

**ANCIENT CONSTITUTIONALISM: SIR EDWARD COKE'S  
CONTRIBUTION TO THE ANGLO-AMERICAN LEGAL TRADITION**

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*Bacon and Shakespeare: what they were to philosophy and literature, Coke was to the common law.*<sup>1</sup>

—J. H. Baker

*I. Introduction*

In his book *The Revolt of the Masses*, Jose Ortega y Gasset commented that American society could not long survive any catastrophe to European society.<sup>2</sup> Over seventy years after it was written, this remains to be true, and especially true with respect to Great Britain. The American civil order is the descendent of institutions and ideas that arose in Great Britain. Indeed, as Russell Kirk has observed, through Britain, “Americans are part of a great continuity and essence.”<sup>3</sup> This great continuity includes a common religious heritage, a common history, and a common pattern of law and politics.

However, with the ascendancy of the United States in world affairs, there seems also to have been a rise in a provinciality of place and time amongst Americans—an ignorance of the inherited order that we have received. On this point Dr. Louis B. Wright has written,

For better or worse, we have inherited the fundamental qualities in our culture from the British. For that reason we need to take a long perspective of our history, a perspective which views America from at least the period of the first Tudor monarchs and lets us see the gradual development of our common civilization, its transmission across the

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<sup>1</sup> J.H. Baker, *An Introduction to English Legal History* (1971) 236.

<sup>2</sup> (1932, 1994 ed) 135.

<sup>3</sup> Russell Kirk, *Redeeming the Time*, (1998) 16.

Atlantic, and its expansion and modification as it was adapted to conditions in the Western Hemisphere. We should not overlook other influences which have affected American life . . . [b]ut we must always remember that such was the vigor of the British culture that it assimilated all others . . . we cannot escape the inheritance which has given us some of our sturdiest and most lasting qualities.<sup>4</sup>

Perhaps responding to Wright's call, in recent decades legal historians have produced a considerable amount of scholarship emphasizing the role of a constitutional theory called *ancient constitutionalism* in the Anglo-American legal culture.<sup>5</sup>

Early on in their struggle with Great Britain, at least in the years before 1774, the colonists primarily based their claims on "the seventeenth-century English constitution of customary restraints on arbitrary power;"<sup>6</sup> an inextricable part of Sir Edward Coke's legal career. The colonists perceived their situation as parallel to the struggle against the Stuart centralization in the seventeenth century—issues like taxation without consent particularly lent themselves to this analogy.<sup>7</sup> Many even adopted the ideological patois of English Whiggery, calling themselves "whigs" and their loyalist adversaries "tories."<sup>8</sup>

Moreover, one of the key elements of whig constitutionalism was that the Crown's authority was limited by the *ancient constitution*, which was defined by custom and had existed, as Coke put it, from "time out of mind as man."<sup>9</sup> Therefore, when colonial lawyers spoke of the "constitution," or of "fundamental rights," it was to this immemorial body of constitutional theory they referred.<sup>10</sup> Indeed, it is in the judicial career of Coke, the lawyer most admired and most often cited by the early Americans, where the identifiable

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<sup>4</sup> Louis B. Wright, *Culture on the Moving Frontier* (1955) 83.

<sup>5</sup> A simple internet search of the respective oeuvres of J.G.A. Pocock and John Phillip Reid for starters would provide a curious reader with many pages to peruse.

<sup>6</sup> John Phillip Reid, *In Defiance of the Law: The Standing Army Controversy, The Two Constitutions, and the Coming of the American Revolution* (1981) 3.

<sup>7</sup> Michael W. McConnell 'Tradition and Constitutionalism Before the Constitution' (1998) *University of Illinois Law Review* 173, 176.

<sup>8</sup> *Ibid.*

<sup>9</sup> Steve Sheppard, ed., *The Selected Writings of Sir Edward Coke V.I* (2003) 62.

<sup>10</sup> McConnell, above n 7, 177.

features of ancient constitutionalism can be seen.<sup>11</sup> The unifying factor between the colonists and Coke was that both struggled with whether the sovereign possessed the authority to abrogate the privileges and liberties traditionally belonging to the people. When combating the presumptions of the king, Coke needed to find an authority higher than the king. What he found were the “immemorial laws and customs of the people of England,” which were reflected in the common laws of the realm and constituted the ancient constitution, reaching back to when King Canute, England’s Viking king, pledged to govern by the customs of King Edgar and before.<sup>12</sup> As one scholar explains, “Coke brought the idea of ‘fundamental law’ into the courts of England” and what made it fundamental was precisely its antiquity and character as ancient custom.”<sup>13</sup>

This essay aims to be a brief *apologia* and introduction to the theory of ancient constitutionalism. Part II discusses traces this school of thought from its alleged roots in Anglo-Saxon society to King John’s historic meeting with the barons at Runnymede, and ends with some thoughts on how the early American legal argot reflects the influence of ancient constitutional principles tempered and developed over the centuries. Part III focuses on Sir Edward Coke, and why he is considered by many scholars to be the father of ancient constitutionalism, using *The Case of Proclamations*, *Calvin’s Case*, and the *Prohibitions del Roy* as examples. Part IV concludes with some thoughts on history, change, and the law. Given the breadth and quantity of the issues germane to such a study, this essay does not seek to arrive at definitive or exhaustive answers, but instead intends to analyze some of the major characteristics of this element of Coke’s career and the Anglo-American legal order.

## *II. The Ancient Constitution, Magna Carta, and the American Constitution*

Sir James Clarke Holt, the great medieval historian, asked, “Was there an ancient constitution?”<sup>14</sup> His answer was a sardonic, “No.”<sup>15</sup>

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid. 178.

<sup>13</sup> Ibid.

<sup>14</sup> J.C. Holt, ‘The Ancient Constitution in Medieval England’ in Ellis Sandoz (ed), *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of the Rule of Law* (1993) 22.

<sup>15</sup> Ibid.

The inquiry does not end here, however, because Holt provided a historian's answer, and not a lawyer's. For Holt and historians in general, the ancient constitution is a fiction and means nothing. By contrast, the Magna Carta, was a real historic event, and meant something in 1215, and means something to historians today.<sup>16</sup> However, lawyers once had a different opinion of the ancient constitution. In the seventeenth-century lawyers believed that this abstraction was no more a fiction than the Magna Carta, or any other historical event. It was relied upon and defended, and became an identifiable part of English legal culture. Its influence can be seen in the Magna Carta, and in the Anglo-American legal order today.

*A. The Ancient Constitution*

In his seminal work on the common law, J.G.A. Pocock argues that legal and political discourse in early seventeenth century England was shaped in large part by a reverence for its ancient constitution. Pocock describes it as a *mentalité*, which he defines as a “deep seated unconscious habit of mind,” common to England's lettered classes and especially its common lawyers.<sup>17</sup> The essential element of this *mentalité* was a faith in the rule of law. In particular, “it was a belief that England had always been governed with reference to its own ‘ancient constitution,’ to a set of principles—the common law—which had existed unchanged from the beginning of time.”<sup>18</sup>

Common law lawyers were conservative and self satisfied—at least those in the mould of Coke. They had a poor sense of actual history and for the most part believed that that English law had remained impervious to substantial change over time. The fundamentals of common law had emerged fully before the memory of man, or from “time out of mind of man.”<sup>19</sup> Without a doubt, the common law's primary attribute was the consistency and continuity it provided. The common law had developed in response to particular English needs, and, ergo, English lawyers were indifferent to other legal

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<sup>16</sup> Ibid.

<sup>17</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (2d ed., 1987) 178.

<sup>18</sup> James Hart and Richard J. Ross, “The Ancient Constitution in the Old World and the New” in Francis J. Bremer and Lynn A. Botelho (eds) *The World of John Winthrop: Essays on England and New England 1588-1649* (2005) 287.

<sup>19</sup> Sheppard above n 9, 62.

traditions, which could do very little to solve English problems.<sup>20</sup> In sum, the time-tested common law had been so successful in governing English society that it had come to represent “an authoritative and infallible frame of reference for resolving the political [and legal] controversies of the age.”<sup>21</sup>

Ancient constitutionalism is commonly attributed to Sir Edward Coke, because although belief in the ancient constitution permeated English legal culture in the early seventeenth-century, no one argued the position more forcefully and persuasively than Coke. Additionally, some scholars have suggested that while most seventeenth-century lawyers were certainly resistant to changes in the law; it was because they did not want to create uncertainty, rather than an inordinate faith in their immutable legal tradition.<sup>22</sup> Most understood that changes had occurred in the past and that the law would continue to change in the future.

However, seventeenth-century lawyers *did* posit a fairly consistent vision of an ancient constitution, which possessed, as the sixteenth-century lawyer Christopher St. German explained, “dyverse generall Customes” which were in line with natural law (*lex orta est cum mente divina*) and which had always been “good and necessarye for the common welth of all the realme.”<sup>23</sup>

This constitutional order was believed to have pre-existed and endured William the Conqueror’s assumption of the English throne in 1066, and was generally understood as the political structure of Anglo-Saxon society, the origins of which are traceable to the mythology of prehistoric Germany. As one scholar explains,

[The ancient constitution] was the norm of governance... of the Anglos, the Saxons, and the Jutes when they were said by ancient constitutionalists to have been free people living under elected kings vested with limited power and confined by the rule of customary law.<sup>24</sup>

Latin charters referring to the use of the jury, Chancery, sheriffs,

<sup>20</sup> Pocock, above n 17, 36.

<sup>21</sup> Hart and Ross, above n 18, 289.

<sup>22</sup> Glenn Burgess, *The Politics of the Ancient Constitution* (1992) 20-27.

<sup>23</sup> James S. Hart, *The Rule of Law, 1603-1660: Crowns, Courts and Judges* (2003) 15.

<sup>24</sup> John Phillip Reid ‘Law and History’ 27 *Loyola of Los Angeles Law Review* (1993) 193, 206.

escheat for treason, and other juridical elements “prove that the common Law of England had been time out of minde [sic] of man before the Conquest, and was not altered or changed by the Conqueror.”<sup>25</sup>

As such, the ancient constitution was considered to accurately reflect the values and ideals of the English people. On this point Sir John Davies stated that it was, “so framed and fitted to the nature and disposition of [the English] people . . . it is connatural to the Nation, so as it cannot possibly be ruled by any other law.”<sup>26</sup> It was also considered to be inherently just; therefore it provided a standard against which all behaviour—especially political behaviour—could be measured.<sup>27</sup> Responsible governing in England was government conducted in conformity with the common law—that was the essence of the ancient constitution. All other propositions were foreign and suspicious, or at the very least, incongruent with the history and character of the English polity.<sup>28</sup>

Indeed, this quality is what enabled it to be used to advocate for certain legal principles or institutions even if abolished by the Crown or rendered invalid via non-usage.<sup>29</sup> Even constitutional customs of long standing did not necessarily take priority over the immutability of a doctrine fundamental to the ancient constitution. The underlying principles of the ancient constitution were ably described by Sir John Fortescue in his highly influential treatise, *De Laudibus Legum Angliae*, which was written *circa* 1470. In it, Fortescue contrasts royal rule, which he overtly associates with civil law and France, with political rule, which he considers distinctly English; the fundamental difference being the amount of power allotted to the monarch:

For the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political. If he were to

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<sup>25</sup> Edward Coke, *Le Tierce Part des Reportes del Edward Coke* (1602) as quoted in Daniel J. Hulsebosch ‘The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence’ 21 *Law & History Review* (2003) 439, 465.

<sup>26</sup> Burgess, above n 22, 52.

<sup>27</sup> Alan Cromartie ‘The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England’ (1999) 163 *Past & Present* 79.

<sup>28</sup> Hart and Ross, above n 18, 291.

<sup>29</sup> See generally Ellis Sandoz (ed), *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of the Rule of Law* (1993) 104-115.

rule over them with a power only royal, he could be able to change the laws of the realm, and also impose on them tallages and other burdens without consulting them; this is the sort of dominion which the civil laws indicate when they state that "what pleased the prince has the force of law." But it is far otherwise with the king ruling his people politically, because he himself is not able to change the laws without the assent of his subjects nor to burden an unwilling people with strange impositions, so that, ruled by laws that they themselves desire, they freely enjoy their goods, and are despoiled neither by their own king nor any other.<sup>30</sup>

In sum, immutable principles—whose origins and functions were often unknown—composed the ancient constitution and were always available as a standard to check the authority of the sovereign and correct legal errors. Even if there were considerable departures from constitutional norms, like the Tudor and Stuart centralization in Coke's time, they could be categorized as changes in form, not amounting to substantial change.<sup>31</sup> As one eighteenth century legal scholar explained, "[W]hile the Fountain Constitution stands Secure, any various Runnings of the Rivulets are no Breach of the Constitution."<sup>32</sup> Recent practices or changing customs did not matter, what mattered were the timeless first principles of ancient constitutionalism. That fact made the ancient constitution available as a perpetual standard when arguments were made for amending the rivulets of legal error.

### *B. Magna Carta: Personification of the Ancient Constitution*

It has been nearly 800 years since King John met with the barons at Runnymede to agree to the terms of what came to be known as Magna Carta. Over the centuries, the ideals of that venerable document have formed a cornerstone of much of our modern jurisprudence, and indeed, our constitutionalism. One noteworthy provision states:

<sup>30</sup> Peter C. Herman, "*Bastard Children of Tyranny*": *The Ancient Constitution and Fulke Greville's A Dedication to Sir Philip Sidney* (2002) *Renaissance Quarterly*, <<http://www.thefreelibrary.com/%22Bastard+children+of+tyranny%22:+The+Ancient+Constitution+and+Fulke...-a093027997>> at 22 September 2002.

<sup>31</sup> Reid, above n 20, 208.

<sup>32</sup> *Ibid.*

No freeman shall be taken or imprisoned or be disseised of his freehold, or liberties or free customs or be outlawed or exiled or in any wise destroyed . . . but by . . . the law of the land.<sup>33</sup>

In the Magna Carta's decree of "law of the land," scholars argue that we find the roots of the Anglo-American concept of "due process of law."<sup>34</sup> Moreover, implicit in the Magna Carta is the principle that today we call "the rule of law."<sup>35</sup> One cannot overemphasize that the fact that King John—unwillingly to be sure—was forced to sign the document was a precedent for later generations' arguments that no individual is above the law. For example, Parliament invoked this sonorous precedent when denying the pretensions of Stuart kings in seventeenth-century England, and in America, it was employed by the Supreme Court to place limits on presidential claims of privilege in *United States v. Nixon*.<sup>36</sup>

Perhaps Dr. Johnson summarized it best,

[t]he contents of the Magna Carta [are] the undoubted inheritance of England, being their antient and approved laws; so antient, that they seem to be of the same standing with the nation . . . [T]hey passed through all the British, Roman, Danish, Saxon, and Norman times, with little or no alteration in the main.<sup>37</sup>

Johnson meant to propagate a principle of constitutional law with this statement, not teach a history lesson. Similarly, in 1744 the Connecticut legislature was told in an annual election sermon that,

The Rights of Magna Charta depend not on the Will of the Prince, or the Will of the Legislature . . . they are the inherent natural Rights of Englishmen: secured and confirmed they may be by the Legislature, but not derived from nor dependent on their Will.<sup>38</sup>

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<sup>33</sup> John Alder, *Constitutional and Administrative Law* (2007) 153.

<sup>34</sup> Indeed, by the end of the fourteenth century, "due process of law" and "law of the land" were largely interchangeable. See A.E. Dick Howard, *Magna Carta: Text and Commentary* (rev. ed. 1998).

<sup>35</sup> See Alder, above n 20, 149 et seq.

<sup>36</sup> *United States v. Nixon* 418 U.S. 683, 713 (1974).

<sup>37</sup> Samuel Johnson, *A History and Defence of Magna Charta* (1769, 1881 ed) 3-4.

<sup>38</sup> Elisha Williams, "The Essential Rights of Protestants. A Seasonal Plea for the Liberty of Conscience, and the Right of Private Judgment, in Matters of Religion, Without any Controul from Human Authority. Being a Letter, from a Gentleman

Thirty-two years later, this would be the legal principle upon which Americans would fight their revolution.

*C. The American Constitution*

Thomas Jefferson wrote, “In questions of power, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”<sup>39</sup> The American Constitution was intended—and has successfully operated—to restrain political power: to prevent any person or clique from permanently dominating the government of the country. Indeed, William Gladstone, the great Victorian statesman, famously declared,

[A]s the British Constitution is most subtle organism which had proceeded from the womb and the long gestation of progressive history, so the American Constituion is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man.<sup>40</sup>

One of the great premises of American political theory is that all just authority comes from the people, under God. The people delegate to the government an amount of power that they deem prudent, and reserve for themselves all other powers and rights. Russell Kirk described this arrangement in his book *The American Cause*,

[T]he American political system, first of all, is a system of limited, delegated powers, entrusted to political officers and representatives and leaders for certain well-defined public purposes.<sup>41</sup>

For over two centuries the system has been a success: America has neither endured dictatorial rule, nor tolerated violent social disorder.

Perhaps the most prominent ancient constitutional principle is the concept of the original contract between the English people and

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in the Massachusetts Bay to his Friend in Connecticut’ (1744), 65 (quoted in Reid above n 24, 193).

<sup>39</sup> Thomas Jefferson, ‘Draft of the Kentucky Resolutions’ (1798) in Scott J. Hammond et al, *Classics of American Political and Constitutional Thought: Origins through the Civil War* (2007) 667.

<sup>40</sup> Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (2006) 162.

<sup>41</sup> Russell Kirk, *The American Cause* (1957) 68.

their ruler.<sup>42</sup> As we have seen, the concept was personified by the Magna Carta and it was certainly in the minds of the colonists during the controversy between Great Britain and the thirteen colonies. For example, shortly before the Stamp Act was enacted the Massachusetts colonists complained,

[O]ur forefathers have told us that they should never have left the land of their nativity, and fled to these ends of the earth, triumph'd over dangers, encountered difficulties innumerable, and suffer'd hardships unparrel'd, but for the sake of securely enjoying civil and religious liberty, and that the same might be transmitted safe to their posterity.<sup>43</sup>

The theory of contract was an element of constitutionalism restricting the power of the monarch stretching back, "from time out of mind as man."<sup>44</sup>

In the eighteenth century it was popular knowledge that Charles I had been executed for violating his compact with the English and Scottish people. At the end of his trial, the head of the court told the king:

There is a contract and a bargain made between the King and his people, and your oath is taken: and certainly Sir, the bond is reciprocal . . . Sir, if this bond be once broken, farewell sovereignty!<sup>45</sup>

With this in mind, the colonists believed that the king had not only broken "the original contract with his three kingdoms, "but he also violated the original contract of the settlement and government of [the] colonies."<sup>46</sup>

Notwithstanding that the contract was implied, it was such a reality to the eighteenth-century American legal mind that in practice it was treated as a readily proven instrument. The source of government, as one commentator explains, "is covered by the Veil of Antiquity,

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<sup>42</sup> Reid, above n 20, 212.

<sup>43</sup> Ibid. (quoting 'Instructions of the Town of Weymouth,' *Boston Evening-Post*, October 21, 1765, 2).

<sup>44</sup> Sheppard, above n 9, 62.

<sup>45</sup> Stephen C. Manganiello, *The Concise Encyclopedia of the Revolutions and Wars of England, Scotland, and Ireland 1639-1660* (2004) 252.

<sup>46</sup> See Reid, above n 41, 2.

and is differently traced by the Fancies of different men; but, of the colonies, the Evidence is as clear and unequivocal as of any other fact.”<sup>47</sup> During the revolutionary controversy, the colonists would readily employ legal arguments based upon history and custom, and it is likely that the notion of the contract between lord and subjects was appealed to more than any other doctrine. This and other doctrines emerging from antiquity serve to inform a *l'esprit des constitutions* in the English and American legal systems. The framers of the American Constitution could not avoid being influence by the customs that were so much a part of English common law.

### III. *Sir Edward Coke*

Unlike John Locke, James Harrington, and the pantheon of other legal philosophers that every undergraduate studies in political science courses, Coke’s primary focus was not on politics and law in general, but on English politics and law in particular. His aim was to identify the traits that gave English law its character. Accordingly, the more general philosophical consequences of his analyses were almost always subordinate to highly specific legal questions, which were viewed in historical terms.

Coke’s legal philosophy was not only centred upon English law, but on a particular branch of English law, the common law. He was not concerned with developing theories on Canon law, as applied in the English ecclesiastical courts, or on the mixture of Romano-English rules and procedures often employed in other English courts. This is not to say that Coke was not familiar with these other branches of English law, he certainly was, however he made a point of ignoring them as foreign law. Throughout his legal career Coke virulently defended the position that the law of the land meant only the English common law, and not “the law of Chancery, Ecclesiastical Law, the Law of Admiralty . . . the Law of the Merchants, the Martial Law, and the Law of the State.”<sup>48</sup>

Coke also attempted to present the common law as a self-contained system in his *Institutes*.<sup>49</sup> To be sure, it was no accident that he

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<sup>47</sup> Ibid. 216-217.

<sup>48</sup> J.W. Gough, *Fundamental Law in English Constitutional History* (1955) 61.

<sup>49</sup> Harold J. Berman ‘The Origins of Historical Jurisprudence: Coke, Selden, Hale’ (1994) 103 *Yale Law Journal* 1651, 1680.

copied the title from Emperor Justinian's famous code.<sup>50</sup> Professor Richard Helgerson has argued that Coke, who owned a glossed copy of Justinian, sought to systematize the English common law so that it would appear to be "Roman" and therefore usher the genuine article into obscurity.<sup>51</sup> "Coke's very insularity," Helgerson states, "his myopic insistence on the uninterrupted Englishness of English law, was the product of a persistent awareness of a rival system of law against which English law had to defend itself and define itself. Coke was insular not by ignorance but by ideological necessity."<sup>52</sup> However, this ideological insularity was shared "by an entire generation of Elizabethan and Jacobean writers seeking to establish English "nationhood."<sup>53</sup> It was Sir Edward's brilliance, and indeed his cantankerous nature that put him in the position to develop a legal theory that would achieve this in large part.

*A. Theory in Action: Case of the Proclamations, Calvin's Case, and Prohibitions del Roy*

One of Coke's more famous cases is *The Case of Proclamations*, a case considered by scholars to be "an important forerunner of our separation of legislative from executive power and hence of an aspect of due process."<sup>54</sup> Coke, while in conference with the Privy Council stated, "the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament."<sup>55</sup> The issue arose when King James I sought an opinion on his authority to promulgate proclamations restricting new buildings in and about London and to regulate the trade of starch, which was in high demand because the fashion of the day was to wear ruffed collars, which needed starch to remain stiff.<sup>56</sup> James I believed that in both cases the authority to make the proclamations was well within the ambit of the prerogative powers of the monarch, i.e., the monarch possessed the power to pass the proclamations absolutely, without Parliamentary approval.

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<sup>50</sup> *The Institutes of Justinian* is available in English at <<http://www.fordham.edu/halsall/basis/535institutes.html>>

<sup>51</sup> Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (1992) 71.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> McConnell, above n 7, 177.

<sup>55</sup> Sheppard, above n 9, 487.

<sup>56</sup> *Ibid.* 486.

Lord Chancellor Ellesmere, arguing on behalf of the king, stated,

in cases in which there is no authority and [precedent], to leave it to the King to order in it according to his wisdom, and for the good of his Subjects, or otherwise the King would be no more than the Duke of Venice . . . [and that] the Physitian was not always bound to a president, but to apply his Medecine according to the quality of the disease.<sup>57</sup>

Ellesmere's view of the law was antipodal to Coke's. He believed that the *fons et origo* of all law, including the common law, was in the will of the sovereign.<sup>58</sup> For example, in *Calvin's Case*, Ellesmere rejected the idea that the law was above the monarch, criticizing the "new-risen philosophers" daring to declare that, "kings have no more power than the people from whom they take their temporal jurisdiction."<sup>59</sup> To Ellesmere, those who were entertaining questions of whether kings or people first made law were participating in near treasonous activities. Succinctly, "[t]he monarch is the law. *Rex est lex loquens*, the king is the law speaking."<sup>60</sup> Therefore, if the authority of the law has its source in the king, who is God's representative on earth, then it is no stretch of the imagination to hold that the king has power over the law.

Coke, on the other hand, considered the monarch's prerogative to be a product of the law of the land, and not intrinsic to the monarch. In *The Case of the Proclamations* he stated that, "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm."<sup>61</sup> Coke defended his position by characteristically delving into the records, and using the "ancient and continual forms of indictments" retorted that all indictments,

Conclude with the words, against the law and custom of England, *Contra legem et consuetudinem Angliae*; or against law and statutes, *Contra leges et statua*. But I never heard of an indictment to conclude, *Contra regiam proclamationem*; against

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<sup>57</sup> Ibid 487.

<sup>58</sup> McConnell, above n 7, 178.

<sup>59</sup> Catherine Drinker Bowen, *The Lion and the Throne* (1956) 300.

<sup>60</sup> Ibid.

<sup>61</sup> Sheppard, above n 9, 488.

the king's proclamation.<sup>62</sup>

Coke's position has tremendous significance: the rights of the people consist of their customary privileges and practices, and these may be amended only with the consent of their elected representatives.<sup>63</sup>

The crux of the divide between Ellesmere and Coke was how custom relates to command. As we have seen, Coke viewed the authority of custom as wholly independent of any command of the king and his prerogative, unless the representatives of the people consent. This was *the* theme of Coke's jurisprudence.

Coke would also cross swords with Lord Chancellor Ellesmere over the custom's relationship with reason. At first glance, this relationship might seem to be a non-issue because a law that has been left on the books for a long period of time arguably has the acceptance of society as a guarantee of its wisdom. The weight of tradition is particularly acute in the common law, which is composed of the "wisdom of generations, as a result not of philosophical reflexion [*sic*] but of the accumulations and refinements of experience."<sup>64</sup> In *Calvin's Case*, Sir Edward explained his position,

we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow in respect of the old ancient days and times past, wherein, the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto . . . [N]o man ought to take upon him to be wiser than the laws.<sup>65</sup>

However, Coke did recognize that in theory tradition and abstract

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<sup>62</sup> Bowen above n 59, 322.

<sup>63</sup> McConnell, above n 7, 178

<sup>64</sup> Pocock above n 17, 35.

<sup>65</sup> Sheppard, above n 9, 173.

reason could come into conflict, and when it did, he naturally believed that tradition was supreme.

Scholars note that in his judicial opinions Coke never “bolster[ed] his case by speculating about the reasons for common law rules.”<sup>66</sup> As a judge, he was absolutely unwilling to use abstract reason as a standpoint for any position regarding the common law, and rarely broke down the well-settled customs of the common law to the abstract principles that might appear to be their foundation. For Coke, the antiquity of a precedent was enough to prove its wisdom; nothing more was necessary.

*Calvin’s Case* is a salient example of how unwilling Coke was to apply abstract reason. The issue of this case, also known as the case of the *postnati*, was whether individuals born in Scotland after James VI (who was himself a Scot) acceded the English throne were aliens in England and therefore barred from holding real property.<sup>67</sup> Such a case had never been decided before, because no foreign king had ever inherited the English crown.<sup>68</sup> However, even in a case of first impression, where it would seem reasonable to most to apply some variant of abstract reason or natural law, Coke perused the records to find an answer. Famously stating that “out of the old fields must come the new corn,” Coke dredged up a 200-year old precedent from the days when the kings of England hailed from Gascony, France. Precedent provided the grounds for his decision that Robert Calvin should not be considered an alien even though he was not born in the kingdom of England.<sup>69</sup> Thus it can be said that to Coke, the common law was omniscient. The historian Charles Gray has noted that “[a] solution to the problem of the ‘case of first impression is implicit in this picture: it does not exist in England . . . [the common law] is like an infinitely experienced man, who has been everywhere, seen everything, [and] heard it all before.”<sup>70</sup>

Even when Lord Chancellor Ellesmere engaged Coke in an argument over whether the role of abstract reason was necessary in

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<sup>66</sup> McConnell, above n 7, 178; See also James R. Stoner, Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (1992).

<sup>67</sup> Charles Gray, *Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke in Culture and Politics from Puritanism to the Enlightenment* (1980) 25.

<sup>68</sup> *Ibid.* at 28.

<sup>69</sup> Sheppard, above n 9 at 173.

<sup>70</sup> Gray, above n 67, 29.

a hypothetical case where existing legal authorities do not resolve the issues, Coke was unwavering. Ellesmere posited that in such a case judges could employ abstract reason, which he understood as the aptitude that all men have to varying degree.<sup>71</sup> Coke disagreed, responding that what judges must use is an “artificial reason,” a skill requiring “long study and experience” with the common law.<sup>72</sup> Gray defines “artificial reason” this way:

The expression artificial reason suggests a substitute for reason—an artifice that does a job better than the natural faculty. In some contexts, this sense predominates. The artifice is simply the law: there are cases for which a lawyer can draw a solution from positive legal sources. Such a legal solution will be better than the solution an ideally wise person would reach with only natural reason to depend on. That is true because the law is a collective product, a repository of many wise men’s thinking about related problems over a long stretch of time.<sup>73</sup>

Artificial reason, then, is reasoning within the law, and not a way to bring in novel premises that exist outside of the common law tradition.

Coke had a practical rationale for his position. He well understood Ellesmere’s maxim, *rex est lex loquens*, and recognized that if cases could be decided by the reasoning of men untrained in the law, then the law was subject to the demands of the king. If artificial reason was not used to decide cases then the opinions of judges, who possess authority because of their thorough knowledge of the law, have no more authority than anyone else.

The diametrically opposed positions of Coke, “conservative defender of the old common law,” and Ellesmere, “personification of the King in judgment and stout defender of the royal prerogative,” came to a head during a dramatic meeting with James I

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<sup>71</sup> John Underwood Lewis, ‘Sir Edward Coke (1552-1634): His Theory of “Artificial Reason” as a Context for Modern Basic Legal Theory in Law Liberty and Parliament’ in Allen D. Boyer (ed), *Selected Essays on the Writings of Sir Edward Coke*, (2004) 107; See Also Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (1986).

<sup>72</sup> Sheppard, above n 9, 481.

<sup>73</sup> Gray, above n 67, 31.

in 1608, labeled the *Prohibitions del Roy* in Coke's *Reports*.<sup>74</sup> The king had called a conference of bishops, and judges to resolve a dispute over the jurisdictions of the Court of Common Pleas (where Coke was Chief Justice) and the Ecclesiastical High Commission. Coke had incensed the clergy by issuing writs of prohibition that prevented the church from collecting tithes that were arguably repealed via oral contracts.<sup>75</sup> During the conference, Coke naturally defended his position by using precedent, in response to which James thundered that, "[c]ommon-law judges were like papists who quoted scripture and then put it to their own interpretation, to be received unquestioned . . . [similarly] judges allege statutes, reserving the exposition thereof to themselves."<sup>76</sup> And, likely sensing an opportunity to checkmate Coke in a rapidly deteriorating encounter, an unidentified adversary inserted the issue of King James' judicial authority to decide such cases stating,

[w]here there is not express authority in law, the King may himself decide it in his royal person; the Judges are but delegates of the King . . . and the King may take what causes he shall please . . . and determine them himself. And the Archbishop said: that this was clear in divinity, that such authority belongs to the King by the Word of God in the Scripture.<sup>77</sup>

Coke answered that under the common law, James was not permitted to decide these questions, lecturing that "the King cannot take any cause out of any courts and give judgment upon it himself."<sup>78</sup>

King James became frustrated with Coke, telling him that he had spoken "foolishly" and said that as supreme head of justice, he would "ever protect the common law."<sup>79</sup> This prompted Coke to express his fervently held view that ancient common law exists to protect the king, which James considered "traitorous speech."<sup>80</sup>

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<sup>74</sup> Sir John Baker, 'The Common Lawyers and the Chancery' in Allen D. Boyer (ed), *Law Liberty and Parliament: Selected essays on the Writings of Sir Edward Coke* (2004) 256.

<sup>75</sup> Sheppard, above n 9, 479; Bowen, above n 59, 303.

<sup>76</sup> Bowen, above n 59, 303.

<sup>77</sup> Ibid. 304; See also Sheppard above n 9, 478.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

James, shaking his fist, added that, "he thought the Law was founded upon Reason, and that he and others had Reason as well as the Judges."<sup>81</sup> Coke would not budge, and although he could admit that the king was endowed with "excellent science and great endowments of nature," James was untrained in the law and therefore could not exercise artificial reason.<sup>82</sup>

The episode ended with James flying into a rage and Coke falling "flat on all fower; humbly beseeching his majestie to take compassion on him and to pardon him."<sup>83</sup> Only the intervention of Robert Cecil, the Lord Treasurer and Coke's uncle by marriage, spared him from an extended stay in the Tower.

To be fair, James and Ellesmere were not being completely unreasonable.<sup>84</sup> After all, if law is to be determined by reason, there is no necessity to refer to the opinions of judges. Judges are no more wise or reasonable than other men. However, a judge's claim to be heard is his knowledge of the law. If cases were considered on a particular judge's abstract reason and not on what the law is, they would lose their claim to more authoritative decision-making. This was why Coke immersed himself in precedents and emphatically held that the common law provided all the answers.<sup>85</sup>

### *B. Coke's Version of History*

Sir Edward's research of the common law was so thorough that his *Reports* and his *Institutes* were regularly cited for centuries after his death. Notwithstanding this use, however, today it is clear that his passion for the common law was such that his history sometimes

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<sup>81</sup> Ibid.

<sup>82</sup> Ibid. 305.

<sup>83</sup> Ibid.

<sup>84</sup> So reasonable in fact, that none other than Thomas Hobbes would later wage a diatribe against Coke's position in *A Dialogue Between a Philosopher and a Student of the Common Laws of England*. Here, Hobbes famously posits that "it is not wisdom, but Authority that makes the Law . . . [N]one can make a Law but he that hath the Legislative Power." [Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (1681, 1997 ed), 16] Indeed, Hobbes was a defender of absolutism, but a cogent argument can be (and was) made for Ellesmere's position, which is important to note when considering Coke's struggle.

<sup>85</sup> William E. Conklin, *In Defence of Fundamental Rights* (1979) 17; See Also Allen D. Boyer, "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review' (1997) 39 *Boston College Law Review* 43, 61.

became intertwined with mythology and legend.<sup>86</sup> Dr. Pocock describes Coke's idea of proof this way:

[Coke] took everything in the records of the common law to be immemorial, and treated every piece of evidence in those records as a declaration of what was already immemorial; so that the beginning of the records of the king's courts in the twelfth century was proof, not that those courts began at that time, but of their great antiquity, and it was usual and—given the presumptions—logical to add that if the earlier records had not been lost or stolen, they would prove the existence of the courts in times earlier still. But at however remote a date the series of records had begun, the common-law mind would still have taken their beginning as proof that at the time the laws were already immemorial; since *jus non scriptum* must by definition be older than the oldest written records.<sup>87</sup>

This understanding of proof is terribly amusing today, especially when reading Coke's claims that the sources of English law can be traced beyond King Arthur to Greek speaking Druids.<sup>88</sup>

While modern historians have had a bit of fun at Coke's expense because by today's standards his historical positions often flirt with the implausible, such beliefs were not an oddity of Coke's jurisprudence or a self-serving endeavour dreamed up to frustrate the king. In Coke's age the idea that law is custom, and that the most fundamental of laws are long-standing custom, was an inextricable part of the common-law mind.<sup>89</sup> If the source of individual rights is a benevolent monarch, then that same monarch, or a less charitable successor, possesses the right to revoke them. On the other hand, if rights are derived from long-standing practice,

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<sup>86</sup> Sir William Holdsworth, *A History of English Law V. 5* (1903, 1972 ed) 459. (Holdsworth was on many occasions critical of Coke's "literary" rendition of certain encounters.)

<sup>87</sup> Pocock, above n 17, 37.

<sup>88</sup> Sheppard, above n 9, 62.

<sup>89</sup> See e.g., Donald R. Kelley, *The Historical Imagination in Early Britain: History, Rhetoric, and Fiction* (1997); Consider also continental legal thinkers that held similarly dubious historical opinions: Claude Joly, Francois Hotman, Pietro de Gregorio, and Antoine Loisel etc.; See also Sarah Hanley 'The Jurisprudence of the Arrêts: Marital Union, Civil Society, and State Formation in France, 1550 – 1650' (2003) 21 *Law & History Review* 1.

and not the will of a monarch, no monarch can be said to possess the right to revoke them. Coke believed that only changes in practice traceable over long periods of time could change custom. The ancient constitution was the apparatus that Coke could use to “argue that the laws of the land were so ancient as to be the product of no one’s will, and to appeal to the almost universally respected doctrine that law should be above will.”<sup>90</sup>

Using the fictitious theory of ancient constitutionalism, Coke established some of the vital principles of the Anglo-American legal system: trial by jury, the foundations of judicial review, no taxation without consent, the reaffirmation of habeas corpus, and the approval of the legislature for the executive creation of new offences. Most scholars agree that when the American colonists used the term “constitution” in their controversy with Britain up to and during the Revolution, Coke’s theory was what they were invoking.<sup>91</sup> As one commentator explains, “the values of the ancient constitution were properly a colonial birthright,” notwithstanding “the brief American experience.”<sup>92</sup>

The legacy of Coke’s can be clearly seen in the work of founding father James Wilson, whose reverence for history can be summarized in the following statement, “[One who knows history] already knows mankind in theory, and, for this reason, will be in less danger of being deceived by them in practice.”<sup>93</sup> Wilson, a native Scot, was educated at the universities of St. Andrews and Edinburgh before immigrating to Pennsylvania in 1765, in the midst of the Stamp Act crisis. After briefly teaching Latin at what would become the University of Pennsylvania, Wilson studied the law under John Dickinson and would begin his own practice in Reading, Pennsylvania in 1768. As a student of the law he read Coke’s *Institutes*, Blackstone’s *Commentaries*, and was also fond of Sidney, Rapin, and Bolingbroke. A good lawyer, Wilson believed,

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<sup>90</sup> Pocock, above n 17, 51.

<sup>91</sup> John Philip Reid, *The Concept of Liberty in the Age of the American Revolution* (1988) 10; McConnell, above n 7, 186; Pocock above n 17, 37; See Also W.H. Greenleaf, *Order, Empiricism, and Politics: Two Traditions of English Legal Thought* (1964).

<sup>92</sup> Stanley Katz, ‘The American Constitution: A Revolutionary Interpretation’ in Richard Beeman et al, *Beyond Confederation: Origins of the Constitution and American National Identity* (1987) 36; See also Christopher W. Brooks, *Communities and Courts in Britain* (1998) 226.

<sup>93</sup> Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (1998) 144.

must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws: and they must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced.<sup>94</sup>

Wilson's approach to history was that of a careful lawyer, and his approach to politics that of a careful historian.

In 1774, Wilson published a work entitled, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*. In it, Wilson would expend a considerable amount of ink discussing the history of the legal rights of Englishmen living in the American colonies: "We have committed no crimes to forfeit [our rights as Englishmen and] we have too much spirit to resign them. We will leave our posterity as free as our ancestors left us."<sup>95</sup> Wilson notes that the American colonies were not conquered, but settled at private expense under royal charters. This being the case, Englishmen coming to America carried with them the fundamental British constitutional right of a representative government. Moreover, this right was inextricable from "one of the most ancient maxims of the English law . . . that no freeman can be taxed at pleasure."<sup>96</sup>

A discussion of *Calvin's Case* would follow in which Wilson highlighted the court's holding that allegiance to the King was personal, not national, and therefore the subjects of each dominion enjoyed their own laws and natural rights. As Ireland has its own parliament, English statutes do not bind it, and therefore Irish subjects are connected to England only through the King. This was the same arrangement that Wilson thought necessary for the American colonies, "[I]f the inhabitants of Ireland are not bound by

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<sup>94</sup> Kermit L. Hall and Mark David Hall eds., *Collected Works of James Wilson V.I* (2007) 458.

<sup>95</sup> *Ibid* 4.

<sup>96</sup> *Ibid*. 13.

acts of parliament made in England, *a fortiori*, the inhabitants of the American colonies are not bound by them.”<sup>97</sup>

Wilson consistently expressed his high regard for the English constitution, considering it an integral part of “the glorious fabric of Britain’s liberty.”<sup>98</sup> He believed that England’s great achievement would only increase its lustre while Parliament and Crown played their respective roles. Additionally, Wilson felt that England’s constitutional future would be brighter if Parliament were in more frequent communication with the people to whom it was responsible.<sup>99</sup> However, Americans were not represented in Parliament. Americans had their own assemblies, and accordingly, Wilson could see no constitutional reason for the Parliament in Westminster to dictate to the colonial legislatures.

In a speech delivered during the Convention for the Province of Pennsylvania in 1775, a convention called to consider the proposals of the First Continental Congress, Wilson again brought his listeners attention to the historical correctness of America’s case. Wilson began by asking his listeners,

Why is [American] opposition to the illegal attempts of their govenours represented under the falsest colours, and placed in the most ungracious point of view? This opposition, when exhibited in its true light, and when viewed, with unjaundiced eyes, from a proper situation, and at a proper distance, stands confessed the lovely offspring of freedom. It breathes the spirit of its parent.<sup>100</sup>

Moreover, Colonial resistance, Wilson continued, was derived from the same spirit of the English constitution that guided “the convention of the barons at [Runnymede], where the tyranny of John was checked, and the magna charta was signed . . .”<sup>101</sup> Indeed, Wilson declared that it was the right of British subjects to resist tyranny, a right “secured to them both by the letter and the spirit of

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<sup>97</sup> Ibid. 20.

<sup>98</sup> Colbourn above n 93, 148.

<sup>99</sup> Ibid.

<sup>100</sup> Hall above n 94, 32.

<sup>101</sup> Ibid. 132.

the British constitution, by which the measures and the conditions of their obedience are appointed.”<sup>102</sup>

The speech then moved on to a brief discussion of the difference between an abuse of the royal prerogative and royal tyranny. The American colonies, Wilson argued, were absolutely loyal to the King. However, history showed many instances of the king forgetting his constitutional character and following the counsel of scheming ministers.<sup>103</sup> Wilson suggests that it would do well for George III to remember such “examples of English history.”<sup>104</sup> As well as that,

[l]iberty is, by the constitution, of equal stability, of equal antiquity, and of equal authority with the prerogative. The duties of the king and those of the subject are plainly reciprocal: they can be violated on neither side, unless they be performed on the other. The law is the common standard, by which excesses of prerogative as well as excesses of liberty are to be regulated and reformed.<sup>105</sup>

Within the next year, Wilson was a member of the Second Continental Congress, where he and his colleagues stated that they were prepared to fight the fight for “the virtuous Principles of our Ancestors.”<sup>106</sup> In his *Address to the Inhabitants of the Colonies*, published in February 1776, Wilson writes that,

[h]istory, we believe, cannot furnish an Example of Trust, higher and more important than that, which we have received from your Hands . . . The Calamities, which threaten us, would be attended with a total Loss of those Constitutions, formed upon the Venerable Model of British Liberty, which have been long our Pride and Felicity. To avert those *Calamities* we are under the disagreeable Necessity of making temporary Deviations from those *Constitutions*.<sup>107</sup>

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<sup>102</sup> Ibid. 141.

<sup>103</sup> Ibid. 38; See also Colbourn above n 93, 150.

<sup>104</sup> Colbourn above n 93, 150.

<sup>105</sup> Hall above n 94, 40.

<sup>106</sup> Colbourn above n 93, 151.

<sup>107</sup> Hall above n 94, 146.

Disavowing accusations of carrying on war for the purpose of independence, Wilson, writing for his fellow congressmen states, “that what we aim at, and what we are entrusted by you to pursue, is *the Defence and the Re-establishment of the constitutional Rights of the Colonies.*”<sup>108</sup> Soon, however, Wilson’s more irenic approach would be washed away by the tide of the radical solution found in Thomas Paine’s influential *Common Sense*. And indeed, when the vote for the Declaration of Independence arrived, a reluctant Wilson cast his vote in favour of the document declaring “the United Colonies FREE and INDEPENDENT STATES.”<sup>109</sup>

American independence being a settled issue, Wilson later would focus his considerable talents on penning the definitive treatise on law in America. He began this project by drafting a number of lectures that would eventually fill fifty-two notebooks.<sup>110</sup> One main theme of the lectures was to emphasize law as a historical science and to suggest law’s superiority to speculative philosophy. Wilson was not interested in “imaginary laws for imaginary commonwealths; he was interested in man, the record of his government and his significance for the independent United States.”<sup>111</sup>

On December 15, 1790, James Wilson presented the first lecture of his series on American law to,

the President of the United States, with his lady—also the Vice-President, and both houses of Congress, the President and both houses of the Legislature of Pennsylvania, together with a great number of ladies and gentlemen . . . the whole comprising a most brilliant and respectable audience.<sup>112</sup>

Wasting no time in establishing his historical perspective on law, the introductory lecture—indeed all of the lectures—are filled with a pantheon of notable leaders and minds: Alexander the Great, Thucydides, Jean-Jacques Rousseau, Sir William Blackstone among others. Also, Wilson was keen to highlight what America owed to its Anglo-Saxon ancestors.

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<sup>108</sup> Ibid. 53.

<sup>109</sup> Colbourn above n 93, 151.

<sup>110</sup> Hall above n 94, 401.

<sup>111</sup> Colbourn above n 93, 152.

<sup>112</sup> Hall above n 94, 403.

In his view, a “respect for law, [and a] tenacity for liberty” were indelible marks on the character of the Anglo-Saxon race.<sup>113</sup> Liberally quoting Tacitus, Wilson explored the Germanic forefathers of Americans, who lived as a free people and created their own laws.<sup>114</sup> There had been, Wilson claimed, a confederacy among the various Anglo-Saxon kingdoms from which developed a *wittenagemote*, or council comprised of chosen leaders that met regularly and administered the law throughout the kingdom.<sup>115</sup> Additionally, citing Nathaniel Bacon’s *Discourse of the Uniformity of the Government of England*, Wilson describes the Anglo-Saxon government and character as such,

The Saxons were called freemen, because they were born free from all yoke of arbitrary power, and from all laws of compulsion, except those which were made by their voluntary consent: for all freemen have votes in making and executing the general laws. The freedom of a Saxon consisted in the three following particulars. 1. In the ownership of what he had. 2. In voting upon any law, by which his person or property could be affected. 3. In possessing a share in that judiciary power, by which the laws were applied.<sup>116</sup>

The ancient Saxon monarch’s power depended entirely upon the consent of the people, and Wilson approvingly quoted the English jurist John Selden’s statement that the Saxon King was “the choicest of the chosen.”<sup>117</sup>

Considering the plight of the newly independent America, the Anglo-Saxon system of governing was a useful example of Wilson’s belief in the people as the source of political authority.<sup>118</sup> Also, he agreed with the Whig historians who maligned William the Conqueror and the Normans for introducing feudalism and attempting to eradicate the “Saxon law of liberty.”<sup>119</sup> Echoing Sir Edward Coke, Wilson’s position was that the Magna Charta was

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<sup>113</sup> Colbourn above n 93, 152.

<sup>114</sup> Ibid.

<sup>115</sup> Says Tacitus, “Eliguntur in iisdem consiliis principes, qui jura per pagosvicosque reddunt.”

<sup>116</sup> Hall above n 94, 831.

<sup>117</sup> Colbourn above n 93, 152.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

“declaratory of the principal grounds of the fundamental laws of England.”<sup>120</sup> On Coke’s work specifically, Wilson once commented that the *Institutes* are “a cabinet richly stored with jewels of law.” He next added a question that would likely receive the approval of centuries of law students, “but are not those jewels strewed about in endless and bewildering confusion?”<sup>121</sup>

Wilson shared Coke’s interest in the common law because it crossed the Atlantic with the American colonists,

The common law, as now received in America, bears, in its principles, and in many more of its more minute particulars, a stronger and a fairer resemblance to the common law as it was improved under the Saxon, than that law, as it was disfigured under the Norman government.<sup>122</sup>

Furthermore, when describing the formation of the American constitution, Wilson states that its “venerable frame may be considered as of Saxon architecture.”<sup>123</sup>

Along with Wilson, many of the founding generation believed that the underlying theme of American law should not be innovation, but continuity because, “a wise and well tempered system must owe much to experience.”<sup>124</sup> It was by looking to the days before the Normans had wrecked the Saxon system that this would be achieved. Therefore, as the Saxon *witenagemont* met regularly, so would the Congress of the United States have a regular schedule of meetings which could not be cancelled at the whim of the executive as was allowed in England.<sup>125</sup> Properly understood, Wilson’s position was that the American constitution and legal order was a return to what he considered was English law in its purest sense: ancient Saxon law.

Throughout his lectures Wilson spends a considerable amount of time discussing the executive branch of government. He firmly believed that the ancient Saxons had elected their monarchs, and used this premise to praise the American presidency as “a renewal,

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<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Hall above n 94, 76.

<sup>123</sup> Ibid. 769.

<sup>124</sup> Colbourn above n 93, 153.

<sup>125</sup> Colbourn above n 93, 154.

in this particular, of the ancient English constitution.”<sup>126</sup> For example, the restrictions on the American executive pleased Wilson, especially the power of waging war, which was given to the American Congress. In Saxon times waging war was within the ambit of the *witenagemote*, and keeping this great power out of the hands of the American President seemed logical from Wilson’s historical perspective. In a statement that rings of Coke’s influence Wilson states that, “the most significant, and the most effectual source of the law is custom” because custom “involves in it internal evidence, of the strongest kind, that the law has been introduced by common consent; and that this consent rests upon the most solid basis—experience as well as opinion”<sup>127</sup> That the new nation had such good sense only highlighted the fact that the Saxons and their American descendants shared much in common.

And, without a doubt, James Wilson believed that a cardinal virtue of the United States was its admiration of its Saxon predecessors, “We have found, and we shall find, that our national government is recommended by the antiquity, as well as by the excellence, of some of its leading principles.”<sup>128</sup>

#### *IV. Conclusion: History, Change, and the Law*

As a matter of practical application, ancient constitutionalism would have been unworkable if it absolutely removed the English legal system of any ability to change in response to the myriad of issues that arise within a nation. However, an integral part of the theory is that the king cannot alter the common law rights of the people without the consent of their Parliamentary representatives. Consequently, a principle with its base in fundamental rights was moulded into the idea of separation of powers: the idea (as seen in the first sentence of Article I section I of the U.S. Constitution) that the power to create or modify law is reserved to the legislature.<sup>129</sup>

Which begs the question: Does the ancient constitution protect the powers of Parliament or the rights of the people? In Coke’s time,

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<sup>126</sup> Ibid.

<sup>127</sup> James Wilson, ‘Of the Study of Law in the United States’ (1791), in R.G. McCloskey, (ed), *I The Works of James Wilson* (1967) 69.

<sup>128</sup> Colbourn above n 93, 154.

<sup>129</sup> “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

when the Stuart kings were expanding their powers, this ambiguity went unnoticed. However, scholars have noted that Coke's ancient constitutionalism developed in two ways.<sup>130</sup> If the role of Parliament was emphasized, the theory could lead to the idea of parliamentary supremacy. On the other hand, if fundamental rights were emphasized, the theory could lead to a "rights-based constitutionalism in which the powers of parliament as well as of the King were restricted."<sup>131</sup> The British followed the course of parliamentary supremacy, and by the time of the Stamp Act crisis of 1765, the British could believe that the consent of the people via Parliament barred any constitutional objection the colonists could have to taxation.<sup>132</sup>

American constitutionalism took a different route. In America, the core of constitutionalism was the protection of rights, and therefore, any system of government that failed to secure those rights was objectionable.<sup>133</sup> The colonists understood the immemorial principles of the ancient constitution as allowing change in their customary rights pursuant to the common law only with the consent of their own representatives.<sup>134</sup> As they were not represented in Parliament, the principle of parliamentary supremacy was inapplicable to them. Moreover, by custom and practice going back to the settlement of New England, the colonies were represented through their colonial assemblies, and therefore the ancient constitution implied—to them—that the powers of taxation and of creating and modifying the law rested in these assemblies.<sup>135</sup> Consequently, the colonies were functionally independent from Parliament even before the Declaration of Independence. This autonomy from Parliament is likely what Thomas Jefferson had in mind when he said, "As to the people or Parliament of England, we had always been independent of them."<sup>136</sup>

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<sup>130</sup> See e.g., Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967) 177; See also Bernard Bailyn ed., *1 Pamphlets of the American Revolution, 1750-1776* (1965) 412 et seq.

<sup>131</sup> McConnell above n 7, 189.

<sup>132</sup> Bailyn, above n 96, 30.

<sup>133</sup> Ibid.

<sup>134</sup> Reid, above n 92, 10.

<sup>135</sup> Ibid; See also Bailyn, above n 130.

<sup>136</sup> Thomas Jefferson, 'The Autobiography of Thomas Jefferson' (1821), in Adrienne Koch & William Peden (eds), *The Life and Selected Writings of Thomas Jefferson* (1944) 17.

The arguments of the American colonists against the mother country, *mirabile dictu*, paralleled the arguments against Stuart absolutism in the previous century. Americans shared Coke's position that rights are not secure if they were given by the grace of the sovereign. Samuel Hopkins of Rhode Island declared, "[Americans] do not hold [their] rights as a privilege granted them, nor enjoy them as a grace and favour bestowed, but possess them as an inherent, indefeasible right."<sup>137</sup> Again, if rights did not have a source prior to and distinct from a benevolent sovereign, they could be taken away at any time.<sup>138</sup>

The purpose of the Revolution was not to create new rights, but to defend and secure the rights that were already possessed. Therefore, the Founding Fathers adhered to a theory of rights rooted in the customs and experience of the American people. The common law was the vehicle that brought ancient constitutionalism to America; not the set of often arcane and technical legal doctrines that flourished in the courts of England, but what Dr. Pocock has called "the common law mind," i.e., the commitment to the idea that the most legitimate source of law is longstanding legal practice, which gradually adapts to a changing world.<sup>139</sup> Americans would make changes to the common law as the young nation developed, but remained firmly committed to their understanding that rights and liberties are not the result of legislative action, but of custom.

Today, constitutional law and common law are studied as different areas of law, but at the founding they were understood to be intertwined.<sup>140</sup> This melding of what seem to be separate areas of law is, perhaps, hard to understand in a legal culture where the

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<sup>137</sup> John Philip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (1986) 67.

<sup>138</sup> *Ibid.* at 70 (Reid explains that the legal imperative of this constitutional theory lay in the reality that granted rights are precarious, for what is given can be revoked. This was a reality to which Americans paid close heed. Throughout their history, Americans had fought attempts to leave them dependent upon rights conferred instead of rights inherited.); See also Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England in American Law and The Constitutional Order: Historical Perspectives* (1978) 29.

<sup>139</sup> J.G.A. Pocock, *Conceptual Change and the Constitution* (1988) 57; See generally Jeremy Black, *George III: America's Last King* (2006).

<sup>140</sup> See Bailyn, above n 130, 30; See also Jeremy Black, "'Rule Britannia!' All Empires Are Not Created Equal" (2008) 49 *Modern Age* 4, 520 (2008).

Supreme Court is the primary expositor of issues like free speech and equal protection, and statutory law can erase common law theories (which no longer have a sense of permanence at all). However, the American system, with its checks and balances, coequal branches, and bicameralism was designed to frustrate change, and therefore naturally leans in favour of long-established rights, duties, and customs.

Coke died in 1634, and while many scholars have criticized his jurisprudence since then, he nonetheless endures as a venerable figure in the Anglo-American legal tradition, and the personification of immutable, immemorial law. The poet Robert Codrington wrote an elegy for Coke soon after his death, which celebrates his legal career and in its verses transport Coke into a world of myth and fantasy. Few can argue that this is a suitable way to remember Coke, who during his juridical career so often called upon iconic figures like King Arthur and Moses to buttress his arguments and support the theory of the ancient constitution. Here is part of Codrington's first stanza,

The Nymphes that haunt the neighboring woods and hilles,  
That guard the valleys, and that guide the Rilles,  
Resound, his losse and honourd name and show  
The boundless Rage of their impatient woe  
In so distracting and so sadde a cry,  
As if with him the Northern World did dye.<sup>141</sup>

In fact, rather than die with Coke's death, common law in England and around the world would flourish, due in large part to his brilliance, persistence, and imagination. It would serve Americans well to remember Sir Edward Coke, and the legal tradition his memory embodies.

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<sup>141</sup> Robert Codrington, *Elegy on Sir Edward Coke* 1634 British Library Manuscripts 37484 at 9b-10a as quoted in Paul Raffield, 'Contract, Custom, and the Common Weal' (2005) 17 *Law and Literature* 69, 70.