

The Clough Center Report

The Gloria L. and Charles I. Clough Jr. Center for the Study of Constitutional Democracy

Boston College

From the Director:



Can the study of constitutional democracy provide a foundation for a first-rate education in the liberal arts? And if so, how? As the founding director of Boston College's Clough Center, these are questions I consider regularly in thinking about how to structure the Center's programs and offerings. The liberal arts have taken a beating in higher education in recent years as parents and students flock to ever more ostensibly 'practical' – and presumably more lucrative – majors, as university administrators reward faculty who can swim in the deepest pools of grant money, and as an obsession with increasingly arcane research without regard for the needs or

interests of students drives the professoriate's understanding of its job. One of the great things about Boston College is its dual commitment to being one of the nation's top research universities while simultaneously preserving a commitment to the liberal education of its students. The Clough Center proudly hopes to both serve and advance this distinctive institutional mission.

Politics is a practical art, and we believe in learning by doing. The students in the Center's Junior Fellows Program and at the Clough Journal of Constitutional Democracy are learning – with active faculty support -- to take charge of their own education in significant ways: they initiate discussions and debates, host film screenings, organize trips to academic conferences, and write (assess and edit) academic articles, while all the while sharpening the skills essential to motivating and working with others to achieve shared objectives. In the process, our students are cultivating the character that sustains healthy democracies. The

Clough Center also sponsors Civic Service internships, where BC undergraduates serve their communities, in the process simultaneously developing new (and practically useful) skills while helping others. However practical their activities, the Clough Center regularly encourages our student participants to reflect upon the deeper questions concerning self-government under the rule of law, and to understand those reflections as not separate from, but closely related to, their real-world engagements.

Today, in my discipline, political science, more and more research is the product of a preoccupation with method over substance, and is descending into triviality and irrelevance by fetishizing precision (the smaller the question, as it happens, the greater likelihood there is of achieving it). By contrast, the Clough Center's annual lecture series, and the conferences and seminars it hosts, are committed to exposing our students to a different kind of research by

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bringing to BC scholars who are not only leaders in their field, but who also ask vital questions, and seek to answer them in deep and learned ways. The scholars we bring to BC care about being able to convey their ideas to a highly interested general audience.

What is a good life, and how can individuals lead it, personally, and in community? How do healthy societies sustain – and fail to sustain – themselves? How important is democracy to these objectives, and how can we balance popular rule with beliefs in timeless principles and the limitations imposed by a commitment to fundamental laws? Our speakers address these and many other highly significant questions.

The study of constitutional democracy is not the only subject that could serve as a foundation for a liberal education devoted to nourishing practical skills and a lifelong facility with, and enthusiasm for, contemplating important questions. But it is a pretty good one. Crucially, and rightly, as I see it, it takes the world as whole -- as a place where our daily practical concerns, and our deepest commitments, are related. As such, the study of constitutional democracy can be an excellent place to begin.



Ken I. Kersch

James Ely: Reviving the Contract Clause



“No state shall,” article 1, section 10 of the United States Constitution states “pass any ...law impairing the obligation of contracts.” This clause, known to lawyers as the “contract clause,” had a profound impact on American law before slipping into obscurity and what some have termed “the Constitution-in-exile.” In September 2009 James Ely, a professor at Vanderbilt University Law School, spoke to students and faculty at Boston College. One of the nation’s foremost authorities on the contract clause, Ely explained the “near eclipse of the contract clause” and urged scholars and legal professionals to take a renewed interest in its potential.

The contract clause, Ely argued, was one of the chief restrictions on state authority in the Constitution as originally drafted. It was intended as a safeguard of commerce and property. As early as the 1790s, two lower federal courts invalidated state laws on

contract clause grounds. Over the next century, however, the interpretation of the contract clause changed to include important limitations. The police powers that the state governments retained, the courts found, could not be abridged by the contract clause. That is, a legislature could not bargain away its rights to police the health, safety or morals of its citizenry.

Professor Ely traces the decline of the contract clause with the rise of due process. The decline of the clause, Ely argued, “took place concurrently with the rise of a political climate supportive of the regulatory and welfare state.” With the arrival of the Progressive movement, the last century saw a move toward greater economic regulation and a decrease in the faith of voluntary contracts and competitive markets. This is despite John Marshall’s claim that the contract clause was among the cluster of provisions John Marshall termed a “bill of rights for the people of each state.”

A lively question and answer session followed Ely’s lecture. Many of these questions focused on what makes a valid contract, especially as related to the “morals” provision of the police powers. Professor Ely’s attempt to revive the contract clause conflicted with some listeners’ understanding of sensible limits on the right of contract.

Going Hypertrophic: Why Democracies Fail

“The first decade of the 21st century has not been a happy time for the fortunes of democracy in the world.” With this statement, Marc Plattner, editor of the *Journal of Democracy* and author of many books and articles on democracy around the world, introduced his October 2009 talk “Pluralism, Populism, and Liberal Democracy.” Plattner argued that the 21st century has seen the spread of democracy come to a halt, and there may be some erosions of its previous success. However, while democratic breakdowns outnumber new democratic births, he explained that no well established or developed democracies have been lost. He argued that the success of these “mature” democracies results from the balance of the two competing tendencies causing democracies to “drift.”

First, Plattner explained that “democracy” as understood today is actually “liberal democracy.” Democracy is defined as the power or rule of the people, which in principle is the rule of the majority. Plattner explained, however, that it is almost universally recognized that majoritarianism doesn’t represent what most consider “modern democracy.” A modern democracy must protect the rights of individuals and minorities, and it must protect freedom and liberalism. Thus, modern democracy is “liberal democracy” or “constitutional democracy.”

Liberal democracy, Plattner argued, pursues not a single goal, but two separate and sometimes competing goals: populism and pluralism. Mature democracies exhibit both of these tendencies, but they cancel each other out. In emerging democracies, one or the other is likely to take strong hold. When either “radical or extreme populism” grows too large (what Plattner terms “hypertrophic populism”) or becomes too fractured along ethnic, racial or religious lines in “radical or extreme pluralism” (“hypertrophic pluralism”) Plattner claims that democracy is unstable.

Radical populism is often characterized by charismatic leaders pushing for the approval of



Marc Plattner

new constitutions—a move that does not make the country a “constitutional democracy” but rather exhibits a contempt for procedural niceties and protections. These moves are justified as the agent and embodiment of the people themselves. In this form of populism, “the people” are seen as a homogeneous group. Those who are different are seen as enemies of the people, not potential allies.

In contrast, radical pluralism focuses on the distinctions between people, increasingly their ethnic, racial or religious differences. Plattner claims that radical pluralism approaches the meaning of “multiculturalism” in the West, where lack of respect for “the other” is a great sin. In the context of a healthy democracy, Plattner claims that radical pluralism pursues minority rights too far, undermining national unity. This difficulty, he claims, is present in all deeply divided societies, and its tendency is faced even by the modern democracies of Europe, which must deal with the challenge of integrating its increasing numbers of Muslim immigrants.

Liberal democracy, Plattner concluded, is only resilient when its internal makeup is at odds with itself: when neither radical populism nor radical pluralism gain the upper hand and overwhelm the complicated balancing act of modern democracy. A healthy democratic society must prevent either pluralism or populism from going hypertrophic.

Luncheon Seminar: Secularization and Modernity in Europe

The 2009-2010 academic year marks the beginning of a partnership with the Délégation générale de l'Alliance Française aux États-Unis, and the Fondation Alliance Française through which the Clough Center has the opportunity to bring prominent French scholars and public figures to campus to discuss topics relevant to the Center's mission. The first such speaker, Danièle Hervieu-Léger of l'École des Hautes Études en Sciences Sociales in Paris (co-sponsored by the Boisi Center) spoke to a large luncheon crowd at Boston College in November. Her topic, "Secularization and Contemporary Religious Renewal in Europe," traced a long history of secularization in Europe and its relationship with modernity.

Hervieu-Léger's talk, attended by scholars from around greater Boston, members of the French consulate, and BC faculty and students, discussed the "common wisdom" that the decline of religiosity was a prerequisite for modernization itself. The major empirical studies on religious practices in Europe, Hervieu-Léger explained, have contributed evidence of the "secularist certainties" as triumphant modernity. The apparent self-evidence of these observations have encouraged

certain assumptions, and created dogma. Nothing contradicts the general diagnosis of secularization and modernization being concurrent.

Hervieu-Léger, however, argued that what happened in Europe was a shift from "hard religion" to "soft religion," where religion is seen as individual, the choice of an autonomous person who is free to cobble together his or her own spiritual narrative. This new wave of religious belief began with the spiritual revival of the 60s and 70s. It was prompted, in part, by the existence of modernity, which sees virtually no end to the possibilities of science. In a world where science is constantly reshaping how we interact with our worlds, where we constantly question the conclusions even of science, the concept of a one true religious teaching becomes harder to sustain. The new religiosity that developed in the 1960s and 1970s disqualified the great narratives and replaced them with small personal narratives cobbled together by the individuals.

The shift from hard religion to soft religion, however, is now becoming the loss of religion. France is the paradigmatic example. In a country of 6 million inhabitants, half say they are "of Catholic origins" but only 4% of those regularly attend services and, remarkably, only 7% of that 4% follow ecclesiastical norms. 40% of French claim to be atheists, and more than 50% of the French claim they never had any contact with religion in their life. The same process is occurring everywhere in Europe.

The reality that Islam brings to Europe is one that both unites and divides the European countries. On the one side, the spread of the media culture, homogenized modes of consumption, a trend that tends to erode the cultural idiosyncrasies of countries. Yet, these very trends engender reactions that revive national and religious sentiments and tend to generate the formation of reactive identities. This dual trend has permanently redefined European religious modernity into a "multiple modernity."



Hervieu-Léger and Lecture Attendees

The New Volume in Tocqueville Scholarship

In early November 2009, the Clough Center hosted Tocqueville scholars Cheryl Welch, Harvey Mansfield, Shep Melnick, and Indiana University's Aurelian Craiutu for a roundtable discussion on Professor Craiutu and Jeremy Jennings' new edited volume *Tocqueville on America after 1840: Letters and Other Writings*. Alexis de Tocqueville's two-volume *Democracy in America* is one of the most widely studied works of American political thought. Tocqueville never composed a third volume of his masterpiece, but the French aristocrat continued to observe the progression of politics in America. Aurelian Craiutu and Jeremy Jennings' new book presents Tocqueville's later writing on such issues as slavery, the instability of the financial markets, political corruption, and the immaturity of American democracy. The two authors also provide a controversial speculation on what a third volume would have looked like had it been written.

Cheryl Welch of Harvard University examined Tocqueville's views on the dilemma of race and slavery in America. Welch remarked that Tocqueville's letters delved into the questions surrounding the abolition of slavery, and discussed Tocqueville's understanding of the conflict between the ethics of conviction and the ethics of responsibility. He recognized that responsibly abolishing slavery in the United States might have been incompatible with maintaining the "great and present good" of the American Union.

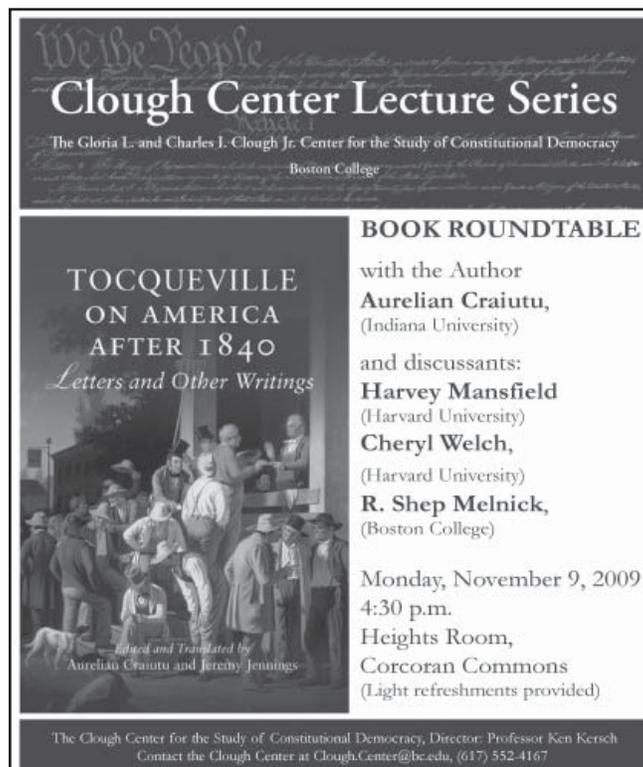
Harvey Mansfield of Harvard University took

issue with the editor's adherence to the common academic practice of treating the two volumes of *Democracy in America* as two separate books published five years apart and vastly different. Mansfield claimed that the two volumes should be considered a single book. Professor Mansfield argued that while there are unmistakable differences between the two volumes, there is sufficient similarity of theme and style to consider them one work.

R. Shep Melnick of Boston College lightened the discussion with several illustrations of Tocqueville's humanity as revealed by his letters, and noted the letters in this book deal with constitutional design and institutions much more explicitly than did Tocqueville's earlier work.

Aurelian Craiutu concluded the discussion mapping out the evolution of Tocqueville's views. In Volume One, Craiutu claims that Tocqueville presents a more optimistic view of American political development, applauding American democracy as accomplished and capable

of overcoming obstacles. In Volume Two, however, he qualifies his initial assessment, deeming America immature in some ways. The "new" things that the new volume explores are harsher and darker than the first two volumes. There was, he claimed, a disintegration of American mores. Professor Craiutu explained that the writings after 1840 paint a darker image of American democracy. Tocqueville cites the corruption of democratic institutions as the cause of America's looming problems.



Clough Center Lecture Series
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Boston College

BOOK ROUNDTABLE
with the Author
Aurelian Craiutu,
(Indiana University)
and discussants:
Harvey Mansfield
(Harvard University)
Cheryl Welch,
(Harvard University)
R. Shep Melnick,
(Boston College)

**TOCQUEVILLE
ON AMERICA
AFTER 1840**
Letters and Other Writings
Edited and Translated by
Aurelian Craiutu and Jeremy Jennings

Monday, November 9, 2009
4:30 p.m.
Heights Room,
Corcoran Commons
(Light refreshments provided)

The Clough Center for the Study of Constitutional Democracy, Director: Professor Ken Kersch
Contact the Clough Center at Clough.Center@bc.edu, (617) 552-4167

The Clough Center Brings Together Local Public Law Scholars

Now in its second year, the Boston Area Public Law Colloquium (sponsored by the Clough Center) has brought together scholars from a variety of backgrounds with a common interest in the law. Speakers at Colloquium dinners have ranged from the University of Maryland’s Mark Graber who spoke on: “The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order” to Lynn Mather of the University of Buffalo discussing “Rethinking Lawyer Fidelity.” Twice each semester scholars and graduate students studying public law gather for dinner and a

freewheeling discussion that represents the different areas and focuses of the Colloquium’s diverse membership.

The group was founded precisely to foster such discussions. Says one of the colloquium co-founders R. Shep Melnick (a Boston College political scientist), “The Boston area has an amazing array of scholars who study the intersection of law and politics. But until now there have been few opportunities for these people to get together to share ideas. The Clough Center has made this possible. We have been pleasantly surprised by how many people have found time in their busy schedules to become

regular participants in our events. Clearly this is something that people have been waiting for, and have embraced. The colloquium also gives us an opportunity to hear from people who are spending a semester or a year in the Boston area. The colloquium not only allows us to get to know people from other universities, but brings together scholars from a diversity of disciplines such as law, political science, history, sociology, and economics.”

More details on upcoming Public Law Colloquium events can be found on the Clough Center’s website. Scholars new to or visiting the Boston area are particularly invited to check the Center’s website for more information.



BC Students Receive Research and Conference Opportunities

In 2009, the Clough Center for the Study of Constitutional Democracy had the opportunity to fund programs that encourage research and participation in government. The Center offers grants to undergraduate students working in an unpaid position for the government or a nonprofit group under the Civic Internships program.

One such student is Michael Stork, A&S '10, who worked at the Regulatory Studies Program at the Mercatus Center of George Mason University. The Mercatus Center is a nonprofit think-tank that seeks to inform

governmental decision-making with academic research. Stork’s responsibilities included researching past and pending economic, environmental, and health legislation and attending Congressional hearings. He also had the opportunity to work on a research project of his own. Congressional offices, law programs, and an embassy were among the diverse list of placements funded by the Clough Center.

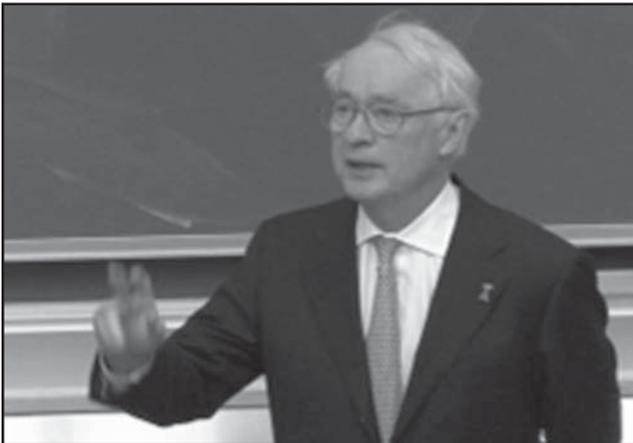
For graduate students, the Center provides research grants and summer stipends for projects related to the study of constitutional democracy. This

summer, fourteen research papers received funding, including one by Michael O’Brien, a Boston College M.A. student in philosophy. His research seeks to reconcile the writings of the eminent political philosophers Jürgen Habermas and David Held.

The Clough Center also funds the Junior Fellows program, a club for undergraduates passionate about political science. The group invites guest speakers to campus, hosts a series of discussions on constitutional issues, and plans trips to conferences.

Clough Center Senior Fellow Revisits “Thinking About Crime”

In November 2009 Professor James Q. Wilson spoke to a large gathering of faculty and students in a lecture entitled “Thinking About Crime, Again - What Have We Learned?” The Clough Center Senior Fellow and renowned political scientist spoke at length on the subject on the causes and solutions to crime within the United States. Wilson offered a brief survey of the recent history of crime in America. The 1960’s had seen a rise in crime rates coupled with a decline in incarceration rates. The rise in crime led to a shift in American views on jail, insofar as Americans had favored rehabilitation for inmates in the 1960’s, but began to favor a pro-incarceration position in the 1970’s.



James Q. Wilson, Clough Center Senior Fellow

Today’s crime rate is comparatively low compared to that of the 1960’s and 1970’s. Wilson argued that there were four reasons for this decline: incarceration has increased,

the population has aged, police employ better procedures, and the culture has become more law-abiding. Many of the high profile programs such as D.A.R.E. and youth “boot camps” have been shown to be ineffective.

We now know that some high-profile programs haven’t worked. Research has demonstrated however, that several programs do effectively lower the crime rate. Wilson noted that pilot programs sending nurses to help pregnant and new mothers care for infants have demonstrably significant long term effects. Further, GPS systems tracking parolees have proven to be costly, but effective.

In some cases, programs have gained widespread acceptance only after a “rebranding” to make them more politically palatable. Wilson highlighted a program that successfully supervised persons on probation, but had been given the unfortunate title of “coerced abstinence.” This program subjected individuals on probation to random drug tests. If a probationer failed that test, probation would be revoked for varying lengths of time. The idea caught on only after being

renamed “Project Hope.”

A lively question and answer session, including probing questions on the deterrence power of punishment. Wilson invited the audience to consider that the true deterrence power of punishment was when it was out of proportion to the crime. His analogy to someone being shot for sneezing on the bus both entertained the audience and effectively illustrated his point.

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Staff Writer

President Obama, National Security and Executive Power

April 8-9, 2010
The Heights Room • Boston College

April 8 2010

6:30 PM Opening Dinner,
Address by James Q. Wilson
(by invitation)

April 9 2010

8:30 Welcoming Remarks, Ken
Kersch, Director, Clough Center

9:00 - 11:30 PM Panel, "Obama
and Executive Power"
Richard Albert, Akhil Reed
Amar, Hugh Hecl, Marc
Landy, Mara Liasson

12:00 Lunch, Address by Ben
Wittes, Senior Fellow, Brookings
Institution (by invitation)

1 - 2:45 Panel, "Controversies Fac-
ing the Obama Administration"
Philip Heymann, Daniel Kanst-
room, Orin Kerr, Mary-Rose Papan-
drea

3 - 5 Panel, "Lessons Learned"
George Brown, Nicholas Burns,
Timothy Crawford, Gabriella Blum

For more Clough Center Spring 2010 events, please see the Center's website.

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