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JAMES MADISON AND WM. BLACKSTONE: INTRODUCING ‘THE KINETIC BECOMES THE NEW SEMANTIC’ 2 OCL 453

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ABSTRACT.
Wm. Blackstone’s *Commentaries on the Laws of England* achieved instant best-seller status in the United Kingdom. Blackstone’s 676,020 words overwhelms, in volume, James Madison’s 5,818 words devoted to the debate over Hamilton’s proposed Bank of the United States in 1791, the outcome of which went against Madison. It would be hard to find two less likely candidates for apples-to-apples comparison than the nascently academic Blackstone and the programmatic Madison. Our Constitutional Logic investigates

KEY WORDS: divine providence, meaning, precedents.

A. AN EXTENDED INTRODUCTION TO BLACKSTONE’S PROGRAM. Wm. Blackstone’s *Commentaries on the Laws of England* exposes five to ten thousand rules, each employing ten to twenty words in natural, semi-regimented, or Latin (choice of language is indifferently employed, as far as the modern reader is concerned) in a framework which insists – OCL underlines this point – that human effort revealed in patterned behavior reflects divine wisdom.

For now, word counts and quotes must suffice to sketch the dimensions of this project.

Fifty deployments of ‘divine’ (less two for Anglican priests) yields a net of 48 instances in which divine providence or wisdom is invoked.

There is, it is true, a great number of 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. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws, that annex a punishment to it, do not at all increase it’s moral guilt, or superadd any fresh obligation in foro conscientiae to abstain from it's perpetration. Nay, if any human law should allow or injoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; 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. Section 2; Paragraph 12.

What Blackstone makes explicit is this: providence arranges human affairs so that human beings are obliged to prohibit murder but permitted to regulate the exportation of wool.

Assume seventy percent of his five to ten thousands of rules are of the “indifferent” variety, that is, rules “not commanded or forbidden by those superior laws.” Nevertheless, this pattern reflects glory on the divine mind because providence has subdivided human affairs into those regulated by obligation and those open to exploitation by political society as its own assessment of its needs may dictate.

B. **Resurrecting Blackstone.** This aspect of WB’s project is entirely rejected by moderns and cannot, on that account, be credited by them; nevertheless, Blackstone’s attribution to Justinian may retrieve the project’s credibility, at least in part.

This will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the creator only as a being of infinite power, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite wisdom, he has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one it’s due; to which three general precepts Justinian has reduced the whole doctrine of law.

Justinian’s ‘three general precepts’ embrace all of Blackstone’s rules in their thousands, which point Blackstone underlines with 46 instances of ‘wisdom.’ To be sure, the measurement is not entirely symmetrical. A motto much favoured of the setttecento comes to mind: ‘The measure of all that is, is man.’ After 14,094 words, WB’s invocation is entirely mortal:
We have seen, in the course of our enquiries, in this and the former volumes, that the fundamental maxims, and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages. [Book IV, Chapter 33, last paragraph.]

Blackstone makes the path as clear as he can make it. Veneration for divine wisdom, five to ten thousand rules later, some commanded by providence, most not, yields a body of rules “now fraught with the accumulated wisdom of ages.”

C. **Blackstone’s Program in Outline.** Expose the “wisdom of the civil polity” (as a means, no less, of launching new academic field, no easy task then or now) through (a) the listing five to ten thousand rules, the text of each rule supplemented by learned meta-text and (b) which listing supplies a pattern of past kinetic official response to public or private need and (c) which pattern suggests, at the highest level of abstraction, that pattern/s reveal divine wisdom in action.

D. **Madison’s Program in Outline.** When Alexander Hamilton and James Madison debated the bill establishing America’s first national bank (1791) the Secretary of the Treasury and the Congressman from Montpelier posed very different questions to the First Federal Congress. Madison’s position may be paraphrased: ‘Does constitutional text authorize Congress to charter a national bank?’ In Alexander Hamilton’s counter to Madison, Hamilton asked, ‘Is it convenient for a government with responsibility for national finances, trade and defense to organize a national bank?’

These two questions divide as follows: the first equates ‘constitution’ with text locatable in one place and the second equates the term ‘constitution’ with government and specifically its structures, titles and offices. The first paraphrase limits answers to the question ‘Is this proposed official action constitutional?’ to an existing constitutional writing, while the second paraphrase does not.


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with 5,818 words in two speeches from the floor of the House (February 2 and February 8, 1791). Hamilton devoted 12,759 words (in his Opinion) successfully defending the bank’s constitutionality and inducing President Washington to sign his bill.

Our point of departure here is that Madison argued that Hamilton’s bank lacked constitutional permission. The defect (which Madison equated to the lack of an explicit “power of making treaties”) could “only have been lamented, or supplied by an amendment of the Constitution.” In short, Madison’s semantic program required supermajoritarian action. When faced with national needs or opportunities, if constitutional text did not resolve issues of the day in favor of action, Congress must lament or amend. If text was, on semantic analysis, inadequate, more text must be rushed to the scene of the lamentation.

Rescue by supplemental text is, therefore, Madison’s motto. OCL has investigated the Doctrine of Semantic Purity which obliges legislators to ‘lament or amend’ in The Doctrine of Semantic Purity: Madison’s Project (and its Difficulties) Introduced, 2 OCL 798, and measured that project against its affiliates in Madison’s Semantic Purity Project and Its Sisters, 2 OCL 709.

Madison’s ‘lament or amend’ motto died a second death when the nation failed to amend the constitution, as Madison, in essence, demanded. “I have no option but to withhold my signature” from the Bonus Bill (March 3, 1817). Madison’s veto message cherished “the hope that its beneficial objects may be attained by a resort [to the] Constitution [which] providently marked out in the instrument itself a safe and practicable mode of improving it.”

E. RESOURCES. For on-line access to Peter Aschenbrenner’s articles, tables and charts see purdue.academia.edu/PeterAschenbrenner or works.bepress.com/peter_aschenbrenner/

F. FIVE KEY WORDS COMPARED. After the foregoing discussion, the reader should be convinced that ‘apples to apples’ comparison of Blackstone’s 676,020 words and Madison’s 5,818 is simply unworkable and cannot yield anything of interest. The Table Annexed to this Article tracks the log (base 10) scores for hits on five key words. These are constitution (including constitutional and constitutions), need (including necessary, necessarily, necessity and so forth), meaning, intent (including intention/s) and precedent/s.

Madison employs these words fewer times than Blackstone; but they do get close with ‘intent’ on sketchy figures: WB’s 193 / 676,020 compared with JM’s 2/5,818. But

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3 Madison to Andrew Stevenson, March 25, 1826, in Farrand, Records, 3:474. “If the instrument be interpreted by criticisms which lose sight of the intention of the parties to it, in the fascinating pursuit of objects of public advantage or conveniency, the purest motives can be no security against innovations materially changing the features of the Government.”

what is of interest is not so much the absolute rate of hits, reduced to when expressed in a \( \log_{10} \) scale. What should catch the reader’s eye is the relative rate at which these words are deployed: ‘constitution’ is used much more by WB and JM than ‘precedent.’ JM’s score falls from the former to the latter leaving the rate for ‘precedent’ to be deployed at 69% of ‘constitution’ while WB keeps his attention to ‘precedent’ only marginally higher, at 76% of constitution. And JM finds ‘meaning’ to fall in a middle zone of deployment while WB is barely interested (by comparison) in ‘meaning.’

G. Conclusion. At this level of analysis, in range of word scores and depth of analysis we can reserve two points for further attention: Madison was eager to show that what we do with words can’t count as a ‘bank’ or ‘resource’ of kinetics for exploitation in the future. That is rather the whole point of semantic purity, both in its obnoxious ‘suicide pact’ formulation – ‘lament or amend,’ a more elevated way to put the matter –or in its linguistic formulation. What we do with text today should matter to future generations who must use the same text. When we assert that text dictates procedures, no generation is going to hesitate to leapfrog our views on the matter and assess any previous generation’s experience with text on its own assessment of the encounter with text.

We respect what others do more than what others think.
Especially when they try to do our thinking for us.
Madison is no more or less committed to explaining constitutional analysis through precedent than Blackstone. True, JM attempts to argue (and on a number of occasions) that following Hamilton is setting a precedent. But that’s the curse of Semantic Purity. One impure act is all it takes to overthrow the entire project. Pretty soon people are citing to previous official Kinesis when ascendant Logos demands our devotions.

‘Pay no attention to that man behind the curtain,’ Madison grinds his gears and wheels as Toto reveals the man behind the drapery.
Madison’s not a bad man, OCL hastens to depart from Dorothy’s judgment.
Nor is Madison a bad wizard. OCL stays the great and powerful their concession.
According to the chart annexed, the magic enjoined on every wizard who encounters the past reveals itself to be, more or less, identical.
Taking a ‘wizard to wizard’ view of things.
Hogwarts, it appears, was doing a roaring business in the settecento.

H. Status. Incomplete.

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