta; and for him to claim a legal right of rebellion would be absurd as well as dangerous. The executive power would 'indeed be but a name and a shadow' if 'any man or body of men were permitted to disobey it, in the ordinary course of law'. True, 'overzealous republicans . . . have fancifully (or sometimes factiously)' allowed to each individual the right of determining, by the use of his own reason, the right 'of employing private force to resist even private oppression'; but this doctrine would lead to anarchy and so prove to be 'equally fatal to civil liberty as tyranny itself'; for 'obedience is an empty name, if every individual has a right to decide how far he himself shall obey'.⁸⁶

What of the right of resistance in the case of 'public oppressions'? Here too the problem should very seldom arise, for here too the law has provided a remedy, at least in 'cases of ordinary public oppression, where the vitals of the constitution are not attacked';⁸⁷ in such cases the constitution itself provides legal remedies, such as the impeachment of evil counsellors and the right of petitioning for redress. There is no right of recourse to arms so long as recourse may be had to the law; 'all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal provision*'.⁸⁸ This emphasis is important: there is no legal right of rebellion, but this is not to say that there is no right at all. The law itself guarantees Englishmen the right to possess arms, 'a public allowance . . . of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression'.⁸⁹ The king's powers are his not by divine right but as the delegate of society.⁹⁰ If he exceeds the powers delegated to him, then the society has 'most indisputably a competent jurisdiction to decide this great and important question':

for, whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to.⁹¹

⁸² I *Comm.* 244.

⁸⁵ I *Comm.* 243.

⁸⁸ I *Comm.* 245.

⁸³ I *Comm.* 154.

⁸⁶ I *Comm.* 250-1.

⁸⁹ I *Comm.* 144.

⁹¹ I *Comm.* 212.

⁸⁴ I *Comm.* 244.

⁸⁷ I *Comm.* 243-44.

⁹⁰ I *Comm.* 268.

If the king commits 'such public oppressions as tend to dissolve the constitution and subvert the fundamentals of government', the answer is not passive obedience.⁹² There is no right of rebellion where illegal acts of the executive are remediable 'in the ordinary course of law'; but

I say, in the *ordinary* course of law; for I do not now speak of these *extraordinary* recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression.

When the law offers no defence and the constitution itself is in danger, when 'the being of the state is endangered, and the public voice proclaims such resistance necessary', then, and only then, 'resistance is justifiable to the person of the prince'.⁹³

Rebellion is justifiable as a last resort. It is a natural right, but one of those natural rights which was traded off for the protection of civil society. It cannot be employed to override positive law, but it is available when society is on the verge of breaking down and positive law is helpless:

Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it.

This is what happened in the 'very remarkable case' of 1688, when 'nature and reason prevailed . . . though the positive laws [were] silent'.⁹⁴ James had threatened society with dissolution; the Convention met not to resist tyranny but to prevent anarchy. James had ceased to offer society that protection which is the absolute minimum duty of a sovereign; we might say that resistance was justifiable not because he was a tyrant, but because he was an anarchist.⁹⁵

Do not the events of 1688 change the status of revolution by creating a

⁹² I *Comm.* 244.

⁹³ I *Comm.* 250–1.

⁹⁴ I *Comm.* 245.

⁹⁵ I *Comm.* 152. At this point, therefore, I dissent from the brief but lucid account of Blackstone's political theory by S. N. Katz: 'Blackstone . . . felt a lawyer's obligation to prove that the right of revolution was not a logical corollary of his Lockean political principles. Yet his only opposition to Locke's argument for the right of revolution when the sovereign violates the social compact was a simple denial, thus exposing his own lack of a principled alternative': Stanley N. Katz, 'Introduction' to volume 1 of the *Commentaries*, facsimile of the first edn (Chicago, 1979), p. x. The right of revolution as a civil right he *did* of course see as a logical corollary of Lockean political principles; therefore his search for a different kind of right and a somewhat laboriously principled alternative. The same objection can be made to the discussion in H. T. Dickinson, *Liberty and property: political ideology in eighteenth-century Britain* (New York, 1977), pp. 131–2, where Dickinson does not distinguish between 'legal' and 'natural' rights. R. A. Posner sees that there is a real right to revolution, but makes an unfortunate choice of words when he interprets Blackstone as saying that 'abridgments of fundamental rights legitimize revolution' ('Blackstone and Bentham', *Journal of Law and Economics*, xix, no. 3, Oct. 1976, 577); he quite correctly observes that 'the main protection of fundamental rights lay not in . . . violent revolution but in the balance of power among the political forces in the society which had been achieved by the British constitution of the day'.

precedent, so that in a similar case similar action could be deemed legal? Blackstone is doubtful, perhaps ironic: 'so far as this precedent leads, and no farther, we may now be allowed to lay down the *law* of redress against public oppression'. James, according to the Convention, had broken the 'original contract'; he had violated the 'fundamental laws'; finally, he had 'withdrawn himself out of the kingdom'. What if some future king should break the original contract, violate the fundamental laws, but inconveniently refrain from absenting himself from the kingdom? Would rebellion then be legal? 'It is not for us to say that any one, or two, of these ingredients would amount to such a situation; for there our precedent would fail us.' Clearly Blackstone would much prefer to withhold the imprimatur of advance legal authority from any future revolution and force it to seek justification from the compelling power of desperate circumstances and the dictates of 'nature and reason'; in whatever

circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.⁹⁶

This passage, which Americans used to assert the right of resistance, is actually designed to limit it. It is consistent with Blackstone's usual approach to natural right that it should be latent as long as the positive law serves to maintain civil rights, and that it should emerge only when society is in danger of breaking down. The Glorious Revolution was justifiable and necessary, but not 'legal'; he is anxious that it should not be used as a facile argument for the legitimization of revolutions less justifiable and less necessary. He would rather

choose to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience: because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient.⁹⁷

This passage is from the chapter 'Of the king, and his title,' in which his chief purpose is to demonstrate that the Revolution did not establish the principle of elective monarchy. This is, indeed, the type which seems 'best suited of any to the rational principles of government, and the freedom of human nature';⁹⁸ but we already know that for Blackstone the most strictly rational principles do not necessarily produce the best government. The king may have shortcomings, but he must not be regarded as an elective public servant to be appointed or dismissed at the whim of a dominant faction; this might 'sound

⁹⁶ I *Comm.* 245. Gerald Stourzh (above, n. 80) appears to believe that this passage legitimizes revolution (p. 187); my argument is that it does quite the opposite, by defining 1688 in such narrow terms that it becomes a unique event, almost worthless as a precedent. For example, George III did not 'withdraw himself out of his kingdom' in 1776. He did several other disagreeable things, of which the authors of the Declaration of Independence compiled quite a list; but 'there', at least in Blackstone's eyes, 'our precedent would fail us'.

⁹⁷ I *Comm.* 212.

⁹⁸ I *Comm.* 192.

like the perfection of liberty, and look well enough when delineated on paper', but if put into practice it would 'be ever productive of tumult, contention, and anarchy'. Blackstone is attempting to forestall exactly the kind of interpretation of 1688 that Richard Price was to make in the Old Jewry sermon of 1789, when he claimed that the Revolution had given the people the right 'to choose our own governors' and 'to cashier them for misconduct'. Elective monarchy would be the best form if men were truly rational beings; then no doubt 'the best, the wisest, and the bravest man' would certainly be chosen, 'and the sense of an unbiassed majority would be dutifully acquiesced in by the few who were of different opinions'. This is spoken ironically; Blackstone was under no illusions about the Hogarthian qualities of the electoral process in eighteenth-century England.⁹⁹ Elective monarchy under such conditions would become a welter of corruption, fraud, and violence, and the results would be unendurable. In elections to lesser offices, such disputes can be settled by appeal to duly ordained tribunals; but if, under an elective monarchy, the defeated minority refuses to accept the choice of the majority, there is no impartial superior tribunal to which appeal may be made. There would be 'no superior to resort to but the law of nature: no method of redress . . . but the actual exertion of private force' – the event which Blackstone is above all anxious to avoid.

When the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battles, the only process by which the appeal can be carried on is that of a civil and intestine war.

If England had an elective monarchy, its succession would be like that of Rome under the Julio-Claudians, or the kingdom of Poland, or (he was writing within recent memory of the War of the Austrian Succession) the Holy Roman Empire.¹⁰⁰

What, let us ask – we already have a fair idea what the answer will be – is Blackstone's attitude towards rebellion against parliament, the legislative sovereign? If king, lords, and commons acting together should prove tyrannical, destroy the legal rights of their subjects and deprive them of lives, liberties, and properties, may those subjects have recourse to arms? The question is not inconceivable to Blackstone, but unlikely – parliament is the guarantor, not the oppressor, of English liberties. Furthermore, since parliament embodies the balance of powers by which those liberties are maintained, successful rebellion would necessarily mean the destruction of that balance. Society may resist a king in order to preserve itself; rebellion against parliament could not but be self-destructive. If members of parliament proved unworthy of their trust, such a thing might happen – the fear of it runs through the *Commentaries* – but there is no question of its ever being legitimate.

⁹⁹ *I Comm.* 218. Blackstone was deeply involved in the Oxfordshire election of 1754, that most Hogarthian of eighteenth-century elections, on the side of the Old Interest: Robert J. Robson, *The Oxfordshire election of 1754* (London, 1949), pp. 140–4; W. R. Ward, *Georgian Oxford* (Oxford, 1958), p. 197.

¹⁰⁰ *I Comm.* 192–3.

It must be owned that Mr Locke, and other theoretical writers, have held, that 'there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them

but 'however just this conclusion may be in theory, we cannot practically adopt it, nor take any *legal* steps for carrying it into execution, under any dispensation of government at present actually existing'. Such a power would not simply 'remove or alter the legislative'; it would destroy the foundations of society itself:

For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation.¹⁰¹

The dissolution of society would result in that anarchy which is worse than even a tyrannical government. There is a last-resort 'natural right' of rebellion against a sovereign legislature only if we are willing to accept the destruction of all positive law and revert to a state of nature much closer to Hobbes's vision than to Locke's.

Why does Blackstone paint a picture so much gloomier than Locke's of the dissolution of society into a state of nature? The answer lies in the implications of his belief that such a dissolution would repeal all positive laws. This was the same ground upon which generations of lawyers had denied that the Norman Conquest was legally a 'conquest': it would have repealed all previous legal rights under the ancient constitution. In this respect, Locke posed the same threat to positive-law liberties that Brady had. A reduction of all members of society to an 'original state of equality' would destroy civilized existence. Positive law provides civil society with many things which are not required by natural law but which are nevertheless highly convenient; the repeal of these regulations by a return to a state of nature would not be equally convenient. Let us look at a passage in Blackstone's description of English land law that has been little noticed. At first appearance it is one of the most radical and surprising things he could have said. The right to possess property is one of the 'absolute rights of Englishmen', but that right ends with the death of the possessor:

There is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him.¹⁰²

Neither the right to inherit property nor the right to bequeath it by will is a natural right. 'All rules of succession to estates are creatures of the civil polity, and *juris positivi* merely. . . . There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal

¹⁰¹ I *Comm.* 160–2.

¹⁰² II *Comm.* 2.

law.¹⁰³ Since inheritance is a civil, not a natural, right, rules of inheritance may vary from one society to another without violating the natural rights of the heirs; 'in England particularly, this diversity is carried to such a length, as if it had been meant to point out . . . how futile every claim must be, that has not its foundation in the positive rules of the state'.¹⁰⁴ Certainly, this assertion runs counter to widely held notions about the right of inheritance; for

we are apt to conceive at first view that it has nature on its side; yet we are apt to mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political establishment.

The right to inherit is not a natural right of individuals, but it is nevertheless highly beneficial to society. If property were vacated by the death of the owner and left open to the next person who could seize possession, 'such a constitution would be productive of endless disturbances'. Or again,

The transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services, will not die with him, but be transmitted to those with whom he is connected by the dearest and most tender affections.

If this seems over subtle, Blackstone agrees. Inheritance is a strong motive for civic virtue; but it is not at all clear that the law of inheritance as it stood in Blackstone's own time, though it produced these happy effects, had been deliberately designed to produce them. 'Reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined'.¹⁰⁵

Witness in particular the custom of primogeniture. The immediate origins of the English law of inheritance were feudal, and lay in the military needs of Saxon and Norman society. The ancient Saxons had, some of them, practised the division of an inheritance into equal shares; and partible inheritance 'is certainly the most obvious and natural way; and has the appearance, at least, in the opinion of younger brothers, of the greatest impartiality and justice'. The imposition of primogeniture was to prevent the 'inconveniencies that attended the splitting of estates' in feudal society, and was, Blackstone thought, one of the very few improvements that Norman feudalism had made upon Saxon. The original military reasons for primogeniture had vanished, but to abandon it for something more 'obvious and natural' would lead to other 'inconveniencies' for modern society: 'the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil or in ecclesiastical employments'.¹⁰⁶ This would be one of those cases in which, if a 'standing rule of law of which the reason perhaps could not be remembered

¹⁰³ II *Comm.* 211.

¹⁰⁴ II *Comm.* 13.

¹⁰⁵ II *Comm.* 10–11.

¹⁰⁶ II *Comm.* 215.

or discerned' were to be 'wantonly broken in upon', the wisdom of the rule would 'in the end appear . . . from the inconveniencies' that would follow the innovation.¹⁰⁷ The reasons for the original establishment of primogeniture have disappeared; but the custom continues, under changed circumstances, to work for the good of society. This is the happy fate of England, that its merely positive laws tend towards that ultimate law of nature, the 'true and substantial happiness' of society – though not necessarily of some individual members of society (such as younger sons) as defined by themselves. If this principle were to be forgotten – if the original contract were dissolved and all positive laws repealed, if the members of society were reduced to a state of equality and then met together in a large plain and proceeded to remodel society according to the majority's highly fallible notions of reason and natural justice – then the 'extremely useful' body of positive law governing the distribution of property in eighteenth-century England might cease to exist and something altogether less useful take its place.

For the convinced Lockean, there is worse to come: this unexpectedly Hobbesian approach to inheritability is only the beginning of Blackstone's attack on the philosophical structure of private property. He is quite unenthusiastic about the labour theory as a satisfactory account of the origin of the right of property in land – the theory of 'Mr Locke and others' that 'bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title'.¹⁰⁸ The labour theory may account satisfactorily for the creation of property in chattels, but property in land is far more complex.¹⁰⁹ At the beginning of recorded history, according to Blackstone's anthropology, grazing land was the common right of all mankind; and as the Old Testament patriarchs moved about with their flocks, 'the right of possession continued for the same time only that the act of possession lasted'. The increase of population created the need for agriculture, and therefore for stability of possession, the need 'to appropriate to individuals, not the immediate use only, but the very substance of the thing to be used'; for otherwise 'innumerable tumults must have arisen . . . while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it'.¹¹⁰ Agriculture simultaneously created the need for security of possession and destroyed the constraints of natural society as an instrument of security: the traditional pastoral society of the patriarchs broke down under the new circumstances generated by economic change and could no longer keep order. Agriculture created new opportunities, but also new dangers: the dissolution of 'natural society' threatened to produce that 'state

¹⁰⁷ Above, p. 52. Why does he labour this point so? I suspect that the answer lies in the *Second treatise*, para. 190 (Laslett, pp. 411–12): 'Every Man is born with . . . a Right, before any other Man, to inherit, with his Brethren, his Fathers Goods' (my emphasis). The liberal theory of property requires the absolute right to dispose of it as one chooses, including the right to bequeath it. This is quite untrue of English property in its feudal origins, in which the lord had a supervisory right over all alienations; the right to bequeath and inherit land held in fee developed gradually and very much as a *civil* right: II *Comm.* 55–6.

¹⁰⁸ II *Comm.* 8.

¹⁰⁹ II *Comm.* 5.

¹¹⁰ II *Comm.* 4.

of nature' in which every individual was the potential enemy of every other.

Who would be at the pains of tilling [the earth], if another might watch an opportunity to seize upon and enjoy the produce of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature.¹¹¹

The long-term results of property in land have been beneficial, 'the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*'; this is because agriculture provided a surplus, so that some men gained leisure 'to cultivate the human mind, to invent useful arts, and to lay the foundations of science'. This was no part of the original intention, however: 'Necessity begat property', and property in turn required the organization of civil government for its protection; and it is only under the protection of civil government that the benefits of civilization are possible, 'so graciously has Providence interwoven our duty and our happiness together'.¹¹² Yet once again, the beneficial long-term results of an institution are not identical with its original purpose.

The only strictly natural right of men to the earth is common; the only natural right of an individual to the land is usufructuary; the only natural right to possess the land is that of temporary occupancy; that right is void when occupancy ceases, by migration or death. Different kinds of possession are appropriate to different types of society. Property, defined as the absolute ownership of land, is not a quality built into 'those relations of justice, that existed in the nature of things antecedent to any positive precept', but an idea generated by historical circumstances. 'The art of agriculture . . . introduced and established the idea of a more permanent property in the soil, than had hitherto been received' – a remarkable perception in the historiographical climate of the eighteenth century.¹¹³ Let us say it unequivocally: astounding as it seems, Blackstone does *not* believe that the right to absolute individual ownership of land is a natural right.¹¹⁴

There have been earlier signs of this unexpected teaching, if we had been watching for them; thus his explanation of the reason why a convicted felon forfeits his property to the state: 'all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities'.¹¹⁵ This demands that we turn back and read more

¹¹¹ II *Comm.* 7–8. ¹¹² II *Comm.* 8.

¹¹³ I *Comm.* 40; II, 4, 7. Historically, none of the landed property in England originated in the labour of the first occupier, but was distributed for military and administrative purposes ('this northern plan of polity, serving at once to distribute and to protect the territories they had newly gained', II *Comm.* 47); the fief was 'in its original import, . . . a stipend, fee, or reward for actual service' (II *Comm.* 68). Because of these feudal origins there is virtually no such thing as 'absolute property of the soil'; the *allodium* is unknown to English law (II *Comm.* 105).

¹¹⁴ Contrast the assertion (or assumption) of Blackstone's 'Lockean' attitude toward property in Douglas Hay *et al.*, *Albion's Fatal Tree* (New York, 1975), 18–19 and 36. ¹¹⁵ I *Comm.* 299.

carefully that chapter in which life, liberty, and property are first defined as the 'absolute rights of Englishmen'. There we find that these are 'either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals'.¹¹⁶ Life and liberty belong to the first of these categories: life is 'a right inherent by nature in every individual'; liberty, too, is 'a right strictly natural'.¹¹⁷ But although 'the original of private property [the primitive right of usufruct] is probably founded in nature', nevertheless 'certainly the modifications under which we at present find it . . . are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty'. It is because property is not protected by natural law, but is accepted in exchange for natural liberty, that the laws of England are 'in point of honour and justice, extremely watchful in ascertaining and protecting this right'.¹¹⁸

In this interpretation of Blackstone's theory of property I have departed considerably from the most extensive earlier discussion, that of D. J. Boorstin.¹¹⁹ Boorstin's treatment obscures the radical nature of Blackstone's disagreement with Locke, and the significance of the point he was trying to make. According to Boorstin, Blackstone's theory is essentially similar to Locke's; property is an absolute right because it exists 'even independently of society', and the positive-law limitations Blackstone imposes on property are 'very curious, particularly in view of the fact that the *Commentaries* had not explained that man had given up any of his natural right of property on entering society' – points that we have seen controverted by a closer reading of Blackstone's text.¹²⁰ Boorstin regards the roles of natural and positive law in Blackstone's theory of property as 'so identified that it was really impossible to separate them', and fails to note the difference, vital to English law and Blackstone's argument, between landed property and chattels.¹²¹ The source of Boorstin's difficulty seems to be his belief that Blackstone saw property mainly in terms of commerce and the creation of commercial wealth – which Blackstone does indeed describe in terms of a natural right of property in things created by labour. But to say that Adam Smith's conception of property was 'embodied in Blackstone's attitude toward the place of commerce in English society' or that the 'unfolding of the commercial forms of property enabled Blackstone to make

¹¹⁶ I *Comm.* 129.

¹¹⁷ I *Comm.* 129, 134.

¹¹⁸ I *Comm.* 138.

¹¹⁹ Daniel J. Boorstin, *The mysterious science of the law* (Gloucester, Mass., 1973 [first published in 1941]), pp. 167 ff. See now, however, a recent article by Duncan Kennedy, 'The structure of Blackstone's *Commentaries*', *Buffalo Law Review*, xxviii, no. 2 (1979), 205–382, a complex and subtle analysis of Blackstone's theory of rights, much of which does not bear directly upon the present article. Kennedy finds less originality than I do in Blackstone's interpretation of feudalism (pp. 328–9) and his use of Montesquieu to explain the natural-law functions of the common law. Kennedy, if I read him correctly, finds in Blackstone a believer in the Lockean theory of property (p. 314) who set out to justify the common law by demonstrating how it had developed out of its feudal past to protect the liberties of the Lockean individual. Although my own conclusions are in partial disagreement with Kennedy's, his article will repay close study; it is the most important work on Blackstone to appear in some time.

¹²⁰ Boorstin, pp. 168–9; 171–2.

¹²¹ Boorstin, p. 179.

property the quintessence of all man's natural rights' goes much too far.¹²² It was property in land, not in chattels, which first required that establishment of government from which civilization, including the possibility of safe and tranquil commerce, flowed. This idea, and not the 'invisible hand', dominates the passage which Boorstin quotes to prove that Blackstone made liberty the product of free trade: 'Experience hath shown, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained.'¹²³ But this passage occurs in a chapter discussing the growth of the freedom to buy and sell *land*, and must be read in its context. In feudal society it was originally very difficult to buy and sell land because of restrictions imposed by the lord; but 'by degrees this feudal severity is worn off' (here follows the passage quoted by Boorstin); 'the road was cleared', Blackstone then continues, 'in the first place by a law of king Henry the first, which allowed a man to sell and dispose of lands which he himself had purchased'. This passage simply does not make Blackstone a free trader. For his attitude towards the legal status of commerce we need only turn back to his passages on the wool trade:

with regard to matters that are in themselves indifferent . . . such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.¹²⁴

Free trade is not a law of nature; the terms of trade are things indifferent and ought to be regulated by the legislature for the good of society. For example, the statute of king Charles II which prescribes a thing seemingly as indifferent (a dress for the dead, who are all ordered to be buried in woollen) is a law consistent with public liberty; for it encourages the staple trade, on which in great measure depends the universal good of the nation.¹²⁵

This is a thoroughly mercantilist approach to the influence of trade upon public welfare. There is no natural right to buy in the cheapest market and sell in the dearest, to pursue one's private profit despite the 'universal good of the nation'; look at his treatment of the statutes against forestalling and engrossing, those barometers of the shift of eighteenth-century thought from mercantilism to *laissez-faire*: he accepts without demur the principle that the practices forbidden by these statutes are 'injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion'.¹²⁶ The laws of society may 'very justly and reasonably' abridge an individual's 'means of acquiring a future property'.¹²⁷ Blackstone's economics are 'moral' rather than political: they are strictly within the framework of eighteenth-century mercantilism and strictly in keeping with his doctrine of 'things indifferent'.¹²⁸ One of the most basic assumptions of the

¹²² Boorstin, p. 183.

¹²³ Boorstin, p. 183, referring to II *Comm.* 288.

¹²⁴ I *Comm.* 43.

¹²⁵ I *Comm.* 126.

¹²⁶ IV *Comm.* 160.

¹²⁷ II *Comm.* 412 (said in respect of the game laws!)

¹²⁸ E. P. Thompson, 'The moral economy of the English crowd in the eighteenth century', *Past and Present*, no. 50 (Feb. 1971), 83-90; *The making of the English working class* (New York, 1964), pp. 66-67.

Commentaries is that the well-being of society is the *sine qua non* of individual well-being.

What, ultimately, was Blackstone's motive in writing the *Commentaries*? Was it merely to teach the ruling aristocracy the true way to protect its property and preserve its political ascendancy? Paul Lucas has demonstrated that Blackstone's vision of English society required an aristocracy learned in the law for the sake of its own preservation as a ruling class.¹²⁹ True; but I think I would emphasize rather more strongly than Lucas does that what Blackstone wanted was not simply the preservation of the aristocracy as such, but the preservation of its constitutional function. Blackstone shows little liking for the gentry as a class, and he certainly did not think that they had a natural right to monopolize political power for their own narrow class purposes. He was quite contemptuous of some of the self-serving uses to which they had put their control of parliament – for example, the 'bastard slip' of the game laws, which had 'raised a little Nimrod in every manor'.¹³⁰ Whatever he wanted, it was not a nation of Squire Westerns – nor the multiplication of petty squireens: we have seen his approval of primogeniture, an originally feudal device which now served a useful purpose by forcing younger sons to make themselves 'serviceable' to the nation by turning to commerce or the professions instead of taking up 'the business and idleness of a country life'. Yet the excessive concentration of too much land in too few hands had its dangers too. A small, but not a closed, body of landowners seems to have been his ideal.¹³¹ Blackstone valued 'gentlemen of independent estates and fortune' not because they had a natural right to govern but because they were the 'most useful' men in the nation.¹³² They had originally been useful because they were a military class; they are useful now, if their role be properly understood, because they are a leisure class. The original feudal reason for their creation has disappeared, but this does not render them irrelevant; they are the middle courses of the pyramid, the guardians of liberty and the bulwarks of property, without which a free and prosperous commercial society cannot exist.¹³³ Government is properly the work of a few, enabling the many to go about their business in peace and security.¹³⁴ Persons of 'inferior condition' have 'neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move'; but those who by 'nature and fortune' have 'more abilities and greater leisure' have likewise greater responsibility: 'These advantages are given them, not for the benefit of themselves only, but also of

¹²⁹ Paul Lucas, 'Blackstone and the reform of the legal profession', pp. 482, 486–7.

¹³⁰ IV *Comm.* 416.

¹³¹ II *Comm.* 360–1 and 374, and refs. in note 39 above; cf. I, 306, on the civil law practice of declaring compulsive spendthrifts *non compos* and putting their estates into the hands of trustees: 'the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigour'. By his own standards, at least, Blackstone is anything but a Whig oligarch.

¹³² I *Comm.* 7.

¹³³ I *Comm.* 260–1, quoting *Spirit of the laws*, Bk. xx, c. 6 (*recte* 7) and Bk. xx, c. 13 (*recte* 14).

¹³⁴ I *Comm.* 307.

the public.¹³⁵ Because their leisure gives them the opportunity for wider education and experience, and frees them from the limited, narrowly personal and self-interested viewpoint of those of ‘inferior condition’ who have to work for a living, the landed aristocracy are more suited to act as the legislative and administrative class, as justices of the peace and especially as members of parliament. This last role is particularly important, for ‘England will in time lose its liberty’ (he quotes Montesquieu) ‘. . . whenever the legislative shall become more corrupt than the executive’ – a terrifying thought in the Age of Newcastle!¹³⁶ Therefore it is ‘a matter most essential to the liberties of this kingdom’ that the men ‘delegated to this important trust’ be those who are ‘most eminent for their probity, their fortitude, and their knowledge’.¹³⁷ Every M.P. serves not one constituency, but the whole realm; ‘the end of his coming thither is not particular, but general’.¹³⁸ Gentlemen ‘ambitious of receiving so high a trust’ must recall that ‘they are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics’, or ‘list under party banners’; they must remember that ‘they are the guardians of the English constitution . . . bound by every tie of nature, of honour, and of religion, to transmit that constitution, and those laws to their posterity.’¹³⁹

The key words here are ‘trust’ and, especially, ‘guardian’. Blackstone’s vision of the aristocracy aspires towards, if it does not quite reach, a platonic conception of their role; but if a gentleman born is to be worthy of guardian status and not an ‘object of contempt from his inferiors’ – if his class is to survive as a guardian class – he must be educated to it.¹⁴⁰ Hence Blackstone’s insistence upon the value of studying English law in a university environment. His aim, however, is twofold: not merely to keep young gentlemen from going down from the university quite unread and unprepared for their role, but also, and even more important, to prevent them from acquiring the wrong kind of education and going down with false ideas taken from the political philosophy then becoming fashionable. They must be taught the true nature of the English constitution, that ‘best birthright, and noblest inheritance of mankind,’ so that

¹³⁵ I *Comm.* 7; cf. I, 272: ‘all offices under the crown carry in the eye of the law an honour along with them; because they imply a superiority of parts and abilities . . . and, on the other hand, all honours in their original had duties or offices annexed to them’.

¹³⁶ I *Comm.* 161, quoting *Spirit of the laws*, Bk. xi, c. 6, as well as Sir Matthew Hale; cf. I *Comm.* 179–80 on election bribery: ‘Mr Locke ranks it among those breaches of trust in the executive magistrate, which according to his notions amount to a dissolution of the government, “if he employs the force, treasures, and offices of the society to corrupt the representatives, or openly to pre-engage the electors, and prescribe what manner of persons shall be chosen.”’ Cf. also I *Comm.* 336–7, a ‘Country’ jeremiad upon the growth of royal ‘influence’ as a consequence of the Revolution.

¹³⁷ I *Comm.* 161.

¹³⁸ I *Comm.* 159.

¹³⁹ I *Comm.* 9. Therefore I have some reservations about Duncan Kennedy’s interpretation of Blackstone as a liberal: ‘The history of property law meant to him the progressive extinction of social obligations arising out of land use’ (Kennedy, ‘The structure of Blackstone’s *Commentaries*’, p. 332). The end of *feudal* obligations to one’s lord does not necessarily extinguish one’s responsibilities as a member of society. Perhaps we might say that even as these lose their positive-law sanctions (cf. Blackstone’s lament at the demise of the hundred court or his complaints about the modern poor law) they remain natural-law duties.

¹⁴⁰ I *Comm.* 8–9.

they will not be misled by specious modern theories.¹⁴¹ In particular, they must learn to avoid the mistake of thinking that the modern constitution was the revolutionary expression of radical ideas. They must keep in mind that the Revolution of 1688 was not a reversion of society to a state of nature; not

an actual subversion, or total dissolution of the government, according to the principles of Mr Locke; which would have . . . levelled all distinctions of honour, rank, offices, and property; would have annihilated the sovereign power, and in consequence have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity.¹⁴²

The aristocracy, if it accepted the Lockean theory of revolution and natural right, would find it ultimately destructive, both of the aristocracy itself and of its admirably contrived role in the pursuit of that ‘final cause’, the true natural law of English history, the ‘true and substantial happiness’ of English society. The modern constitution is properly the ancient constitution, restored during the Restoration; it provides both the substance of liberty and the means of preserving it, and it is therefore, with all its faults, ‘perfect’ in the sense in which Blackstone had probably seen it defined in Johnson’s *Dictionary*: ‘complete; . . . finished; neither defective nor redundant’ – a definition which Johnson illustrated with a passage from Hooker which Blackstone had also probably seen: ‘We count those things perfect which want nothing requisite for the end whereto they were instituted.’¹⁴³

¹⁴¹ IV *Comm.* 437.

¹⁴² I *Comm.* 213.

¹⁴³ Richard Hooker, *The laws of ecclesiastical polity*, II, viii, 5 (Edelen, p. 189); cf. *idem*, ‘the absolute perfection of scripture is scene by relation unto that end whereto it tendeth’.