HARVARD
LAW REVIEW

VOL. XLII JANUARY, 1929 No. 3

PREDICTABILITY IN THE ADMINISTRATION OF CRIMINAL JUSTICE

FOREWORD

NOT the least interesting of present-day movements in jurisprudence is the renewed quest for certainty after the reaction from the formal certainty of nineteenth-century law. In the last century we had looked at the general security from the standpoint of security against the arbitrary action of magistrates and abuse of prosecuting machinery by officials, rather than from the standpoint of security of society against the conduct of offenders. In effect we had sought to put the social interest in the individual life in terms of the general security. It is the task of the criminal law to discover and mark out the lines of a wise adjustment or practical compromise between the general security and the individual life. In the humanitarian thinking of the eighteenth century, stress was put upon the individual life, and until recently that interest in effect had preponderant recognition. The whole apparatus of criminal justice was shaped by the quest for means of insuring an abstractly uniform, outwardly mechanical administration. The superseding of the common-law principle as to misdemeanors by a doctrine of *nulla poena sine lege,* minutely defined degrees of crime, and exact statutory penalties, worked out in detail for minutely differentiated offenses, tied tribunals down

THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW *

III

IT was the happy strategy of the Tudors to convert Parliament from an outpost against the royal power into its active instrument. The result of this alliance for English constitutional ideas was momentous. Contemporaneously Bodin was attributing to the king of France the whole power of the state and describing that power as "perpetual and absolute," as "*legibus soluta.*" [1] Very different is the doctrine of Sir Thomas Smith in his *Commonwealth of England,* written near the middle of Elizabeth's reign:

> "The most high and absolute power of the realme of Englande, consisteth in the Parliament. . . . That which is doone by this consent is called firme, stable, and *sanctum,* and is taken for lawe. The Parliament abrogateth olde lawes, maketh newe . . . and hath the power of the whole realme, both the head and the body. For everie Englishman is entended to bee there present, either in person or by procuration and attornies." [2]

In consequence of the Tudor reformation, the joint work of king and Parliament, the concept of sovereignty in the sense of *potestas legibus soluta* became confined to that branch of his power which the king customarily exercised "by and with the advice and consent" of Parliament.

Yet to begin with, this characteristically English compromise was assailed from both sides. The Stuarts, not enjoying the cooperation of Parliament, sought to put themselves beyond the

---

* This is the second and concluding instalment of Corwin, *The "Higher Law" Background of American Constitutional Law* (1928) 42 HARV. L. REV. 149.

[1] 2 DUNNING, HISTORY OF POLITICAL THEORIES (1916) 96 *et seq.*

[2] SMITH, DE REPUBLICA ANGLORUM (Alston ed. 1906) bk. ii, c. 1. Coke regards the bulk of the law of his time, both common and statute, as unalterable. 2 Co. INST. 187. "The People of England, have both ancient Fundamental Rights, Liberties, Franchises, Laws, and a Fundamental Government, which like the Laws of the Medes and Persians, neither may nor ought to be altered." PRYNNE, GOOD OLD FUNDAMENTAL LIBERTIES (1655) pt. 1, 27.

need of it by appealing to the doctrine of the divine right of kings. In answer, their Parliamentary opponents did not hesitate to challenge, in the name of the supremacy of the common law, the outstanding constitutional result of the Tudor reformation; and the foremost figure of this reaction was Sir Edward Coke.

Coke was best known to our ancestors as the commentator on Littleton's *Tenures*. "Coke's Lyttleton," wrote Jefferson many years afterward with reference to the pre-Revolutionary period, "was the universal lawbook of students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or in what was called British liberties." [3] Before he was a commentator on the law of England, however, Coke was successively law reporter, crown attorney, chief justice of the Common Pleas, chief justice of the King's Bench, and member of Parliament; and always he was Edward Coke, an outstanding, aggressive personality, with a fixed determination to make himself mightily felt in whatever place of authority he might occupy. That such a person, having occasion to express himself from the standpoint of such various capacities, should be altogether self-consistent, would be demanding too much. Medievalist and legalist, Coke's objective is sharply political — the curbing of the pretensions of royalty. So precedent and authority — the legalist's stock materials — must be bent to the selected end. Indeed, if occasion require, they may be embroidered upon somewhat, for Coke's outlook upon such procedures is not unlike that of a medieval chronicler of edifying intent. In another respect, too, Coke is thoroughly medieval; his method, even in his *Institutes*, is irritatingly fragmentary, with the result that his larger ideas have often to be dug out and pieced together from a heterogeneous mass. Nor should the student of Coke fail to reckon on the difficulty which arises from the sheer operation of time on the significance of the terms which he employs. Madison's warning centuries later against "those errors which have their source in the changed meaning of words and phrases," is singularly pertinent in this instance.[4]

[3] 12 JEFFERSON, WRITINGS (Mem. ed. 1903) iv. As a student himself, Jefferson entertained a very uncomplimentary opinion of Coke. 4 *id.* 3.

[4] See especially MacKay, *Coke — Parliamentary Sovereignty or the Supremacy of the Law?* (1924) 22 MICH. L. REV. 215–47; and 5 HOLDSWORTH, HISTORY OF

While Coke as attorney general had shown himself conspicuously subservient to the royal interest, his clashes as judge with James I make a notable chapter in judicial history. His basic doctrine was "that the King hath no prerogative, but that which the law of the land allows," [5] and that of this the judges and not the king were the authorized interpreters.[6] The circumstances of his admonition to James that he had no right to judge as between subject and subject save through the ordinary courts proceeding without royal interference were reviewed above. Later he had cause to inform James that the latter could not by proclamation "make a thing unlawful which was permitted by the law before." [7] On these occasions Coke had the support of his judicial brethren; but in the matter of the Commendams they deserted him to a man. The question put the judges was whether, in a case pending before them which the king thought "to concern him either in power or profit," they could be required to stay proceedings till the king could consult with them. All but Coke answered yes. Coke's answer was "that when that case should be, he would do that which should be fit for a judge to do." [8] Shortly after he was removed from his chief justiceship.

For students of the origins of American constitutional law and theory, however, no judicial utterance of Coke's — few indeed in language — can surpass in interest and importance his so-called dictum in *Dr. Bonham's Case*, which was decided by the Court of Common Pleas in 1610.[9] Holding that the London College of

ENGLISH LAW (1924) 423–93. WALLACE, REPORTERS (3d ed. 1855) 112–42, makes a convincing defense of Coke's reliability as a reporter.

[5] Proclamations, 12 Co. 74, 76 (1611).

[6] Nicholas Fuller's Case, 12 Co. 41 (1608); The Case of the King's Prerogative in Saltpetre, 12 Co. 12 (1607); Case of Non Obstante, or Dispensing Power, 12 Co. 18 (c. 1607). In Commissions of Enquiry, 12 Co. 31 (1608), Coke, commenting on Bates' Case, 2 How. St. Tr. 371 (1606), sustains the King's power to exact retaliatory duties from foreign merchants, and also his power to exact benevolences. Exaction of Benevolence, 12 Co. 119, 120 (c. 1610). See also 2 Co. INST. 63. Today the royal prerogative is subject absolutely to the legislative power of Parliament, and when a statute has directed the exercise of the prerogative in a certain way there is no "remnant prerogative." See Morgan, *Introduction* in ROBINSON, PUBLIC AUTHORITIES AND LEGAL LIABILITY (1925) xiv. See CHITTY, PREROGATIVES OF THE CROWN (1820) 383, for statement of the older view.

[7] Proclamations, 12 Co. 74, 75 (1611).

[8] The Case of Commendams, Hobart 140–66 (1616); HICKS, MEN AND BOOKS (1921) 67–70.

[9] 8 Co. 107a (1610), 2 Brownl. 255 (1610).

Physicians was not entitled, under the act of Parliament which it invoked in justification, to punish Bonham for practicing medicine in the city without its license, Coke said:

"And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void." [10]

In these words we have foreshadowed not merely the power which American courts today exercise in the disallowance of statutes on the ground of their conflict with the Constitution, but also that very test of "reasonableness" which is the ultimate flowering of this power. We must determine if we can to what extent Coke's own intention sanctions the modern application of his doctrine, and also to what extent the historical background of the dictum does so.

We may first dispose of a matter having only incidental reference to these questions. In employing the phrase "common right and reason," Coke is no doubt again alluding to "that artificial reason and judgment of the law" of which he regarded bench and bar as the especial custodians. What is pertinent to note here is that his employment of these terms is by no means the narrowly official and precisionist one that it would probably have been a hundred years before. Early in the sixteenth century the author of *Doctor and Student,* possibly voicing the suspicion of the Tudor epoch toward principles restrictive of governmental authority, had taken pains to explain that the term "law of nature" "is not used among them that be learned in the laws of England." [11] The attitude revealed by Coke and his associates con-

[10] 8 Co. 118a (1610). The best comment on the dictum is to be found in McILWAIN, HIGH COURT OF PARLIAMENT AND ITS SUPREMACY (1910) c. 4, and Plucknett, *Bonham's Case and Judicial Review* (1926) 40 HARV. L. REV. 30 *et seq.* COXE, JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION (1893) cc. 13–17 is of incidental value. Ellesmere's charge that Coke had the support of only one judge and that three others were against him seems to be refuted both by Coke's and by Brownlow's report of the case. Apparently only three judges participated, and all agreed with Coke's statement.

[11] ST. GERMAIN, DOCTOR AND STUDENT (Muchall ed. 1787) 12–13. Suspicion of ecclesiastical domination is given by Pollock as the reason for the reluctance of

temporaneously with *Bonham's Case* is very different. Reporting *Calvin's Case,* which was decided the same year, following argument by the chief legal lights of England, Coke says, by way of summary: "1. That ligeance or obedience of the subject to the Sovereign is due by the law of nature: 2. That this law of nature is part of the laws of England: 3. That the law of nature was before any judicial or municipal law in the world: 4. That the law of nature is immutable, and cannot be changed." [12] He then recites in support of these propositions the following quaint argument:

"The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *Lex aeterna,* the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world. . . . And Aristotle, nature's Secretary Lib. 5. Æthic. saith that *jus naturale est, quod apud omnes homines eandem habet potentiam.* And herewith doth agree Bracton lib. 1. cap. 5. and Fortescue cap. 8. 12. 13. and 16. *Doctor and Student,* cap. 2. and 4." [13]

---

the sages of the common law before the Reformation to refer expressly to the laws of nature. POLLOCK, EXPANSION OF THE COMMON LAW (1904) 112–13. Fortescue, however, evinced no such reluctance. Bryce notes that both Yelverton and Lord Chancellor Stillington, who held office under Edward IV, referred to the law of nature. BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE (1901) 601. Pollock himself adds: "It is not credible that a doctrine which pervaded all political speculation in Europe, and was assumed as a common ground of authority by the opposing champions of the Empire and the Papacy, should have been without influence among learned men in England." BRYCE, *loc. cit. supra.* See also Pollock, *History of the Law of Nature* in his ESSAYS IN THE LAW (1922) 157; LOWELL, GOVERNMENT OF ENGLAND (1908) 480–88. 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 276, 279–82; 5 *ibid.* 216, points out the close connection between equity and the law of nature in the fifteenth and sixteenth centuries. Though equity never served the purposes of a higher law, restrictive of royal or Parliamentary authority, it may have helped to keep natural law ideas alive for that use in the seventeenth century. The adaptability of the common law was referred in the nineteenth century to its resting upon the law of nature. See argument of Alexander Hamilton in People v. Croswell, 3 Johns. 337 (N. Y. 1804); also BARNARD, DISCOURSE ON THE LIFE, CHARACTER, AND PUBLIC SERVICES OF AMBROSE SPENCER (1849) 52. Thus the applied law changes through the progressive revelation to the judges of the immutable law.

[12] 7 Co. 1, 4b (1610).

[13] 7 Co. at 12a–12b. Bacon's argument in the case invoked the law of nature. 2 BACON, WORKS (Montague ed. 1825) 166, 176.

The receptive and candid attitude thus evinced toward natural law ideas, a fresh influx of which from the Continent was already setting in, is a matter of profound importance. In the great constitutional struggle with the Stuarts it enabled Coke to build upon Fortescue, and it enabled Locke to build upon Coke. It made allies of sixteenth century legalism and seventeenth century rationalism, and the alliance then struck has always remained, now more, now less vital, in American constitutional law and theory.

The question of the significance which Coke attached to "common rights and reason" can, however, be answered in much more definite terms. Let the reader's mind revert in this connection to those "maxims" which, according to Fortescue, "do not admit of proof by reason and argument" but bear with them their own evidence, and which, according to the same authority, constituted the very substance of the peculiar science of the judges.[14] Coke yields very little to his predecessor in the reverence he pays to such "fundamental points of the common law."[15] It was, moreover, just such a maxim that Coke found to be involved in *Bonham's Case.* The College of Physicians had, under color of authority from an act of Parliament, ammerced Bonham and taken half the fine for themselves. Coke's comment is as follows: "The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, quia aliquis non debet esse judex in propria causa; imo iniquum est aliquem suae rei esse judicem."[16] Thereupon follows the famous dictum.

"Common right and reason" is, in short, something fundamental, something permanent; it is higher law. And again it is relevant to note the ratification which Coke's doctrine received in American constitutional law and theory. With such axioms,

[14] Corwin, *The "Higher Law" Background of American Constitutional Law* (1928) 42 HARV. L. REV. 149, 182. *Cf.* ST. GERMAIN, DOCTOR AND STUDENT 25–26.

[15] "In truth they are the main pillars and supporters of the fabric of the Commonwealth." 1 CO. INST. 74. He also issues a warning that "the alteration of any of these maxims of the common law is most dangerous." *Ibid.* 210; see also *ibid.* 97.

[16] "Ne quis in sua causa judicet vel jus sibi dicat." (No man may be a judge in his own cause.) CODE III, 5, 1; WOOLF, BARTOLUS (1913) 159. *Cf.* BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (Twiss ed. 1854) f. 119; Earl of Derby's Case, 12 Co. 114 (1614); Tumey v. Ohio, 273 U. S. 510 (1926); also cases cited in notes 35 and 37, *infra.*

traceable in many instances to the *Digest* and *Code* of Justinian, Coke's pages abound;[17] and from his work many of them early found their way into American judicial decisions, sometimes as interpretative of the written constitution, sometimes as supplementary of it. Such a postulate is the doctrine that "a statute should have prospective, not retrospective operation."[18] Another is the principle that "no one should be twice punished for the same offence."[19] Another is the maxim that "every man's house is his own castle."[20] Still another is the aphorism which has played so large a rôle in the history of the judicial concept of the police power, "*Sic utere tuo ut alienum non laedas*";[21] while another, almost equally famous in the history of constitutional litigation, is the axiom "*delegata potestas non potest delegari.*"[22] Every one of these axioms is citable to the *Reports* or the *Institutes,* and each one was first taken thence, if not from intermediate derivative works, by early American lawyers and judges. Mention might also be made of the numerous rules for the construction of written instruments which were originally adapted from the same sources to the business of constitutional construction.[23]

We are thus brought to the question of Coke's meaning when he speaks of "controuling" an act of Parliament and "adjudging such act to be void." When the Supreme Court of the United States pronounces an act of Congress "void," it ordinarily means

---

[17] I have used BROOM, LEGAL MAXIMS (5th Am. ed. 1870). There are earlier collections by Wingate and by Noy.

[18] BROOM, LEGAL MAXIMS 34–35. "Nova constitutio futuris formam imponere debet, non praeteritis." *Cf.* "Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari; nisi nominatim etiam de praeterito tempore adhuc pendentibus negotiis cautum sit." CODE I, 14, 7. In this, the original form, no suggestion of a restriction on the legislative power appears.

[19] "Nemo debet bis puniri pro uno delicto. . . . Deus non agit bis in idipsum." Bonham's Case, 8 Co. 114 (1610). See also Wetherel v. Darly, 4 Co. 40 (1583); Hudson v. Lee, 4 Co. 43 (1589); and BROOM, LEGAL MAXIMS 347.

[20] Semayne's Case, 5 Co. 91 (1605); BROOM, LEGAL MAXIMS 321: "Domus sua cuique est tutissimum refugium." *Cf.* "Nemo de domo sua extrahi debet." DIG. I, 17, 103.

[21] Aldred's Case, 9 Co. 57, 59 (1611); BROOM, LEGAL MAXIMS 274. In these places the maxim is considered purely as a rule of private conduct.

[22] 2 Co. INST. 597; BROOM, LEGAL MAXIMS 665, where it is stated as a principle of the law of agency.

[23] See, *e.g.*, BROOM, LEGAL MAXIMS 650, 682.

void *ab initio*, because beyond the power of Congress to enact, and it furthermore generally implies that it would similarly dispose of any future act of the same tenor. Was Coke laying claim to any such sweeping power for the ordinary courts as against acts of Parliament?

One thing seems to be assured at the outset — Coke was not asserting simply a rule of statutory construction which owed its force to the assumed intention of Parliament as it would today, although the statute involved in *Bonham's Case* was also construed from that point of view.[24] As we have already seen, Coke was enforcing a rule of higher law deemed by him to be binding on Parliament and the ordinary courts alike. This also appears from his treatment of the precedents he adduces. The most ancient of these is *Tregor's Case*, which occurred in the eighth year of Edward III's reign.[25] On that occasion Chief Justice Herle had used these words: "There are some statutes made which he himself who made them does not will to put into effect"; although just why this is so is not stated. In Coke's opinion these words become: "Some statutes are made against common law and right, which they that made them perceiving would not put into execution." In other words, the law-making body itself recognized the binding and invalidating force of principles external to the legislative act. Two other precedents Coke submits to similar elaboration.[26]

Furthermore, we should recall in this connection, Coke's repeated assertion that statutes made against Magna Carta were "void," a doctrine that Parliament itself had confirmed more than once in annulling its own past enactments.[27] Nor may we

[24] "An act of parliament . . . (as a will) is to be expounded according to the intention of the makers." 8 Co. 114, 119 (1610). This is said with reference to a comparison of certain clauses of the act before the court. *Cf.* 1 Bl. Comm. 91: "Where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are, in decency, to conclude that this consequence was not foreseen by the Parliament."

[25] McIlwain, High Court of Parliament 286 *et seq.*

[26] Plucknett, *supra* note 10. See also *supra* note 11.

[27] 1 Co. Inst. 81; 2 *id.* 51; 3 *id.* 111; Proclamations, 12 Co. 74, 76 (1611); Ehrlich, Proceedings Against the Crown (6 Oxford Studies in Leg. and Soc. Hist. 1921) 114. In 1341 the Chancellor and others protested that "they could not keep them [certain statutes] in case those statutes were contrary to the laws and customs of the realm, which they were sworn to keep." *Ibid.* 115. In other

overlook his words in the *Case of Non Obstante or the Dispensing Power*: "No act can bind the King from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *Non obstante*; as a sovereign power to command any of his subjects to serve him for the public weal"; or the sovereign power of pardon, and he instances acts of Parliament itself which recognize this principle.[28] In *Calvin's Case*, decided the term before *Bonham's Case*, the same doctrine is repeated, with the exception that the royal prerogative is rested on the "law of nature."[29] Nor does such doctrine lose in impressiveness when we reflect that along with it, in Coke's mind, went the doctrine that the royal prerogative was subject to delimitation by the common law as applied by the ordinary courts.

At the very least, therefore, we can assert that in *Bonham's Case* Coke deemed himself to be enforcing a rule of construction of statutes of higher intrinsic validity than any act of Parliament as such. Does this, on the other hand, necessarily signify that he regarded the ordinary courts as the *final* authoritative interpreters of such rule of construction? A contemporaneous critic of the dictum in *Bonham's Case* was Lord Chancellor Ellesmere, whose objection was couched in the following significant terms:

"He challenged not power for the Judges of this Court [King's Bench] to correct all misdemeanors as well extrajudicial as judicial, nor to have power to judge Statutes and acts of Parliament to be void, if they conceived them to be against common right and reason; but left to the King and Parliament to judge what was common right and reason. I speak not of impossibilities or direct repugnances."[30]

The issue contemporaneously raised by the dictum, therefore, was not, as we should say today, between judicial power and leg-

words, a statute merely as such is not necessarily law of the realm. *Cf.* Proclamations, 12 Co. 74, 76 (1611). The first recorded judicial application of the word "void" in relation to a statute seems to have been in the Annuity Case, in FITZHERBERT, ABRIDGMENT (Pasch. 27 HEN. VI (1450)), one of the precedents cited by Coke in support of the dictum. Its precise significance, however, in that connection seems to have been uncertain to Coke himself. COXE, *op. cit. supra* note 10, at 153–60.

[28] 12 Co. 18 (c. 1607).

[29] 7 Co. 1a, 14a (1609).

[30] MCILWAIN, *op. cit. supra* note 10, at 293–94, citing Moore 828 (1663).

islative power; but between the law declaring power of the ordinary courts and the like power of "the High Court of Parliament."

There may have been a period when Coke, in view of the threatened deadlock between the king and the Houses, dreamed of giving the law to both through the mouths of the judges. Otherwise it is difficult to account for such criticisms as that voiced by Ellesmere, the accumulation of which was a material factor in forcing Coke's retirement from the Bench six years later. And further confirming this suspicion is, on the one hand, the obviously gratuitous character of the dictum, the case having been adequately disposed of on other grounds, and, on the other hand, Coke's apparent effort later to effect a retreat from an untenable position. In *Rowles v. Mason*, decided in 1612, Coke stated that the common law "Corrects, Allows, and Disallows, both *Statute Law, and Custom*, for if there be repugnancy in *Statute*; or unreasonablenesse in custom, the Common Law Disallowes and rejects it, as appears by Doctor *Bonhams Case*. . . ." [31] This statement of the matter seems to bring his own theory into line with Ellesmere's. His later expressions in the *Institutes* are in the same tone. Indeed, at one point he asserts, on the authority of Chief Justice Herle, a judge in the reign of Edward III, that an award by the High Court of Parliament is "the highest law that could be." [32]

In brief, while Coke regarded the ordinary courts as peculiarly qualified to interpret and apply the law of reason, he also, finally at least, recognized the superior claims of the High Court of

---

[31] 2 Brownl. 192, 198 (1612). He adds that "statute law . . . corrects, abridges, and explains the Common Law." Notice also his expression in his "Humble and Direct Answer" in explanation of a precedent used in Bonham's Case: "and, because that this is against common right and reason, the common law adjudges the said act of parliament *as to this point* void" (italics mine). 2 BACON, WORKS 506.

[32] 2 Co. INST. 497–98. A still more decisive passage may be found in 4 *id.* 37; *cf.* 1 BL. COMM. 91. See also Co. INST. 272 (a)(b); *ibid.* 360(a), 381(b); 2 *id.* 148, 301; *cf.* 6 BACON, ABRIDGMENT (6th ed. 1807) 383, 635, 643. I do not find, however, that Coke anywhere in the INSTITUTES says that a statute may be void in relation to "common right and reason," though he does say that statutes contrary to *Magna Carta* are, and that "words of an act of Parliament must be taken in lawful and rightful sense." 1 Co. INST. 381(b). See also COXE, *op. cit. supra* note 10, 154–55.

Parliament as a *law declaring body*. Indeed, as we shall see in a moment, his last years were especially devoted to asserting the competence of Parliament in this respect. While the dictum uncovers one of the indispensable premises of the doctrine of judicial review, the other, that which rests on the principle of separation of powers, he still lacks. This, of course, is a matter to be treated later.

A word should be added regarding the reception and transmission of the dictum. Though there is no reference in *Day v. Savadge* [33] to *Bonham's Case*, Chief Justice Hobart's words in the later case are doubtless an echo: "Even an Act of Parliament, made against Natural Equity, as to make a Man Judge in his own Cause, is void in itself; for *jura naturae sunt immutabilia* and they are *leges legum*." [34] Thus Bracton — and ultimately Cicero — is brought to Coke's support. In *Captain Streater's Case*,[35] decided in 1653, while the Barebones Parliament was in control, the dictum for the first time encountered the rising principle of legislative sovereignty. Streater, who had been arrested on an order by the Parliament, applied for a writ of *habeas corpus* on the ground that such an order was not "law of the land" and so was void. He pleaded that, "Parliaments ever made laws, but judges of the law judged by those laws." The court answered: "Mr. Streater, one must be above another, and the inferior must submit to the superior. . . . If the Parliament should do one thing, and we do the contrary here, things would run round. We must submit to the legislative power. . . ." [36]

Yet even as late as 1701, we find Chief Justice Holt reaffirming the dictum, in the case of *City of London v. Wood*,[37] but not with-

---

[33] Hobart 85 (1614).

[34] *Ibid.* at 87a–87b.

[35] 5 How. St. Tr. 365 (1653).

[36] *Ibid.* at 386. Meantime Finch, C. J., in his LAW (1636), had surpassed the dictum in dogmatic assertion of the legal limits on Parliament's powers. "Therefore Lawes positive, which are directly contrary to the former [the law of reason] lose their force, and are no Lawes at all. As those which are contrary to the law of Nature." FINCH, LAW (1636) bk. 1, c. 6, quoted by Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 391–92. In the Ship-Money case, Finch, C. J., advanced a similar doctrine in defence of the royal prerogative. "No act of parliament can bar a king of his regality. . . . Therefore acts of parliament to take away his royal power in defence of the kingdom are void." See MAITLAND, CONSTITUTIONAL HISTORY (1909) 299.

[37] 12 Mod. 678 (1701).

out significant ambiguity. At one point in his opinion, Holt says that the difference between a municipal by-law and an act of Parliament is "that a by-law is liable to have its validity brought in question, but an act of Parliament is not." Yet he later adds:

"And what my Lord Coke says in *Dr. Bonham's Case* in his 8 Coke is far from any extravagancy, for it is a very reasonable and true saying, That if an act of Parliament should ordain that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void act of Parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party. . . ." [38]

What precisely does Holt mean by the word "impossible" here? Does he mean impossible without injustice; or does he mean impossible without logical absurdity — what Coke himself had termed "repugnancy" — and giving rise perhaps to something approaching physical impossibility? In the one case the restraint on the act of Parliament is still the higher law, in the other it is not. The question cannot be resolved further than to say that Holt, like Blackstone later, seems to be attempting to bridge the gap between two conflicting theories of law. As we shall see, these attempts furnished a useful prop to judicial review in its earlier American stages.[39]

From Holt's time, the dictum finds no place in important judicial opinion in England; but it does find its way into the *Digests* and *Abridgments* of the time, works which are apt to be comprehensive rather than critical. Through these works, as well as the *Reports,* it passed to America to join there the arsenal of weapons being accumulated against Parliament's claims to sovereignty.

In 1616 Coke, who had three years earlier been transferred from the Common Pleas to the King's Bench, was dismissed as judge altogether. Four years later he was elected to the House of Commons, and there at once assumed the leadership of the growing opposition to the Stuarts. In 1625 Charles succeeded James, and in 1627 occurred the arbitrary arrest by royal order of the Five Knights, giving rise in Parliament to the great Inquest on the Liberties of the Subject, and eventually to the framing of the

[38] *Ibid.* at 687.

[39] COXE, *op. cit. supra* note 10, 176–78, and c. 25.

Petition of Right.[40] In all these proceedings the leading rôle fell to Coke, and their general tendency is made clear in the quaint words of Sir Benjamin Rudyard, who expressed his great gratification to see "that good, old, decrepit law of Magna Charta, which hath been so long kept in and lain bed-rid, as it were . . . walk abroad again."[41] Coke's main objective was still the curbing of the royal prerogative, but the terms in which he expressed himself also assert the existence of constitutional limits to Parliament's power as well. Especially significant are his remarks on the clause "saving the sovereign power" of the king which was at first attached to the Petition by the Lords. The question arising, "what is Sovereign power," a member quoted Bodin to the effect "that it is free from any conditions"; whereupon Coke arose and said:

"This is *magnum in parvo*. . . . I know that prerogative is a part of the law, but 'Sovereign Power' is no parliamentary word. In my opinion it weakens Magna Charta, and all the statutes; for they are absolute without any saving of 'Sovereign Power'; and should we now add it, we shall weaken the foundation law, and then the building must needs fall. Take heed what we yield unto: Magna Charta is such a fellow, that he will have no 'Sovereign.'"[42]

The words of Wentworth and Pym during the same debate were to like effect. The former said, "These laws are not acquainted with 'Sovereign Power'"; while Pym added that, far from being able to accord the king sovereign power, Parliament itself was "never possessed of it."[43] Another noteworthy feature of the debate was the appearance in the course of it of the word "unconstitutional" in essentially its modern sense when used in political discussion.[44]

In his *Institutes*, Coke, still the embattled commoner, completes his restoration of *Magna Carta* as the great muniment of English

[40] 2 HANSARD, PARLIAMENTARY HISTORY (1628) 262–366.

[41] *Ibid.* 335.

[42] *Ibid.* 356–57.

[43] *Ibid.*

[44] The occasion was Serjeant Ashley's expression of "divine right" sentiment. *Ibid.* 317. "The doctrine advanced by this gentleman seemed so unconstitutional that he was ordered into custody." *Ibid.* 328–29. Chalmers in his POLITICAL ANNALS notes that the word "unconstitutional" was applied in New England to certain acts of Parliament in 1691. 1 NEW YORK HISTORICAL SOCIETY COLLECTIONS (1868) 81.

liberties. It is called "Magna Charta, not for the length or largeness of it . . . but . . . in respect of the great weightiness and weighty greatness of the matter contained in it; in a few words, being the fountain of all the fundamental laws of the realm." [45] Declaratory of the common law, "this Statute of Magna Charta hath been confirmed above thirty times." [46] Judgments and statutes against it "shall be void." [47] Its benefits extend to all, even villeins, they being freemen as to all save their own lords.[48] And what are these benefits? Especially they are the benefits of the historical procedure of the common law, the known processes of the ordinary courts, indictment by grand jury, trial by "law of the land," *habeas corpus*, security against monopoly, taxation by the consent of Parliament.[49] Thus the vague concept of "common right and reason" is replaced with a "law fundamental" of definite content and traceable back to one particular document of ancient and glorious origin.

And alongside *Magna Carta* in the pages of the *Institutes* stands "the High Court of Parliament," Coke's description of whose powers has been often interpreted as flatly contradicting his teachings regarding a "law fundamental." "Of the power and jurisdiction of Parliament," runs a famous passage, "for the making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds." [50] A century and a quarter later this same passage was to be quoted by Blackstone as expressing the notion of Parliamentary sovereignty.[51] Actually in Coke's pages it has no such significance. As his own words indicate, he classifies Parliament as primarily a *court*, albeit a court which may make new law as well as declare the old; and what he is describing is not a power and jurisdiction which is entitled to override rights at will, though it is entitled to reach all "persons and causes." [52]

[45] 1 Co. Inst. 81; 2 Hansard, Parliamentary History 327. See also 2 Co. Inst. 57.

[46] 1 *id.* 36, 81.

[47] See note 27, *supra*; also 4 Bacon, Abridgment (6th ed. 1807) 638.

[48] 2 Co. Inst. 45.

[49] *Ibid.* 2–77, furnishing a general commentary on the charter.

[50] 4 *id.* 36. [51] 1 Bl. Comm. 160–61.

[52] McIlwain, High Court of Parliament 141 *et seq.*; also *ibid.* 312n.; 2 Co. Inst. 497–98; 2 Hansard, Parliamentary History 271–312; Pease, The Leveller

Furthermore, the illustrations which he gives of Parliament's "transcendent power and jurisdiction" are not, by today's standards, instances of law-making at all, but of the exercise of a species of equity jurisdiction in individual cases which, while it may seem often to invade the rights of those most immediately affected, was apparently controlled by the motive of vindicating rights of others.

"Daughters and heirs apparent . . . may by act of Parliament inherit during the life of the ancestor. It may adjudge an infant or minor of full age. To attaint a man of treason after death. [To attaint a man during life was too ordinary a manifestation of Parliamentary authority to deserve, in Coke's estimate, special mention.] To naturalize a mere alien, and make him a subject born. It may bastard a child that by law is legitimate, the father being a proved adulterer. To legitimize one that is illegitimate. . . ." [53]

Clearly, what we have here exemplified is not legislative sovereignty, but rather entire absence of the modern distinction between legislation and adjudication.

That Coke generally regards the cause of Parliament and that of the law as identical is altogether evident. *Magna Carta* itself was of Parliamentary origin, and Parliament had later forced more or less reluctant monarchs to confirm the charter no less than thirty-two times. "A Parliament," he writes, "brings judges, officers and all men into good order. . . . [Note the inclusion of judges in this list.] Parliament and the Common Law are the principal means to keep greatness in order and due subjection." [54]

Coke's contributions to the beginnings of American constitutional law may be briefly summarized. First, in his dictum in *Bonham's Case* he furnished a form of words which, treated apart from his other ideas, as it was destined to be by a series of judges, commentators, and attorneys, became the most important single source of the notion of judicial review. This is true even though

---

MOVEMENT (1916) 43–45. "These two judgments in parliament by way of declaration of law, against which no man can speak." See the *Argument in Calvin's Case* in 2 BACON, WORKS 179.

[53] 4 Co. INST. 36.

[54] 2 *id.* 626; 2 HANSARD, PARLIAMENTARY HISTORY 246. For quaint comparisons of Parliament with a clock and with an elephant, see 4 Co. INST. 2–3.

we of the present day can see that, in view of the universal subordination of the common law as such to statute law, judicial review grounded simply on "common right and reason" could not have survived. But, as if in anticipation of this difficulty, Coke came forward with his second contribution, the doctrine of a law fundamental, binding Parliament and king alike, a law, moreover, embodied to great extent in a particular document and having a verifiable content in the customary procedure of everyday institutions. From his version of *Magna Carta,* through the English Declaration and Bill of Rights of 1688 and 1689, to the Bills of Rights of our early American constitutions the line of descent is direct; and if American constitutional law during the last half century has tended increasingly to minimize the importance of procedural niceties and to return to the vaguer tests of "common right and reason," the intervening stage of strict law was nevertheless necessary. Lastly, Coke contributed the notion of Parliamentary supremacy *under* the law, which in time, with the differentiation of legislation and adjudication, became transmutable into the notion of *legislative* supremacy within a law subject to construction by the processes of adjudication.

IV

It has become a commonplace that every age has its own peculiar categories of thought; its speculations are carried on in a vocabulary which those who would be understood by it must adopt, and then adapt to their own special purposes. Nowadays intellectual discourse is apt to be cast in the mould of the evolutionary hypothesis. In the seventeenth and eighteenth centuries, the doctrine of natural law, with its diverse corollaries, furnished the basic postulates of theoretical speculation. For this there were several reasons; but our interest is naturally centered upon those which were especially operative in England.

The immense prestige of the natural law doctrine in the seventeenth and eighteenth centuries was due particularly to the work of two men, Grotius and Newton. In erecting the law of nations upon a natural law basis as a barrier against the current international anarchy, Grotius imparted to the latter a new solidity, as well as an immediate practicality such as it had never before

been able to boast. Yet even more important was Grotius' revival of the Ciceronian idea of natural law, which served at one stroke to clear the concept from the theological implications which it had accumulated during the Middle Ages and from any suspicion of dependence on ecclesiastical and Papal interpretation. Once again natural law is defined as right reason; and is described as at once a law of, and a law to, God. God himself, Grotius asserted, could not make twice two other than four; nor would his rational nature fail to guide man even though there were no God, or though God lacked interest in human affairs.[55] And at this point Newton enters the story.[56] While modern science employs the term "natural law" in a sense that is alien and even hostile to its juristic use, the vast preponderance of deduction over observation in Newton's discoveries at first concealed this opposition. His demonstration that the force which brings the apple to the ground is the same force that holds the planets in their orbits, stirred his contemporaries with the picture of a universe which is pervaded with the same reason which shines in man and is accessible in all its parts to exploration by man. Between a universe "lapt in law" and the human mind all barriers were cast down. Inscrutable deity became scrutable nature. On this basis arose English deism, which, it has been wittily remarked, "deified Nature and denatured God."[57] And one section of nature is

[55] 1 GROTIUS, DE JURE BELLI AC PACIS 1, 5, 10; GROTIUS, PROLEGOMENA (Whewell ed. 1853) 11. Von Gierke finds a German precursor of Grotius in Gabriel Biel, who wrote in 1495: "Nam si per impossibile Deus non esset, qui est ratio divina, aut ratio illa divina esset errans: adhuc si quis ageret contra rectam rationem angelicam vel humanam aut aliam aliquam si qua esset: peccaret." GIERKE, ALTHUSIUS (Zur. deutschen Staats u. Rechts Geschichte 1879–80) 74, n.45. Related to this question is the medieval controversy whether *jus naturale* is divine will (*voluntas*) or divine reason (*ratio*), whether God is a law-giver or a teacher working through the reason. GROTIUS, PROLEGOMENA 73, n.44.

[56] See BECKER, THE DECLARATION OF INDEPENDENCE (1922) 40–53.

[57] *Ibid.* 51. "The eighteenth century, conceiving of God as known only through his work, conceived of his work as itself a universal harmony, of which the material and the spiritual were but different aspects." *Ibid.* 52–53. Addison's famous Hymn is a fine expression of the deistic cosmology. It is Pope, however, who condensed the deistic philosophy of history into a line: "Whatever is, is right." ESSAY ON MAN (1732) Ep. i, l. 294. The theological classic of Deism is Butler's ANALOGY, where Christianity is presented as "a promulgation of the law of nature . . . with new light . . . adapted to the wants of mankind." 1 BUTLER, WORKS (Gladstone ed. 1897) 162. Note also Butler's contention that "miracles must not be compared to common natural events . . . but to the extraordinary phenomena

human nature and its institutions. With Newton's achievement at their back men turned confidently to the formulation of the inherently just and reasonable rules of social and political relationship. Entire systems were elaborated which purported to deduce with Euclidean precision the whole duty of man, both moral and legal, from a few agreed premises.[58] It was the discredit into which such systems ultimately fell that revealed the disparity between the two uses of the term "natural law" of which we today are aware — or should be.[59]

The revived Ciceronian conception of natural law, extended and deepened by Newtonian science, furnishes, therefore, the general background of credibility against which the contemporary political applications of natural law have to be projected. But these political applications also bring into requisition certain new elements — new, that is to say, in the combinations in which they now appear. For it is always a question when theoretical notions are under consideration whether the term "new" is in strict pro-

of nature." *Ibid.* 181. The later and most extreme representatives of Deism, for example Voltaire and Jefferson, scouted miracles altogether, which led to their being termed "atheists" and "infidels."

[58] See an interesting note in DICKINSON, ADMINISTRATIVE JUSTICE AND SUPREMACY OF LAW (1927) 115–18. See also the same writer's reference to Domat, DICKINSON, *op. cit. supra* 125n. Puffendorf took issue with Grotius' contention that "there is not equal certainty to be met with in morals and mathematics." 1 PUFFENDORF, LAW OF NATURE AND NATIONS (Spavan ed. 1716) 2, 9. "Principles of civil knowledge, fairly deduced from the law of nature." WISE, VINDICATION OF THE GOVERNMENT OF NEW ENGLAND CHURCHES (1860) 45.

[59] "Natural Law" in the sense of "the observed order of phenomena" has tended in recent years to crowd the earlier rationalistic conception to the wall, thus aiding the triumph of the idea of human and governmental law as an expression solely of will backed by force. The nineteenth century was no stranger to the idea that there are factors of human behavior which are obdurate to advantageous political control; only such factors are ordinarily represented as of a non-rational nature and *as having no necessary tendency to produce human justice.* Savigny's apotheosis of custom was an appeal to a natural law of this sub-rational or scientific type. So also were the confident pronouncements of the classical economists regarding the "laws of Political Economy." So again were the characteristic preachments of Herbert Spencer concerning the proper field of governmental intervention, wherein is linked up, with an altogether shameless illogic, the notion of an automatic industrial organism to a revived theory of natural rights. Professor Duguit would also have us regard his "social solidarity" as a scientific datum. In fact, all these theories are only endeavors to dragoon science into the service of some variety or other of Utopism. Professor Duguit's theory, for example, is only that of Locke stood on its head — nor is this to question but that twentieth century conditions may demand this novel perspective.

priety admissible. Systems fall apart and new systems are assembled from the wreckage. Any serious turn of events is apt to produce a fresh coruscation of ideas, elevating some and suppressing others; but the contents of the kaleidoscope remain throughout much the same. And never was this observation better borne out than by the political speculations of the sixteenth, seventeenth, and eighteenth centuries. These speculations contributed immensely to the shattering of the existing foundations of authority and in transferring authority to an entirely new basis. The particular ideas in which they dealt were, nevertheless, for the most part, far from novel. Not a few of them are identifiable, in embryo at least, among the writings of the ancients; and nearly all of them had been stated with varying degrees of clarity before the Reformation.

The conveyance of natural law ideas into American constitutional theory was the work preëminently — though by no means exclusively — of John Locke's *Second Treatise on Civil Government*, which appeared in 1690 as an apology for the Glorious Revolution. The outstanding feature of Locke's treatment of natural law is the almost complete dissolution which this concept undergoes through his handling into the natural rights of the individual; or — to employ Locke's own phrase, borrowed from the debates between Stuart adherents and Parliamentarians — into the rights of "life, liberty, and estate." [60] The dissolving agency by which Locke brings this transformation about is the doctrine of the Social Compact, with its corollary notion of a State of Nature. Indeed, it is hardly an exaggeration to say that the only residuum which remains in the Lockian crucible from the original Ciceronian concept is the sanction which is claimed from natural law for the social compact, and at one point, he dispenses even with this. It thus becomes of interest to inquire whence Locke derived his intense preoccupation with rights, as well as the form in which he chose to express them.

[60] 2 DUNNING, HISTORY OF POLITICAL THEORIES (1923) 222, 346n. "Is it not a common principle that the law favoureth three things, life, liberty, and dower. . . . This because our law is grounded upon the law of nature. And these three things do flow from the law of nature. . . ." Bacon, *Argument in Calvin's Case* in 2 BACON, WORKS 176. See also HALE, HISTORY OF THE COMMON LAW (1779) § 13: "Of the Rights of the People or Subject," where it is said these are protected according to their "lives, their liberties, their estates."

A recent effort has been made to refer Locke's system to Calvinistic premises; [61] but if it is meant that the outstanding features of Locke's political thinking are traceable to Calvin himself, the thesis falls of its own weight. Calvin knows nothing of the social compact — he rests civil authority on the basis of divine right. Far from being an apologist for revolution, he in general teaches non-resistance. The doctrine of the sovereignty of God which looms so large in his pages bears not the faintest analogy to anything in Locke; and the doctrine of election with its undemocratic implications is entirely antithetical to Lockian optimism.[62] The founder of the Geneva theocracy, who burned Servetus at the stake, and the author of the *Letters on Toleration* have little in common.

It is evident that certain important distinctions have been overlooked. The entire Protestant movement with its emphasis on the priesthood of the individual believer was permeated with individualistic implications; but before these could come to effective political expression, they had to be released from the very medievalism which Calvinism seems at the outset to have been principally bent on restoring.[63] Fortunately for its ultimate reputation in the history of political thought, Calvinism found itself much more frequently than not in the position of a religious minority subject to persecution. Its adherents were consequently forced

---

[61] Foster, *International Calvinism through John Locke and the Revolution of 1688* (1927) 32 AM. HIST. REV. 475.

[62] 2 DUNNING, *op. cit. supra* note 60, 26 *et seq.*; 2 MACKINNON, HISTORY OF MODERN LIBERTY (1906) 147–53. "It is, however, the disciples of Calvin, rather than the master himself, who advanced the theory of resistance, and Calvin's attitude was more authoritarian than that of Luther. Luther's intolerance was merely that of an enthusiast, Calvin's was that of a strong ruler, who dislikes all obstacles in the way of a uniform system. Calvin's bigotry was that of a lawyer or an inquisitor, Luther's that of a preacher or a schoolboy." FIGGIS, GERSON TO GROTIUS (1916) 138. Calvinism "certainly did not favour individual liberty; but it was opposed in theory to secular interference, and by its own methods to monarchical power. Hence in spite of itself Calvinism in France, in the Netherlands and Scotland became either in the world of thought or in that of practice the basis of modern liberty." *Ibid.* 155–56. Calvin's chief service to liberty, by way of theory, was shunting "sovereignty" off to heaven. This helped to keep the ground clear for popular sovereignty once the theocrats were disposed of. The Jesuits, operating from different premises, performed a similar service by emphasizing the secular character of political authority.

[63] FIGGIS, *op. cit. supra* note 62, at 21–22.

either to adopt Calvin's own teaching of non-resistance, or to develop a type of political theory that countenanced resistance, and many of them took the latter route. That is to say, because of the actual situation of Calvinism, certain Calvinists developed doctrines of political liberalism, as for that matter did also certain Catholic writers of the same era.[64] As Dr. Figgis has put it, "Political liberty is the residuary legatee of ecclesiastical animosities." [65]

Nor is this to disparage Locke's indebtedness to such forerunners, which was indeed immense. For taking up the thread of later medieval political thought at the point where it had been broken off by Machiavelli and Bodin, to say nothing of Luther and Calvin, they at once revived the postulates of popular sovereignty which underlay Roman law and institutions and supplemented these by principles adapted from the matured Roman law of private contract.[66] Yet, this concession made, it still remains true that the contact of Locke's system with the writers alluded to is indirect, and through a question which they left unsolved rather than through those they purported to answer. Sixteenth century liberalism rested its case largely on the notion of an original compact between governors and governed, between rulers and the people.[67] The question inevitably emerged: Who are "the people," and how did they become an entity capable of contracting?

Locke's own answer to these questions springs from a threefold rootage. Its primary source was English legal tradition as illustrated in Fortescue and Coke, the entire emphasis of which has always been on rights of the individual rather than on rights of the people considered in the mass.[68] The latter, indeed, was sufficiently provided for in Parliament. A second source was Eng-

---

[64] 2 DUNNING, *op. cit. supra* note 60, at 67 *et seq.*, also c. 4.

[65] FIGGIS, *op. cit. supra* note 62, at 118.

[66] 2 DUNNING, *op. cit. supra* note 60, c. 2; GOOCH, ENGLISH DEMOCRATIC IDEAS IN THE SEVENTEENTH CENTURY (1898) Intro. and c. 1. On the doctrine of popular sovereignty in the later Middle Ages, see GIERKE, ALTHUSIUS 69 and n.36; GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (Maitland tr. 1922) 37–40; FIGGIS, *op. cit. supra* note 62, at c. 2.

[67] 2 DUNNING, *op. cit. supra* note 60, at 79.

[68] See Corwin, *The "Higher Law" Background of American Constitutional Law* (1928) 42 HARV. L. REV. 149, 180, for Fortescue's anticipation of Locke.

lish Independency, which was in turn the direct outgrowth of Luther's doctrine of the priesthood of the individual. For in a period in which religious and political controversy were so closely involved with each other as in seventeenth century England, ideas developed in the one forum were easily and inevitably transferred to the other. Finally, Locke himself would have been the first to own his indebtedness to Grotius and Puffendorf [69] and so ultimately to Cicero; while his citations of "the judicious Hooker," a still earlier apostle of the Ciceronian revival, outnumber those to any other writer. The first and last of these sources need only to be cataloged. The second, however, demands some further comment.

The leader of the extreme sect of the Independents, called the Levellers, was John Lilburne, a veritable ragamuffin, in whose writings the concern of his highly respectable successor, Locke, for "property" is replaced by demands for the "natural rights" of freedom of conscience and expression, and to political equality [70] — demands which even in the deepest dungeons he seems never to have lacked pen and ink to indite. The political *chef d'oeuvre* of Independency was the famous Agreement of the People of 1647, which was an effort to give concrete realization to the principle of the Social Compact.[71]

In America the filiation of Independency with the Social Compact philosophy can be traced at a still earlier date in connection with the Pilgrim foundation of Plymouth. The expedition comprised John Robinson's Scrooby congregation, of which a contemporary critic wrote: "Do we not know the beginnings of his Church? that there was first one stood up and made a covenant, and then another, and these two joyned together, and so a third, and these became a church, say they." [72] And the procedure

[69] "When a young Gentleman has pretty well digested *Tully's Offices*, and added to it *Puffendorff de Officio Hominis & Civis*, it may be seasonable to set him upon *Grotius de Jure Belli & Pacis*; or, which perhaps is the better of the two, *Puffendorff de Jure naturali & Gentium*; wherein he will be instructed in the natural Rights of man and the Originals and Foundations of Society and Duties resulting from thence. . . ." 3 LOCKE, WORKS (1823) 84, quoted in the introduction to FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE (Gregor ed. 1775) xx.

[70] 2 DUNNING, *op. cit. supra* note 60, 234 *et seq.*; GOOCH, *op. cit. supra* note 60, 141–46, 200–03, 253–56; PEASE, THE LEVELLER MOVEMENT (1916) *passim*.

[71] 2 DUNNING, *op. cit. supra* note 60, 238. The agreement was greatly modified in 1648 and further so in 1649.

[72] DAVIS, JOHN ROBINSON (1903) 48.

which, under the sanction of God, was effective to produce a church, could also be availed of under the same sanction to produce a commonwealth, as was shown in the famous Mayflower Compact:

"In the name of God, Amen. We whose names are underwritten, the loyall subjects of our dread soveraigne lord, King James . . . doe by these presents solemnly and mutualy in the presence of God, and one of another, covenant and combine oursselves togeather into a civill body politick, for our better ordering and preservation . . . and by vertue hearof to enacte, constitute, and frame such just and equall lawes, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meete and convenient for the general good of the Colonie, unto which we promise all due submission and obedience." [73]

Thus, more than two generations before Locke's *Second Treatise*, a social compact was conceived as supplying the second permanent government within what is now the United States. Whereas with Locke the ultimate basis of authority is supplied by natural law, here it is supplied by God. We shall observe presently how the rapprochement between the two positions was effected by eighteenth century Deism.

A generation later, though still more than a generation before the appearance of Locke's *Treatise*, we find another Independent, Thomas Hooker of Connecticut, proffering the theory of contract as explanatory of all human association.

"Every spiritual or ecclesiastical corporation receives its being from a spiritual combination . . . there is no man constrained to enter into such a condition, unless he will; and he that will enter, must also willingly bind and engage himself to each member of that society to promote the good of the whole, or else a member actually he is not." [74]

Though Hooker is here speaking of "ecclesiastical corporations," the Fundamental Orders of Connecticut of 1639, whereby the inhabitants of the three towns did "assotiate and conjoyne"

[73] MACDONALD, DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY (1920) 19.

[74] WALKER, LIFE OF THOMAS HOOKER (1891) 124–25. I am indebted for this and the reference in note 72, to my friend, Professor W. S. Carpenter.

themselves "to be as one Publike State or Commonwelth," embodies his political application of the same thought.[75] Nor is this the only significance of the Fundamental Orders. Taken along with the Agreement of the People a decade later, it shows the powerful, ineluctable necessity felt by those who held the compact theory for placing governmental institutions on a documentary basis.

One other predecessor of Locke must be mentioned before turning more particularly to the *Second Treatise,* Thomas Hobbes, author of the *Leviathan.* It is usual to contrast these two writers, but they also have much in common, and in relation to American constitutional theory, their contributions are often complementary rather than contradictory. For if Locke shares with Coke the paternity of American constitutional limitations, Hobbes's emphasis upon the *salus populi* is a definite forerunner of the modern doctrine of the police power, as well as a clear prophecy of legal tendency even in a constitutional state when conditions of emergency menace public order. Hobbes is at the outset as thoroughly individualistic as Locke, and the prosecution by the individual of his own interest is as much his objective as it is Locke's. Both Hobbes and Locke also agree in dispensing with the governmental contract; but whereas a sovereign law-making body is the direct outcome of the social compact with Hobbes, with Locke it is the corporate majority, which then determines the form of government.

Where Hobbes and Locke part company is in their view of the state of nature, that is to say, in their view of human nature when not subjected to political control. Hobbes, a timid man who had been called upon to witness stern events, pictures the state of nature as one of "force and fraud," in which "every man is to every man a wolf."[76] Locke, who was perhaps of a more robust type, and at any rate wrote amid happier surroundings, depicts the state of nature as in the main an era of "peace, good will, mutual assistance, and preservation," in which the "free, sovereign" individual is already in possession of all valuable rights, though from defect of "executive power" he is not always able to make them good or to determine them accurately

[75] MACDONALD, *op. cit. supra* note 73, 36–39.

[76] HOBBES, LEVIATHAN (1651) c. 13.

in relation to the like rights of his fellows.[77] And from this difference flow all the others. With Hobbes a dissolution of government is substantially a dissolution of society; with Locke it is not, society having existed before government. With Hobbes natural law and civil law are coextensive; that is to say, "when a commonwealth is once settled, then are they [natural laws] actually laws, and not before."[78] With Locke, natural law approximates to positive law from the first, while even after the establishment of government, popular interpretation of natural law is the ultimate test of the validity of civil law. Thus Hobbes becomes, more or less in spite of himself, the founder of the Positive School of Jurisprudence, which traces all rights to government and regards them simply as implements of public policy. Locke, on the other hand, regards government as creative of no rights, but as strictly fiduciary in character, and as designed to make more secure and more readily available rights which antedate it and which would survive it.

The two features of the *Second Treatise* which have impressed themselves most definitely upon American constitutional law are the limitations which it lays down for legislative power and its emphasis on the property right. The legislature is the supreme organ of Locke's commonwealth, and it is upon this supremacy that he depends in the main for the safeguarding of the rights of the individual. But for this very reason legislative supremacy is supremacy within the law, not a power above the law. In fact, the word "sovereign" is never used by Locke in its descriptive sense except in reference to the "free, sovereign" individual in

---

[77] LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT (Everyman's ed. 1924) c. 2, 118.

[78] HOBBES, LEVIATHAN c. 26. "'Civil law,' is to every subject, those rules, which the commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of, for the distinction of right and wrong; that is to say, of what is contrary and what is not contrary to the rule." *Ibid.* c. 26. In the face of this definition of "right," Hobbes, in order to base his commonwealth on contract, asserts that "when a covenant is made, then to break it is 'unjust'; and the definition of 'injustice' is no other than 'the not performance of covenant.'" *Ibid.* c. 15. Nor does Locke escape a contradiction of a different sort. The SECOND TREATISE ON CIVIL GOVERNMENT is founded on conceptions not drawn from experience, whereas the object of the ESSAY CONCERNING HUMAN UNDERSTANDING is to discredit such ideas. 1 STEPHEN, HORAE SABBATICAE (1892) 150 in Carpenter, *Introduction* to LOCKE, *op. cit. supra* note 77, at xvii.

the state of nature. In detail, the limitations which Locke specifies to legislative power are the following: [79] First, it is not arbitrary power. Not even the majority which determines the form of the government can vest its agent with arbitrary power, for the reason that the majority right itself originates in a delegation by free sovereign individuals who had "in the state of nature no arbitrary power over the life, liberty, or possessions" of others, or even over their own. In this caveat against "arbitrary power," Locke definitely anticipates the modern latitudinarian concept of due process of law.

"Secondly, the legislative . . . cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges"; nor may it vary the law in particular cases, but there must be one rule for rich and poor, for favorite and the ploughman. In this pregnant passage, Locke foreshadows some of the most fundamental propositions of American constitutional law: *Law must be general; it must afford equal protection to all; it may not validly operate retroactively; it must be enforced through the courts — legislative power does not include judicial power.*

Thirdly, as also follows from its fiduciary character, the legislature "cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others." More briefly, *legislative power cannot be delegated.*

Finally, *legislative power is not the ultimate power of the commonwealth,* for "the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject." So while legislative supremacy is the normal sanction of the rights of men, it is not the final sanction. The identical power which was exerted against James II would in like case be equally available against Parliament itself.[80]

Locke's bias in favor of property is best shown in the fifth

[79] *Of the Extent of the Legislative Power* in LOCKE, *op. cit. supra* note 77, at c. 11, 183 *et seq.*

[80] LOCKE, *op. cit. supra* note 77, at c. 19, 224.

chapter of the *Treatise,* where he brings the labor theory of value to the defense of inequality of possessions, and endeavors to show that the latter is harmonious with the social compact. His course of reasoning is as follows: All value, or almost all, is due to labor; and as there were different degrees of industry, so there were apt to be different degrees of possession. Yet most property, in those early days, was highly perishable, whence arose a natural limit to the accumulation of wealth, to wit, that no man must hoard up more than he could make use of, since that would be to waste nature's bounty. Nevertheless, "the exceeding of his just property" lay, Locke is careful to insist, not "in the largeness of his possession, but the perishing of anything uselessly in it." Accordingly, when mankind, by affixing value to gold, silver, and other imperishable but intrinsically valueless things for which perishable commodities might be traded, made exchanges possible, it thereby, as by deliberate consent, ratified unequal possessions; and the later social compact did not disturb this covenant.[81]

So, having transmuted the law of nature into the rights of men, Locke next converts these into the rights of ownership. The final result is to base his commonwealth upon the balanced and antithetical concepts of the rule of the majority and the security of property. Nor, thanks to the labor theory of value, is this the merely static conception that at first consideration it might seem to be. Taken up a century later by Adam Smith, the labor theory became the cornerstone of the doctrine of *laissez faire.*[82] It thus assisted to adapt a political theory conceived in the interest of a quiescent landed aristocracy to the uses of an aggressive industrial plutocracy. By the same token, it also assisted to adapt a theory conceived for a wealthy and civilized community to the

---

[81] *Of Property, ibid.* c. 5, 129. Locke uses the term "property" with various degrees of precision. In Chapter 5 he is thinking of *things* with exchangeable value. In Chapter 7 he uses the word to cover "life, liberty, and estate." In *A Letter on Toleration* he says that the commonwealth exists to promote "civil interest," and "civil interest I call life, liberty, inviolability of Body, and the possession of such outward things as Money, Lands, Houses, Furniture, and the like." 2 LOCKE, WORKS (1823) 239, quoted by LASKI, GRAMMAR OF POLITICS (1925) 181.

[82] CAREY, HARMONY OF INTERESTS, AGRICULTURAL, MANUFACTURING AND COMMERCIAL (1872). Henry C. Carey attempts an application of Smith's theory to American conditions in favor of a protective tariff.

exactly opposed conditions of life in a new and undeveloped country. In a frontier society engrossed in the conquest of nature and provided with but meagre stimulation to artistic and intellectual achievement, the inevitable index of success was accumulation, and accumulation did, in fact, represent social service. What is more, the singular affinity which Calvinistic New England early discovered for Lockian rationalism is in some measure explicable on like grounds. The central pillar of Calvinism was the doctrine of election. It goes without saying that all who believed this dogma also believed themselves among the elect; yet of this what better, what more objective evidence than material success? Locke himself, it may be added, was a notable preacher of the gospel of industry and thrift.[83]

Two other features of Locke's thought deserve brief comment. The first is his insistence upon the "public good" as the object of legislation and of governmental action in general. It should not be supposed that this in any way contradicts the main trend of his thought. Rather he is laying down yet another limitation on legislative freedom of action.[84] That the public good might not always be compatible with the preservation of rights, and especially with the rights of property, never once occurs to him. A century later the possibility did occur to Adam Smith, and was waived aside by his "harmony of interests" theory. Also the dimensions which Locke assigns to executive prerogative are, in view both of the immediate occasion for which he wrote and of his

---

[83] Foster, *supra* note 61, at 486. See also ROBINSON, CASE OF LOUIS THE ELEVENTH AND OTHER ESSAYS (1928); Weber, *Protestantische Ethick u. der "Geist" des Kapitalismus* (1904) 30 ARCHIV FÜR SOZIAL-WISSENSCHAFT U. SOZIAL POLITIK 1–54; (1905) 21 *id.* 1–110; SOMBART, QUINTESSENCE OF CAPITALISM (1915) 257–62; and Tawney, *Puritanism and Capitalism* (1926) 46 NEW REPUBLIC 348. Puritanism has been not inaptly characterized as "a religious sublimation of the virtues of the middle class." Puritan abhorrence of beauty and amusement necessarily led to concentration on the business of money-getting; and the belief of the Puritans that they were "chosen people" worked to the same end, for it turned their attention to the Old Testament, where the idea that prosperity is proof of moral worth is repeatedly presented. Nor is the New Testament devoid of such ideas. Compare the parable of the Talents, MATTHEW XXV, 29; also ROMANS xii, 11; and see especially the texts from BAXTER, CHRISTIAN DIRECTORY, quoted by ROBINSON, *loc. cit. supra.*

[84] "Their [the legislature's] power, in the utmost bounds of it, is limited to the public good of the society." LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT c. 11, § 135; *cf.* §§ 89, 110, 134, 142, 158 with §§ 124, 131, 140.

"constitutionalism," not a little astonishing. On this matter he writes:

"Where the legislative and executive power are in distinct hands (as they are in all moderated monarchies and well-framed governments), there the good of the society requires, that several things should be left to the discretion of him that has the executive power: for the legislators not being able to foresee, and provide by laws, for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of nature a right to make use of it for the good of the society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it; Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require: nay, it is fit that the laws themselves should in some cases give way to the executive power, or rather to the fundamental law of nature and government — viz., That as much as may be, all the members of the society are to be preserved." [85]

Extrication from the trammels of a too rigid constitutionalism through a broad view of executive power is a device by no means unknown to American constitutional law and theory.

Locke's contribution is best estimated in relation to Coke's. Locke's version of natural law not only rescues Coke's version of the English constitution from a localized *patois*, restating it in the universal tongue of the age, it also supplements it in important respects. Coke's endeavor was to put forward the historical procedure of the common law as a permanent restraint on power, and especially on the power of the English crown. Locke, in the limitations which he imposes on legislative power, is looking rather to the security of the substantive rights of the individual — those rights which are implied in the basic arrangements of society at all times and in all places. While Coke rescued the notion of fundamental law from what must sooner or later have proved a fatal nebulosity, yet he did so at the expense of archaism. Locke, on the other hand, in cutting loose in great measure from the historical method of reasoning, opened the way to the larger issues with which American constitutional law has been called upon to

[85] LOCKE, *op. cit. supra* note 84, "Of Prerogative," c. 14, § 159.

grapple in its latest maturity. Without the Lockian or some similar background, judicial review must have atrophied by 1890 in the very field in which it is today most active; nor is this to forget his emphasis on the property right. Locke's weakness is on the institutional side. While he contributed to the *doctrine* of judicial review, it was without intention; nor does he reveal any perception of the importance of giving imperative written form to the constitutional principles which he formulated. The hard-fisted Coke, writing with a civil war ahead of him instead of behind him, was more prescient.

V

The influence of higher law doctrine associated with the names of Coke and Locke was at its height in England during the period when the American colonies were being most actively settled, which means that Coke had, to begin with, the advantage since he was first on the ground. The presence of Coke's doctrines in the colonies during the latter two-thirds of the seventeenth century is widely evidenced by the repeated efforts of colonial legislatures to secure for their constituencies the benefits of *Magna Carta* and particularly of the twenty-ninth chapter thereof. Because of the menace they were thought to spell for the prerogative, the majority of such measures incurred the royal veto.[86] In point of fact, since the "law of the land" clause of chapter twenty-nine was interpretable as contemplating only law which was enacted by the colonial legislature, the menace went even further. Clothed with this construction, chapter twenty-nine afforded affirmation not only of rights of the individual, but also of local legislative autonomy.[87] The frequently provoked discussion of such matters, moreover, served to fix terminology for the future moulding of thought. *Magna Carta* became a generic term for all documents of constitutional significance, and thereby a symbol and reminder of principles binding on government.[88]

But more specific evidence of Coke's influence also occurs dur-

[86] For details, see HAZELTINE, MAGNA CARTA COMMEMORATION ESSAYS (1917) 191–201. MOTT, DUE PROCESS OF LAW (1926) cc. 1, 6, adds some further items.

[87] HAZELTINE, *loc. cit. supra* note 86, at 195.

[88] *Ibid.* 199–200.

ing this period. One such instance is furnished by the opinion of a Massachusetts magistrate in 1657 holding void a tax by the town of Ipswich for the purpose of presenting the local minister with a dwelling house. Such a tax, said the magistrate, "to take from Peter and give it to Paul," is against fundamental law. "If noe kinge or Parliament can justly enact or cause that one man's estate, in whole or in part, may be taken from him and given to another without his owne consent, then surely the major part of a towne or other inferior powers cannot doe it." [89] An opinion of the attorney general of the Barbados, rendered sometime during the reign of Anne, which held void a paper money act because it authorized summary process against debtors, is of like import. The entire argument is based on chapter twenty-nine of *Magna Carta* and "common right, or reason." [90] Evidence of the persistence of the dictum in *Bonham's Case* also crops up outside New England now and then, even before its notable revival by Otis in his argument in the *Writs of Assistance Case*.[91] As late as 1759 we find a New York man referring quite incidentally to "a Judicial power of declaring them [laws] void." [92] The allusion is inexplicable unless it was to Coke's "dictum."

If the seventeenth century was Coke's, the early half of the eighteenth was Locke's, especially in New England. After the Glorious Revolution the migration to America of important English elements ceased. Immediate touch with political developments in the mother country was thus lost. The colonies were fain henceforth to be content for the most part with the stock of political ideas already on hand; and in fact these met their own necessities, which grew chiefly out of the quarrels between the governors and the assemblies, extremely well. And along with this comparative isolation from new currents of thought in the mother country went the general intellectual poverty of frontier life itself. There were few books, fewer newspapers, and little travel. But one source of intellectual stimulation for the adult there was, one point of contact with the world of ideas, and that was the sermon.

---

[89] 2 HUTCHINSON, PAPERS (Prince Soc. Pubs. 1865) 1–25.

[90] 2 CHALMERS, OPINIONS OF EMINENT LAWYERS (1814) 27–38, especially at 30.

[91] See MOTT, DUE PROCESS OF LAW 91, n.19.

[92] 2 NEW YORK HISTORICAL SOCIETY COLLECTIONS (1869) 204.

Through their election sermons in particular and through controversial pamphlets, the New England clergy taught their flocks political theory, and almost always this was an elaboration upon the stock of ideas which had come from seventeenth century England. The subject has been so admirably treated in a recent volume that it is here necessary only to record some of the outstanding facts.[93]

After the Bible, Locke was the principal authority relied on by the preachers to bolster up their political teachings, although Coke, Puffendorf, Sydney, and later on some others were also cited. The substance of the doctrine of these discourses is, except at two points, that of the *Second Treatise*. Natural rights and the social compact, government bounded by law and incapable of imparting legality to measures contrary to law, and the right of resistance to illegal measures all fall into their proper place. One frequent point of deviation from the Lockian model is the retention of the idea of a compact between governed and governors; that notion fitted in too well with the effort to utilize the colonial charters as muniments of local liberty to be discarded.[94] The other point of deviation from Locke is more apparent than real, for all these concepts are backed up by religious sanction. Yet to the modern reader the difference between the Puritan God of the eighteenth century and Locke's natural law often seems little more than nominal. "The Voice of Nature is the Voice of God," asserts one preacher; "reason and the voice of God are one," is the language of another; "Christ confirms the law of nature," is the teaching of a third.[95] The point of view is thoroughly deistic; reason has usurped the place of revelation, and without affront to piety.

Nor should it be imagined that all this teaching and preaching on political topics took place *in vacuo* — in deliberate preparation, as it were, for a great emergency as yet descried only by the most perspicacious. Much of it was evoked by warm and bitter controversy among the New England congregations them-

[93] BALDWIN, THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION (1928).

[94] The same fact may also account for John Wise's preference for Puffendorf over Locke, though this may be due to his having had a copy of the former and not of the latter.

[95] BALDWIN, *op. cit. supra* note 93, 29n., 43, 73n. See also note 57, *supra*.

selves.[96] One such controversy was that which arose in the second decade of the eighteenth century over the question whether the congregations should submit themselves to the governance of a synod. Even more heated was the quarrel which was produced by the great awakening consequent on the preaching of George Whitefield in 1740. Whitefield's doctrine was distinctly and disturbingly equalitarian. A spirit of criticism of superiors by inferiors, of elders by juniors ensued from it; while, at the same time the intellectual superiority of the clergy was menaced by the sudden appearance of a great crop of popular exhorters. Men turned again to Locke, Sydney, and others, but this time in order to discover the sanctions of authority rather than its limitations. Still some years later the outbreak of the French and Indian Wars inspired a series of sermons extolling English liberty and contrasting the balanced constitution of England with French tyranny, sermons in which the name of Montesquieu was now joined with that of Locke.[97]

This kind of preaching was not confined to New England, nor even to dissenting clergymen. Patrick Henry from his eleventh to his twenty-second year listened to an Anglican preacher who taught that the British constitution was but the "voluntary compact of sovereign and subject." Henry's own words later were "government is a conditional compact between king and people . . . violation of the covenant by either party discharges the other from obligation"; [98] and more than half of the signers of the Declaration of Independence were members of the Church of England.[99] It is also an important circumstance that the famous Parson's Cause, in which Henry participated as the champion of local liberty, was pending in Virginia from 1752 to 1758, helping to bring the people of Virginia during the period face to face with fundamental constitutional questions.[100] "On a small scale, the

[96] *Ibid.* cc. 5–6.

[97] *Ibid.* 88–89.

[98] Van Tyne, *Influence of the Clergy on the American Revolution* (1913) 14 AM. HIST. REV. 49.

[99] Letter of G. MacLaren Brydon, N. Y. Times, May 30, 1927, citing PERRY, THE FAITH OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE (1926). All the signers from the Southern Colonies except one from Maryland (a Catholic) and one from Georgia were Anglicans.

[100] Scott, *The Constitutional Aspects of the "Parson's Cause"* (1916) 31 POL.

whole episode illustrates the clash of political theories which lay back of the American Revolution." [101] And meantime the first generation of the American bar was coming to maturity — students of Coke, and equipped to bring his doctrines to the support of Locke should the need arise.[102]

The opening gun of the controversy leading to the Revolution was Otis' argument in 1761 in the *Writs of Assistance Case*,[103] which, through Bacon's and Viner's *Abridgments*, goes straight back to *Bonham's Case*. Adams' summary of it reads: "As to acts of Parliament. An act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very words of the petition, it would be void. The Executive Courts must pass such Acts into disuse. — 8 Rep. 118, from Viner." [104] "Then and there," exclaims Adams, "the child Independence was born." [105] Today he must have added that then and there American constitutional law was born, for Otis' contention goes far beyond Coke's: an ordinary court may traverse the specifically enacted will of Parliament, and its condemnation is final.

The suggestion that the local courts might be thus pitted against an usurping Parliament in defence of "British rights," served to bring the idea of judicial review to the very threshold of the first American constitutions, albeit it was destined to wait there unattended for some years. Adams himself in a plea before the Governor and Council of Massachusetts, turned Otis' argument against the Stamp Act,[106] while a Virginia county court actually

---

SCI. Q. 558 *et seq.* The controversy evoked much talk of "void laws," though from the clerical party and with reference to acts of the Virginia Assembly.

[101] *Ibid.* 577.

[102] WARREN, HISTORY OF THE AMERICAN BAR (1911) cc. 2–8; LECKY, AMERICAN REVOLUTION (Woodburn ed. 1922) 15–16.

[103] Quincy (Mass. 1761) 51–57, and appendices, 395–552, of which 469–85 are especially relevant; also 2 ADAMS, LIFE AND WORKS (C. F. Adams ed. 1850) 521–25, and 10 *ibid.* 232–362 *passim*.

[104] Quincy 474 (Mass. 1761).

[105] 10 ADAMS, LIFE AND WORKS 248.

[106] 2 *ibid.* 158–59; Memorial of Boston, Quincy 200–02 (Mass. 1765). Otis also spoke to the same effect. *Ibid.* at 205. Adams reiterated his argument in *Letters of Clarendon* in 3 ADAMS, WORKS 469. An argument greatly stressed against the Stamp Act was its tendency to abolish trial by jury contrary to Magna Charta, through its extension of the jurisdiction of the admiralty courts, over penalties incurred under the act. *Ibid.* at 470. Governor Hutchinson wrote at this period: "The

declared that measure void. "The judges were unanimously of the opinion," a report of the case reads, "that the law did not bind, affect, or concern the inhabitants of Virginia 'inasmuch as they conceived the said act to be unconstitutional.'" [107] As late as 1776, Chief Justice William Cushing of Massachusetts, who was later one of Washington's first appointees to the Supreme Court of the United States, was congratulated by Adams for telling a jury of the nullity of acts of Parliament.[108]

Nor did the controversy with Great Britain long rest purely on Coke's doctrines. Otis himself, declares Adams, "was also a great master of the law of nature and nations. He had read Puffendorf, Grotius, Barbeyrac, Burlamaqui, Vattel, Heineccius. . . . It was a maxim which he inculcated in his pupils . . . that a lawyer ought never to be without a volume of natural or public law, or moral philosophy, on his table or in his pocket." [109] Otis' own pamphlet, *The Rights of the British Colonies Asserted and Proved,* none the less was almost altogether of Lockian provenience. The colonists were entitled to "as ample rights, liberties, and privileges as the subjects of the mother country are and in some respects to more. . . . Should the charter privileges of the Colonists be disregarded or revoked, there are natural, inherent, and inseparable rights as men and citizens that would remain." [110] And Adams argues the year following in his dissertation on *The Canon and the Feudal Law* for

"Rights antecedent to all earthly government — Rights that cannot be repealed or restrained by human laws — Rights derived from the great

prevailing reason at this time is, that the Act of Parliament is against Magna Charta, and the natural Rights of Englishmen, and therefore, according to Lord Coke, null and void." Appendix, Quincy 527n. (Mass. 1769); and to same effect, *ibid.* at 441, 445.

[107] 5 McMASTER, HISTORY OF THE AMERICAN PEOPLE (1920) 394.

[108] 9 ADAMS, LIFE AND WORKS 390. Meanwhile, the dictum, with a strong Lockian infusion, had been invoked against domestic legislation. See George Mason's argument in Robin v. Hardaway, Jefferson 109–23 (Va. 1772), in which an act of the Virginia Assembly, passed in 1682, was declared void. Mason relied mainly on Coke and Hobart.

[109] 10 ADAMS, LIFE AND WORKS 275.

[110] The date of the pamphlet is 1764. A summary of it in 10 ADAMS, LIFE AND WORKS 293, is a summary of Locke's eleventh chapter. In OTIS, VINDICATION OF THE HOUSE OF REPRESENTATIVES (1762), Locke is characterized as "one of the most wise . . . most honest . . . most impartial men that ever lived . . . as great an ornament . . . the Church of England ever had to boast of."

Legislator of the universe. . . . British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts . . . coeval with government. . . . Many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed." [111]

But it is the Massachusetts Circular Letter of 1768 that perfects the blend of Coke and Locke, while it also reformulates in striking terms, borrowed perhaps from Vattel, the medieval notion of authority as intrinsically conditioned. The outstanding paragraph of the letter is the following:

"The House have humbly represented to the ministry, their own sentiments, that his Majesty's high court of Parliament is the supreme legislative power over the whole empire; that in all free states the constitution is fixed, and as the supreme legislative derives its power and authority from the constitution, it cannot overleap the bounds of it, without destroying its own foundation; that the constitution ascertains and limits both sovereignty and allegiance, and, therefore, his Majesty's American subjects, who acknowledge themselves bound by the ties of allegiance, have an equitable claim to the full enjoyment of the fundamental rules of the British constitution; that it is an essential, unalterable right, in nature, engrafted into the British constitution, as a fundamental law, and ever held sacred and irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent; that the American subjects may, therefore, exclusive of any consideration of charter rights, with a decent firmness, adopted to the character of free men and subjects, assert this natural and constitutional right." [112]

Notwithstanding all this, as late as the first Continental Congress there were still those who opposed any reliance whatsoever on natural rights. One of "the two points which we laboured most" John Adams records in his *Diary* was "whether we should recur to the law of nature, as well as to the British constitution, and our American charters and grants. Mr. Galloway and Mr.

[111] 3 ADAMS, LIFE AND WORKS 448–64, especially at 449, 463.

[112] MACDONALD, DOCUMENTARY SOURCE BOOK (1768) 146–50. *Cf.* VATTEL, LAW OF NATIONS (London tr. 1797) bk. i, c. 3, § 34. The subordination of the legislative authority and that of the Prince to the constitution is the gospel of this and the succeeding chapter. The work first appeared in 1758.

Duane were for excluding the law of nature. I was strenuous for retaining and insisting on it, as a recourse to which we might be driven by Parliament much sooner than we were aware." [113] The "Declaration and Resolves" of the Congress proves that Adams carried the day. The opening resolution asserts "that the inhabitants of the American colonies in North America," by the immutable laws of nature, the principles of the British constitution, and the several charters or compacts "are entitled to life, liberty, and property." [114]

Nor did the corollary notion of a single community claiming common rights on the score of a common humanity, escape American spokesmen. It was in this same first Continental Congress that Patrick Henry made his famous deliverance:

> Government is dissolved. . . . Where are your landmarks, your boundaries of Colonies? We are in a state of nature, sir. . . . The distinctions between Virginians, Pennsylvanians, New Yorkers, and New Englanders, are no more. I am not a Virginian, but an American.[115]

And the less casual evidence of everyday speech is to like effect: "the people of these United Colonies," "your whole people," "the people of America," "the liberties of Americans," "the rights of Americans," "American rights," "Americans." [116] The constant recurrence of such phrases in contemporary documents bespeaks the conscious identity of Americans everywhere in possession of the rights of men. Natural rights were already on the way to become national rights.

At the same time it is necessary to recognize that the American Revolution was also a contest for local autonomy as well as one for individual liberty. The two motives were in fact less competitive than complementary. The logical deduction from the course of political history in the colonies, especially in the later decades of it, was that the best protection of the rights of the individual was to be found in the maintenance of the hard-won

---

[113] 2 ADAMS, LIFE AND WORKS 374.

[114] MACDONALD, *op. cit. supra* note 114, at 162–66.

[115] 2 ADAMS, LIFE AND WORKS 366–67.

[116] BALDWIN, VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION OF THE UNITED STATES (1837) 15–16; Dillon, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA (1895) 46–48. See also NILES, PRINCIPLES AND ACTS (1876) 134–35, 148.

prerogatives of the colonial legislatures against the royal governors; in other words, of what they locally termed their "Constitutions."[117] The final form of the American argument against British pretentions was, therefore, by no means a happy idea suggested by the stress of contention, but was soundly based on autochthonous institutional developments. As stated by Jefferson in his *Summary View*, published in 1774, it comprised the thesis that Parliament had no power whatsoever to legislate for the colonies, whether in harmony with the rights of men or no; that the colonies were mutually independent communities, equal partners in the British Empire with England herself; that each part had its own parliament which was the supreme law making power within its territorial limits; that each was connected with the Empire only through the person of a common monarch, who was "no more than the chief officer of the people, appointed by the laws . . . to assist in working the great machine of government erected for their use."[118] The Declaration of Independence, two years later from the same hand, proceeds on the same theory. It is addressed not to Parliament but to the king, since it was with the king alone that the bond about to be severed had subsisted; in it the American doctrine of the relation of government to individual rights finds its classic expression; these rights are vindicated by the assertion of the independence of the thirteen states.[119]

[117] For this use of the term "Constitution," sometimes referring to the colonial charter, sometimes referring to the established mode of government of the colony, see 2 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS (1720) 370; 8 *ibid.* 279, 302, 318 (1728). In New Jersey, which had no charter after 1702, the term "constitution" referred altogether to the mode of government that had developed on the basis of the royal governor's instructions, but may have been suggested by the Fundamental Constitutions of 1683 of East Jersey. C. R. ERDMAN, THE NEW JERSEY CONSTITUTION OF 1776 (to be printed).

[118] 11 JEFFERSON, WRITINGS 258; THE JEFFERSONIAN CYCLOPEDIA (Foley ed. 1900) 963–68. Jefferson characteristically claimed his to be the first formulation of this position. 9 JEFFERSON, WRITINGS 258. But in this he was seriously in error. Richard Bland, Stephen Hopkins, John Adams, James Wilson, Benjamin Franklin, Roger Sherman, James Iredell, and others all preceded him, Hopkins and Franklin by nearly ten years. Indeed, advocates had developed a similar doctrine in Ireland's behalf in the seventeenth century. On the whole subject see ADAMS, POLITICAL IDEAS OF THE AMERICAN REVOLUTION (1922) cc. 3, 5; BECKER, *op. cit. supra* note 56, c. 3; MCILWAIN, THE AMERICAN REVOLUTION (1923).

[119] Jefferson's indebtedness to the Virginia Declaration of Rights of 1776 appears more striking when the Declaration of Independence is compared with the former as it came from the hands of George Mason. NILES, PRINCIPLES AND ACTS

From the destructive phase of the Revolution we turn to its constructive phase. This time it was Virginia who led the way. The Virginia constitution of 1776 is preceded by a "Declaration of rights made by the representatives of the good people of Virginia . . . which rights do appertain to them and their posterity, as the basis and foundation of government."[120] In this document, antedating the Declaration of Independence by a month, are enumerated at length those rights which Americans, having laid claim to them first as British subjects and later as men, now intended as citizens to secure through governments of their own erection. For the first time in the history of the world the principles of revolution are made the basis of settled political institutions.

What was the nature of these governments? Again the Virginia constitution of 1776 may serve as a model.[121] Here the horn of the legislative department is mightily exalted, that of the executive correspondingly depressed. The early Virginia governors were chosen by the legislature annually and were assisted by a council of state also chosen by the legislature, and if that body so desired, from the legislature. The governor was without the veto power, or any other participation in the work of law-making, and his salary was entirely at the mercy of the assembly. The judges were in somewhat better case, holding their offices "during good behavior," yet they too were the legislature's appointees, and judicial review is nowhere hinted. Finally, both judges and governors were subject to impeachment, which as still defined by English precedents, amounted to a practically unrestricted inquest of office. The underlying assumption of the instrument, gatherable from its various provisions, is that the rights of the individual have nothing to fear from majority rule exercised through

301–03. The phrase "pursuit of happiness" was probably suggested by Blackstone's statement that the law of nature boils down to "one paternal precept, 'that man should pursue his own true and substantial happiness.'" 1 BL. COMM. 41. BURLAMAQUI, PRINCIPLES OF NATURAL AND POLITICAL LAW (1859), an English translation of which appeared in 1763 (the work was first published in 1747), teaches the same doctrine at length. See, *e.g.*, 2 *ibid.* 18. The phrase "a long train of abuses," is Jefferson's recollection of LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT § 225, c. 19.

[120] 7 THORPE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS (1909) 3812–14.

[121] *Ibid.* 3814–19.

legislative assemblies chosen for brief terms by a restricted, though on the whole democratic, electorate. In short, as in both Coke and Locke, the maintenance of higher law is intrusted to legislative supremacy, though qualified by annual elections. Fortunately or unfortunately, in 1776 the influence of Coke and Locke was no longer the predominant one that it had been. In the very process of controversy with the British Parliament, a new point of view had been brought to American attention, the ultimate consequences of which were as yet unforeseeable.[122]

Lord Acton has described the American Revolution as a contest between two ideas of legislative power. Even as late as the debate on the Declaratory Act of 1766, the American invocation of a constitution setting metes and bounds to Parliament did not fail of a certain response among the English themselves. Burke, it is true, brushed aside all questions of prescriptive rights and based his advocacy of the American cause on expediency only; but Camden, who possessed the greatest legal reputation of the age, quoted both Coke and Locke in support of the proposition that Parliament's power was not an unlimited one; while Chatham, taking halfway ground, pretended to discover a fundamental distinction between the power of taxation and that of legislation, qualifying the former by the necessity of representation.[123] Camden and Chatham were, none the less, illustrious exceptions. The direction which the great weight of professional opinion was now taking was shown when Mansfield, who a few years earlier had as solicitor general quoted the dictum in *Bonham's Case* with approval, arose in the House of Lords to support the Declaratory Act.[124] The passage of that measure by an overwhelming ma-

---

[122] On the Revolutionary state constitutions, see generally NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION (1924); Morey, *First State Constitutions* (1893) 4 ANN. AM. ACAD. POL. AND SOC. SCI. 201–32; Webster, *Comparative Study of the State Constitutions of the American Revolution* (1897) 9 *id.* 380–420.

[123] See the debate on the Declaratory Bill, 16 HANSARD, PARLIAMENTARY HISTORY (1813) 163–81, 193–206 *passim*. Camden was especially vehement: The bill is "illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution." *Ibid.* 178. On the other hand, it was denied that *Magna Carta* was any proof "of our Constitution as it now is. The Constitution of this country has been always in a moving state, either gaining or losing something." *Ibid.* 197.

[124] *Ibid.* 172–75.

jority committed Parliament substantially to Milton's conclusion of a century earlier that "Parliament was above all positive law, whether civil or common." [125]

The vehicle of the new doctrine to America was Blackstone's *Commentaries,* of which, before the Revolution, nearly 2500 copies had been sold on this side of the Atlantic,[126] while the spread of his influence in the later days of the pre-Revolutionary controversy is testified to by Jefferson in his reference to that "young brood of lawyers" who, seduced by the "honeyed Mansfieldism of Blackstone, . . . began to slide into Toryism." [127] Nor is Blackstone's appeal to men of all parties difficult to understand. Eloquent, suave, undismayed in the presence of the palpable contradictions in his pages, adept in insinuating new points of view without unnecessarily disturbing old ones, he is the very exemplar and model of legalistic and judicial obscurantism.

While still a student, Blackstone had published an essay on *The Absolute Rights of British Subjects,* and chapter one of book one of his greater work bears a like caption. Here he appears at first glance to underwrite the whole of Locke's philosophy, but a closer examination discloses important divergences. "Natural liberty" he defines as "the power of acting as one thinks fit, without any restraint or control, unless by the law of nature." It is "inherent in us by birth," and is that gift of God which corresponds with "the faculty of free will." Yet every man, he continues, "when he enters into society, gives up a part of his

[125] McIlwain, High Court of Parliament 94. On the rise of the notion of Parliamentary sovereignty, see Holdsworth, Some Lessons from Our Legal History (1928) 112–41. The first to assert the supremacy of the King in Parliament over the King out of Parliament was James Whitlocke, in the debate on Impositions, in 1610. *Ibid.* 124. A division on the subject is shown in the debate on the Septennial Act of 1716. *Ibid.* 129; 7 Hansard, Parliamentary History 317, 334, 339, 348–49. The doctrine of the Declaratory Act evoked numerous protests outside of Parliament. Mott, Due Process of Law 63n. For a belated expression of the doctrine of limited Parliamentary power, see *ibid.* 67n., citing various works of Toulmin Smith. Smith, however, was no advocate of judicial review, but warned his people against such an institution as the Supreme Court of the United States. *Ibid.* 68n.

[126] The first volume appeared in 1765, the fourth in 1769. An American edition appeared in Philadelphia in 1771–72, of the full work, 1400 copies having been ordered in advance. Warren, History of the American Bar 178.

[127] 11 Jefferson, Writings (Mem. ed. 1903) iv. Jefferson had no high opinion of "Blackstone lawyers." He termed them "ephemeral insects of the law."

natural liberty as the price of so valuable a purchase," receiving in return "civil liberty," which is natural liberty "so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."[128] The divergence which this phraseology marks from the strictly Lockian position is two-fold. Locke also, as we saw above, suggests public utility as one requirement of allowable restraints upon liberty, but by no means the sole requirement; nor is the law-making power with him, as with Blackstone, the final arbiter of the issue.

The divergence becomes even more evident when the latter turns to consider the positive basis of British liberties in *Magna Carta* and "the corroborating statutes." His language in this connection is peculiarly complacent. The rights declared in these documents, he asserts, comprise nothing less than

> "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. These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world, being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England."[129]

Yet when he comes to trace the limits of the "rights and liberties" so grandiloquently characterized, his invariable reference is simply to the state of the law in his own day — never to any more exalted standard.

And so by phraseology drawn from Locke and Coke themselves, he paves the way to the entirely opposed position of Hobbes and Mansfield. In elaboration of this position he lays down the following propositions: First, "there is and must be in all of them [states] a supreme, irresistible, absolute, uncontrolled authority . . . "; secondly, this authority is the "natural, inherent right that belongs to the sovereignty of the state . . . of making and enforcing laws"; thirdly, to the law-making power "all other powers of the state" must conform "in the execution of their several functions or else the Constitution is at an end"; and, finally, the law-making power in Great Britain is Par-

[128] 1 Bl. Comm. 125–26. [129] *Ibid.* 127–29.

liament, in which, therefore, the sovereignty resides.[130] It follows, of course, that neither judicial disallowance of acts of Parliament nor yet the right of revolution has either legal or constitutional basis. To be sure, "Acts of Parliament that are impossible to be performed are of no validity"; yet this is so only in a truistic sense, for "there is no court that has power to defeat the intent of the legislature, when couched in . . . evident and express words."[131] As to the right of revolution — "So long . . . as the English Constitution lasts, we may venture to affirm that the power of Parliament is absolute and without control."[132]

Nor does Blackstone at the end, despite his previous equivocations, flinch from the conclusion that the whole legal fabric of the realm was, by his view, at Parliament's disposal. Thus he writes:

"It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws . . . this being the place where that absolute, despotic power which must in all governments reside somewhere, is entrusted by the Constitution of these kingdoms. All mischiefs and grievances, operations and remedies that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. . . . It can, in short, do everything that is not naturally impossible, and therefore some have not scrupled to call its power by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth no authority upon earth can undo."[133]

This absolute doctrine was summed up by De Lolme a little later in the oft-quoted aphorism that "Parliament can do anything except make a man a woman or a woman a man."

Thus was the notion of legislative sovereignty added to the stock of American political ideas.[134] Its essential contradiction of the elements of theory which had been contributed by earlier thinkers is manifest. What Coke and Locke give us is, for the

[130] *Ibid.* 49–51.

[131] *Ibid.* 91.

[132] *Ibid.* 161–62.

[133] *Ibid.* 160–61.

[134] Blackstone, however, was not the first to introduce the notion in the Colonies. See some earlier pulpit utterances recorded in BALDWIN, *op. cit. supra* note 93, at 42n. "The Legislature is Accountable to none. There is no Authority above them. . . ."

most part, cautions and safeguards against power; in Blackstone, on the other hand, as in Hobbes, we find the claims of power exalted. This occurred, moreover, at a moment when, as it happened, not merely the actual structure of government in the United States, but this strong trend of thought among the American people afforded the thesis of legislative sovereignty every promise of easy lodgement.

The formula laid down by the Declaration of Independence regarding the right of revolution is a most conservative one. The right is not to be exercised for "light and transient causes," but only to arrest a settled and deliberate course of tyranny. Yet within a twelve month of the Declaration we find one Benjamin Hichborn of Boston proclaiming the following doctrine:

"I define civil liberty to be not a 'government by laws,' made agreeable to charters, bills of rights or compacts, but a power existing in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and essence of any former government, and adopt a new one in its stead." [135]

Ultimately the doctrine of popular sovereignty thus voiced was to be turned against both legislative sovereignty and at a critical moment against state particularism. But at the outset it aided both these ideas, because the state was conceived to stand nearer to the people than the Continental Congress, and because, within the state, the legislature was conceived to stand nearer to the people than the other departments.[136] Thus legislative sovereignty, a derivative from the notion of popular sovereignty in the famous text from Justinian which was quoted at the outset of this study, was recruited afresh from the parent stream, with the result that all the varied rights of man were threatened with submergence in a single right, that of belonging to a popular majority, or more accurately, of being represented by a legislative majority.[137]

---

[135] NILES, PRINCIPLES AND ACTS 47.

[136] On the growth of particularism, as shown by the proceedings in the Continental Congress, especially regarding the Articles of Confederation, see ADAMS, JUBILEE DISCOURSE ON THE CONSTITUTION (1839) 13 *et seq.*

[137] "The Law of nature is not, as the English utilitarians in their ignorance of its history supposed, a synonym for arbitrary individual preferences, but on the contrary it is a living embodiment of the collective reason of civilized man-

Why, then, did not legislative sovereignty finally establish itself in our constitutional system? To answer at this point solely in terms of institutions, the reason is twofold. In the first place, in the American *written Constitution,* higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people.* Once the binding force of higher law was transferred to this new basis, the notion of the sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a *sovereign* law-making body which is subordinate to another law-making body. But in the second place, even statutory form could hardly have saved the higher law as *a recourse for individuals* had it not been backed up by *judicial review.* Invested with statutory form and implemented by judicial review, higher law, as with renewed youth, entered upon one of the great periods of its history, and juristically the most fruitful one since the days of Justinian.

Edward S. Corwin.

PRINCETON UNIVERSITY.

kind. . . . But it has its limits. . . . Natural justice has no means . . . of choosing one practical solution out of two or more which are in themselves equally plausible. Positive law, whether enacted or customary, must come to our aid in such matters." POLLOCK, EXPANSION OF THE COMMON LAW (1904) 128. The arguments of the analytical school against higher law notions must be conceded to this extent: it is better to confine the term "law" to rules enforced by the state. But that fact does not prove that the term should be applied to all such rules. In urging that it should be, the analytical thinkers endeavor to steal something — they try to transfer to unworthy rules supported by the state the prestige attaching to the word "law" conceived of as the embodiment of justice. The trouble with the analysts, in other words, is not that they define "law" too narrowly, but too broadly.