A Treatise of Legal Philosophy and General Jurisprudence

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 8

A History of the Philosophy of Law in the Common Law World, 1600–1900

by

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Michael Lobban is professor of Legal History at Queen Mary, University of London. After finishing his doctorate at Cambridge University, he held a Junior Research Fellowship at St. John’s College, Oxford, and has held posts at the University of Witwatersrand, the University of Durham and Brunel University. Michael Lobban’s research interests lie in the field of English legal history and the history of jurisprudence. He is the author of *The Common Law and English Jurisprudence, 1760–1850* (Oxford: Clarendon Press, 1991), which was the joint winner of the Society of Public Teachers of Law’s prize for outstanding legal scholarship in 1992, and of *White Man’s Justice: South African Political Trials in the Black Consciousness Era* (Oxford: Clarendon Press, 1996). He has also written widely on aspects of private law and on law reform in England in the eighteenth and nineteenth centuries, as well as co-editing, with C.W. Brooks, a volume entitled *Communities and courts in Britain, 1150–1900* (London: Hambledon Press, 1997).
PREFACE

This volume is primarily concerned with jurists’ and legal philosophers’ understandings of law, rather than with those of philosophers (such as J.S. Mill), whose views are handled in other volumes of the *Treatise*, particularly in Patrick Riley’s Volume 10. In the chapters that follow, brief mention has been made of John Locke and of Thomas Hobbes, insofar as their theories were directly of relevance to, and discussed by, common lawyers. However, since both of these thinkers are given more comprehensive treatment by Professor Riley, readers should consult his volume for a fuller discussion of these thinkers. In the current volume I have modernised all spelling and punctuation.

In such a work as this, it is inevitable that the author will draw many ideas both from the published work of other scholars and from the guidance and advice of colleagues and friends. I hope in the body of the text to have drawn the reader’s attention to relevant published works of other authors. The Clarendon Edition of Thomas Hobbes’s *Writings on Common Law and Hereditary Right* (ed. Alan Cromartie and Quentin Skinner, Clarendon Press, Oxford 2005) unfortunately appeared too late to be taken account of in this volume, but readers are referred both to its edition of Hobbes’s *A Dialogue between a Philosopher and a Student of the Common Laws of England* and to Dr. Cromartie’s very useful introduction.

I should like to take this opportunity to express my gratitude to a number of people who have helped me in a number of ways during the writing of this volume, though without pretending to hold any of them in any way to account for any infelicities and errors which may remain. I am especially grateful to Chris Brooks, who has been a consistent source of stimulating and thought-provoking ideas and comments, as well as offering generous guidance, advice and assistance. I have long greatly appreciated both his friendship, and his example. I have also benefited from the comments and advice of Neil Duxbury, David Lemmings, David Lieberman, Wilfrid Prest and Philip Schofield. John Langbein was kind enough to allow me to read his unpublished work on the early history of Yale Law School, and was an excellent host when I presented some of the ideas contained here at a seminar at Yale Law School in 2001. I am also grateful to David Lemmings for inviting me to present some of the material at a conference at the Australian National University in the same year. Some of the material in Chapters 3–5 of this volume is discussed in a chapter in the volume of proceedings from that conference, *The British and Their Laws in the Eighteenth Century* (Boydell & Brewer, Woodbridge 2005) under the title, “Custom, Nature and Authority: The Roots of English Legal Positivism.” I have also given a more extended version of some material con-
tained in Chapter 4 in a chapter entitled, “The Ambition of Lord Kames’s Eq-
ui ty,” in Law and History, edited by Andrew Lewis and myself (Oxford Uni-
versity Press, Oxford 2004). The research for the current volume was done at
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CHAPTER 1 - PRECURSORS

1.1. The Age of Bracton

Legal historians since F. W. Maitland have agreed in dating the origins of the English common law to the era of the reign of Henry II (1154–1189) (Pollock and Maitland 1968; Milsom 1976; Hudson 1996; Brand 1992b). Although the Anglo-Saxon monarchy prior to the Norman conquest was strong and relatively centralised, with kings issuing law codes and taking an active interest in the maintenance of law and order and in dispute resolution (see Wormald 1999a, Wormald 1999b), it was only with the introduction of new remedies in the 1160s and 1170s that the foundations were laid for a system of justice in which cases would be commenced by a regular procedure of returnable writs, and judgments rendered by a professional judiciary, operating in courts keeping records (see in addition Turner 1985; Brand 1992c). These remedies were regular and available throughout the king’s domain, and the royal courts administered “one national law and not a multitude of local and regional customs” (Van Caenegem 1988, 29). When historians speak of the “common law” in the late twelfth and early thirteenth centuries, it is this system which they are referring to: the term itself was not then in use. By the mid-thirteenth century, however, the expression “common law,” adapted from the canonists’ invocation of a *ius commune*, was widely used to mean the body of law administered in the court which was distinct from statutes enacted by the king with his council, prerogative and local custom (Hudson 1996, 18; Pollock and Maitland 1968, I: 176–7).

The era of the formation of the English common law saw the production of two treatises on “the laws and customs of England” which give some insights into how early jurists thought about law, legislation and custom. The first, written between 1187 and 1189, was known as *Glanvill*, after Sir Ranulf de Glanvill, the justiciar of England by whom it was presumed, probably incorrectly, to have been written. It was a largely practical and procedural work, describing the writs used before the king’s justices in civil litigation, though it also contained some substantive discussions (see Turner 1990; Brand 1999). Writing, as he was, in the early period of the formation of the common law, *Glanvill* acknowledged that there was a “confused multiplicity” of “laws and legal rules of the realm,” but he felt that there were enough general rules to be written down. At the same time, the author showed some familiarity with the terminology and concepts of Roman law. Although England’s laws were unwritten, he said, “it does not seem absurd to call them laws—those, that is, which are known to have been promulgated about problems settled in council
on the advice of the magnates and with the supporting authority of the prince, for this is also a law, that ‘what pleases the prince has the force of law’” (Hall 1993, 2–3).

Glanvill’s reference to D.1.4.1 suggests that he saw the principal source of law to lie in the royal will, a point which may be reinforced if we believe that the author of the text was familiar with precise reforms legislated by Henry II, the evidence for which was later lost (Hall 1993, xxxvi). Nonetheless, some caution is needed before we conclude that the author had a more “legislative” view of law than a “customary one” (cf. Tubbs 2000, 7). For Glanvill observed that the king “does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed” nor by those “most learned” in those laws and customs (Hall 1993, 2). Nor should it be overlooked that the reforms of Henry II were more about creating procedures to enforce customary norms which already existed than self-consciously altering these norms. If the effect of Henry’s reforms was to alter the nature of the customs, it was not necessarily his intention to do so (see Milsom 1976, 36–7).

Glanvill was soon superseded by a larger work on the laws and customs of England. This work, known as Bracton, was attributed to Henry of Bracton, a thirteenth century judge of the King’s Bench. Recent scholarship has cast doubt on its authorship. According to Samuel Thorne, the text was originally composed in the 1220s by a clerk in the service of the judge Martin of Pateshull, most probably William of Ralegh, who himself in turn became a judge. Additions were then made to the text in the 1240s, either by another author or a reviser. This may account for the many apparent contradictions in the text and the various changes of mind which the author appears to have had (Thorne and Woodbine 1968–1977, 3: xlv–l; Brand 1996, 73–9; but contrast Barton 1993). Bracton was the first attempt to put the law of England into a comprehensive structure; and this project was clearly influenced by Roman law models. The level of Bracton’s Roman law learning has long been debated. For Maitland, Bracton was “a poor, an uninstructed Romanist” (Maitland 1895, xviii). He argued that Bracton borrowed from Azo’s Summa of the Institutes for his general statements, but made little use of Roman law when dealing with the English detail. More recent scholarship has challenged this view, showing that Roman learning is to be found in much more of the text than Maitland realised (Woodbine 1922; Barton 1968). In Thorne’s view, Roman law supplied him both with concepts and a technical vocabulary, with which to describe and analyze material obtained from the plea rolls (Thorne and Woodbine 1968–1977, xxxiii).

The structure of the work followed that of Justinian’s Institutes, beginning with a general introduction on justice and law, and proceeding to discuss persons, things and actions. However, its content consisted “of the judgments and the cases that daily arise and come to pass in the realm of England”
This attempt to put English law into Institutional form was not a complete success. Firstly, Bracton was not a successful redaction of actual English law. It combined analysis of the practice of the courts in the 1220s and 1230s with material clumsily added in the 1240s, which made for unresolved inconsistencies. One scholar has indeed pointed out that the text contains passages which do not describe the actual practice of the courts at any time in the period of its composition (Barton 1993). By the time it had got into circulation, it was hence no longer an accurate guide as to the details of the law (Brand 1996, 87). Secondly, it failed to establish a tradition of treatises. It is true that over fifty copies were made of the manuscript and circulated widely before the mid-fourteenth century; and the material was drawn on by the authors of two treatises known as Fleta and Britton, which were written at the end of the thirteenth century. However, as the legal education of common lawyers developed, particularly at the Inns of Court after 1339 (Baker 2000), works such as Bracton came to be seen as of decreasing relevance. Nevertheless, Bracton is an important text, not only for its insight into legal thought in the early era of the common law, but also because interest in it revived strongly in the early modern period (Yale 1981). The treatise was published in 1559, and was soon cited and drawn on by a range of other scholars, including Sir Edward Coke. Moreover, in the seventeenth century, Bracton’s few comments on the nature of kingship (which we will examine shortly) were frequently invoked, both by those who sought to limit the king, and by those who sought to magnify his powers (see, e.g., Malcolm 1999, 83, 664–5, 779).

Bracton’s text began with a statement similar to Glanvill’s. “Though in almost all lands use is made of the leges and the jus scriptum, England alone uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved.” He proceeded to say that it was not absurd to call them leges,

since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the res publica, the authority of the king or prince having first been added thereto, has the force of law. (Thorne and Woodbine 1968–1977, 2: 19)

There has been much debate about the relationship between custom and legislation in Bracton. According to Charles H. McIlwain, the text saw the king as bound by a substantive customary law, which defined the extent of royal power. The king had full powers of administration and legislation to implement and supplement this customary law, but he had no power to alter it. There was thus a distinction in legal thought, he suggests, between law (iurisdictio) and government (gubernaculum), and between leges (administrative orders which could be changed) and consuetudines (fundamental customs which could not be changed) (McIlwain 1947, 77, 82–3). McIlwain’s view has been challenged by a number of scholars who have cast doubt on his distinc-
tion, and on the idea that the king was bound by fundamental customs (Tierney 1963, 309; Lewis 1964; Hanson 1970). Moreover, it has recently been argued that there is no claim in Bracton that “custom stands in a superior position to enacted law” and that there is nothing in the text which compels the conclusion that the author considered all law to be customary (Tubbs 2000, 15–7).

McIlwain’s view that Bracton conceived of custom as being fundamental in the sense of being unchangeable cannot be accepted. However, he did see most law as derived from the consent of the community as manifested in custom, rather than from any kind of legislation: the laws and customs of England “have been approved by the consent of those who use them.” Bracton’s rationale for why custom was binding was the same as that given in the Digest for resorting to custom when written law was silent (D.1.3.32). Unlike the Digest, Bracton did not explicitly say that custom should be resorted to when there was no written law applicable; but this was superfluous, as he had already established at the outset that English law was unwritten. For Bracton, the bases of the general rules of law were customary. To give an example, he pointed out that a gift made propter nuptias by the bridegroom to the bride at the church door was “properly called the wife’s dos according to English custom”—in contrast to the Roman meaning—“and it is that with which we deal here” (Thorne and Woodbine 1968–1977, 2: 266).

However, while the basis of the system was customary, its rules were already becoming the technical matter of specialists developed in the judicial legal forum. Again following the Roman model, Bracton noted that if “like matters arise let them be decided by like, since the occasion is a good one for proceeding a similibus ad similia” (cf. D.1.3.12). Where the matter is “difficult and unclear,” there needed to be resort “to the great court to be there determined by counsel of the court, [...] [since] it is more becoming and more lawyer-like to take counsel rather than to determine anything rashly” (Thorne and Woodbine 1968–1977, 2: 19, cf. 3: 73). There could be disagreements among those specialists, and it took the best reasoning to resolve these issues (see, e.g., ibid., 3: 321–2). We should not forget that the work was written “to instruct the lesser judges” since “these laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the laws” (ibid., 2: 266).

If the law was primarily derived from the custom of the people, what was the relationship between the king and the law? Bracton made it clear that the king held the “material sword pertaining to the governance of the realm,” having the power “to cause the laws, customs, and assises provided, approved and sworn in his realm to be observed by his people” (ibid., 2: 166). However, while he had no equal in the realm, he could not legislate alone. In making this argument, Bracton wrote that “since he is the minister and vicar of God on earth,” the king “can do nothing save what he can do de jure.” He sought
to draw the sting of the principle in D.1.4.1, that what pleases the prince has the force of a statute, by noting that the king obtained his sovereignty “by the lex regia.” Bracton cited the text from the Digest, but omitted the words: “this is because the populace commits to him and into him its own entire authority and power.” His omission suggests that for Bracton, if the king derived his power from the people, they had not transferred their power to him. Rather, the king gave his auctoritas to “what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon” (ibid., 2: 305).

Secondly, Bracton sought to establish that the king was bound to act according to law. This was so even though no writ could run against him, but he could only be petitioned. In a passage much rehearsed (and adapted) by seventeenth century writers, Bracton wrote,

The king must not be under man but under God and under the law, because law makes the king. Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power. For there is no rex where will rules rather than lex. (Ibid., 2: 339)

There has been much debate about the nature of the king’s obligation in Bracton’s view. At a number of points, the text spoke of the king’s obligation in moral terms. Following a civilian tradition which laid stress on the text Digna Vox (C.1.14.4), he noted that it was a saying worthy of the majesty of a ruler that the prince should acknowledge himself bound by the law (Thorne and Woodbine 1968–1977, 2: 305, cf. 2: 166). Equally, Bracton pointed out that the king swore a coronation oath to give judgments with equity and mercy; and he spoke of the laws and customs being confirmed by their oath (ibid., 2: 21, 304; see Post 1968). Moreover, Bracton clearly expected kings to be just. It has been suggested that for Bracton, the salient feature of kingship was “the granting of justice to all subjects who may require it,” and that the king was expected to acquire a habit of being just. According to this view, the king was expected to submit to law without external constraint, “because the justice embodied therein is congruent with the fixed and unshakable quality of justice inscribed upon his soul” (Nederman 1984, 68). Equally, Bracton put it in logical terms. The king should enforce the laws, since “it is useless to establish laws unless there is someone to enforce them” (Thorne and Woodbine 1968–1977, 2: 166).

The notion that the king was bound by a moral obligation is supported by the comment early in the text that if the king was not just, “it is punishment enough for him that he await God’s vengeance. No one may presume to question his acts, much less contravene them” (ibid., 2: 33). But elsewhere in the text, this view was contradicted, and it was suggested that there were human controls to be exerted. This is most notable in the well-known passage which begins, “Private persons cannot question the acts of kings, nor ought the justices to discuss the meaning of royal charters.” The passage proceeds:
No one may pass upon the king’s act (or his charter) so as to nullify it but one may say that the king has committed an *injuria*, and thus charge him with amending it, lest he [and the justices] fall into the judgment of the living God because of it. The king has a superior, namely, God. Also the law by which he is made king. Also his *curia*, namely, the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him. [That is why the earls are called the partners, so to speak, of the king; he who has a partner has a master.] (Ibid., 2: 110)

This passage, much drawn on by later constitutionalist writers, has been taken as an acknowledgement by *Bracton* of the realities of the English polity, set into a text which drew on very different theoretical paradigms, but without seeking to make a coherent theory (Hanson 1970, 131). It is generally agreed that this passage, the *addicio de cartis*, did not form a part of the original text, but was a later addition, perhaps by the reviser. Nevertheless, the contradictory positions elaborated in the text were rehearsed in simplified form by later texts, such as *Fleta* (Richardson and Sayles 1955, 35–7). Moreover, some scholars have sought to interpret the text as consistent with *Bracton’s* general views. Tierney, for instance, looking to canonistic parallels, and drawing on the writings of Decretists who asserted that the power of the pope and council together was greater than that of the pope alone, suggests that the writer of this text might have adhered to one of the canonist positions. By such a view, magnates could oppose the king’s judgments *in curia*, and had a duty to do so if they were unjust, though if the king maintained his position, his judgment retained legal validity. The magnates could thus exert political pressure, but in the end had no legal means to coerce a recalcitrant king (Tierney 1963, 315–6). Nederman, by contrast, argues that according to the position in the *addicio*, while the magnates could not force the king to do justice, they were able to prevent him from acting unjustly, and thus far had a legal and not merely a moral bridle on the king (Nederman 1988, 422–5). *Bracton* indeed commented that a king “is called rex not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care” (Thorne and Woodbine 1968–1977, 2: 305), which might be read to imply that unjust acts by the king were simply not “kingly” acts.

Nevertheless, as Tierney has observed, *Bracton* had no sophisticated knowledge of the learned laws, and had no concept of the English state on which to build a constitutional theory. He offered no explicit theory of what legal steps could be taken if the king misbehaved. In the often turbulent world of the early thirteenth century, kings often found themselves “bridled” by the political action of the magnates (see Goldsworthy 1999, 24). *Bracton’s* phrases about the importance of law and the need to bridle the king were to be well received in the seventeenth century: but he offered no vision of human law which could control a recalcitrant king.
1.2. The Age of Fortescue

After Bracton, there was strikingly little literature aimed at lawyers beyond introductory guides to practice (see, e.g., Turner and Plucknett 1951; Philbin 1999), registers of writs (De Haas and Hall 1970), reports of cases (notably the Year Books dating from the beginning of the fourteenth century) and (from the middle of the fifteenth century) abridgments. Such literature was decidedly practical, rather than theoretical. The lack of a theoretical literature should perhaps not surprise us. If a legal text has the function of educating lawyers, and of propagating or publicising common doctrine used in a variety of courts over a wide area, it may be said that the common law stood in little need of such texts. The system created by Henry II and his successors was a highly centralised system of justice, focused on Westminster Hall. A small number of judges and subsequently lawyers worked in a small number of courts. These judges whether on eyre or on assizes took their learning with them, as they toured the kingdom (see Turner 1985; Brand 1992c). Secondly, there was no university-based common law education in England (until Blackstone’s Vinerian Chair was set up in Oxford in 1758). Instead, the legal Inns in London were the place of study of the aspiring practitioner. Here, practice and theory intertwined; and legal expertise was elaborated and shared between judges, senior lawyers and students in equal measure within the Inns and inside the court (Brand 1992a; Baker 1986c; Thorne and Baker 1990; Baker 2000). As Baker has shown, until the flexible system of oral tentative pleading became ossified in the sixteenth century, judges tended to avoid settling disputed points of substantive law, preferring that the parties compromise. For them, the essence of the common law was not to be found in the definitive judicial pronouncements from the bench, but in the “common learning” of the profession, which was elaborated primarily in the readings and moots at the Inns (Baker 2003, 48–52, 467–72).

The one central legal textbook to emerge in the fifteenth century was Sir Thomas Littleton’s Tenures, which this judge of the Common Pleas wrote for his son, probably in the 1450s or 1460s. Printed after its author’s death in 1481, this remained a model treatise, setting out the medieval rules of real property (without equitable complications) in straightforward series of definitions and rules. Though lambasted by Hotman, Littleton remained an object of veneration for the English. In 1550, Mountagu CJ referred to it as “the true and most sure register of the fundamentals and principles of our law” (Baker 2003, 501, note); while Sir Edward Coke called it “a work of as absolute perfection in his kind, and as free from error, as any books that I have known to be written of any humane learning” (Coke 1614, preface). Indeed William Fulbecke, writing in 1600, stated that “Littleton is not now the name of a lawyer, but of the law itself” (Fulbecke 1620, 27*). With Coke’s commentary, it remained a standard introduction for law students to land law into the nine-
teenth century. But Littleton’s text—unlike Coke’s elaborate notes to it—was scarcely a work of jurisprudence. It was, as Baker comments, “very much a student primer” (Baker 2003, 502).

For the theory of English law, the work of Littleton’s contemporary, Sir John Fortescue (c.1395–1479) was much more important. Fortescue was admitted to Lincoln’s Inn before 1420, becoming a sergeant at law in 1438, and rising to be chief justice of the King’s Bench in 1442. Fortescue also had an active political career, sitting in several parliaments in the 1420s and 1430s. In the era of the Wars of the Roses, he remained loyal to the Lancastrian king Henry VI, with whom he fled to Scotland in 1461. It was here that he composed De Natura Legis Naturae, written in support of the Lancastrian claim to the throne of England. In 1463, he went with Queen Margaret to France, where he contributed to the education of Edward, Prince of Wales, for whom, as “Chancellor of England,” he composed De Laudibus Legum Angliae. Fortescue also wrote a treatise on The Governance of England, which may also have been composed in exile. In April 1471, he returned to England with the Queen and the prince, but was captured at the battle of Tewkesbury. Prince Edward died in the battle, and shortly afterwards his father was also killed. After their deaths, Fortescue sought a general pardon from Edward IV, for whom he was to act as a counsellor (Fortescue 1885, 40–74).

Although Fortescue has sometimes been seen as a scholar providing a detached view of the system he knew, it has been convincingly shown that he was in fact an active polemicist whose works must be read in their political context (Gross 1996). His works were not treatises aimed at the legal profession, but were polemical pieces furthering a particular cause. However, the arguments he put forward about the constitution were to have an enduring appeal. De Laudibus Legum Angliae was first published ca. 1546, and was reprinted six times in the sixteenth century. It was produced in an edition with notes by John Selden in 1616, and saw new editions in the eighteenth and nineteenth centuries (Fortescue 1942, xcv). De Natura Legis Naturae, a work referred to on a number of occasions in De Laudibus, was not, however, published until 1869, although it did circulate among lawyers in the late fifteenth century (see Baker 2003, 492).

1.2.1. Fortescue on the Constitution of England

Fortescue’s fame rested on his articulation of a theory of England as a domini- num politicum et regale (Fortescue 1997, xv; Skeel 1916; Burns 1985). He first made use of the terminology in De Natura, a work written to answer the question—of particular importance in an era of rival dynastic claims to the English throne—whether on the death of a king, the crown should pass to his younger brother, or to the son of the king’s deceased daughter (see Gill 1971). Since Fortescue argued that this could only be settled by natural law,
he had to demonstrate that the rule of kings was founded in that law and discuss its nature. In making the argument, he had to explain the meaning of the passage in 1 Samuel 8: 11–8, which related that when the people of Israel asked for a king to rule over them, God punished them with an oppressive tyrant. The passage seemed to indicate both that to seek a king went against natural law, and that once a king had been created, he was to be obeyed even if his commands went against the law of nature. Fortescue’s response came in two arguments. The first admitted that the Israelites had committed a great offence in asking for a king, but noted that “this proveth not that the kingly dignity which they demanded is an unjust thing.” They had offended, since they already “had God for their king” (Fortescue 1869a, 203–4). However, by appointing a king, God showed his approval of kingly power.

For his second argument, Fortescue distinguished between the powers a king had, which were necessarily good, and the use he made of them, which might be bad. Just as a married woman was not *sui iuris*, but under the power of her husband, so the people were under the power of their king, or the *ius regis*. When the king exerted that power over the people, “to them it is always law; though sometimes good and sometimes bad.” The power itself was always good since it came from God; but it could be abused and “brought into ill-fame by contagion of an unjust prince, even as an unjust prince becomes deservedly infamous.” Fortescue therefore acknowledged the existence of binding unjust laws, such as Herod’s decree, by which all the children in Bethlehem were put to death. Nonetheless, if such laws were binding on the people—and Fortescue noted that there were benefits to the people even from the worst of kings—no royal action ever escaped the vengeance of divine punishment if it proceeded against “the rule of nature’s law” (Fortescue 1869a, 218–20; cf. Doe 1990, 52–5).

The key question was thus not whether a king could validly make unjust laws, but how to ensure the best kind of rule, so that this would not occur. If, as Aquinas had argued, the best kind of rule was that by the best king, the worst was rule by a tyrant. It was therefore essential to remove any opportunities for tyranny (Fortescue 1869a, 218; cf. Fortescue 1942, 27). The problem of the unjust king, Fortescue contended, was best solved by having government which was both regal and political. Adapting Aquinas’s definitions of *dominium regale*, where the ruler governed by laws he had made, and *dominium politicum*, where the ruler governed by laws made by the community, he defined the English polity as a combination of the two, a *dominium politicum et regale*, where laws were made by the king with the consent of the three estates of the realm (Fortescue 1869a, 205). As Fortescue saw it, law made under the *Lex Regia*, where the prince had absolute power, was “oftener bad than good” (ibid., 220); deserving “the name of corruptions rather than of laws.” But the laws made with the assent of the kingdom, as in England,
cannot be injurious to the people nor fail to secure their advantage. Furthermore, it must be
supposed that they are necessarily replete with prudence and wisdom, since they are promul-
gated by the prudence not of one counsellor nor of a hundred only, but of more than three
hundred chosen men [...]. And if statutes ordained with such solemnity and care happen not to
give full effect to the intention of the makers, they can speedily be revised. (Fortescue 1942, 41)

In *De Laudibus*, Fortescue argued that, whereas kingdoms possessed regally
had originated in usurpation and conquest, kingdoms ruled politically origi-
nated in consent, and with the purpose of making the people safer in their
persons and property than they had been before. Since this purpose would be
frustrated if they were ruled by strange laws or if the king could deprive them
of their means, “such a power as this could not issue from the people, and if
not from them, a king of this sort could obtain no power over them” (ibid., 35). The king and the people were part of one body united by law:

The law, indeed, by which a group of men is made into a people, resembles the nerves of the
body physical, for, just as the body is held together by the nerves, so this body mystical is
bound together and united into one by the law [...]. And just as the head of the body physical
is unable to change its nerves, or to deny its members proper strength and due nourishment of
blood, so a king who is the head of a body politic is unable to change the laws of that body, or
deprive that same people of their own substance uninvited or against their wills. (Ibid., 41)

Nevertheless, Fortescue’s king was not merely a governor executing the laws
of the community. He remained *regal* and was as powerful as kings in purely
regal kingdoms. To be sure, since the English king could not legislate alone,
he was unable to make the tyrannical corruptions of law which a purely regal
king might enact. However, “to be able to sin is not power or liberty, no more
than to be able to grow old or rotten” (Fortescue 1869a, 217; cf. Fortescue
1942, 35; Fortescue 1885, 121). Practically speaking, of course, the political
king was weaker: if Fortescue accepted the theory that a king who became a
tyrant thereby became less kingly, he noted that the populace could not resist
a tyrant, whose punishment would come in another world, but had to accept
his law. But as a matter of theory, insofar as corruptions of law were not to be
regarded as law, they were equals.

Fortescue also argued that there were occasions when any king needed to
rule purely regally. In cases of emergency, including invasions or rebellions,
where time would not allow the due process required in peacetime to be fol-
lowed, the king did not have to follow the law. At such times, he could, for
the safety of the kingdom, waste the property of his subjects (Fortescue
1869a, 216). Besides prerogative powers in times of emergency, the king had a
regal power to dispense equity. Drawing on Aristotle’s discussion in the fifth
book of the *Nicomachean Ethics*, he noted that not all cases were capable of
being embraced by the statutes and laws of the kingdom. In such cases, “su-
perior authority is held to have absolute power, not indeed so as to violate a
perfect law, but so as rather to fulfil a law of his own kingdom by reason of
the law of nature, which is natural equity.” In these instances, “the office of a
good prince, who is called a living law, supplies the defect of the written law,”
breathing life into it (Fortescue 1869a, 215; cf. Aristotle, Nicomachean Ethics,
1137b). Fortescue thus did not see the king as being bridled by the law or by
his parliament, in any coercive sense.

The concept of a dominium politicum et regale was later seen as a precur-
sor of a theory of constitutional monarchy. Yet Fortescue was ambiguous on
the matter. Although the polity was founded by consent, the people as a body
was not said to confer power on the king, whether absolute or limited. In De
Laudibus, he rather compared the formation of the state with the growth of an
embryo, with the king issuing from the people, as the head issued from the
body (Fortescue 1942, 31; cf. Chrimes 1936, 319–24). Kingly power could
neither be conferred by custom nor by the acts of rulers themselves: it could
only come from natural law (Fortescue 1869a, 200). His argument in De
Natura was therefore that the succession to the crown in cases of doubt was to
be settled by that law. Though in another tract, he argued that where there
was no direct heir, the son of the woman nearest in the royal line should be
raised up as king by the Lords and Commons (Fortescue 1869b, 515; cf. Doe
1989, 259; Gross 1996, 88), the elective nature of kingship played a relatively
minor role in his works. Fortescue as a political adviser was clearly keen for
the king to rule well, and on the best advice; and he was well aware of the
problems caused by the weak kingship of Henry VI (Wolffe 2001, 343–4).

However, his plans for the fiscal powers of the crown as set for the
Governance of England would have weakened parliament by endowing the crown
generously (Chrimes 1936, 329–32).

1.2.2. Fortescue on the Nature of Law

Fortescue’s discussion of the nature of law rested on familiar foundations
drawn from medieval philosophy. All human laws, he said, were either estab-
lished by the law of nature, or by its authority. Any law which did not con-
form to natural law was no law, but a corruption, so that “the rules of the po-
litical law, and the sanctions of customs and constitutions ought to be made
null and void, so often as they depart from the institutes of nature’s law”
(Fortescue 1869a, 193–4, 200, 221). However, he was more interested in fo-
cusing attention on human law. Fortescue taught the young prince that since
all power came from God, “all laws that are promulgated by man are decreed
by God” (Fortescue 1942, 9, citing Romans 13: 1). The prince would there-
fore learn justice by learning the law, since human laws “are none other than
rules by which perfect justice is manifested” (Fortescue 1942, 11).

If human law derived from natural law, there was a clear distinction be-
tween them. This could be seen in two ways. Firstly, ius was a genus of which
lex was a species. Ius, which derived from iustitia, embraced “everything
which is equal and good." While law had to be equal and good to be a species of ius, it was not convenient to call give all ius the name of lex: “for every man who seeks to have back what is his own before a judge hath the right [ius] but not the law [lex] of claiming it” (Fortescue 1869a, 222). It was only in the decree of the judge that ius and lex merged. This was to suggest that human law might not supply the remedies which the law of nature, or right, demanded.

Secondly, he pointed out that human laws were distinct from divine laws, though they derived their life from them. Human laws were to divine laws as the planets were to the sun: “For every planet hath its functions within its proper sphere, wherein it develops the powers of its own nature, and yet escapes not the laws of the sun, in which all the planets partake.” In like manner, all human laws acquired their force by the influence of divine law “and yet they who are skilled, however profoundly, in the knowledge of the divine law cannot, without the study of human laws, be learned in human laws” (ibid., 242). This was in effect to remove natural law from consideration as an operative force. For Fortescue, as for many common lawyers, natural law was only to be resorted to in questions where positive law gave no answers. For him, the key example of this was the question of succession debated in De Natura, yet as has been noted, it is ironic that in making his argument for the point of succession at issue, Fortescue, who declared that he had “for more than forty years studied and practised himself in the laws of England, ultimately found the most compelling argument not in the law of nature, but in the English law of entails (ibid., 261; see Hanson 1970, 232ff.).

In De Laudibus, Fortescue reiterated his arguments about the importance of positive law, and was similarly brief on natural law. He pointed out that the law of nature was the same in all regions, so that in those areas where the laws of England sanctioned natural law, it was no better or worse than the laws of any other place: “Wherefore there is no need to discuss it further” (Fortescue 1942, 39). However, when it came to matters of positive law—customs and statutes—English law was the best. This was testified by the continuity of its customs, which had ever since “the kingdom of England blossomed forth into a dominion regal and political out of Brutus’s band of Trojans.” Although the kingdom had often been conquered,

throughout the period of these nations and their kings, the realm has been continuously ruled by the same customs as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them, especially the Romans, who judged almost the whole of the rest of the world by their laws. (Ibid.)

Fortescue’s argument appeared to be that the common law had been un­changed since time immemorial—it was of greater age even than Roman law—and that it was this age gave it its authority (see Pocock 2003, 15–8). This was a view echoed in a comment in 1470 of Serjeant Catesby, who ob-
served in a case that the common law had been in existence since the creation of the world (Baker 2003, 18).

Fortescue’s sense of history may have been naive; but it should not be assumed that he felt the entire body of the law was static and unchanging. He admitted that the law was not perfect. Defects were to be amended in parliament, as well as by the equitable intervention of the king (Fortescue 1942, 135). Indeed, his very theory of the dominium politicum et regale would have been superfluous if laws could not be changed. At the same time, Fortescue acknowledged the difficulty of learning the law. Knowledge of English law, he pointed out, could scarcely be acquired in twenty years of learning (Fortescue 1869a, 241; cf. Fortescue 1942, 23 and 117–21). His argument was not that the details of the law were perfect and immutable, but that the fundamental principles of the common law were so good that it had never been felt necessary to change them. It was these principles, rather than the detail of the law, which he urged the prince to learn. In explaining these, he drew on the language of Aristotle’s metaphysics. Since law was “artificially devised,” there was strictly speaking no “matter and form” out of which it was made, as there was with physical objects. Nevertheless, “customs, statutes, and the law of nature, from which all the laws of the realm proceed” could be treated as the material causes of law, the elements from which it was created. (In this phrase, his reference to the law of nature must be taken to refer to particular applications of it in human law.) The efficient cause of law, or the means by which law was created, were its principles. These he described as certain universals which those learned in the laws of England and mathematicians alike call maxims, just as rhetoricians speak of paradoxes, and civilians regulae iuris. These principles, indeed, are not known by force of argument nor by logical demonstrations, but they are acquired, as it is taught in the second book of the Posteriora, by induction through the senses and the memory. Wherefore, Aristotle says in the first book of the Physics that Principles do not proceed out of other things nor out of one another, but other things proceed out of them.

Out of these principles were “discovered the final causes, to which one is brought by a process of reasoning upon a knowledge of principles” (Fortescue 1942, 21). The final end was, justice. But, as the chancellor asked the prince, “how shall you be able to love justice, if you do not first somehow grasp a knowledge of the laws by which justice itself is known?” (ibid., 15). A parallel conception of the distinction between the general concept of right or justice, the principles of law, and the elements from which it was made was set out in De Natura, where Fortescue noted that while law “is a species of Right, yet as thus described it is itself a genus in relation to the Law of Nature, of Custom, of Statute, and to all special and private laws, of which, as above related, the number is like that of the stones in the heap or the trees in the forest” (Fortescue 1869a, 223).

It was the principles or maxims of the common law that comprised its unchanging core, rather than its details, which could vary. The principles were
largely to be found in customs dating back to the arrival of Brutus. But it was not their age, or even their customary status which made them binding; for customs could be void, since “reason and truth always overcomes custom” (ibid., 224). Instead, they were binding because they were consonant with divine law and justice: and the reason for this was because they were made in a dominium politicum et regale. Viewed this way, the theoretical question of whether laws could be void as corruptions lost its relevance in the English polity, where justice was to be learned through the laws. Fortescue thus was not arguing that human law regulated matters indifferent in a way which rendered morality irrelevant. Rather, his was an argument for the innate morality of English law, particularly as compared with a jurisdiction such as France.

1.3. Christopher St. German

If Fortescue’s De Laudibus was regarded by many as a foundational text for theories of the English constitution, Christopher St. German (1460–1541) produced what was perhaps the most important theoretical work on English law prior to the seventeenth century. A member of the Middle Temple, he practised in the Court of Requests and the Star Chamber, but seems to have given up legal practice around 1511 (Guy 1985, 11–2). All his significant work dates from the late 1520s. His best known work is Doctor and Student, the first part of which was published in Latin in 1528 (and translated into in English in 1531), and the second part in English in 1530. The fact that St. German wrote in English is significant, for he aimed at a wider audience than merely the legal profession, who “have least need of it” (St. German 1974a, 177). Nevertheless, it was a work which remained extraordinarily popular with lawyers. After its author’s death, it was republished six times in the sixteenth century, nine times in the seventeenth, and six more times in the eighteenth. The arguments in Doctor and Student were subsequently challenged by an anonymous Replication of a Serjeant at the Laws of England. It has been conjectured that this work may well have been written by St. German himself, perhaps as a way of summarising contemporary attacks on the earlier work (Guy 1985, 57; but cf. Yale 1975, 327). Whatever the authorship of this tract, St. German himself replied in A Little Treatise Concerning Writs of Subpoena, which was written around 1532, but not published until 1787.

At the same time as writing these legal works, St. German was actively engaged in the political debates around the English Reformation. In 1531, he wrote A Little Treatise called the New Additions (St. German 1974b), which examined the issues then being debated between church and state. It was designed to accompany a set of parliamentary proposals drafted by St. German which sought to secure reforms to curtail the clergy’s traditional privileges and restrict their jurisdictional independence (Guy 1985, 19–33). Over the next four years, he wrote a further number of polemical pamphlets on the re-
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relationship between church and state, which took him into a controversy with Sir Thomas More. In 1532, he published *A Treatise concerning the Division between the Spirituality and Temporality* (St. German 1979), which was answered by More’s *Apology*, which elicited in turn a reply from St. German—*Salem and Bizance* (St. German 1987)—which itself led to further exchanges between the two (see Guy 1986a). After the passing of the Act of Supremacy in 1534, he published *A Treatise concerning the Power of the Clergy and the Laws of the Realm* (St. German 1535a) and *An Answer to a Letter* (St. German 1535b), again looking at the relationship between church and state.

As John Guy has argued, St. German “constructed a brilliant, comprehensive and systematic theory of law within an English context,” which “created the impression that English law was a homogeneous corpus” with an enhanced status with regard to other species of law (Guy 1986a 102). The corollary of this was a theory of the supremacy of the king-in-parliament, which might independently of the Pope declare King Henry VIII’s marriage to Catharine of Aragon void. For St. German, the king-in-parliament had both absolute temporal power within the realm of England, and power to interpret scripture. If his work had constitutional importance, it was also highly important for illustrating the nature of reasoning in common law and equity, and for the relationship between those two. It is therefore useful to begin with his views of the grounds of the law of England.

1.3.1. *St. German on the Grounds of the Law of England*

*Doctor and Student* took the form of a dialogue, and began with a Doctor of Divinity explaining his understanding of the grounds of law to a Student of English law. The Doctor’s discussion of natural and positive law borrowed largely from Gerson and Aquinas. Using Aquinas’s terminology, the Doctor defined the law of reason as “the participation or knowledge of eternal law in a rational creature, revealed to him by the natural light of reason.” He argued that it was immutable, so that any statute, custom or prescription against it was void, as a corruption (St. German 1974a, 13–5). Since men were liable to be blind to the dictates of reason, however, more laws were needed, including those given by revelation, and human positive law, “which is necessarily and probably following of the law of reason and of the law of God for the due end of human nature.” Neither the laws of princes nor the ordinances of the church were obligatory unless consonant to the law of God; but if they were so consonant, such laws “must be observed in the law of the soul, and he that despiseth them despiseth God” (ibid., 27–9).

Having opened with fairly commonplace definitions, St. German turned the reader’s attention to the law of England. In reply to the Doctor, the Student outlined six grounds of these laws: reason, the law of God, general customs, maxims, local customs, and statutes. Discussing the first, the Student
explained that English lawyers did not “reason what thing is commanded or prohibited by the law of nature and what not.” Instead, if something was grounded on the law of nature, they said that reason willed it to be done. English law was a system based on a process of practical reasoning. The student proceeded to distinguish between the primary and secondary law of reason, but in a way very different from Aquinas, for whom the secondary law of nature consisted of deductions from the primary law, which was comprised of self-evident principles. For the Student, the law of primary reason was derived from reason alone, and commanded or prohibited those things which all men knew simply by reason to be so commanded or prohibited. It encompassed acts such as murdering the innocent, perjury or deceit (ibid., 31–3). The law of secondary reason by contrast dealt with rules grounded on customs. It was primarily concerned with matters of property, which (both Doctor and Student agreed) was a human institution (ibid., 19). This law in turn divided into two branches. The first—the law of secondary reason general—dealt with rules derived by reason from the custom of property generally kept in all countries, including offences such as theft, trespass or disseisin. The second—the law of secondary reason particular—was derived by reason from the customs and statutes of England that were particular to this realm (ibid., 35). Matters of property law were thus not derived from “pure” reason but from reasoning on the custom of holding property. Through the use of examples, the Student was able to show how the reasoning process worked in law: Given the premises of a custom—for instance that one could distrain beasts for arrears of rent—the lawyer could by the use of his reason solve legal questions—such as who would bear the loss if the beast died. There was “no need to have a written law upon the point” (ibid., 37).

In setting up this debate between Doctor and Student, St. German aimed to show that English law conformed to the law of nature as understood by philosophers, thereby enhancing its status (St. German 1974a, 31; cf. Hanson 1970, 259). However, for practical purposes, rules derived from pure reason or from the law of God were much less important than the complex rules derived from other sources. Indeed, he argued that the law of primary reason and secondary reason general was not much debated in England, since their contents were sufficiently well known. The real difficulty came with the reasoning on the law of secondary reason particular, derived from maxims of English law. Since “often there is no easy approach to deduction from them,” a true knowledge of English law needed a high degree of professional expertise. No man “though he were the wisest” could reason in the laws of England if he were ignorant of its first principles (St. German 1974a, 37–9). These principles were mainly to be found in the common law, which was made up of general customs “of old time” used throughout the kingdom, which had been “accepted by our sovereign lord the king and his progenitors and all their subjects” and which were not against the law of God or reason (ibid., 45–7). Custom was “the very
ground of divers courts,” as well as the basis for the main principles of land law, such as primogeniture. However, the existence and interpretation of these customs were matters for determination by the judges, rather than the people, sitting as jurors. These customs did not have the strength of law “only by reason,” which alone could not explain (for instance) the rules of primogeniture. It was their acceptance by custom which made them binding. Since they were not grounded on pure reason alone—which was immutable—they could be abolished or modified, by parliamentary statute.

Alongside general customs stood maxims, or “divers principles [...] which have been always taken for law in this realm.” Maxims were sufficient authority of themselves: Provided they were not against reason or the law of God, they needed no justification. Unlike other common lawyers, St. German described maxims in terms which made them appear more like rules than principles. Indeed, he said they were of the same strength and effect as statutes (ibid., 59). Like general customs, they were determined by judges, not juries. Although St. German acknowledged that maxims might conveniently be considered as general customs—since they drew their strength from custom—they were distinctive in that whereas the latter were diffused throughout the realm and were known by all, maxims were only known in the king’s courts and among those learned in law. Nevertheless, this distinction was a fine one. Indeed, St. German acknowledged that while some customs (such as primogeniture) were so generally known that they needed no proclamation by written texts, there were other “maxims and customs” that were not openly known by the people, but were to be known “partly by the law of reason: & partly by the books of the laws of England” (ibid., 69; cf. Guy 1986b, 193–5).

The maxims of the law were in effect the customs of the courts, as evidenced in their records, and were thus to be distinguished from reason. As the student pointed out, in many cases, it was unclear whether a legal rule (such as that a man who commanded another to commit a trespass was himself to be considered a trespasser) was founded on the law of reason or “only by a maxim of the law” (St. German 1974a, 69).

1.3.2. St. German on the Power of Parliament

Pure reason thus played a part in English law, but it was entwined with reasoning on the basis of customs, maxims and statutes. However, for St. German, the latter were not purely indifferent matters which only owed their status to human imposition. For, like Fortescue, he accepted the familiar argument that all human institutions were part of the divine order. Human law was “superadded” to the law of God and reason; it

hath not only the strength of man’s law, but also of the law of reason or of the law of God, whereof it is derived, for laws made by man which have received of God power to make laws be made by God. (St. German 1974a, 111)
This raises the question of the relationship in St. German’s thought between human law and the law of reason. St. German has often been seen as a pioneer of the concept of the sovereignty of parliament, which carried the implication that statutes could not be tested by a higher law (Guy 1986a, 101; Baumer 1940, 59; Allen, 1957, 167; Goldsworthy 1999, 71). Recently, however, it has been argued that he did subject human law to legal invalidation if it contradicted natural law (Walters 2003). St. German’s view of the role of parliament, which he discussed most fully in his polemical works, echoes the vision of law found in Doctor and Student. Although pure reason might determine some simple questions, for practical purposes most questions were too complicated to be left to individual reason. In these situations, it was left to parliament to determine the rule.

In his polemical writings, St. German argued that there was no other authoritative interpreter of law—secular or religious—than parliament. When considering who should expound scripture, St. German noted that some Biblical texts, such as those on the genealogy of Christ, were so clear that they needed no further exposition. By contrast, it was wise to consult men learned in Scripture over unclear texts, as one would consult a lawyer in cases of law. Their opinions could be followed, provided they were “not directly against the law of reason: for that all men are bounden to know” (St. German 1535b, sig. G). However, in cases of doubt “concerning the faith or moral living of the people,” which might lead to disquiet in the realm, it could not be left merely to the learning of the clergy, for wisdom without power could not ensure stability which it was the task of a wise king to provide (St. German 1535a, sig. 5v–6). A king could therefore prevent “any exposition of scripture be it by doctors, preachers or any other [...] that it is like to make unquietness among the people.” In these cases of doubt, the means given by God through which the people could “come to the knowledge of the truth as shall be necessary to their salvation” was parliament (St. German 1535b, sig. G4v–G5v). As St. German explained, according to Scripture, disputes which could not be resolved were to be referred to the church (Matthew 18: 15–7). This however did not mean the priesthood alone, but the entire congregation of Christ; and since disputes could not be referred to the universal church, “when it is said, show it to the church, it is to be understood thereby that it shall be shown to them that by the law & custom there used have authority to correct that offence.” In England, this power lay with the king-in-parliament which “represenseth the whole catholic church of England.” For in England, the power of kings was a “Jus regale politicum” (St. German 1535a, sig. D4–4v, cf. St. German 1535b, sig. G 6v).

If parliament was the means by which to resolve these problems, were there any limitations to its powers? St. German did not argue that the solutions found by parliament (or according to the custom of the realm) would necessarily be just, for he reiterated the Thomist point that only human laws
"not contrary to the law of reason nor the law of God" derived their authority from God (St. German 1974a, 111). Parliament had no direct power over the laws of God or reason, “but to strengthen them and to make them to be more surely kept it hath good power” (St. German 1974b, 332). A law forbidding the giving of alms would therefore be void (St. German 1974a, 41). Similarly, in his polemical writings, St. German was clear that there were some powers which the secular authority simply could not possess. Thus, the king could not exercise any merely spiritual powers, such as consecration and absolution. If parliament were expressly to grant to the king such spiritual powers, the grant would be void “for they have no authority to change the law of God” (St. German 1535b, sig. B 3). Nor did parliament have power (for instance) to prohibit marriage or to forbid entry into religious houses (St. German 1974b, 331). In effect, if parliament granted such powers, they would be no more effective than if it were to grant the king power to make men geniuses.

Such limitations were hardly controversial. What was notable about St. German’s exposition was the extent to which he was prepared to go to confer jurisdiction over ecclesiastical matters onto parliament. Although secular authority had no direct power over spiritual matters, St. German was clear that it could regulate their exercise. Thus, while it was part of the law of God and of reason that ministers of the church should be given sufficient goods to sustain them, it was a matter of positive law to determine what that amount was. Tithes were therefore a positive, and not a divine institution (St. German 1535a, sig. A 7’–A 8’, F1). Similarly, parliament could regulate how marriages should be made and in what form, and could “order the manner of entry into religion.” A statute which forbad the sons of lords marrying the daughters of husbandmen would be void; but a statute that no lord’s son should marry a foreign-born woman without a royal licence would be valid (St. German 1974b, 331). Perhaps most controversially, parliament, “as the high sovereign over the people which hath not only charge on the bodies, but also on the souls of his subjects,” could determine who was Pope in case of a schism (St. German 1974b, 327).

If in theory, there were some limits to parliament’s authority, St. German (like Fortescue) tended to assume that parliament would not err, but would exercise an infallible moral judgment (see Hinton 1960, 416–7; Baumer 1940, 76, 156; Eccleshall 1978, 112). His polemical works were replete with examples of ecclesiastical rules which violated secular law, and were to be regarded as void; but he offered no examples of secular laws which violated the law of God and reason. Indeed, in Salem and Bizance, he threw out a challenge: “if master [Sir Thomas] More can show any laws, that have been made by parliament, concerning the spirituality, that the parliament had no authority” to make, he should produce them (St. German 1987, 371). Moreover, in Doctor and Student, he observed that “it can not be thought that a statute that is
made by [the] authority of the whole realm” in parliament “will recite a thing against the truth” (St. German 1974b, 300, cf. 317). Similarly, in The Power of the Clergy, he reiterated the point, when discussing legislation regulating the benefit of clergy:

it is not to [be] presumed that so many noble princes and their counsel and the lords and the nobles of the realm and yet the Commons gathered in the said parliament would from time to time run in to so great offence of conscience as is the breaking of the law of God.

He added that no sufficient proof had been shown at any of these parliaments that it was against the law of God that priests should answer before secular courts: “and if there be no sufficient proof that it is against the law of God, then the custom of the realm is good to put them to answer upon” (St. German 1535a, sig. B 8v–C). The laws of the realm could not be presumed to violate the laws of God; and in the absence of proof, they had to be presumed good.

1.3.3. Law, Conscience, and Equity in St. German’s Thought

In most cases, the individual was to regulate his conscience according to law and the dictates of public authority, presuming them to be reasonable. In most matters of law, there was little room for the individual to be instructed by the pure light of reason. As he showed in Doctor and Student, when it came to the law of property, which was derived from custom and statute, conscience was to be guided by law. Thus, St. German pointed out that the rules of inheritance enforced in some parts of England varied from the common law rule of primogeniture, allowing the youngest son to inherit under the custom of Borough English and allowing equal partition under gavelkind. However, in their respective areas, the rule of law bound conscience: so that it would not be against conscience for a younger brother to inherit in some places and not in others (St. German 1974a, 121). Equally, if positive laws were changed by competent authority, even without sufficient cause, “then the conscience which had been previously founded upon it must change likewise” (ibid., 111, 129). St. German’s polemical point behind this was that conscience should not be ruled by clerics. Discussing a number of determinations to be found in the Summa Rosella of Baptista Trovomara and the Summa Angelica of Angelus Carletus, two manuals of conscience aimed at confessors, he noted that they were “either against the king’s laws” or “of no authority in this realm. And therefore those whosoever in this realm order their conscience after the determinations of the said sommes [...] and by the authority of the said sommes we think they err in conscience” (St. German 1535a, sig. F8–8; cf. St. German 1974a, 275).

St. German’s picture of a system of positive law under the control of secular authorities, which was to be presumed to be reasonable, raised a problem: if
the common law was reasonable, why did it need equity to correct it? More specifically, why was a court of Chancery needed to supplement the common law? This was a matter not touched on by Fortescue, but it was one which St. German, who had practiced in courts of equity, could not avoid. The Chancery’s equitable jurisdiction had developed since the later middle ages (Jones 1967; Avery 1969; Avery 1970; Ormrod 1988). In St. German’s day, the court had attracted significant amounts of business under the Chancellorship of the cleric Thomas Wolsey (1515–1529), whose methods of dispensing justice so antagonised the common lawyers that when he fell from power, the Lords issued articles against him listing complaints about his conduct. His successor as Chancellor, the lawyer Thomas More (1529–33), took much greater care not to alienate the common lawyers. In this context, questions were raised concerning the relationship between law and equity. St. German’s Doctor and Student was the first English published work to address the relationship between these two.

For St. German, if in many areas conscience was to be guided by law, there were also times when law was to be ruled by a conscience which was not simply a set of rules pronounced by theologians. In defining this conscience, St. German elaborated the concept of synderesis. This was a natural power in the soul moving towards good from evil, which he described as “a spark of reason” (St. German 1974a, 81). Law was to be tested by this reasoning faculty which was found in every man. In many cases, it was quite consonant with this reason that conscience should be guided by law. The Student illustrated this through a syllogism. The major proposition, which “synderesis ministers,” was that “Rightwiseness is to be done to every man.” The minor proposition, supplied by a rule of English law, was that only a son born after marriage should be the heir. The conclusion was that in conscience the inheritance was only to be given to a son born after marriage (ibid., 129). But in other cases, conscience operated to modify the law.

The prime vehicle through which conscience did this was equity. In turning to equity, or epieikeia, St. German began with a definition drawn from Gerson’s interpretation of Aristotle. Laws, he said, “covet to be ruled by equity,” which is no other thing but an exception of the law of God or of the law of reason from the general rules of the law of man: when they by reason of their generality would in any particular case judge against the law of God or the law of reason, the which exception is secretly understood in every general rule of every positive law. (St. German 1974a, 97; see Rueger 1982, 17–9)

In contrast to Fortescue, St. German’s Student showed that equity was administered by English judges, rather than by the king. Equity was to be found firstly within the common law itself, for judges were able to make equitable interpretations of statutes, excepting cases from the rigour of a statute either by the law of reason or by considering the intent of the makers. However, St. German showed that the main judicial forum for the exercise of equity was the distinct Court of Chancery, for “most commonly, where any thing is ex-
cepted from the general customs or maxims of the laws of the realm by the law of reason, the party must have his remedy by a writ that is called *sub pena,*” which commenced cases in that court.

The distinction between the practice of common law and the Chancery was illustrated most clearly by their respective attitudes to uncancelled bonds. At common law, if a man borrowed money on a sealed bond, but failed to have it cancelled when he paid the money owed, the holder of the bond could sue for the sum, and the debtor would not be allowed to deny the debt. For St. German, the general rule on bonds was a convenient one, designed to prevent people avoiding sealed obligations by means of bare averments. Although it was clear that any rule requiring a debtor to pay twice for the same debt was “against reason & conscience,” this would only occur in particular cases; and in such cases, a remedy was given to the man by subpoena in equity (St. German 1974a, 77). This seemed an illustration of the Aristotelian point that the general words of the law were good but that they might lead to injustice in the individual case. Nevertheless, the question remained as to why there needed to be separate courts of law and equity.

St. German’s answer was to look at the different procedures of the courts. The common law courts had distinct rules of procedure, which might prevent the defendant making the plea which would render him justice. Since they determined *secundum allegata et approbata,* if certain facts were kept from the record, a case might be “tried & found by verdict against the truth” (St. German 1974a, 117; cf. St. German 1985, 121). In such cases, “it is not against the common law, [that] the party have remedy in the Chancery […] though he can have none by common law” (St. German 1985, 108). The Chancery, where “the very truth in conscience is to be searched,” thus was able to provide a remedy where the common law could not (St. German 1985, 121). Indeed, in the case of uncancelled bonds,

The Judges of the common law know as Judges by the grounds of the law that the payment sufficiently dischargeth the debt in reason and conscience, as the chancery doth, but yet they may not by the maxims and customs of the law admit the only payment for a sufficient plea before them. (Ibid.)

This was to indicate that the law of the realm—indeed perhaps even the “common law” itself—was not limited to the practices of the King’s Bench, Common Pleas and Exchequer. For “the common law pretendeth not that that maxim stretcheth not [sic] to all courts, nor to the whole common law, but to certain courts, according to the custom before time used” (St. German 1985, 111). This seems to suggest that St. German saw there to be a single system of law, to which different courts with different procedures might contribute (but cf. Yale 1975, 330).

If the Court of Chancery was a court of conscience, nevertheless the Lord Chancellor must “order his conscience after the rules and grounds of the law
of England” (St. German 1974a, 111; St. German 1985, 123). This meant that it could not be a perfect court of conscience and that there would remain areas where individuals should depart from the law for conscience’s sake, but where law would not do so. St. German made it clear that Chancery only intervened “If a subpoena lie in the case” (St. German 1974a, 103). This meant that while the law of the realm was grounded on the law of reason and God, yet it “will not always give him remedy when he hath right” (St. German 1985, 124). There were a number of examples given where the Chancery offered no remedy. Firstly, there were cases where no evidence was available to put before the court, as where a man who was sued for a genuine debt waged his law—defending himself with the aid of oath-swearers rather than a jury—and succeeded by swearing a false oath. Since his wrongful act could not be proved in court, there would be no remedy even in Chancery, but he would be bound in conscience to restore the debt (St. German 1974a, 109; cf. St. German 1985, 116–7). In this kind of case, Chancery was of necessity blind; but elsewhere, it shut its ears to supplicants for reasons of policy. Thus, the Chancery refused to hear a man contradict what he had earlier affirmed in a court of record, denying him a remedy to prevent any “unseemly ambiguity or contradiction in the king’s courts” (St. German 1974a, 117; cf. St. German 1985, 115). Again, though there was no curial remedy, the party would be bound in conscience to recompense. Finally, if a remedy in Chancery would relieve directly against the rule of a statute, the remedy was denied. As he put it, “there lyeth no subpoena directly against a statute, nor directly against the maxims of the law, for if it should lie, then the law should be judged to be void, and that may not be done by [any] court, but by the parliament” (St. German 1985, 116).

In saying this, St. German clearly acknowledged that if a statute contradicted the law of God or reason, there would be no remedy in court to address the problem. For instance, “if it were enacted that if an alien came through the realm as a pilgrim and died, that all his goods should be forfeit, this statute were against reason and not to be observed in conscience.” However, there would be no remedy at common law or in Chancery for the executors of the pilgrim to recover the goods (St. German 1985, 117). It would be incumbent on parliament to correct its error; and the law would not bind in conscience. In the Treatise concerning the Division, St. German appeared to reiterate the idea that a statute could bind in law but not in conscience:

It is held by them, that be learned in the law of this realm, that the parliament hath an absolute power, as to the possession of all temporal things within this realm, in whose hands so ever they be, spiritual, or temporal, to take them from one man, and give them to another without any cause or consideration. For if they do it, it bindeth in the law. And if there be a consideration, that it bindeth in law and conscience. (St. German 1979, 194)

As a matter of law, parliament could confiscate goods without reason, and there would be no court to compel restitution. In such cases, the party ben-
efiting would be impelled to restitution only by his conscience, by the fear of punishment in the next world (St. German 1974a 109, 115–7).

While acknowledging parliament’s theoretical power to act in an arbitrary way, St. German generally sought to show that it had not done so. Thus, in the text where the passage quoted above appears, he argued that a statute which had deprived the church of mortuaries (21 Hen VIII c. 6, 1529) had been enacted on good grounds and not “without any cause or consideration”—and indeed that clergymen who told people that they were bound for the sake of their souls to give an equivalent to the church were bound in conscience themselves to make restitution of money so acquired. Similarly, although he argued in Doctor and Student that if a statute were passed denying a remedy in Chancery on any matter in conscience, and enacting that every matter should be decided only by the rules of the common law, then such a statute would be against right and conscience, he nevertheless insisted there was no such statute in England, not even 4 Hen. IV c. 23, which forbad the Chancery from examining cases after judgment in the common law courts, and which some saw as curtailing the jurisdiction of equity (St. German 1974a, 103; cf. St. German 1985, 108).

However, when it came to the detail of law, he did in fact show that there were cases where equity would not intervene—since to do so would be to give relief against a statute—but where the party was bound in conscience to recompense (St. German 1985, 116). St. German thus made it clear that the law was not always coincident with reason in every case. It attempted via the subpoena to provide a remedy for defects of law in many instances, but there would remain some cases where there was no remedy in court, but only in the conscience of the person. It should be noted that the cases St. German gave as illustrations were ones involving property, in which conscience was normally to follow the law. How was a party to know what conscience demanded, if he was not to look to another source of authority, such as the clergy? St. German’s view was that by reasoning from the premises of the established law, the conclusion in some cases would be self-evidently unreasonable and unjust. The conscience of the individual, informed by synderesis, would guide his conduct.

St. German’s works thus put forward a number of perspectives which would prove highly important. Firstly, he showed that equity as administered by the Lord Chancellor was to be guided by the law, and not by the conjectures of the holder of the Great Seal (St. German 1985, 121). As he showed, the distinction between common law and the equity of the Chancery was rooted in their different procedures. Secondly, he showed in a theoretical work that the foundations of English law were customary, but also that these customs were interpreted and applied by professional lawyers, rather than laymen. Thirdly, in an age of Reformation, he showed that England was not bound by any external authority, but that parliament had full power to legislate for the kingdom. What parliament enacted was to be presumed reason-
able, as was the case with the common law. The fact that parliament was supreme did not of itself make its pronouncements right; and there were occasions when a party might be bound by conscience to restore what the law said was his. For the law did not always provide a remedy; and in the exceptional cases when it did not, a party was left to his own conscience.

1.4. Equity, Common Law, and Statute under the Later Tudors

The concept of equity which St. German had discussed in its various aspects continued to play an important part in legal thought in the later sixteenth century. This era saw a number of works which discussed the jurisdiction of the Chancery in ways which owed much to St. German (Hake 1953; West 1627). Like St. German, the Elizabethan lawyer Edward Hake reiterated that the Chancery offered remedies which were not available at common law, because of the strictness of its procedure. Both common law and Chancery looked to equity, but only the latter could look at collateral circumstances. Moreover, echoing St. German, Hake said that where the common law failed to give a remedy, it was often for want of proof by the plaintiff (Hake 1953, 126–7).

The Chancery, moreover, did not contradict the common law, for it did not settle the question of right, but only directed the conduct of the parties before the court. William Lambarde (1536–1601) also noted that the Chancery worked in a distinct way from that of the common law courts. The subpoena allowed the examination on oath of parties and witnesses; the court did not refer issues to a jury but left all in the hands of the judge; but its decision therefore did not determine matters of right, but only directed the conduct of the parties before the court (Lambarde 1957, 40; cf. Macnair 1999).

The concept of equity was also used by lawyers who reflected on the common law and statute. If the rise of the Chancery’s jurisdiction had forced lawyers to consider the role of that court, the Tudor era was also one of great legal growth, with the development of much new law. In this context, lawyers faced with having to apply the common law to new situations and to interpret an increasing body of statute found the concept of equity a useful tool in explaining the adaptability of law to new situations. On the common law side, the decline of oral tentative pleading put a greater onus on judges to make definitive decisions on matters of law after the pleadings had been set, and they became more confident in making authoritative decisions. At the same time, the legal profession and its clients sought a law “clearly stated upon known or admitted facts” (Baker 2000, 81–2). This was reflected in changes in the nature of law reporting, manifested in the publication of the Commentaries, or reports, of Edmund Plowden (1518–1585). Where the Year Book reports focused on procedural questions, Plowden claimed a superiority in his reports since they were made “upon Points of Law tried and debated upon Demurrers or special Verdicts” (Plowden 1816, preface; see also Behrens 1999;
Tubbs 2000, chap. 5). His cases were carefully selected, for the reporter sought “to extract the pure only, and to leave the refuse.”

Elizabethan lawyers continued to perceive the common law as being founded on custom, or “a secret convention of the citizens agreeing together for a long time.” However, its rules and maxims were considered a matter of specialist legal reasoning to be applied by lawyers (Hake 1953, 132, 92). As Serjeant Morgan put it in 1550, arguments in court were to be drawn from our Maxims, and Reason, which is the Mother of all Laws. But Maxims are the Foundations of the Law, and the Conclusions of Reason, and therefore they ought not to be impugned, but always to be admitted; yet these Maxims may by the Help of Reason be compared together, and set one against another, (although they do not vary) where it may be distinguished by Reason that a Thing is nearer to one Maxim than to another, or placed between two Maxims. (Colthirst v. Bejushin, Plowden 1816, I: 27a)

Although the word “equity” was little used in the courts of common law, some argued that the exposition of the common law was in fact “altogether guided and directed by Epieikeia” (Hake 1953, 103–4, 11–2). When cases occurred which could not be ruled by the generality of legal maxims (which were constant), they had to be “expounded by the hidden righteousness of those grounds and maxims” (Hake 1953, 11). Hake rejected Plowden’s view that equity was “no part of the law, but a moral virtue which corrects the Law” (Plowden 1816, II: 466a). Equity, he argued, was not the private conscience or reason of a judge, but of the law. The judge needed to be learned in every part of the law, taking his direction “as a skilful artisan” from the grounds and fountains of the law (Hake 1953, 33). Hake argued that the common law’s innate equity could be seen firstly in its exposition of the law. Thus, judges had at all times expounded deeds and contracts according to the intention of the parties, and not by the strict form of the words they used (ibid., 51). Secondly, it could be seen in its provision of remedies, which were flexible and directed by reason. Following Fortescue, Hake acknowledged that in cases which could not be determined either by the letter or interpretation of the law, recourse had to be had to magistrate to supply a new law, since to do otherwise would be to set the judge above the law. However, in England, the law did provide a comprehensive system of remedies: for in all cases where a special writ was not available, “it is allowed unto a man to take his remedy by the general writ” (ibid., 23, 104–5).

Hake’s reference was to the action on the case, which he portrayed as an equitable remedy offered by the common law. It was a flexible common law remedy for non-forcible wrongs, which was widely (though incorrectly) agreed in this era to have been created by chapter 24 of the Second Statute of Westminster of 1285 (but which historians now agree dated from a change in pleading practices dating from the later fourteenth century: see Milsom 1981, chap. 11; Ibbetson 1999, chap. 3). By this action, a party could in his writ set
out background information to his claim, and assert that the facts alleged constituted a wrong from which he suffered damage. At the heart of this action stood the concepts of a legal “wrong,” *injuria* and damage. However, the wrong was not generally pre-defined in law. Rather, courts often used precedent customary norms as a source of liability, as when innkeepers or carriers of goods were held liable for goods entrusted to them. Equally, this remedy allowed judges to develop the law in new directions, by granting the remedy in novel cases, when reason or justice favoured the plaintiff. Thus, in 1516, when discussing whether the remedy of action on the case should be extended to cover cases for the nonperformance of contracts, the Reader at Gray’s Inn, Peter Dillon, argued that it should, “for every law is grounded on reason, and reason wills that if a man has injury he should have an action” (Baker 1977, 272). The flexible format of the action on the case meant that it allowed the common law to expand significantly in the course of the sixteenth century. It is notable therefore that Hake commented that if pleaders only turned their minds to framing actions under this remedy more frequently, there would be less need to resort to the Chancery (Hake 1953, 107); while Lambarde equally attributed the rise of the Chancery’s jurisdiction to the failure to develop the remedies offered by the second statute of Westminster (Lambarde 1957, 38–40). These comments were most likely to have been motivated by the fact that the common law remained blind to uses and trusts, which had come to play a central role in property law, rather than from any lack of awareness of the flexible common law remedies available. In any event, Hake’s discussion should serve to remind that if common lawyers saw their system as being built on a customary foundation, as supplemented by statute, they also conceived of it as a system of remedies devised by public authority, administered by experts which could ensure that justice was done, by drawing on norms from within the community. It was not a static system, but one which could grow and adapt, developing in an “equitable” way.

The reign of Henry VIII also saw a transformation in the number and range of statutes passed, as part of what has been called the Tudor Revolution in government (Elton, 1953). While judges had always had to handle legislative material, it was only from the reign of Henry VIII that they began to articulate a conception of statute as a categorically distinct source of law, and to develop theoretical views of how to interpret statutes (Thorne 1942; Hatton 1677). In this era, therefore, lawyers became more concerned to define more clearly the relationship between common law and statute, and to see the relationship of each to a wider concept of equity. According to Plowden, it was not the words of a statute which made it law, but its internal sense. Equity was therefore “a necessary ingredient in the exposition of all laws,” informing the judge when the literal meaning was to be enlarged or contracted (Plowden 1816, II: 466a). Once again, stress was laid on the expert, rather than private nature of equity, for it was argued that statutes were to be construed by “judi-
cial knowledge” rather than the private knowledge of the judge (Serjeant Saunders in Partridge v. Strange and Croker (1553), Plowden 1816, I: 83a). The equity and good reason which would temper the words of a statute were often to be sought in the common law, “which is the ancient of every positive Law” (Stowell v. Lord Zouch (1562), Plowden 1816, I: 363). As Thomas Egerton put it, in the first treatise composed on statutory interpretation, if they did not know the ancient law, judges would neither be able to know the statute or follow it well, but would only “follow their noses and grope at it in the dark” (Thorne 1942, 141). In other cases, however, notably where statutes made innovations, they were to be interpreted according to the intent of the legislator. Since those who had framed the law were not available to be asked, the task devolved on the sages of the law “whose talents are exercised in the study of such matters” (Plowden 1816, I: 82). They were to consider what the law maker would have done when confronted with the case (Plowden 1816, II: 467). In practice, this meant deciding “according to the necessity of the matter, and according to that which is consonant to Reason and good Discretion” (Plowden 1816, I: 205a).

A number of rules of construction were developed. Statutes which enlarged the common law, or settled doubts in it, were to be expounded equitably “for since the common law is grounded upon common reason, it is good reason that that which augmenteth common reason should be augmented” (Thorne 1942, 143; cf. Hake 1953, 89). Statutes which remedied mischiefs were to be construed equitably, though they should not be extended to cases outside the mischief (Thorne 1942, 146–7; cf. Hake 1953, 87–8). By contrast, penal statutes were to be narrowly construed (Thorne 1942, 154; cf. Hake 1953, 88), as were those in restraint of the common law. Egerton argued that statutes were to be construed against their very words on a number of occasions. In some cases, words had to be disregarded ex necessitate “as when it can otherwise not happen.” Parallel to this was a rule that the words did not apply where they would lead to absurdity or contradiction. Similarly, there were cases where provisions in statutes fell out of use through desuetude. More striking still was Egerton’s argument that in some cases, a statute should be construed against its very words “ut evitetur iniquum, for statutes come to establish laws, and if any iniquity should be gathered of them they do not so much as deserve the name of laws” (Thorne 1942, 162). He was not the only one to put forward such an argument. Sir Christopher Hatton (d. 1591) noted that “sometimes statutes are expounded by equities, because law and reason repugn to the open sense of the words, and therefore they are reformed to consonance of Law and Reason” (Hatton 1677, 44–5). If this appeared to give judges a great power to ignore the words of statutes, it should nevertheless be noted that this was a rule of interpretation, not one of nullification. Thus, one example given of its operation by Egerton was the provision in Magna Carta, confirming all customs, which was held to confirm only ones with a reasonable beginning.
Chapter 2

THE AGE OF SIR EDWARD COKE

The Renaissance saw a transformation in the legal environment in England (see Baker 1986b). To begin with, English society became more litigious than it had ever been. The sixteenth century saw a tenfold rise in the volume of civil litigation, which resulted in part from social and economic expansion. At the same time, there was a significant expansion in the number of lawyers, both of barristers and attorneys (Brooks 1986, 51 and 113; Brooks 1998a; Muldrew 1998; Prest 1986, 7). Moreover, in the age of humanism, law had a new cultural role. It was increasingly perceived that the work of the barrister was officium ingenii, to be contrasted with the mechanical officium laboris of the attorney. The Inns of Court were seen not merely as venues for training lawyers, but as finishing schools for gentlemen. In The Book Named Governor (1531), Sir Thomas Elyot (ca. 1490–1546) advised that if young men were set to study philosophy and “the laws of this realm,” they would become the most “noble counsellors” in any realm (Elyot 1962, 52–3; cf. Terrill 1981, 31). At the same time, the era from the later fifteenth century saw major developments in substantive law, with the development of new remedies for breaches of contract, and significant changes in land law (Simpson 1975; Ibbetson 1999; Simpson 1986).

Such was the growth of the law in the sixteenth century that by its end, many of the leading common lawyers of the age, including Edward Coke (1552–1634), Francis Bacon (1561–1626) and Thomas Egerton, Lord Ellesmere (ca. 1540–1617), considered it to be replete with complexities which only served to make it uncertain and encourage litigation. Bacon, Ellesmere and Coke each condemned the condition of the statutes, which were often contradictory and acted as snares to the unwary. Even the conservative Coke recommended making “one plain and perspicuous law divided into articles [...] so as each man may clearly know what and how much of them is in force, and how to obey them” (Knafla 1977, 105; Coke 1604, sig. B3v). They also worried about the state of the common law. Ellesmere condemned developments in the common law which threatened to undermine its certainty by giving too great a discretion to the judges (Knafla 1977, 121–2). His rival Coke agreed that the law could be harmed by lawyers, drawing new forms of conveyances unknown to ancient law, or engaging in complex pleadings in novel forms of action (Coke 1602a, sig. q 5v; Coke 1611, sig. A ii).

In this context, we might expect to see a flourishing of a new theoretical or institutional treatment of the common law, both for lawyers, and for the wider litigating public. It is therefore striking that the early seventeenth century saw no overarching treatise which would put the law into a learned and compre-
hensive framework in the manner of Bracton. Part of the reason for this may be sought in the context in which lawyers and legal writers found themselves, for the question of law reform was complicated after the accession of James VI of Scotland to the throne of England in 1603 by the new king’s plans to unite his two kingdoms. Many common lawyers, and notably Coke, opposed any project to unite English and Scots law, which had seen a reception of Roman law in the fifteenth and sixteenth centuries. It was those lawyers who were trained in the civil law who were most enthusiastic for a union of laws, and one of them, John Cowell (1554–1611), was the author of the only early seventeenth century work to attempt to put English law into the institutional framework of Justinian. Cowell’s Institutiones Juris Anglicani of 1605 was not merely an academic exercise for the better instruction of lawyers (Cowell 1651). As Levack has written, “it was a serious attempt at the codification of English law on the basis of the civil law, and it represented a practical, albeit preliminary effort towards the realization of legal union” (Levack 1987, 83). Cowell’s standing among common lawyers fell further in 1607, because of the absolutist views he expressed in another work, the Interpreter.

Even those who were in favour of a union of the two kingdoms, such as Bacon (who wrote a A Preparation toward the Union of Laws for the King in 1604), were cautious in this atmosphere not to propose any recasting of the content of the common law which might imply any kind of codification on Romanist lines. In his 1616 Proposition Touching the Compiling and Amendment of the Laws of England, Bacon observed that more doubts arose on written law than on the common law, which in the manner of all good sciences kept “close to particulars”: and he declared that the “work which I propound, tendeth to pruning and grafting the law, and not to ploughing up and planting it again; for such a remove I should hold indeed for a perilous innovation” (Bacon 1857–1874e, 67). Common lawyers from Coke to Bacon aimed to remove the excrescences from the pure common law, but without casting the law into a new form. This however raised the problem of how one was to find pure principles of law from the “multitude of cases, judgments, statutes, arguments, treatises, comments, questions, diversities, expositions, customs of courts, pleadings, moots, readings, and such like” with which the student of the law had to deal (Fulbecke 1620, 9).

Legal writers offered a number of tools. Firstly, the early seventeenth century saw the publication of more law reports, notably the English reports of Sir Edward Coke and the Irish reports of Sir John Davies (1569–1626). Common lawyers from Bacon to Coke agreed that it was from such sources that any understanding of the law was to be sought. Coke’s reports, published after 1600, came in for much criticism from his opponents. He was accused of making reports which were not warranted by the records of the cases, and of reporting decisions contrary to the judgments given (see Egerton 1710). Nonetheless, no less a rival than Bacon could concede that had it not been for
Coke's reports, “the law by this time had been almost like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former time” (Bacon 1857–1874e, 65). For Coke, the law report was an essential tool for understanding the law: it “set open the windows of the law to let in that gladsome light whereby the right reason of the rule (the beauty of the law) may be clearly discerned” (Coke 1613, preface, sig. c iii). Davies, who produced a set of reports (rather than an institute) for Ireland in an era when the common law was being exported there, also saw the law report as an essential tool (see Pawlisch 1985). He described reports as “comments or interpretations upon the text of the Common Law: which text was never originally written, but hath ever been preserved in the memory of men, though no man's memory can reach to the original thereof” (Davies 1869–1876a, 251). Bacon argued for an official system of law reports, noting that “judgments are the anchors of laws, as laws are of the state.” Indeed, he himself appointed short-lived reporters when he was Lord Keeper (Bacon 1857–1874b, 103–4). The core of his proposal for a digest of the common law contained was to make “a perfect course of the law in serie temporis, or yearbooks, (as we call them) from Edward the First to this day” (Bacon 1857–1874e, 68; cf. Bacon 1857–1874b, 100–1). His plan involved condensing agreed law, omitting overruled cases, and pruning repetition or tautologies. However, he continued to insist that “laws be taken from sworn judges” (Bacon 1857–1874b, 107).

A second form of literature comprised “auxiliary books” which could serve as guides to the law. These included books explaining the terms and practices of law, such as Coke's Book of Entries which contained the pleadings used in various actions, alphabetically arranged, and taken from recent and cases which he had himself discussed elsewhere. For Coke, such works were essential, for the lawyer needed to combine “knowledge in universalities, and the practice in particulars.” As he advised the student,

> No man can be a complete lawyer by universality of knowledge without experience in particular cases, nor by bare experience without universality of knowledge; he must be both speculative and active, for the science of the laws, I assure you, must join hands with experience. (Coke 1671, preface).

If this was to teach the particulars, education in “universals” was to be obtained from another type of book, which sought to instruct students in the method of extracting underlying principles of law, and organising them. From the late sixteenth century, a number of works appeared which sought to teach logic and method to the lawyer. One example of this was Abraham Fraunce’s 

> Lawiers Logike of 1588, the first treatise on forensic logic published in England, and a work which sought to introduce lawyers to the Ramist method. If the law was “in vast volumes confusedly scattered and utterly undigested,” Fraunce said, it was not the law itself which was to be blamed, “but lawyers
themselves that never knew method” (Fraunce 1588, sig. a3v). Fraunce’s work was an exposition of Ramus’s method, using examples drawn from English law, often from Plowden’s Commentaries. But the notion of instructing lawyers in logic soon took hold: a series of pedagogical works in the early seventeenth century taught lawyers the tools of logic to extract principles, or maxims, from the mass of material in law. Such works included A Direction or Preparative to the Study of the Law by William Fulbecke (1560–1603) and The English Lawyer and Lawyer’s Light by John Dodderidge (1555–1628). They also included works which extracted and discussed maxims. The first book of Sir Henry Finch’s (1558–1625) Nomotechnia (published in 1613 in Law French) and of his Law, or a Discourse thereof (published in English in 1627), set out and illustrated a number of maxims and rules (see Finch 1759a; Finch 1759b). His work was followed by the Treatise of the Principall Grounds and Maximes of the Lawes of this Kingdome by William Noy (1577–1634; see Noy 1757) and the Maximes of Reason, or Reason of the Common Law of England by Edmund Wingate (1596–1656; see Wingate 1658). It was also followed by Francis Bacon’s Collection of Some Principall Rules and Maxims of the Common Lawes of England, which derived from work begun in the 1590s, and was published in incomplete form in 1630.

Finally, there were what Bacon dubbed “institutions.” These he saw as being books for the novice, “to be a key and general preparation to the reading of the course.” They needed to be comprehensive and well-ordered, to give the student “a little pre-notion of every thing, like a model towards a great building,” but they were not to be authoritative (Bacon 1857–1874e, 70; Bacon 1857–1874b, 105). Other lawyers were often sceptical about the value or need for works discussing substantive law. Davies boasted that the grounds of the law of England “are so plain and so clear, as that the professors of our law have not thought it needful to make so many glosses and interpretations thereupon as other laws are perplexed an confounded withall.” He praised Littleton for having reduced the principal grounds of the common law with “singular method and order” and asked rhetorically, “who ever yet hath made any gloss or interpretation upon our Master Littleton?” (Davies 1869–1876a, 262). Coke was also initially sceptical about attempts to bring the common law into a better method, noting that abridgements “greatly profited the authors themselves; but as they are used have brought no small prejudice to others” (Coke 1604, sig. B 3v). Nevertheless, there were some general overviews produced, besides Cowell’s explicitly Romanist work. Finch’s Nomotechnia and his Law, or a Discourse thereof, which were more influenced by Ramus than by Justinian, provided such an introduction. Finch used the Ramist method of definition and division to produce an overview of the law in which “there should not be the slightest particular that is left uncertain and of which there is not contained herein the unequivocal truth, everything having a natural and consistent relationship with everything else” (quoted in Prest 1977,
344). However, although this work was later seen as a precursor of Blackstone, its influence in the early seventeenth century remained limited.

In the event, the most influential and widely read introduction to English law in the seventeenth century was Edward Coke's four volume *Institutes of the Laws of England*. Coke's method was neither that of Ramus nor that of Justinian. His masterpiece was in fact a gloss on Littleton's *Tenures*, which was published as the first volume of the *Institutes* in 1628. In it, he added to Littleton's simple and uncluttered text a detailed series of commentaries on law and legal reasoning, adding reference to statutes, Year Book authorities, and older texts and making observations on them. Three more parts were published posthumously in the 1640s. The second part was a commentary on statutes, the third a discussion of criminal law, the fourth a commentary on the courts. Coke's *Institutes* were not a comprehensive overview of the law of England set out in the form of rules: Rather, they were a commentary on the sources of English law by a lawyer keen to impart the art of legal thinking.

### 2.1. Common Law Reasoning in the Early Seventeenth Century

Coke and Davies have often been identified as representative of a “common law mind” which existed in the early seventeenth century. According to J.G.A. Pocock, their vision was very insular, in that they assumed that the common law was both ancient and immemorial, and the only true source of law in England (Pocock 1987; but cf. Brooks and Sharpe 1976; Pawlisch 1980). In the preface to his Irish reports, Davies eulogised the common law as "nothing else but the Common Custome of the Realm":

> a Custom which hath obtained the force of a Law is always said to be *Ius non scriptum*: for it cannot be made or created either by Charter, or by Parliament, which are Acts reduced to writing, and are always matter of Record; but being only matter of fact, and consisting in use and practice, it can be recorded and registered no-where but in the memory of the people. (Davies 1869–1876a, 252)

Customs obtained the force of law when they had been “continued without interruption time out of mind,” which continued use showed their convenience and suitability for the people. Coke equally eulogised the common law as the product of experience as developed over time:

> if all the reason that is dispersed into so many several heads were united into one, yet he could not make such a law as the Law of England is, because by many succession of ages it has been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection. (Coke 1794, 97b)

Historians like Pocock have been troubled by the problem that while Coke described the law as a customary system, which might imply that it changed over time with the manners of the people, he also seemed to hold to the view
that the common law and the constitution had always existed in its present form (Pocock 1987, 35–6, 275; cf. Burgess 1992, 72–7). Such a view was put forward especially in the prefaces to his reports. In Coke’s view, the grounds of the common law were “beyond the memory or register of any beginning,” and were the same as those William the Conqueror had found after his invasion (Coke 1611, preface, sig. §§ 3). In making this argument, he drew on Fortescue’s notion that the common law had arrived with Brutus and that “the realm has been continuously ruled by the same customs as it is now” (Fortescue 1942, 39; cf. Coke 1602b, preface sig. C ii–D i). His use of history has long been seen as problematic. To begin with, it was very crude. Coke often read current institutions back into history from the slenderest foundations. Thus, in the preface to the third volume of his reports, he used a post-conquest claim by an abbot to have had consunace of pleas out of the king’s court in the time of Edward the Confessor to infer the existence prior to 1066 of a Chancery issuing original writs directed to sheriffs who summoned juries for trials. In fact, Coke was not an incompetent historian. He was rather a careful collector of historical manuscripts and an enthusiastic and able researcher (see Boyer 2003, chap. 9; Musson 2004). Yet he was prepared to maintain positions which he must, as an historian, have known were hard to maintain.

In explaining this, it must be recalled that he was writing not as an historian but as a lawyer. Indeed, he warned “the grave and learned writers of histories” not to meddle “with the laws of this realm, before they confer with some learned in that profession” (Coke 1602b, sig. Dii). Coke’s aim in the prefaces was not merely to praise the laws of England, but to prove that the common law had survived unaltered by any conqueror (Coke 1602b, preface, sig. C iii?). In making this proof, he used historical evidence to vouch authority for his propositions, rather than to establish historical fact (see Yale 1976, 11). Thus, Coke sought to prove his contention that the common law existed prior to the conquest by testing whether examples of the operation of four common law rules could be found from that era (Coke 1607, sig. q iii–v). By proving these selected propositions, he felt he would obtain support for his greater argument. In reading the prefaces, it should be borne in mind that Coke’s emphasis on the importance of history was something which had not been particularly stressed earlier in the sixteenth century. As C. W. Brooks has shown, his “ancient constitutionalism” did not reflect the attitude of late sixteenth century lawyers, but was rather “a response to a particular set of political, religious and legal conditions” (Brooks 1998b, 226; cf. Brooks 2002).

Nevertheless, Coke’s arguments were not merely those of a polemicist who hid his essentially evolutionary view of law to make political points. He did perceive that there were fundamentals which were unchanging. The ancient common law was the “birth-right and the most ancient and best inheritance” which the subjects had. It was by the law that they enjoyed their goods, their
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lives and indeed their very country (Coke 1605, preface, sig. A iii). As Coke saw it,

For any fundamental point of the ancient common laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of any of them is most dangerous; for that which hath been refined and perfected by all the wisest men in former succession of ages and proved and approved by continual experience to be good & profitable for the common wealth, cannot without great hazard and danger be altered or changed. (Coke 1604, preface, sig. B2)

This raises the question of what the “fundamental points” of the common law were for Coke. He clearly did not see the law as static. Indeed, he described his selection of pleadings in his Book of Entries as being of “greater authority and use, and fitter for the modern practice of the law, since they were recent. Nonetheless, the image of change to be found in Coke is often a negative one, of the pure stream of law corrupted by badly drawn statutes or over-complex pleadings. His desire to purify the law thus begs the question of what was essential and unchanging in Coke’s vision of law.

In answering this question, it should be noted to begin with that Coke did not see the common law as a set of rules which could be defined, or a set of customs which could be described. Rather, he said,

reason is the life of the Law, nay the common law itself is nothing else but reason, which is to be understood of an Artificial perfection of reason, gotten by long study, observation, and experience, and not of every man’s natural reason [...]. No man (out of his own private reason) ought to be wiser than the law, which is the perfection of reason. (Coke 1794, 97b; cf. Dodderidge 1629, 91)

For Coke, law was the professional learning of lawyers. He was not unrepresentative in taking this view. In explaining legal reasoning, Dodderidge distinguished primary and secondary conclusions of reason. The former kind were certain and evident to everyone with capacity. For Dodderidge, some of the law was derived from primary principles, or the law of nature. However, most law which concerned matters of probability only, or secondary principles, which were “not so well known by the light of nature, as by other means.” They were discerned through “discourse,” and were “peculiarly known, for the most part, to such only as profess the study and speculation of laws” (Dodderidge 1629, 45). These secondary principles were drawn from two sources. Some came from custom and experience, but others came from reason deduced in argument (Dodderidge 1629, 47–8, 57). Common lawyers often stressed the importance of nature and custom, for they were the foundations of much of the law. But in practice, it was reason in argument which was the most important source of law. As Dodderidge put it, “the efficient ground of rules, grounds, and axioms is the light of natural reason tried and fitted upon disputation and argument” (Dodderidge 1629, 91).
Dodderidge’s typology of nature, custom and reason reflected the way many lawyers viewed the common law. Though the natural law foundations of the common law were commonly invoked, nature was only resorted to in the absence of other authority. “When new matter was considered whereof no former law is extant,” Sir John Dodderidge wrote (quoting words of Justice Yelverton spoken in 1468), “we do as the Sorbonnists and Civilians resort to the law of nature which is the ground of all Laws” (Dodderidge Undated, 4v; Doe 1990, 71; cf. Hake 1953, 108). Coke himself was happy to invoke the law of nature when needed. In Calvin’s Case in 1608, a test case to determine whether a subject of King James, born in Scotland after his accession to the English throne, was an alien in England, he argued that obedience and li- giance was due to the king by the law of nature. Coke described it as the eternal law of the creator, which “never was nor could be altered or changed.” Although Coke also used precedents and analogies from the common law, the importance of the law of nature in helping to settle a novel and uncertain question here should be noted (English Reports 77: 393; cf. Burgess 1992, 127–9; Gray 1980).

Lawyers equally accepted the customary foundation of the law. “The Cus- tomary Law of England,” Davies wrote, “we do likewise call Jus commune, as coming nearest to the Law of Nature, which is the root and touchstone of all good Laws, and which is also Jus non scriptum, and written only in the memory of man” (Davies 1869–1876a, 253). However, legal writers made it clear that the common law developed in the courts, and not in the community. In particular, a distinction was made between general customs, which were equated with the common law, and particular customs, which were equated with local practices. When Coke listed the “divers laws within the realm of England,” he used the phrases communis lex Angliae and lex terrae to de- scribe the common law, which “appears in our books and judicial records.” It was distinct from to “Consuetudines, Customs reasonable,” which were local customs (Coke 1794, 11b, 110b). Finch similarly defined the common law as “a law used time out of mind” in contrast to customs, which were “special us- ages time out of mind altering the common law” (Finch 1759b, 77–8). The difference between the two was explained by Thomas Hedley in a speech to parliament in 1610. The common law, he said, “is a reasonable usage, throughout the whole realm, approved time out of mind in the king’s courts of record which have jurisdiction over the whole kingdom, to be good and profitable for the commonwealth.” It was “extended by equity,” so that whatever fell under the same reason would be found to be covered by the same law. By contrast, customs were confined to particular local places, were tried by a jury. They were to be “taken strictly and according to the letter and prece- dent,” and therefore admitted “small discourse of art or wit,” in contrast to the common law, which required learning and wisdom. Hedley pointed out that while the common law derived from custom, it did not rest upon any cus-
tom as its *immediate* cause. Instead, it rested on “many other secondary reasons which be necessary consequence upon other rules and cases in law, which yet may be so deduced by degrees till it come to some primitive maxim, depending immediately upon some prescription or custom” (Foster 1966, 2: 175–6).

It was the common law’s foundations, rather than its current details, which were customary. When lawyers spoke of these foundations, they often had in mind the constitutional structure of the kingdom, and the fundamental rules concerning property, whose origins could not be precisely traced, but which had been digested in Littleton. For Coke, the essential principles of the common law were derived from immemorial custom, reconfirmed over time. Magna Carta, the Charter of the Forest, the Statute of Merton and the two Statutes of Westminster, along with the original writs in the *Register*, he observed, “are the very Body, & as it were the very Text of the common Laws of England. And our Year Books and Records, yet extant for above these 400 years, are but Commentaries and Expositions of those laws, original writs, indictments and judgements” (Coke 1611, preface, sig. A ii; cf. Coke 1794, 115b). Nature and Custom were thus the bases on which the law was built. As Dodderidge saw it,

A Ground, Rule, or Principle, of the Law of England is a conclusion either of the Law of Nature, or derived from some general custom used within the Realm, containing in a short Sum, the reason & direction of many particular & special occurrences. (Dodderidge 1629, 6)

Nonetheless, the essence of the law was found in the process of legal reasoning. For common lawyers, this was an essentially forensic exercise. As Coke saw it, the principles of law were clear; it was their application which was complex. The law, as he put it, “is not uncertain *in abstracto* but *in concreto*” (Coke 1613, preface, sig. ciii). Davies similarly argued that doubts arose more from the multiplicity of facts than of laws. “[I]t must be a work of singular judgement,” he said “to apply the grounds and rules of the law, which are fixed and certain, to all human acts and accidents, which are in perpetual motion and mutation” (Davies 1869–1876a, 261). Law was to be dealt with at the very point where it was most difficult: *in concreto*, mixed with fact. As Coke put it, “no man alone with all his true and uttermost labours, nor all the actors in them themselves by themselves out of a Court of Justice, nor in Court without solemn argument” could ever have come to the “right reason of the rule.” It was the very procedure of argument in open court which led men to the correct legal solution (Coke 1613, preface, sig. c iii).

The principles of law were themselves derived from the process of reasoning. As Dodderidge put it, they were the “reasons of every resolution in any book case being reduced into short sentences, propositions or summary conclusions” (Dodderidge 1629, 95). Rather than drawing on positive ancient foundations for the rules they would use in court, lawyers therefore pointed
to the tools of reasoning learned from books on logic, as well as maxims. In his commentary on Littleton, Coke observed that Littleton’s proofs of common law were taken from twenty different fountains. Firstly, they were drawn “from the maxims, principles, rules, intendment and reason of the common law.” The list which followed of the other sources included a number which referred to judicial sources—legal records, original writs, good pleadings, approved precedents—some from logical arguments, and some from the opinions of learned men. Of these sources, maxims were the most important. Following Edmund Plowden’s much quoted phrase, Coke defined a maxim as “a sure foundation or ground of art, and a conclusion of reason.” A maxim, he noted, was in essence the same thing as a rule, a common ground, or an axiom (Coke 1794, 11a). In effect, the unchanging “fundamentals” of law were to be found in its principles and maxims, which had been refined by learned men over the ages.

Perhaps the most sophisticated exponent of maxims in the early seventeenth century was Francis Bacon (Bacon 1857–1874c). In his view, maxims were “most important to the health [...] and good institutions of any laws,” for they were like the ballast of a ship, which would keep everything upright (Bacon 1857–1874c, 70). Bacon’s enthusiasm for the form of the maxim was echoed in his use of aphorisms in De Augmentis Scientiarum (1623), and at various points in his career he planned to put together a comprehensive set of legal maxims. In the end, however, this project remained unfinished and only an incomplete set of maxims, dating from 1596–1597, was published after his death, only to be largely neglected (Coquillette 1992, 35–48). For Bacon, maxims were not simple rules to be learned. On commencing his collection, he deliberately eschewed digesting them into a certain method or order, to give a coherence to the whole. Instead, by setting forth a series of “distinct and disjointed aphorisms,” he wanted to “leave the wit of man more free to turn and toss, and to make use of that which is so delivered to more several purposes and applications” (Bacon 1857–1874c, 321).

Bacon described his project as “collecting the rules and grounds” dispersed through the body of the law. The function of the maxim was to illuminate how the law worked, revealing its underlying principles. He was thus not concerned with the technicalities of the forms of action to be used, or the manner of pleading, but the principles which animated the law. Thus, his first maxim, or regula, dealt with causation in the law. Bacon explained that the law looked to proximate, and not remote causes, since it would be “infinite for the law to judge the causes of causes.” But as a principle was not a fixed rule, he illustrated his proposition by showing its limits. Thus, he showed that the rule did not apply in criminal cases, because “when the intention is matter of substance [...] there the first motive will be principally regarded, and not the last impulsion” (Bacon 1857–1874c, 327–9). His fifth regula dealt with necessity and duress, showing that a man was not held to be at fault “where the
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act is compulsory and not voluntary, and where there is not a consent and election.” Once again, Bacon explained the limits of the rule: while the plea of necessity could be used to justify private wrongs, it could not be used to justify wrong against the commonwealth. Similarly, “the law intendeth some fault or wrong in the party that hath brought himself into the necessity.” The seventh regula showed that in civil cases, the law looked to the “damage of the party wronged, [rather] than the malice of him that was the wrong-doer,” while in criminal cases, it was the intention of the defendant which mattered (Bacon 1857–1874c, 343–5). For Bacon, such maxims, which “sound into the true conceit of law by depth of reason,” were of use in helping resolve cases where there was no direct authority, or where the authorities varied. More broadly, “the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will by this new strength laid to the foundation somewhat the more settle and be corrected” (Bacon 1857–1874c, 319).

Bacon’s method of gathering maxims reflected his broader inductive method. They were to be derived from legal materials: statutes, Year Book cases, forms of pleading. In De Augmentis Scientiarum, Bacon wrote,

It is a sound precept not to take the law from the rules, but to make the rule from the existing law. For the proof is not to be sought from the words of the rule, as if it were the text of law. The rule, like the magnetic needle, points at the law, but does not settle it. (Bacon 1857–1874b, 106)

A maxim in law was thus like a “middle axiom” in natural science. As Kocher has put it, “it is obtained by induction from congruous lines of cases running through several different kinds of law, and, when applied back to those fields, serves to promote consistency within and between them” (Kocher 1957, 11–2). Bacon was insistent that law came not from abstract opinions, but from the material of judgments. Instead of taking the views of advocates or doctors, he said, “Let the laws be taken from sworn judges.” Any reconstruction of law must be based on old authorities, “otherwise the work would appear rather a matter of scholarship and method, than a body of commanding laws” (Bacon 1857–1874b, 107, 101). At the same time, Bacon had a fluid view of the development of law, as assisted by the reasoning process which generated usable maxims. He argued that it was inevitable that new situations would arise where the law had not found an answer. In such situations, he advised drawing from similar cases, but with caution and judgment. Moreover, he stressed the need to avoid the judicial conservatism he associated with Coke and excessive veneration for the past: “Let reason be esteemed prolific, and custom barren. Custom must not make cases” (Bacon 1857–1874b, 90).

As befitted a man who held the Great Seal, he was therefore prepared to look for justice beyond the legal rule. Indeed, in De Augmentis Scientiarum, he commented that not every position of law should be taken as a rule: “But
let those be considered rules which are inherent in the very form of justice” (Bacon 1857–1874b, 106). Maxims were thus to be guided by reason and justice rather than by positive rules. Bacon therefore distinguished between more important maxims, and less important rules. In the twelfth regula, which stated that pleadings should be departed from, rather than that wrongs should be unpunished, he argued

The law hath many grounds and positive learnings, which are not of the maxims and conclusions of reason, but yet are learnings received, which the law hath set down and will not have called in question: these may be rather called placita juris than regulae juris. With such maxims the law will dispense, rather than crimes and wrongs should be unpunished. (Bacon 1857–1874c, 358–39; cf. 320)

These placita contrasted “with highest rules of reason, which are legum leges, such as we have here collected.” Bacon gave as an illustration of what he meant the qualification of the legal rule that an accessory to a felony could not be proceeded against until the principal had been tried. This rule, Bacon said, did not apply to protect a man who induced a madman to commit a felony, on the grounds that the madman could not be tried. In such a case, the crime had to be punished. However, where the rule in question was “one of the higher sort of maxims,” then the law would rather endure a particular offence to escape punishment than the rule be violated. As an illustration of this, Bacon noted that a penal statute was not to “be taken by equity.” Bacon did not fully articulate what he meant by the distinction between regula and placita (see Coquillette 1992, 44–5). It may however be suggested that he had in mind an equitable application of remedies, in which courts would modify the strict application of a rule of procedure or practice in order to do justice.

Bacon’s unfinished work proved far less influential on common lawyers than Coke upon Littleton, for Coke’s emphasis on the primacy of the judicial forum for legal argument was what held the greatest attraction for lawyers. Nonetheless, the view which Bacon had of the importance of the maxim was one shared by other common lawyers. For they were the legal principles running through the legal system which were both drawn from the experience of past cases and allowed the law to be applied and developed in novel situations. It is thus notable that many of those who stressed the importance of maxims and the process of legal reasoning were wary of putting law into a static institutional form for the very reason that it would stifle development. It was, Dodderidge said, “more convenient and profitable [...] to frame law upon deliberation and debate of reason, by men skilful and learned in that faculty” when a case arose which needed settling, for then it would be resolved with much more care and thought (Dodderidge 1629, 90). Legal reasoning using principles and maxims which were developed from reasoning on ancient foundations allowed the common law to be both static in its fundamentals, and developing at the same time.
2.2. The Common Law and Legislation

The role of the common lawyers in the constitutional debates of the early seventeenth century has attracted much recent attention. Historians have disagreed about whether this era saw a clash between a monarch keen on advancing absolutist claims and those who wanted to restrain the king through the language of common law constitutionalism, or whether there was largely a constitutionalist consensus (see Russell 1990; Burgess 1992; Burgess 1996; Sommerville 1999). Two constitutional questions have attracted particular attention. The first (which is examined in this section) concerns the question of legislation. This involves two issues: the legislative powers of the crown, and the relationship between legislation and the common law. The second (which is examined in the next) concerns the question of whether the crown was bound by the common law, or had prerogative powers beyond it.

The question of legislation was largely a theoretical one, given the irregularity of early seventeenth century parliaments and the relative paucity of statutes. Nevertheless, it could generate much political heat. When, in 1607, John Cowell wrote in his *Interpreter* that the king was “above Law by his absolute power” and could make laws by himself (though he usually made them in parliament), the opinion was so offensive to parliamentarians that the king was forced to condemn the book. When Roger Maynwaring preached a similar doctrine in 1627, he faced impeachment (Cowell 1607 sig. Qq1, tit. “King”; Sommerville 1999, 113–24). Their positions were extreme, however, and the king never sought to act on them. The mainstream position was derived from Fortescue’s notion of a *dominium politicum et regale*, in which statutes did not come from the will of the prince alone, but were made with the assent of the whole realm (Fortescue 1942, 41). In Coke’s phrasing, “There is no Act of Parliament but must have the consent of the Lords, the Commons, and the Royal assent of the king” (Coke 1644a, 25). Nevertheless, agreement on the process of legislation could mask disagreement about its intrinsic nature. In particular, there was disagreement over whether law was made by the king, or came from the consent of the community. The Royalist position echoed the view of the *Digna vox* (cf. Davies 1869–1876b, 25). James I told parliament in 1610 that kings, who were the original lawmakers, subsequently bound themselves “to the observation of the fundamental laws of his kingdom.” Every just king was “bound to observe that paction made to his people by his laws, in framing his government agreeable thereunto, according to that paction which God made with Noah after the deluge.” Nevertheless, “laws are properly made by Kings only; but at the rogation of the people, the King’s grant being obtained thereunto” (McIlwain 1918, 309). By contrast, common lawyers like Coke cited Bracton’s proposition that the king was under God and the law, interpreting this to mean he was bound by it (Coke 1604, preface, sig. B3).
It has sometimes been suggested that men like Coke sought to show that the common law was fundamental; and that part of his argument was that parliament had no power to legislate in contradistinction to the common law. Instead, it is said that parliament was seen as the ultimate court of the common law, guarding its unchanging values, but acting when they needed detailed application or when the law needed pruning. This is a view associated with the work of C. H. McIlwain, who argued that until the civil war, the “high court of parliament” was seen as giving judgments declaratory of a fundamental law (McIlwain 1910 and 1947). While McIlwain’s thinking on fundamental law has been criticised (Gough 1955), the idea that early seventeenth century lawyers saw parliament as a court which declared, but did not make, the law has recently been restated by some historians. Indeed, in the words of one historian, “[t]hat Coke thought of parliament as a sovereign court rather than a sovereign legislator is apparent in all he wrote about the institution” (Burgess 1996, 180; see also Cromartie 1999). A number of comments from Coke can be found to support this view. For instance, he said that “expounding of laws does ordinarily belong to the reverend judges, and sages of the realm: and in cases of greatest difficulty and importance to the high court of parliament” (Coke 1604, preface, sig. B 2; cf. Coke 1613, preface, sig. c). Moreover, in his discussion in the Institutes, he compared the records of parliament with judicial records, and asserted that the Commons and the Lords had the power of judicature, both together and separately (Coke, 1644a, 3). There were clear potential political advantages in treating parliament as a court, for it might allow the two houses to “declare” the law independently of the king, and indeed control the king. The 1620s thus saw some lawyers keen to reassert parliament’s judicial role, notably in passing acts of attainder.

However, the fact that common lawyers spoke of parliament as a court does not mean that they denied it had a legislative role (see Gray 1992, 182–3). Indeed, the power of parliament was stressed repeatedly in the sixteenth and seventeenth centuries (see Goldsworthy 1999). Thomas Egerton, for instance, in his treatise on statutory interpretation, wrote,

The most ancient court & of greatest authority is the king’s high court of Parliament, the authority of which is absolute & bindeth all manner of persons because that all men are privy & parties thereunto. (Thorne 1942, 108)

While speaking of parliament as a court, William Lambard noted that it “has also jurisdiction in such cases which have need of help, and for which there is no help by any law, already in force” (Lambard 1957, 140). Sir Thomas Smith, writing in the 1560s, talked of parliament as the “most high and absolute power” in the realm. He stated that parliament had the power to abrogate old laws and make new, to change the rights and possessions of private men, to establish forms of religion and give form to the succession of the crown, for it “representeth and hath the power of the whole realm both in the
head and the body” (Smith 1982, 78–9). Smith did note that there could be trial or judgment by parliament, but said that “that great council being enough occupied with the public affairs of the realm, will not gladly intermeddle itself with private quarrels and questions” (ibid., 89).

Nor did Coke himself see parliament as a judicial court as opposed to a legislative body. In arguing for Coke’s “judicial” vision of parliament, Burgess cites the following as “the most significant passage of all,” which “opened the way for parliamentary ‘legislation’ to be seen as the rendering of a decision, binding on all other courts” (Burgess 1996, 180–1):

And as every Court of Justice has laws and customs for its direction, some by the Common Law, some by the Civil and Canon law, some by peculiar laws and customs, &c. So the High Court of Parliament Suis propriis legibus & consuetudinibus subsistit. It is lex & consuetudo Parliamenti, that all weighty matters in any Parliament [...] ought to be determined, adjudged, and discussed by the course of Parliament, and not by the Civil law, nor yet by the Common laws of this realm. (Coke 1644a, 14–5)

Omitted from the above quotation, however, is a key phrase—“moved concerning the Peers of the Realm or Commons in Parliament assembled.” This passage indicates that what Coke had in mind was not general judgments about the law of the land, but rather decisions on matters internal to parliament: parliamentary privilege. Moreover, this was precisely not the common law—as clashes in subsequent centuries between the Commons and Courts would show (see Stockdale v. Hansard (1840), English Reports 113: 411, 428). For Coke, lex & consuetudo parliamenti was a separate source of law, the law relating to parliament (Coke 1794, 11b).

Coke did not confuse the function of the courts and those of parliament. Echoing Lambarde, he pointed out that this institution was akin, not to the French parlaments, but to their “Assemblée des Etats” or the German Diet (Coke 1613, preface, sig. c iii; cf. Lambarde 1957, 123). It was the commune concilium of the realm, with every member a counsellor (Coke 1644a, 3). The judges, by contrast, could be called to give assistance in the upper house, but “they have no voices in Parliament” (Coke 1644a, 4). In making this point, Coke was echoing the view of James I in 1616, when he told the judges that their function was ius dicere and not ius dare: “you are so far from making Law, that even in the higher house of Parliament, you have no voice in making of a Law, but only to give your advice when you are required” (McIlwain 1918, 332). For Coke, parliament did have power to make new law: “Of Acts of Parliament,” he said, “some be introductory of a new law, and some be declaratory of the ancient law, and some be of both kinds by addition of greater penalties or the like” (Coke 1644a, 25). Coke was in no doubt about the power of parliament. “Of the power and jurisdiction of the Parliament for making laws in proceeding by Bill,” he wrote, “it is so transcendental and absolute, as it cannot be confined either for causes or persons within any bounds” (Coke 1644a, 36; cf. Coke 1794, 110a).
This was clearly a power to go beyond the common law, for one of the examples he gave was that parliament could legitimize one born before his parents’ marriage. The English rule on legitimation was distinct from that of the civil law, and was cited by Fortescue as an example of its superiority (Fortescue 1942, 93). This was also the point on which, in the Statute of Merton, the medieval barons had famously rejected the civilian rule, when “with one voice [they] answered, that they would not change the laws of England” (Coke 1604, preface; Baker 2002, 490). While he often condemned the effect of statute on the common law, Coke also admitted that “there be certain Statutes concerning the administration of justice, that are in effect so woven into the common Law, and so well approved by experience, as it will be no small danger to alter or change them” (Coke 1604, preface, sig. B3). Once the act was made, he added, it had to be expounded by the judges, according to the intention of those passing the acts, just as they interpreted wills according to the intention of the testator (Coke 1613, preface, sig. c iii). Indeed, no judge of Coke’s generation would have confused the distinction between a statute and a judgment, for by 1600 there was an increasingly large amount of discussion on how to interpret and construe statutes (see Egerton 1942; Behrens 1999; Knafla 1977; Mirow 1999; and chap. 1 above).

If Coke did not deny parliament’s power to make new law, did he nevertheless feel that statutes were subject to review by the judges of the common law? Following his judgment in Dr. Bonham’s Case, Coke has often been seen as the father of judicial review. Under legislation passed in the reign of Henry VIII, the College of Physicians was authorised to fine any person who practised medicine in London without being licensed by the College. It was also given the power to punish malpractice, which included the power to fine and imprison. Thomas Bonham, a medical practitioner, continued his practice after being refused membership by the College, feeling they had no authority to regulate the medical practice of those who held university degrees; whereupon he was gaol by the College. The dispute went on for a number of years, before in 1610 the Common Pleas ruled that the College, despite its statute, had no power to punish Bonham (see Cook 1985). Coke gave a number of reasons for his decision, but the most significant one centred on his objection to the provision in the statute which seemed to make the College judge in its own cause. In his judgment, Coke stated,

And it appears in our books, that in many cases, the common law will control 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 control it, and adjudge such Act to be void. (English Reports 77: 652)

The meaning of this judgment has been much discussed by historians (Plucknett 1926; Thorne 1938; Berger 1969; Gray 1972; Stoner 1992, 48–62; Burgess 1996, 181–93; Boyer 1997, 82–93; Tubbs 2000, 155–61). On the one
hand, it has been suggested that in the case, Coke was only putting forward a maxim of statutory interpretation, arguing that judges should make narrow constructions of unreasonable statutes. On the other, it has been urged that laws were to be tested by the standard of a fundamental law, which opened the way for judicial review.

A close examination of the case suggests that Coke was engaged rather in judicial interpretation of a statute than in its overturning. Coke gave a number of reasons for finding for Bonham, which rested on a close reading of the statute. He ruled, for instance, that the College was not by its statute constituted a court, and so had no power to gaol for contempts; and that it had no power by its statute to gaol Bonham for practising without a licence (English Reports 77: 651, 655). Moreover, even Coke’s dictum can be read as advocating a form of statutory interpretation rather than nullification. As has been shown in Chapter 1, judges were sometimes prepared to go far in interpreting statutes against their very words. Coke’s statement was not intended to suggest judges could strike down statutes which merely violated natural reason. His use of the words “common right,” which he used elsewhere to mean the common law, suggested that it would be for the judges to “control” statutes by reading them in the context of the broader common law, using their “artificial” reason in this process (Coke 1794, 142a–b; cf. Burgess 1996, 182–4). Moreover, in the case which he reported immediately after Bonham’s Case, Coke spoke of London customs “which are against common right” but which were allowed “because they have not only the force of a custom, but are also supported and fortified by the authority of Parliament” (The Case of the City of London (1610), English Reports 77: 658, 664). This might suggest he did not have in mind a power of nullification. Nevertheless, the words which Coke used in his report of the case—with its bold declaration that statutes could be judged void—were broad and controversial, seeming to suggest a greater power of review. Coke knew that they were provocative, and when challenged by the crown to revise his report, he held his ground (Boyer 1997, 87–8). Moreover, his report drew sharp criticism. Lord Ellesmere for instance commented that it was not for the judges, but for “the King and Parliament to judge what was common right and reason” (English Reports 72: 932; cf. Knafla 1977, 306–7).

Coke and other lawyers certainly saw some limits to parliament’s authority. As Thomas Hedley saw it in 1610, parliament derived its authority from the common law, not vice versa:

But you will say the parliament has often altered and corrected the common law in diverse points and may, if it will, utterly abrogate it, and establish a new law, therefore more eminent. I answer set a dwarf on a tall man’s shoulders, and the dwarf may see further than the tall man, yet that proves him not to be of a better stature than the other. The parliament may find some defects in the common law and amend them (for what is perfect under the sun), yet the wisest parliament that ever was could never have made such an excellent law as the common law is. But that parliament may abrogate the whole law, I deny, for that were includedly to take away the power of the parliament itself, which power it has by the common law. (Foster 1966, 2: 174)
Parliament itself was not omnipotent. Coke pointed out that one parliament could never bind a subsequent one, “for it is a maxim in the law of the parliament, quod leges posteriores priores contrarias abrogant” (Coke 1644a, 43). For common lawyers, there were certain essential constitutional foundations which could not be undermined by the statute of one parliament. With this in mind, it is worth noting that the small handful of English cases in the following century claiming a power of judicial review each involved the issue of allowing a man to be judge in his own cause (Day v. Savadge (1615), English Reports 80: 235; The City of London v. Wood (1702), English Reports 88: 1592). Statutes conferring such powers would in effect abolish the jurisdiction of the courts, and remove one of the foundations on which the polity rested. Coke’s notion of judicial review (and that of some of his successors, such as Holt) may thus have been limited to voiding laws which were perceived to remove one of the institutional foundations of the state, rather than reviewing laws for any lesser kind of unconstitutionality (cf. Hamburger 1994).

Yet if this was the understanding which explains Coke’s broad wording in Bonham, it was not one which he articulated clearly. Indeed, in the world of practical politics, he often showed an awareness more of parliament’s strength than its weakness. Thus, in 1628, he looked for constitutional security in ancient statutes, and warned of the consequences of parliamentary acknowledgement of royal sovereign powers. It was Coke who read a draft of the Petition of Right to the House of Lords, protesting against the levying of forced loans and imprisonment per mandatum domini regis. In the petition, a range of medieval statutes from de Tallagio Non Concedendo to Magna Carta were cited to show that the king was acting against the rights of the people: “by which the statutes beforementioned, and other the good laws and statutes of this realm,” the petition declared, “your subjects have inherited this freedom, and they should not be compelled to contribute any tax, tallage, or aid, or other like charge not set by common consent in parliament” (Johnson et al. 1977–1983, vol. 3: 339; cf. Gardiner 1899, 67). At another point in the debates, Coke noted that Magna Carta, “with the statutes, are absolute” (Johnson et al. 1977–1983, vol. 3: 503). In these debates, Coke was seeking to anchor the people’s inheritances in firmer evidence than the collective judicial memory. Nor did he seem to doubt parliament’s power to alter the constitution. Warning against accepting the Lords’ resolution saving the king’s intrinsic prerogative power, he stated, “We are now about to declare and we shall now introduce and make a new law, and no king in Christendom claims that law, and it binds the subject where he was never bound.” Coke went on: “Never yet was any fundamental law shaken but infinite trouble ensued.” His argument was not that it could not validly be done, but rather that it could not safely be done (Johnson et al. 1977–1983, vol. 3: 95).
2.3. The Common Law and the Crown

The nature of the royal prerogative, and the question of whether the king was bound by the common law, were much more pressing issues for lawyers in the era of the first two Stuart kings than the issue of the power of parliament. They raised a central question over the relationship between common law and other parts of the “lex terrae.” In his commentary on Littleton, Coke listed fifteen “diverse laws within the realm of England.” He began with the lex coronae, the lex et consuetudo parliamenti, and the law of nature, before going onto the famous threesome of common law, statute and local customs. Thereafter he listed jus belli, canon law and civil law in certain courts in certain cases, lex forestae, lex mercatoria and some local laws (Coke 1794, 11b). These were listed separately. Instead of being set out as features of a unified common law, they appeared as a number of jurisdictions, which sat together, sometimes competing for litigation, within a recognised legal system, but not necessarily subservient to the common law (cf. James I’s views in McIlwain 1918, 330–3).

The most contentious of them was the lex coronae. The royal prerogative was often treated (in the words of Chief Justice Hobart in 1623) as “the law of the realm for the King, as the common law is the law of the realm for the subject” (English Reports 78: 173; cf. Coke 1794, 15b, 90b). This law regulated such matters as how the crown descended and how it could acquire and dispose of rights in things. There was relatively little comprehensive discussion of the crown’s prerogative powers in the late sixteenth century (but see Staunford 1567). Such as there was tended to focus little on the public law powers of the king as a governor. However, in the early seventeenth century, when the crown increasingly sought to use its prerogative powers to raise revenue at the expense of the private property of the subject, the question of how far the king had powers beyond the reach of the common law became more contentious.

Revisionist historians have recently argued that absolutist positions were only taken by a small group of civil lawyers in England, and that most sought to argue on more common ground. There was clearly widespread agreement on some crucial issues. It was a constitutional maxim that “the laws of England are the high Inheritance of the Realm,” so that any act of the king alone which went against these laws was not valid unless it received its “life and strength from some Act of Parliament” (Fuller 1607, 3; cf. Burgess 1996, 158). The king could not legislate or tax—and thus interfere with private property rights—without calling parliament. Nonetheless, a question which was more open to debate was whether by his prerogative the king had a power of government, which might allow him at time of emergency to act in a way which would interfere with private property without consent; and whether such a power was beyond the scrutiny of the courts.
In this context, some lawyers and judges began to use the language of the king’s “absolute” and “ordinary” powers (see Oakley 1968). This language was used particularly in 1606 in *Bate’s Case*, in which the court of Exchequer had to consider the case of a trader who had refused to pay an imposition levied on imported currants, which had not been sanctioned by parliamentary authority. While there were many precedents affirming that the king could not raise taxes without parliamentary assent, there was also established authority that the king’s prerogative powers included the regulation of overseas trade. The king’s view prevailed; and the case was notable for a comment of the Chief Baron, Sir Thomas Fleming:

> The King’s power is double, ordinary and absolute [...]. That of the ordinary is for the profit of particular subjects, for the execution of civil justice, the determining of meum; and this is exercised by equity and justice in ordinary courts, and by the Civilians is nominated jus privatum, and with us Common Law [...] The absolute power of the King is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people and is salus populi; [...] and this power is [not] guided by the rules which direct only at the Common Law, and is most properly named policy and government. (Howell 1816–1826, vol. 2: 389)

Such language was echoed by others. Sir John Davies, whose support of the king’s extra-parliamentary methods of raising revenue would lead to his being offered the chief justiceship of the King’s Bench in 1626, drafted a work on *The Question concerning Impositions*, which was not published until 1656. In it, he discussed certain prerogatives, including the right to make war, pardon offenders and grant honours, as well as levying impositions on foreign trade, as areas where the king had “sole and absolute power Merum imperium & non mixtum, and which prerogative is as antient as the Crown, and incident to the Crown by the Law of Nations” (Davies 1869–1876b, 11–2). The king thus had a double power. In his ordinary power of jurisdiction, he ministered “justice to the people, according to the prescript rule of the positive law.” By contrast, matters of government, trade, and commerce rested with the crown “as a principal prerogative.” In having this double power, the king “doth imitate the Divine Majesty, which in the Government of the world doth suffer things for the most part to pass according to the order and course of Nature, yet many times doth shew his extraordinary power in working miracles above Nature” (Davies 1869–1876b, 25–6). These prerogatives were not granted to the king by the people, but were kept by the king when positive law was established. They could not be removed from the king by any statute, for his “prerogatives are the sunbeams of his crown, and as inseparable from it as the sunbeams from the sun” (Davies 1869–1876b, 89). Answering the objection that if the king levied impositions, this would deprive people of their property without their consent, Davies retorted that when subjects lived under a “royal monarchy,” they consented to be ruled by the law which gave the king these powers.
Coke later observed of the decision in Bate’s Case, that “the common opinion was, that that judgement was against law” (Coke 1642, 63). In a number of disputes with the crown over extra-parliamentary revenue, leading to the famous case of Ship Money case in 1637–38 (Howell 1816–1826, vol. 3: 825–1316), common lawyers attempted to marshal arguments to control the crown’s use of the prerogative, to deny the crown any “absolute” power. However, lawyers had difficulty making a conclusive argument that would subject the crown to the common law. The ambiguity of the position can be seen from some comments of Francis Bacon’s. On the one hand, Bacon stressed the king’s double power, in a way analogous to that of Fleming and Davies (Bacon 1857–1874g, 373). On the other, he noted in Calvin’s Case: “although the king, in his person, be solutus legibus, yet his acts and grants are limited by law, and we argue them every day” (Bacon 1857–1874a, 646). The common lawyers’ problem was that the prerogative itself had two different aspects: firstly, there were the crown’s powers regarding its property and patronage; and secondly, there were its broader governmental powers. The first was clearly subject to control by the courts. As Edmund Plowden put it, “the law has so admeasured [the king’s] prerogatives that they shall not take away nor prejudice the inheritance of any” (Plowden 1816, vol. 1: 236; English Reports 75: 359; cf. Coke 1642, 63; Coke 1644b, 84). When lawyers cited his maxim, it was to interpret the extent of the king’s power to grant privileges or use his property in a way which would harm others’ rights. They were not addressing the governmental problem of what he could do for the sake of the commonwealth. As James Morice put it, in a Reading in the Middle Temple in 1578, “The Law has rightly distinguished between the Sovereign rule and government of the king, and the right liberties and Inheritances of the Subject.” Thus, there were limits to the king’s power to grant monopolies, which might deprive individuals of their trade, but in cases concerning royal government, he had a pre-eminence above the law (Morice 1578, f. 248–9; cf. Weston and Greenberg 1981, 11). James I himself acknowledged the distinction, when telling the judges in 1616 to keep within their bounds:

for my part, I desire you to give me no more right in my private prerogative, than you give to any subject; and therein I will be acquiescent: As for the absolute prerogative of the crown, that is no subject for the tongue of a Lawyer, nor is lawful to be disputed. (McIlwain 1918, 333)

The nature and limits of legal control over the king were also seen in the debate over his power to dispense with statutes. In Bacon’s words, statutes could be suspended by the king’s sole authority for causes known to him; and this “inherent power” was “exempt from controlment by any Court of Law” (Bacon 1857–1874g, 373). In spite of this, lawyers did seek to set some limits the king’s powers. It was contended that the king could not by his licence prejudice individual subjects, or allow the commission of a wrong which was malum in se. He could only dispense with statutes dealing with wrongs which
were *mala prohibita* (Egerton 1942, 168–9; Knafla 1977, 303). In the *Case of Monopolies*, Coke controversially sought to extend this further, saying that the king could not dispense with statutes made *pro bono publico*, though his assertion was denied by Ellesmere (*English Reports* 77: 1260, 1265n; cf. Cromartie 1999, 99–100). However, legal discussions of the king’s power to dispense with law tended to focus on the problem of the crown using the prerogative to benefit itself, or particular subjects, at the expense of the wider community, rather than with matters pertaining to the government of the realm. For example, Plowden wrote, regarding a power of pardon: “if a bridge is repairable by a subject, and it falls to decay, and the King pardons him from repairing it, yet this shall not excuse him, but he shall repair it notwithstanding, because others, viz. all the subjects of the realm, have an interest in it” (*Nichols v. Nichols*, *English Reports* 75: 725; cf. Coke 1644b, 154). Thus, the king was not permitted to harm private rights incidentally by the exercise of his prerogative. However, there was also a higher form of prerogative, which could not be removed. As Coke put it in his Report of the *Case of Non Obstante*:

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 [...] for upon commandment of the King, and obedience of the subject, doth his government consist [...] but in things which are not incident solely and inseparably to the person of the King, but belong to every subject, and may be severed, there an Act of Parliament may absolutely bind the King; as if an Act of Parliament [were passed] to disable any subjects of the King to take any land of his grant, or any of his subjects [...] for to grant or take lands or tenements is common to every subject. (*English Reports* 77: 1300)

It has been argued that if there were matters which were within the “absolute” power of the king, this only meant that this power was discretionary in the sense of not being subject to appeal. This discretion, it has been suggested, still had to be exercised according to law, and therefore respecting the property rights of subjects (Burgess 1996, 30–7). Thus, when William Lambarde spoke of the absolute power of justices of the peace in certain cases, he said that this “absolute authority is to our Law better known by the name of Discretion” (Lambarde 1602, 54, quoted in Burgess 1996, 31). Coke himself wrote that even though commissioners of sewers were authorised to act “according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law” (Coke 1605, 99b). Elsewhere, he wrote

*Discretio est discernere per legem quid sit justum*. And this description is proved by the Common law of the land, for when a jury do doubt of the law, and desire to do that which is just, they find the special matter, and the entry is, *Et super tota materia, &c petunt discretionem justiciariorum [...]* that is, they desire that the Judges would discern by law what is just, and give judgment accordingly. (Coke 1644a, 41; cf. *Held v. Boyer* (1614), *English Reports* 80: 1063)
This appeared to say that all discretion was a matter of judicial knowledge: that artificial reason determined all matters of discretion. On the other hand, Coke elsewhere spoke of “the crooked cord of private opinion, which the vulgar call discretion,” which he contrasted with “the golden and streight metwand of the law” (Coke 1794, 227b; Coke 1644a, 41). He realised that there was a discretion which was beyond the control of the common law. Indeed, the most obvious example of this was the Chancellor’s jurisdiction, so distrusted by Coke as being the judgment of one man alone, without a jury. If the king’s absolute power was discretionary, then, it was not necessarily bounded by laws.

Try as they might, common lawyers in a number of disputes from Bate’s Case to the case of Ship Money in 1637 were unable convincingly to argue that the king’s prerogative powers of government were subject to control by the common law. If it was agreed that the king had no authority to take the property of subjects without their consent, it was also agreed that he could, in emergencies, use his prerogative power for the sake of the good of the kingdom. In cases such as Ship Money, the central question turned on whether an emergency in fact existed, and who could determine this question. Yet this was a matter on which the common law could give no clear answer.

2.4. Common Law and Equity

Besides seeking to control the prerogative powers of the crown, common lawyers such as Coke were concerned about the powers of the rival jurisdiction of the Court of Chancery. After the tempestuous Chancellorship of Cardinal Wolsey, there had been much co-operation between common lawyers and Chancery (Jones 1961; Jones 1967). But by the era of Ellesmere and Coke, it was contested once more. Part of the rivalry was simply over business; but much of it was political and ideological, and derived from the Chancery’s position (in James I’s words) as “the dispenser of the king’s conscience” (McIlwain 1918, 334). John Cowell’s entry in his Interpreter on the “Chancelor” stated that whereas all other Justices in our commonwealth, are tied to the law, and may not swerve from it in Judgement: the Chancellor hath in this the kings absolute power, to moderate and temper the written law, and subjecteth himself only to the law of nature and conscience, ordering all things iuxta aequum & bonum. (Cowell 1607, sig. N2v)

This was a rather less controversial statement than his description of the king’s absolute powers elsewhere in the work, for it was common enough by 1600 to describe the Chancellor’s jurisdiction in equity as “absolute” (e.g., Staunford 1567, f. 65; West 1627, 177). Nevertheless, in early Stuart England, such language was apt to make common lawyers uncomfortable. Coke certainly preferred the word “extraordinary” when describing the equitable jurisdiction of the Chancellor (Coke 1644a, 79).
The contest between the common law courts and the Chancery came to a head in the clash which developed between Coke as Chief Justice of the King’s Bench, and the Lord Chancellor Ellesmere (supported by Bacon) between 1614 and 1616, and which resulted in Coke’s dismissal from the bench. The clash centred on Ellesmere’s practice of examining suits in Chancery after they had received a final judgment at common law. Equity lawyers justified hearing such cases by saying that their court did not challenge the right, but only directed the conscience of the parties. As Ellesmere put it in 1615, “when a judgment is obtained by oppression, wrong and a hard conscience, the Chancellor will frustrate and set it aside, not for any defect or error in the judgment, but for the hard conscience of the party” (Earl of Oxford’s Case, English Reports 21: 487). In any event, they did not see their court as subject to the control of the common law. As William West put it in 1594, so great was the power of the Chancery “that judgements therein given are not to be controlled or reversed in any other court, than the high court of parliament” (West 1627, 177). Common lawyers like Coke were of a different view. They feared that this practice would undermine their judgments, and might lead to endless litigation as those who lost at common law sought to reopen their cases in equity. They also felt that the practice was against the statute 4 Hen. IV c. 23 which stated that judgments in the king’s courts could only be undone by attain or writs of error, and against a decision of the judges in Finch v. Throgmorton (see English Reports 81: 101).

Matters came to a head in a series of disputes after Coke’s appointment to the King’s Bench in 1613 (see Knafla 1977, 159ff; Baker 1986a). The first case involved one Richard Glanvill, a jeweller, who had obtained money on the sale of a jewel which was falsely represented to be a diamond. Glanvill subsequently obtained judgment for the sum, by apparently fraudulent means. The purchaser of the stone then sought to recover in Chancery, and obtained a decree. However, Glanvill refused to pay, and was committed to gaol for contempt of Chancery. He then sued a writ of habeas corpus in the King’s Bench for his release, which he obtained, was recommitted by Ellesmere, and released again when the King’s Bench found the return to the writ of habeas corpus—bad for generality. This was not the only case where the question of whether the King’s Bench could examine Chancery decrees in cases brought on habeas corpus was raised. In the Earl of Oxford’s Case’s, Ellesmere made clear his views of Chancery’s right to examine the conscience of the party, and when the defendants in that case, committed to gaol by the Chancellor for refusing to answer the plaintiff’s bill, sought a habeas corpus, the King’s Bench judges reiterated their view that the common law courts would be undermined if their judgments could be questioned in Chancery. However, they desisted from directly challenging Ellesmere by releasing the prisoners (Dr Googe’s Case (1615), English Reports 81: 98, 487). While no further habeas corpus ap-
plications were brought, Glanvill sought to indict his antagonists in the Chancery suit by using the statute of *prae munire*, in a proceeding apparently encouraged by Coke. This statute (27 E. 3 c 1) punished those who “sue in any other court to defeat or impeach the judgments given in the king’s courts,” and was aimed at those who sued in courts outside the realm—particularly in Rome—without the assent of the monarch. When the grand jury failed to find a true bill, Coke declared to the assembled lawyers that “whosoever shall set his hand to a bill in any English court after a judgment at law, we will preclose him from the bar for ever speaking more in this court” (Knafla 1977, 173; Baker 1986a, 217).

In the context of these challenges to his authority, Ellesmere made a complaint to the king, and asked for his personal resolution of the affair, asking whether “upon apparent matter of equity,” which the common law judges could not resolve, the Chancery could give relief, and whether there was any statute to restrain the Chancellor in the exercise of his powers (see Bacon 1857–1874d, 350). Ellesmere had already composed a treatise on the question over the summer of 1615 in which he showed that the statute of *prae munire* could not apply to the Chancery since it was one of the king’s courts. The matter was investigated by the king’s counsellors, rather than the judges, and in June 1616, the king gave his resolution in the Star Chamber. In his speech, he noted that each court should keep within its expected bounds. However, he declared that the King’s Bench had no jurisdiction to hear cases of *prae munire* against the Chancery, for “how can the King grant a *prae munire* against himself?” The king went on: “I mean not, the Chancery should exceed its limit; but on the other part, the King only is to correct it, and none else” (McIlwain 1918, 334). The king thereby upheld the authority of the Chancellor to hear cases after a judgment at common law, although he encouraged suitors to abide even by unjust judgments, rather than continue to litigate. Chancery’s right was confirmed by a decree (Spedding 1869).

The victory of the Chancery was followed by the humiliation of Coke and the death of Ellesmere, and the Great Seal passed to Bacon. On taking his seat in Chancery in 1617, Bacon made it clear that he was not ambitious to undermine the jurisdiction of the common law, and that he would exercise the power to issue decrees after judgment cautiously, and would not seek to subvert the law (see Bacon 1857–1874f, 182–93). Bacon’s views on the equitable function can be seen in *De Augmentis Scientiarum*, where he spoke of the need for praetorian courts. “It is of the greatest importance to the certainty of laws,” he wrote, “that Praetorian Courts be not allowed to swell and overflow, so as, under colour of mitigating the rigour of the law, to break its strength and relax its sinews, by drawing everything to be a matter of discretion” (Bacon 1857–1874b, 96). Moreover, he was insistent on the need to keep “praetorian” and “regular” courts apart, for if they were mixed together, “discretion will in the end supersede the law” (Bacon 1857–1874b, 96). Though venal in office, Ba-
con also presided over important reforms in the court’s practice, and restored a harmony between the workings of the courts. This harmony was maintained by his successor, Lord Keeper Williams who declared that he acted as keeper of the king’s conscience, which could never be “in enmity and opposition with his laws and statutes” (Baker 1986a, 227). Moreover, the harmony was largely maintained throughout the rest of the century, although there were again to be some criticisms that equity procedure threatened the common law after the Restoration and in the early 1690s (see Macnair 1997).

While Chancery and common law worked in harmony after 1616, the debate flared up again in the 1640s, with the publication of the third and fourth volumes of Coke’s Institutes, in which he discussed Chancery’s jurisdiction, and put forward his own view of the arguments of 1616 (Coke 1644b, 122–3; Coke 1644a, 86). In reply, an anonymous Arguments, Proving from Antiquity the Dignity, Power and Jurisdiction of the Court of Chancery was written, although it was not to be published until 1693, when it was included in a volume of Reports of Cases Taken and Adjudged in the Court of Chancery in the Reign of Charles I, Charles II, and James II. This tract set out the opinions of counsel as given in 1616, and also drew on the arguments which Ellesmere had put forward in a tract written at the time of the crisis, and which were themselves published in 1641.

As these publications revealed, there was more at issue in 1616 than the personal rivalries of the participants, for the dispute revealed some contrasting views of the nature of English law. It showed firstly that equity and common lawyers had different notions of legal reasoning. For Coke and the common lawyers, as has been seen, the essence of law was to be found in the artificial reasoning of lawyers practising in common law courts. Although Chancery men accepted St. German’s views that equity should be guided by law, the very notion of equity which they derived from Aristotle suggested the need to test the hard rule of law by a notion of justice which went beyond it. Using Aristotelian terminology, William West’s Symboleography, written in 1594, thus stated that the efficient cause of equity was God, while its material cause comprised the law of nature, the law of nations, and good manners. In contrast to the vision of a law which was rooted in a customary ancient constitution, as interpreted by the common law judges, equity lawyers argued that both kinds of court “join in the Manifestation of God’s glory” (English Reports 21: 486), seeking justice. Discussing the Chancery in 1616, Sir Anthony Ben of the Middle Temple noted that “justice is her plain song, as it is the plain song of the law.” If the function of equity was “to supply, not to subvert the fundamental laws of the land,” one sometimes needed to go beyond strict law (Ben 1615, 211). For example, according to the rules of the common law, only the eldest son inherited as heir: but many fathers went beyond this strict law when they sought to provide for their younger children. “If then a private man may see an equity and a justice in his own heart, which the law sees not,”
he went on, it could be presumed that the Chancery could do right “though not by the light of the law” (Ben 1615, f. 214v). For West, equity was like an apothecary’s store, which was full of all manner of drugs, but which needed a skilful apothecary so to mix them to make the medicine effective. In contrast to the later quip of John Selden, who criticised the conscience of the Chancery for varying according to the length of the Chancellor’s foot, West compared equity with a shoe shop, in which every man would be sure to find a shoe to fit (West 1627, 175v).

This meant, secondly, that they had a different view of history from that put forward by Coke. Equity lawyers were able to point not only to Coke’s own admission in Calvin’s Case, “that before judicial or municipal laws were made, Kings did decide causes according to natural equity, and were not tied to any rule or formality of law, but did dare jura” (English Reports 77: 392). They could also invoke his revered medieval Mirror of Justices, which stated that cases had been judged by equity before customs were written and made certain (Whittaker 1895, 9; Anonymous 1902, 579). Ben noted “that equity is ancieneter than law” and that the Chancery should not be limited by her “younger brother” (Ben 1615, f. 211v). Citing the comment made by Serjeant Catesby in 1470 that the common law was an ancient as the world, he observed,

Catesby surely must be intended to speak of that law which is reasonable, equal, supple and mild, which is the law of nature or the law of reason which is the law of justice; let us not impound all reason into book cases and law authorities (though they also make manifest for us) but if law be universal reason let us examine it by that reason that is every man’s reason and then for whether this be reason. (Ben 1615, f. 207v)

Coke’s views on the history of the courts was also open to challenge. In the fourth part of his Institutes published in 1644, Coke set out a history which argued that while the Chancery had existed in the time of Alfred, its equitable jurisdiction developed much later, only being recognised by legislation in the later middle ages (Coke 1644a, 82–3). However, this was not the only version available. In Archeion, written in 1591, and published in 1635, William Lambarde dated the creation of law courts to the reign of Alfred (Lambarde 1957, 15). Lambarde’s history accounted both for the presence of a common law which derived from the consent of the people, and a distinct equitable jurisdiction derived from the king. In his view, government originated when a people racked by conflicts submitted themselves to a ruler for the sake of peace, initially accepting his commands as laws. Since such kings turned their power to personal gain, the people subsequently devised laws and rules of justice which bound the ruler. According to this vision, it was the king who set up the courts in which people were to be given remedies, but the courts applied the rules of justice derived from the people themselves. Nonetheless, the king himself retained an obligation as “immediate minister of justice under God” to provide them with justice. This meant
that besides his court of mere Law, he must either reserve to himself, or refer to others a certain
sovereign and pre-eminent Power, by which he may both supply the want, and correct the rig-
our of that positive or written law, which of itself neither is nor can be made such a perfect
Rule, as that a Man may thereby truly square out Justice in all Cases that may happen.
(Lambarde 1957, 42–3)

Law was thus to be corrected by the “conscience of the prince” (Lambarde 1957, 17). For Lambarde, the equity jurisdiction of the Chancery was to be traced to the era when the King’s Bench ceased to follow and advise the king, and as a result became more limited in its jurisdiction. At that point, the king conferred on the Chancellor “his own regal, absolute, and extraordinary pre-
eminence of Jurisdiction in Civil Causes, as well for amendment as for supply of the Common Law” (Lambarde 1957, 39; cf. Hake 1953, 140).

Other lawyers took up the notion that the Chancery derived its jurisdiction
from the king’s continuing duty to see that justice was done. Ben argued that
the king had the duty to dispense justice with mercy, which was supported
both by scripture (Proverbs 20: 28) and by his coronation oath (e.g., Ben
1615, f. 206; Anonymous 1902, 578). Pointing out that no one disputed the
king’s power to pardon offenders, Ben argued that to deny him the power to
assist his honest subjects with equity in civil cases would be “a lopping of an
arm of goodness from the body of Majesty” (Ben 1615, f. 206). Defenders of
equity could trace the history of their institution to this exercise of the king’s
powers, rather than to statute or usurpation. This point was made by the au-
thor of the Arguments, writing at a time when Lambarde’s work had been
published, and had been supplemented by the historical researches of John
Selden and Sir Henry Spelman. He maintained that in Saxon times, the king
gave equitable relief to all his subjects in his aula regis. It was only after the
conquest that this body divided into four courts, and only in the reign of
Edward I that a legal profession emerged. According to the author,

It cannot be denied but that the Chancery, as it judgeth in Equity, is Part of the Law of the
Land, and of the ancient Common Law; and let it not be imputed to the Chancery, that the
Lord Chancellor hath too great an arbitrary Power in making of his Decrees: For if it be well
observed, the Judges use as great a Power in declaring what is law, as the Lord Chancellor doth
in declaring what is Equity; and if either be covetous, timorous or malicious, as much Hurt may
be done by the one as by the other; whereas in Truth, neither of them ought to proceed in
doubtful Cases without the Judgment of Parliament. (Anonymous 1902, 591; cf. Egerton 1641,
1–2, 8; Anonymous 1651, 22)

Earlier, Ben had equally argued that the court of Chancery was as much a
court by the law as any other court in the land, the Chancellor as warranted in
his office as the sheriff.

As with the dispute over the royal prerogative, it was not merely the politi-
cal power of the king which prevented the common lawyers’ view prevailing.
For they were unable to make a legal argument which subjected equity to the
common law. However, defenders of equity did not seek to make the court
into an instrument of royal power. Rather, they saw the two courts as complementary. Why, Ben puzzled in 1615, “should law and equity become now of a sudden incompatible who have so long time been found profitable servants of the state?” (Ben 1615, f. 215). For him, it was more important to “look to the work, and not to the instrument by which the work is wrought” (ibid., f. 211). In Lambarde’s view, just as two poisonous herbs when skilfully mixed made a good medicine, so law and equity when well compounded made “a most sweet and harmonical Justice” (Lambarde 1957, 44; cf. Anonymous 1902, 577). Again lawyers reiterated the points that courts of law were blind to questions of fraud, trust and confidence which the Chancery could unravel. When arguing against the applicability of 4 Hen. IV c. 23, the author of the Arguments pointed out that if a man was brought before the Chancery having previously obtained judgment at law, “he cannot be said to answer anew, having never answered before” (Anonymous 1902, 590). The courts asked different questions, for they had different machineries and procedures. There were, he pointed out, a number of functions the Chancery performed which could not be done by the common law courts. And if they could perform those functions, “were not this to erect a Court of Chancery in themselves, and to confound the Courts of Equity and Law together?” (Anonymous 1902, 580).
Chapter 3

THE AGE OF SELDEN AND HALE

The first half of the seventeenth century saw continuing disagreements regarding the power of the crown, and its relationship with the law. The debate over the king’s power was revived after the accession of Charles I in 1625, particularly after he sought to finance a war with Spain through a forced loan, and used martial law powers to billet troops on the civilian population (see Cust 1987, chap. 1; Boynton 1964). In both cases, the legality of the king’s actions came under scrutiny. For his defenders, there were certain areas of prerogative power which lay beyond the remit of the common law. “Execution of martial law is necessary where the sovereign and state think it necessary,” the admiralty judge Sir Henry Marten told the Commons in April 1628: “Neither does it derogate common law in the execution of it” (Johnson et al. 1977–1983, vol. 3: 548). For the common lawyers, however, this was a dangerous argument, for they were reluctant to admit that the crown had powers beyond the scrutiny of the law. As Sir Edward Coke retorted to Marten, “Our common law bounds your law martial” (ibid., 550).

The extent of the king’s prerogative powers were particularly questioned after five knights were imprisoned in 1627 for refusing to pay the forced loan. When they obtained a writ of habeas corpus, the crown stated that they had been “committed by his majesty’s special commandment.” Although such a committal without cause shown appeared to violate Magna Carta, the law on the matter was ambiguous (Baker 2002, 472–4). As recently as 1615, the judges, including Sir Edward Coke, had accepted as lawful a similar return to a writ of habeas corpus, which had not shown cause, but simply recorded a committal by the mandate of the Privy Council. In that instance, the men detained were suspected of involvement in a gunpowder treason plot (Salkingstowe’s Case, English Reports 81: 444). However, when the knights were gaol for refusing to pay money not authorised by parliament, many began to argue that this was an unlawful exercise of crown power. The detentions were first challenged in the King’s Bench, where no formal judgment was entered, and later in parliament. The question was again raised whether the king’s powers were part of, or distinct from, the common law.

The parliament of 1628 continued to assert and affirm the ancient rights of Englishmen, notably in securing the passage of the Petition of Right, which addressed the grievances of the raising of revenue by means of forced loans, the use of martial law and the billeting of troops, and imprisonment without cause shown (see Guy 1982; Popofsky 1979; Reeve 1989, chap. 2). The debates on the petition give an important insight into common lawyers’ thought. The lawyers remained keen both to harness prerogative to law, and to deny
the king any notion of sovereignty. When the Lords proposed that the petition should state that they were acting “with a due regard to leave entire that sovereign power wherewith your Majesty is trusted,” so that it would not be seen as an attack on the prerogative, Coke answered:

I know that prerogative is 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 of law; and then the building must needs fall [...]. If we grant this, by implication we give a “Sovereign Power” above all laws. (Johnson et al. 1977–1983, vol. 3: 495, 502–3; cf. Burgess 1992, 195–200)

For Coke, it was the common law which was sovereign; and prerogative was part of that law. Nonetheless, omitting the proposed clause did not confirm that the king did not have prerogative emergency powers, and the question of the extent of the crown’s powers remained ambiguous.

While the king reluctantly accepted the petition, being in dire need of subsidies, this experience taught him the lesson that calling parliament was more trouble than it was worth. Abandoning parliament, he now sought to rule alone, raising revenue by the use of extraordinary levies, such as ship money, from 1634 onwards. Although it was no innovation to raise money in this way to pay for a fleet, the levy was controversial since it was exacted on inland as well as coastal counties, and was levied on a regular and sustained basis. As had occurred with the forced loan, some refused to pay, and in 1637 proceedings were taken against John Hampden for his failure to pay. The crown succeeded in the litigation, though the judges divided seven to five. At issue was the crown’s right to use its prerogative powers to raise funds, and thereby to interfere with the property of the subject without their consent. There was much agreement in the case that the crown could raise money in an emergency for the defence of the kingdom, and that the king was the sole judge of what constituted an emergency. But Hampden’s counsel argued that in the absence of a clear and immediate danger, the king should call parliament to authorise a tax. It was the king’s use of his prerogative powers which was causing controversy, and raising deeper questions about how and when he could use them (see Keir 1936; Sharpe 1992, 721–8).

The heightened political tension of the era from the mid-1620s to the civil war, which broke out in 1642, created a new incentive to develop a vision of the common law which would encompass both private law adjudication and the public law position of the crown. Coke’s vision of the law as artificial reason, elaborated in the courtroom by skilled practitioners, reflected the practising common lawyer’s view of how legal disputes were solved. However, it did not comfortably explain either the crown’s role in public affairs, or the role of legislation. It seemed ultimately to rest either on an assertion of the immemoriality of the common law, which made the crown and parliament somehow subservient to it, or on an assertion of judicial expertise. Neither proved con-
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vincing, in an age when Coke’s version of history came under attack. In this context, a different vision of the common law emerged, which sought different foundations for its authority, and for the crown and parliament’s role within it.
The central theorists of this new vision were Coke’s contemporary, John Selden (1584–1654), and his disciple Sir Matthew Hale (1609–1676). These men began to turn common law theory into a more positivistic direction.

3.1. The Positivism of Selden and Hale

Selden did not see the law as a process of expert reasoning, but as a set of positive rules which could be traced. “All the law you can name,” he argued, “is reduced to these two: it is either ascertained by custom or confirmed by act of parliament” (Johnson et al. 1977–1983, vol. 3: 33). Far more than Coke, he undertook painstaking research into the history of the common law, to trace the origins of its doctrines and institutions. His historical works included scholarly editions of medieval texts, including Fortescue (Selden 1725d) and Eadmer (Selden 1623), an introduction to a new edition of Fleta (Selden 1925), general overviews of the development of English law in the middle ages (Selden 1615; Selden 1683), and more detailed scholarly works on particular topics, such as his History of Tythes (Selden 1725c) and his Titles of Honour (Selden 1725e). In these works, Selden rejected a Cokean veneration of the antiquity of the common law. All laws, he retorted, were equally ancient, and equally founded in nature. However, they had taken different paths, and “hence it is, that those customs which have come all out of one foundation, nature, thus vary from and cross one another in several common-wealths” (Selden 1725d, 1891). Moreover, laws were subject to change. From their beginnings, laws increased, altered, or were interpreted, so that, save for the “meerly immutable part of nature,” they were like a “ship, that by often mending had no piece of the first materials” remaining (Selden 1725d, 1891–2).

Selden’s interest in history was not merely for the sake of erudition. He realised that many disputed questions could not be settled simply by arguments from reason alone, but needed historical determination. Thus, the History of Tythes was written to answer those who argued that tithes were due to the clergy by divine right. Selden showed that when it came to the temporal maintenance of the church, practice was often at odds with the canon law, which “was never received wholly into practice in any state” but was subjected to “the variety of the secular laws” and to “national customs.” What state existed, he asked, “wherein tythes are paid de facto, otherwise than according to human law positive? that is, as subject to some customs, to statutes, to all civil disposition” (Selden 1725c, 1070–2; cf. Woolf 1990, 216–35). An historical examination could show the development of the form in which tithes were paid in different locations. Selden also felt that close historical examination could give answers to political questions, such as how extensive the king’s pre-
rogative powers were. Rather than arguing in the abstract, Selden felt the lawyer should look to the history of positive institutions to see if the powers claimed by the king had ever existed (see Tuck 1982; Tuck 1993, 207–11). Such investigations were more reliable than Coke’s case-based reasoning, for they rendered “the sudden opinion of any judge to the contrary [...] of no value” (Johnson et al. 1977–1983, vol. 2: 527; cf. Berkowitz 1988, 143; Christianson 1996, 139; White 1979, 233–4). In his work, Selden criticised those—including scholars who treated the Roman civil law as if it were the positive law of European states—who “can make no difference betwixt the use of laws in study or argument (which might equally happen to the laws of Utopia) and the governing authority of them” (Selden 1725c, 1332). Law had to be traced in its social context.

Alongside his historical works, Selden also engaged in theoretical writing about the nature of law. His ideas were developed in three works: *Mare Clausum*, first composed in 1619 to answer Grotius’s arguments in *Mare Liberum* (Selden 1652); *De Jure Naturali et Gentium Juxta Disciplinam Ebraorum* (Selden 1725a) composed in 1640; and *De Synedriis et Praefecturis Juridicis Veterum Ebraorum* composed in the early 1650s. In these works, Selden elaborated a theory of natural law based on divine commands. Where Coke’s concept of law was essentially adjudicative, Selden’s was clearly positivist. “[H]ow should I know I ought not to steal, I ought not to commit Adultery,” he asked,

unless some body had told me? [...] ’tis not because I think I ought not to do them, nor because you think I ought not, [for] if so, our minds might change; whence then comes the restraint? from a higher power, nothing else can bind. (Selden 1927, 69–70)

Law was not made by reason but by authority. “When the Schoolmen talk of *Recta Ratio* in Morals,” he said, “either they understand Reason, as ’tis governed by a command from above, or else they say no more than a woman, when she says a thing is so, because it is so” (Selden 1927, 116). This meant that the notion of punishment was essential to the concept of a law: “The idea of a law carrying obligation irrespective of any punishment annexed to the violation of it,” he wrote, “is no more comprehensible to the human mind than the idea of a father without a child” (Selden 1725a, 106, quoted in Tuck 1993, 215). Selden divided natural law into the obligatory part—what was commanded or forbidden by God—and the permissive part, which was left to human decision (Selden 1652, 12–3; cf. Tuck 1979, 84–98; Christianson 1996, 251–5). For Selden most of the positive laws of a society were composed of “permissive” matter, human legislation which built on the foundations of the obligatory laws in ways appropriate to their contexts. The obligatory matter was quite restricted in scope, but the most important principles were to be found in the seven *praeccepta Noachidarum*, given to Noah’s sons after the Flood (see Sommerville 1984; Tuck 1993, 214–7; Roslak 2000). These divine
commands forbade homicide and theft, and obliged people to maintain the religious and civil order. The most important of them was the duty to keep one’s contracts, and the forms of government agreed on by the people (Selden 1725a, 150). For Selden, like Grotius, political society emerged after individuals began to appropriate property, occupying uninhabited portions of the earth with the explicit or implicit consent of others. The positive rules concerning property allocation derived from the content of the contracts people made. It was part of the permissive law. Nonetheless, that law depended on the force of the obligatory laws: “all these things,” he wrote,

are derived from the alteration of that Universal or Natural law of nations which is Permissive: for thence came in private Dominion or Possession, to wit from the Positive Law. But in the mean while it is established by the Universal Obligatorie Law, which provides for the due observation of Compacts and Covenants. (Selden 1652, 24–5)

Selden’s positivist view of the nature of law was echoed by his follower, Sir Matthew Hale. Hale was a judge and a law reformer (see Cromartie 1995). Although less accomplished both as an historian and as a philosopher, he proved highly important in transmitting a Seldenian approach to law and history. Hale’s influence came both from his work as a judge and jurist in the 1650s and 1660s, when he composed a number of writings which aimed towards providing an overall institutional treatment of the common law. Although the writings remained unpublished in his life, a number of them proved very influential when they were published in the eighteenth century, notably his Pleas of the Crown of 1707 (Hale 1707b) and his Analysis of the Common Law and History of the Common Law of 1713. While his treatise on the prerogatives of the crown was not published until the twentieth century (Hale 1975), it circulated in manuscript form.

In his unpublished Treatise of the Nature of Lawes in Generall and Touching the Law of Nature, Hale set out a definition of law which owed much to Selden. For Hale, law was

a rule of moral actions, given to a being endued with understanding and will, by him that hath power or authority to give the same and exact obedience thereunto per modum imperii, commanding or forbidding such actions under some penalty expressed or implicitly contained in such law. (Hale Undated (c), f. 3)

For a law to exist, he argued, “there must be an author thereof as a legislator” who “must be distinct from the person to whom it is given or that is to be obliged by it” (Hale Undated (c), f. 7). Hale answered the objection to a positivist view that in society men were obliged by laws which derived from their own consent, by saying that “[t]he legislator is one, and I that am obliged am another person, and between us there may arise an obligation.” Like Selden, Hale said that a law required the existence of a sanction. Law created two kinds of obligation:
1. An antecedent obligation, whereby the subject is bound to obey such laws as are justly made.  
2. An obligation secondary or subsequent, whereby the subject in case of disobedience is obliged to the penalty or sanction of the law. (Hale Undated (c), f. 12, cf. f. 48)

Like Selden, Hale argued that natural law was revealed to man through the seven Præcepta Noachidarum, as well as through a faculty possessed by every rational being, the intellectus agens, which enabled men to see natural law, just as light enabled them to perceive objects. However, man could not live by these precepts and his conscience alone. Positive law was needed, and not only because men might be blinded to the dictates of conscience by their lusts, and required the prospect of human punishment. For Selden and Hale, natural law was not a complete set of immutable, timeless principles which operated independent of government. It could not be applied in the abstract, for law was a social institution, located in a context. As Hale noted,

though it may be true, that the consequences and deductions, that may be made by reason, may be ramifications of the law of nature; yet possibly it may be hard to conclude, that all those deductions and inferences are that law of nature, which was intended for the common rule or law of mankind; because, though they might be truths; yet every man is not capable of that perspicacity to follow the consequences so far. (Hale Undated (c), 17

Positive laws were needed “to settle that variety and inconstancy of particular applications and conclusions, which, without some established rule, would be found in most men, though of excellent parts and reason, and agreeing in common notions” (Hale 1791, 274–5).

Natural law was itself hard to uncover where it was “mingled with involved or difficult circumstances of the particular acts or actions,” or where there were several laws of nature to be considered, “that either cross, or alloy, or are interwoven with the moral actions to be done.” Equally, while there were indifferent matters, when closely examined, any moral action might lose its indifference, since “there may be the circumstances considered a greater preponderance of reason to the one part than the other” (Hale Undated (c), 26, 22, 81). This meant that natural law and positive law were closely intertwined. Many details were left undetermined by the law of nature “because of their great variety and the great diversity that ariseth by the exigencies and conveniences of several people.” Such matters were “left to the guidance, laws and customs of people” (ibid., f. 83). Indeed, like Selden, Hale argued that “judicial laws [...] were never in the design of Almighty God intended farther than that people to whom they were given.” Just as it would be unsuitable to apply the natural law which existed for birds to beasts, so “that law, which would be a most wise, apt, and suitable constitution to one people, would be utterly improper and inconvenient for another” (Hale 1787, 259–60).
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3.2. Hooker, Selden, and Hale on the Source of Political Authority

For Selden and Hale, positive law in society derived from a lawmaker contractually created by the people. Their views carried strong echoes of the position developed by Richard Hooker (1554–1600) in the 1590s, of a constitution created by past consent, which generated criteria of validity for the actions of various constitutional agents. Hooker’s *Of the Laws of Ecclesiastical Polity* was a work which proved congenial not only to common lawyers, but also to radical Whigs such as John Locke and to conservative political thinkers such as Edmund Burke (see Eccleshall 1981). It was made up of eight books and a preface. However, only the first five books were published in Hooker’s lifetime. The sixth and eighth books were first published in 1648, and the seventh in 1662. In the later books, Hooker developed a view of the English constitution which laid stress on the legislative authority of the crown-in-parliament, and minimised the independent role of the king. This led to royalist writers in the seventeenth century casting doubt on the authorship of these books. Later scholars have also puzzled over the authorship of the later works, since many felt that the voluntarist arguments developed here, which saw law as the will of the sovereign, were inconsistent with the rationalist Thomist position predominant in the early books (Munz 1952, 107–10; but cf. McGrade 1963). It is now agreed that the entire work was composed by Hooker in the 1590s (Hill 1971). Although Hooker was generally regarded after his death as a “judicious” writer, giving a neutral and balanced account of the constitution, it is now also recognised that he was engaged in a partisan controversy concerning the nature of the late Elizabethan English church (see esp. Cargill Thompson 1980; Lake 1988, chap. 4). In particular, his aim was to convince English Calvinists that they were morally compelled to follow established ecclesiastical authority even when they disagreed with its rulings.

Hooker’s argument entailed showing the rational structure of the universe and that it was governed by law (Lake 1988, 146–7). He therefore began with a rationalist view of law derived from Aquinas, in which he set out a definition of natural law, taught by reason, which bound universally. The law of reason included whatever could easily be known to be the duty of all men, and whatever could be deduced from manifest principles “by necessary consequence” (Hooker 1977, I.8.9, I.8.11, I.10.1). However, man’s will was “inwardly obstinate, rebellious, and averse from all obedience unto the sacred laws of his nature” (ibid., I.10.1). Moreover, what natural law required could not “be discerned by every man’s present conceit, without some deeper discourse and judgement” (ibid., I.10.5). Mankind therefore needed political societies, which “do not only teach what is good but they enjoin it” with “a certain constraining force” (ibid., I.10.7). But why should an individual accept the coercive judgment of a political authority rather than following his own conscience? Hooker’s answer had two aspects.
The first echoed a position we have encountered in St. German’s thought. Hooker acknowledged that, if there were “necessary and demonstrative” proofs that established laws were wrong, the individual was at liberty in conscience to reject them. However, when it came to mere probabilities, over which men were apt to disagree, it was unseemly that publicly accepted rules should be set aside because particular private individuals protested against them (ibid., Preface 6.6). Matters of probability—which comprised human laws—were to be settled by the collective voice of society, rather that the individual, for there would be no end of contention unless all agreed to some definitive sentence. Moreover, positive laws should be made by wise men, since men of common capacity were unable to discern what was best. Hooker’s view on probability also led him to argue why men were morally obliged to obey settled laws and customs. Hooker told the Calvinists that “since equity and reason, the law of nature, God and man, do all favour that which is in being, till orderly judgement of decision be given against it; it is but justice to exact of you, and perverseness in you it should be to deny thereunto your willing obedience” (ibid., Preface V.5). Established laws should be presumed to be morally right until it could be demonstrated that they were not. This applied even when the reason of established rules was not evident, since “the judgment of antiquity concurring with that which is received may induce [men] to think it not unfit, who are not able to allege any known weighty inconvenience which it hath” (ibid., V.7.4).

The second part of Hooker’s answer rested on the notion of consent. He argued that each individual was bound by the law, since he had already consented to it. For Hooker, political power derived either from the immediate appointment of God, or from “common consent” (ibid., I.10.4). Any prince who exercised political power without either express commission from God or “authority derived at the first from their consent upon whose persons they impose laws” was no better than a tyrant. “Laws they are not therefore,” he wrote, “which public approbation hath not made so” (ibid., I.10.8). However, approbation was given to the laws not only by those “who personally declare their assent by voice sign or act, but also when others do it in their names by right originally at the least derived from them.” Although political authority derived from the community, it could be conferred even on an absolute monarch. But once this authority had been conferred, its holder had the right to speak for the community:

to be commanded we do consent, when that society whereof we are part hath at any time before consented, without revoking the same after by the like universal agreement. Wherefore as any mans deed past is good as long as himself continueth: so the act of a public society of men done five hundred years since standeth as theirs, who presently are of the same societies, because corporations are immortal: we were then alive in our predecessors, and they in their successors do live still. (Ibid., I.10.8)

Hooker’s view was a significant modification of the position we have seen in Fortescue. His theory of the original contract could show not only that sub-
jects were bound by the constitution, but that the powers of the crown were defined by it. Hooker thus made use of Bracton’s maxim that the king should be under no man, but under God and the law (ibid., VIII.2.3; cf. McGrade 1985, 119–20). “The entire community giveth general order by law how all things publicly are to be done,” he wrote, “and the King as the head thereof the highest authority over all causeth according to the same law every particular to be framed and ordered thereby” (Hooker 1977, VIII.8.9). The power of legislation came from the community, and not from the king, whose role in lawmaking was essentially limited to the power of veto.

Hooker did not have a static vision of a fundamental law or an unchanging ancient constitution. To understand the constitution involved not merely looking to the original compact (the details of which were in any event likely to have been lost), but also to whatever had subsequently been freely “conde-
scended unto, whither by express consent, whereof positive laws are wit-
nesses, or else by silent allowance famously notified through custom reaching beyond the memory of man” (ibid., VIII.2.11). The constitutional allocation of power in the state was the product of an original agreement, as modified over time, which determined where powers lay in the community, and how they were to be exercised. A body politic could thus not resume the powers conferred on rulers “without their consent” (ibid., VIII.2.10). It was better, therefore, to set out the limits on the power of the king before the power was transferred. In England, Hooker said, the constitution had given some powers to the king, where he was free to act; but in other areas, the law was “a barr unto him; not any law divine or natural [...] but the positive laws of the realm have abridged therein and restrained the Kings power” (ibid., VIII.2.17).

In Mare Clausum and in De Jure Naturali, Selden similarly rooted the origins of political society in consent. He argued that common property came to be divided among particular proprietors through the “consent of the whole body or universality of mankind (by the mediation of something like a compact, which might bind their posterity)” (Selden 1652, 21). Selden and Hale argued what had been agreed had to be maintained. In Hale’s view, by the agreement which transferred governmental powers, each individual had given his faith both to the governors, and to God: “and till God himself shall cancel that obligation, which I owe thereby to Almighty God, I cannot deliver myself from the obligation that I have given by my faith to my governors” (Hale Undated (c), f. 7v). When discussing the question whether the people were greater than the king, since they had made him king, Selden observed, “The answer to all these Doubts is, Have you agreed so? if you have, then it must remain till you have alter’d it” (Selden 1927, 93). The form of government created by a society could vary across time and space. As Hale saw it, the people could transfer all powers to the prince, or they might reserve some (Hale 1975, 3). Even if the prince had originally been given absolute powers, the
constitution could be changed by the agreement of “all persons interested.” This could be manifested by a formal treaty between prince and people, or “by long custom and usage,” which raised a presumption that there had been an agreement, and which itself implied consent (Hale 1975, n. 5). In England, of course, there was no document containing the original contract. However, in the absence of firm evidence, “constant usage is to be the Rule to judge by; because it carries the Evidence of what the Pact shall be presumed to have been” (Hale Undated (a), f. 222). Similarly, talking of the liberties found in the grants of Edward the Confessor, or Magna Carta, he said there was as great reason to conclude them to be parts of the Original & primitive Institution of the English Government by their long usage and frequent concessions and Confirmation of Princes in so long and continued a Series of Time, as if Authentic Instruments of the first articles the English Government were extant. (Hale 1924, 511)

Where Coke had felt it to be politically important to argue for the immemoriality of the laws and constitution in order to show both that the common law was superior to the king, and that William I had not obtained a full right to legislate by the conquest (see Pocock 1987, chap. 2), Selden and Hale were less anxious to show that nothing had changed in 1066. For Selden, while much stayed the same after the Conquest, changes had also been introduced. Notably, his historical work revealed the importance of new feudal tenures introduced after 1066 and their impact on English society. However, Selden did not see William as a conqueror changing all laws. In his early Jani Anglorum, he noted that William agreed to the petition of “all the great men of the Country, who had enacted the English Laws” to observe the previous laws; but “together with the ratifying of old Laws, there was mingled the making of some new ones.” For Selden, William took possession of the royal government “upon pretence of a double Right,” having both a claim by blood and by “adoption,” “having in Battel worsted Harald” (Selden 1683, Preface, 47–9). For Hale, no conquest would be secure until the conqueror had obtained the “Consent or Faith of the conquered, submitting voluntarily to him” (Hale 1971, 50–1; Hale 1975, 4). In fact, William’s conquest was of the usurper Harold, rather than of the whole nation; but in any event his title to the crown had been “ratified by continued Custom & Usage, which doth interpret the first submission, or dedition & gives a Right by tacit consent of King & People” (Hale Undated (a), f. 225). For both men, what mattered in effect was less the ultimate historical origins of the polity—which could not in any case be accurately traced—than the constitutional criteria which had been clearly established over the course of time.

Selden’s position on the historical origins of civil society was inconsistent. In the first edition of Titles of Honour, he argued that it arose when families gathered in villages or cities as self-governing democracies, which subsequently introduced kingship by consent (Selden 1725e, 927). He modified his
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He now argued that kingship was the original form of rule, “as if the sole observation of nature had necessarily led the affections of men to this kind of state” (Selden 1725e, 112). Although Selden here traced the origins of kingship to the division of the earth after the Flood, he did not put forward a divine right view of kingship. Rather, he said that kingship “hath a twofold original, either from the power of the sword, or conquest [...] or by some choice proceeding from the opinion of the virtue and nobleness of him that is chosen.” Selden gave examples of each kind (omitting mention of England), but noted that even the kingdom of the Israelites derived from consent “if we regard only the humane way of instituting it [...] For there the people having referred themselves to Samuel, for the election of their King, he made a choice for them in the anointing both of Saul and David, from whom the title continued hereditary” (Selden 1725e, 110).

There has been some debate about whether Selden developed a theory of a mixed monarchy in the years before the civil war (cf. Christianson 1996 and Sommerville 2002). Some consistency can be identified. For Selden, laws were not made by the king alone. In ancient times, Druids “were wont to meet, to explain the Laws in being, and to make new ones as occasion required”; and “whilst the Saxons governed, the Laws were made in the General Assembly of the States or Parliament” (Selden 1683, 93). Turning to the present, he spoke of “a wonderful harmony” by which “the three estates, the King, the Lords and the Commons, or Deputies of the People, are joined together, to a most firm security of the public.” This statement was significantly criticised by Selden’s late seventeenth century editor, who felt that the author had erred in characterising the king as one of the three estates and not as paramount (Selden 1683, 94, 117). Selden turned again to the nature of royal power in 1647 in his introduction to Fleta. Here, he discussed the power of the king by considering how Bracton and his successors had treated the lex regia. Selden noted that Bracton’s abbreviated citation of the text masked the Roman idea of all power being transferred to the ruler, and instead suggested that the king’s prerogative was bound by “the various stipulations of the Lex Regia” which in England comprised “our remarkable characteristic of administering justice according to law and legislating in assemblies of Estates.” Ulpian’s maxim was interpreted “only in so far as consistent or at least not inconsistent with our immemorial customs” (Selden 1925, 29, 39). Much of his introduction contained a discussion of the impact of Roman law in England. While he admitted that medieval jurists drew on Roman sources for reasons or analogies, he showed that Roman ideas on government had no impact in England. The civil law did not take root firstly because the English felt an aversion to its principles of government, and secondly because of “the remarkable esteem in which the English or common law was held, and our constant faithfulness
to it as something immemorially fitted to the genius of the nation” (Selden 1925, 165).

Hale also traced the roots of parliament to Saxon times (Hale 1707a, 63; Hale 1971, 5, 70). Writing legal treatises on parliament and prerogative after the civil war, he was more explicit in his constitutional theory than Selden. As he put it, “Parliament hath sovereign and sacred Authority in making, confirming, repealing and expounding Laws.” It had, he added, borrowing a phrase from Coke, “transcendent and absolute” powers (Hale 1707a, 46, 49). Neither the king, nor the people alone, had sovereign powers. “The original or fundamental Law bounding monarchy,” Hale said, was “that regularly he cannot make or alter a Law or impose any common charge without assent of Parliament.” The king’s subjection to law was confirmed by the presence of “other additional Laws which either Custom or the King’s assent in Parliament have provided to be perpetual or temporary bounds of the King’s power” (Hale Undated (a), f. 243r-v). However, the king was not a mere agent of the people, for he had “his rights absolutely, perpetually & hereditarily & cannot be deprived of them either in whole, or part, without his consent,” since he was given these powers by the original contract (ibid., f. 222v; cf. Hale 1975, 13). He was not subject to control by the people within the area of his just prerogatives. If the king had his rights, however, so too did the people have their liberties (confirmed in instruments such as Magna Carta), which could not be removed without their consent (Hale 1924, 511).

Although agreeing that all human law derived its power from the original consent of the people, neither Hale nor Selden said that laws required their current, actual consent. According to Selden,

Laws or civil sanctions depend on the express and natural consent of those who were present and active themselves in making laws or admitting customs in use; or on the tacit and civil consent of those who surrendered their decision and power before others, according to the diverse origins and constitutions of republics, or from the submission of themselves and their descendants, or by other means, so that they agreed to bind themselves and their descendants to whatever was decreed, without giving their express and natural consent to each individual matter. (Selden 1725a, 607; cf. Roslak 2000, 141)

Hale equally rejected the view that English law came from “the immediate consent of all the persons concerned in the law to be made.” Instead, statutes were passed “[b]y the immediate consent of that person or those persons in whom by the constitution of the commonwealth that power is placed” (Hale 1975, 169). By the law of nature, he said, each man had an obligation “to obey that authority and those laws that are made by his express or tacit consent or by those whom he has virtually and implicitly at least trusted with that power” (Hale Undated (c), f. 83). Legislation was thus not the act of the people, but a “Tripartite Indenture, between the King, the Lords and the Commons” (Hale 1971, 3). For Selden, similarly, “Every Law is a Contract between the King and the People, and therefore to be kept” (Selden 1927, 69).
3.3. Constitutional Theories in the Civil War

The view of the constitution taken by Selden and later by Hale came under pressure in 1642, when it became apparent that the “contract” between king and people was being violated. Faced with a rebellion in Scotland which he needed funds to quell, Charles I finally called a “short” parliament in April 1640, but dissolved it after three weeks when its members were keener to air their grievances than vote money. By November, his increasingly urgent need for money forced him to call a new parliament. The “long” parliament sought immediately to remove the tools which the king had used to rule alone. In 1641, legislation was passed to ensure parliament would meet at least every three years and could not be dissolved without its own consent; and the courts of Star Chamber and High Commission were abolished. Relations between king and parliament deteriorated as fear grew that the king was negotiating with the Scots to raise an army. In January 1642, backed by 400 soldiers, he attempted unsuccessfully to arrest five leading parliamentarians; and having failed to do so, he left London, to prepare for war. In this context, a constitutional question was raised: by what authority could either side raise troops?

In March 1642, parliament issued a militia ordinance, to allow it to raise troops without the king’s assent. The ordinance declared that there was an emergency, and that the ordinance was needed for the safety of the king, parliament and the kingdom. The king had already rejected an appeal in January by parliament to put troops under the control of men named by it. As Mendle has shown, while royalists saw the ordinance as an attempt by parliament to act against the constitution, encroaching on the royal prerogative, parliament did not explicitly assert a right of legislation in issuing the ordinance. Seeing itself as a council, it claimed to assume an executive power, akin to a royal proclamation. In normal circumstances, the king’s agreement was needed, for such acts by the council essentially constituted the giving of advice to the king. However, in the context of danger, parliament took the view that if the king endangered the kingdom, by leaving the country or subjecting himself to evil counsellors, it could act alone, just as the council could act for the king in the event of a minority (see Mendle 1992; Mendle 1995, 79–81). Thus, Sir Simonds D’Ewes argued, when it was said that all men ought to obey the ordinance, it was not meant that an ordinance had the same efficacy as an act of parliament “or that we can bind the liberties and properties of the subject by such an ordinance against their wills.” Rather, it meant that since the ordinance was merely made for the preservation of the kingdom “to which every man is by the fundamental laws of this realm bound,” each man should “voluntarily, willingly, and cheerfully” obey it (Snow and Young 1987, 41). In June, the king (who commanded that men disobey the ordinance) responded by seeking to raise troops through commissions of array.
In this context, many began to resort to reason-of-state arguments. Nevertheless, there remained much common ground in early 1642 between those who have been described as “constitutional royalists” and “constitutional parliamentarians,” with many on both sides remaining keen to invoke the language of constitutionalism (see Smith 1994). In an attempt to attempt to woo constitutionalist moderates, the king in June issued an Answer to the XIX Propositions, in which he acknowledged the co-ordinate power of legislation, declaring that “In this kingdom the laws are jointly made by a king, by a house of peers, and by a house of commons chosen by the people, all having free votes and particular privileges” (Wootton 1986, 172; see also Weston and Greenberg 1981, chap. 3; Mendle 1985). The drafters of the Answer, Lucius Cary (Viscount Falkland), and Sir John Culpeper, sought to use the theory to defend the king’s constitutional position from attacks in the Commons, and to that end endorsed the risky argument that the king was only one of three estates, which had co-ordinate powers. The theory of mixed monarchy was given greater articulation in A Treatise of Monarchie, published in 1643 by the presbyterian clergyman, Philip Hunton (see Tuck 1979, chap. 7; Sanderson 1982). Though not a lawyer, Hunton position echoed that of the common lawyers, both before the civil war, and after the Restoration. It is also useful for showing the limits of the constitutionalist theory.

3.3.1. Philip Hunton and the Mixed Monarchy

Hunton argued that while the office of kingship had divine authority, the incumbents were established as kings by the people’s consent (Hunton 1643, 20). Governments, he argued, grew from contracts. Even where there had been a conquest, the people submitted to a contract of subjection, so that the rule was by consent. If a society agreed to create an absolute monarchy, it was bound thereafter to obey the ruler, “because an Oath to a lawful thing is Obligatory […]. And let none complain of this as a hard condition when they or their ancestors have subjected themselves to such a power by oath or political contract” (Hunton 1643, 6, 11). Nevertheless, if the ruler violated divine law, or plotted the destruction of the political society, he could be resisted, for this contradicted the very purpose of political society. If the people, by their original contract, created a limited monarchy, the monarch gained no greater powers than he was given by that agreement. An initially absolute monarchy could become limited by “after-condescents,” which were not mere acts of grace by a king promising to rule according to law, but were “a change of title, and a resolution to be subjected to in no other way, than according to such a frame of government” (Hunton 1643, 13). The nature of the government thus depended on the terms of the agreement. To see what power the community retained, one had to look to the “Originall Contract and Fundamentall Constitution of that State” (Hunton 1643, 16).
England, Hunton explained, was a mixed monarchy: The nobles and commons had set a sovereign over themselves by a public compact; agreed to be governed by certain fundamental laws; and covenanted with the king that their consent would be needed for the passing of any new laws. The king could not legislate or tax alone, and in matters “of the greatest difficulty and weight” he was bound to consult the Lords and Commons (Hunton 1643, 38–9, 44, 47). Nonetheless, he was properly a monarch, and was not subject to control by the other two estates. For that reason, Hunton rejected arguments that the king was universis minor and that the people which had made the king were greater than the king thus made. The English constitution was a mixed monarchy at its core, for the concurrence of all three estates was needed for legislation, which was “the height of power, to which the other parts are subsequent and subservient.” The architects of this frame of government were praised for creating a system where the two houses could “moderate and redress the excesses and illegalities of the Royal power” (Hunton 1643, 40–1). If this seemed a eulogy of a balanced constitution, the context of the civil war forced him to consider the question of resistance. Hunton argued that the king himself could not be resisted, for kingship made his person sacred. However, his unlawful orders to others could be:

The two estates in parliament may lawfully by force of arms resist any persons or number of persons advising or assisting the king in the performance of a command illegal and destructive to themselves or the public. [...] For the measure of [the sovereign’s power] in our government is acknowledged to be the law: and therefore he cannot confer authority to any beyond law: so that those agents deriving no authority from him are mere instruments of his will. (Hunton 1643, 51–2)

Could the two houses go further and take unilateral action, as they had in passing the militia ordinance? Hunton noted that in times of emergency, the two houses had a duty to act for the public safety and to preserve the fundamentals of the kingdom, when the kingdom was in danger, and the king refused to use his power of the sword:

I say, in this case, the two estates may by extraordinary and temporary ordinance assume those arms, wherewith the king is entrusted, and perform the king’s trust: and though such ordinance of theirs is not formally legal, yet it is eminently legal, justified by the very intent of the architects of the government, when for [the preservation of the kingdom] they committed the arms to the king [...]. And thus doing the king’s work, it ought to be interpreted as done by his will. (Hunton 1643, 62–3)

This was no disparagement of the king’s prerogative, since his very being as king depended on the existence of a kingdom which was being defended. Despite his attempts to argue for a kind of lawfulnessness parliament’s actions, Hunton’s theory of mixed monarchy showed that in such cases, law in effect provided no solution. In a mixed monarchy, there could by definition be no constitutional judge between the parts, since such a judge would be a supe-
rior. A clash between the monarch and the community was “a transcendent case beyond the provision of that government, and must have an extraordinary judge, and way of decision.” Such a decision was not “authoritative and civil, but moral,” where “the superior law of reason and conscience must be Judge” (Hunton 1643, 17–8). In such a situation, parliament could make a judgment. But in deciding whether the kingdom was in danger, parliament was not

a legal court ordained to judge of this case authoritatively, so as to bind all people to receive and rest their judgement for conscience of its authority, and because they have voted it: ’Tis the evidence, not the power of their votes, must bind our reason and practice in this case [...] our consciences must have the evidence of truth to guide them, and not the sole authority of votes. (Hunton 1643, 73)

An appeal had to made to the community, which was “unbound, and in state as if they had no government” (Hunton 1643, 18).

Hunton’s view was reflected in Selden’s succinct comment:

To know what obedience is due to the prince, you must look into the Contract betwixt him and his people, as if you would know what Rent is due to the Landlord from the Tenant, you must look into the Lease. When the Contract is broken, and there is no third Person to judge, then the [decision] is by arms. (Selden 1927, 137)

In the crisis of 1642, after careful legal inquiry, Selden took the decision that the king was more clearly in breach of his contract than parliament, in issuing commissions of array. As a result, he stayed with parliament in London, rather than joining the king (Tuck 1982). Other “constitutionalists,” including lawyers such as Edward Hyde, who saw the threat posed by the militia ordinance as greater than that which came from the king’s actions, left Westminster in 1642, and threw in their lot with the monarch (Smith 1994, 101–2). In this context of crisis, when “the ancient pillars of law, and policy were taken away, and the state set upon a new basis” (Parker 1642, 5), theorists began to look to new foundations for political obligation which were based on notions distinct from those of the common lawyers. The most important exponents of these theories were Henry Parker (1604–1652) and Thomas Hobbes (1588–1679).

3.3.2. Henry Parker and Parliamentary Absolutism

Unlike the common lawyers, Parker sought to locate ultimate power in parliament without the king. Although a lawyer, called to the bar in 1637, he developed arguments in a series of pamphlets written in the early 1640s which were not cast in traditionally legal terms. Parker said in certain situations, one had to look beyond law, to reason of state, which was “more sublime and imperial than Law,” for “when war has silenced Law, as it so often does; policy is to be observed as the only true law, a kind of dictatorian power is to be allowed to
her” (Parker 1643, 18–9; cf. Mendle 1995, 118). Parker first addressed the issue of what happened when law ran out in 1640, in *The Case of Shipmony*, where he considered the king’s right to levy extraordinary duties (see Mendle 1989). He admitted that any ruler could exact extraordinary duties in times of need, for

the supreme of all human laws is *salus populi*. To this law all laws almost stoop, God dispenses with many of his laws, rather than *salus populi* shall be endangered, and that iron law which we call necessity itself, is but subservient to this law: for rather than a nation shall perish, anything shall be held necessary, and legal by necessity. (Parker 1640, 7)

However, Parker insisted that this could only be done for the public good. In case of public need, every man would consent to have his property taken, since this would be the only means by which property could be secured, and those who suffered would be compensated. However, property could not be confiscated for the private needs of the king. In these situations, the decision could not be left to the king alone with his private counsellors, for he might be seduced from the public interest. Instead, the king had to be counselled by parliament, for while “[p]rivate men may thrive by alterations [...] the common body can affect nothing but the common good, because nothing else can be commodious for them” (ibid., 35–6).

Parker returned to the question of who was to decide in emergencies in 1642, after the issuing of the militia ordinance. With parliament under attack from some quarters, and the “king deserting his grand council,” Parker reiterated his view in May that parliament was the best counsel a king could have, for it had greater knowledge “than any other privadoes” and had no private interest to deprave them. Indeed, the judgment of parliament was “the judgment of the whole Kingdom” (Parker 1642, 9). Moreover, in this pamphlet, Parker noted that “that right which [the king] hath as a Prince, is by way of trust, and all trust is commonly limited more for the use of the party trusting, than the party trusted” (ibid., 8). These themes were developed more fully in a second pamphlet written shortly afterwards, in response to the King’s condemnation of parliament’s position. Parker now noted that all power was “originally inherent in the people” and it was passed into the hands of rulers by “a law of common consent and agreement,” by which the people could “ordain what conditions, and prefix what bounds it pleases” to rulership. This meant that “the king, though he be *singulis major*, yet he is *universis minor*, for if the people be the true efficient cause of power, it is a rule of nature *quicquid efficit tale, est magis tale*” (Parker 1934, 1–2). Moreover, he argued that the purpose of government was to pursue the common good, and that there were some natural limitations to the people’s obligation:

the safety of the people is to be valued above any right of [the king’s], as much as the end is to be preferred before the means; it is not just nor possible for any nation so to enslave itself, and to resign its own interest to the will of one Lord, as that that Lord may destroy it without in-
jury, and yet have no right to preserve it self: For since all natural power is in those which obey, they which contract to obey to their own ruin, or having so contracted, they which esteem such a contract before their own preservation are felonious to themselves, and rebellious to nature. (Ibid., 8)

Since kingship was a trust, the question was raised as to who was to ensure the trust was kept. Princes were not “beyond all limits and laws.” They were not to be judged by private parties, however, but by “the whole community in its underived Majesty” (ibid., 15). This was to be found in parliament. Parker still spoke of parliament as offering counsel to the king, rather than commanding him to do certain acts. But he noted that “public approbation, consent, or treaty is necessary in all public expedients, and this is not mere usage in England, but a law” (ibid., 5). The king was bound in these matters to follow the counsel of his parliament, just as he was bound to follow that of the judges in legal matters. “In perspicuous, uncontroverted things, the law is its own interpreter,” he noted, but in matters of law or of state which were ambiguous, the supreme determination had to be left either to the discretion of Parliament or that of the king (ibid., 36). For Parker, it was clear that parliament had to be the final arbiter, rather than the king, since it could have no private interest, whereas the king was liable to be seduced by evil counsellors. In the context of the developing crisis of the spring of 1642, Parker wrote that parliament “may not desert the king, but being deserted by the king, when the kingdom is in distress, they may judge of that distress, and relieve it, and are to be accounted by the virtue of representation, as the whole body of the state” (ibid., 45). This was an extraordinary measure, Parker noted, to save the kingdom from ruin. Nonetheless, Parker’s vision of the nature of the polity still saw parliament as standing at the apex of law. Thus, he said that Henry VII had been praised since

he governed his subjects by his laws, his laws by his lawyers, and (it might have been added) his subjects, laws and lawyers by advice of Parliament, by the regulation of that court which gave life and birth to all laws. In this policy is comprised the whole art of sovereignty; for where the people are subject to the law of the land and not to the will of the prince, and where the law is left to the interpretation of sworn upright judges, and not violated by power; and where parliaments superintend all, and in all extraordinary cases, especially betwixt the king and kingdom, do all the faithful offices of umpirage, all things remain in such a harmony, as I shall recommend to all good princes. (Ibid., 42)

However, by January 1643, Parker was much more cynical about law, ridiculing the king’s supporters’ claim that the subject’s best security lay in the law. As “our judges preyed upon us heretofore in matters of state,” he said, “so our martialis now have a power of spoiling above the general law, or any particular protection” (Parker 1643, 5). Now, he defended parliament’s power to go beyond law, saying it was “equally destructive to renounce reason of state, and adhere to law in times of great extremity, as to renounce law, & adhere to policy in times of tranquillity” (ibid., 19). Parliament, he now said, “is
nothing else but the whole Nation of England.” Kings and laws could not have been created by nations acting collectively. Rather, “both kings and laws were first formed and created by such bodies of men, as our parliaments now are; that is, such councils as had in them the force of whole nations by consent and deputation, and the majesty of the whole nations by right and representation” (ibid., 16). It followed from there that “princes are the creatures, and natural productions of parliaments” (ibid., 18).

3.3.3. Thomas Hobbes and the Sovereign State

If Parker’s was a theory suited for the parliamentarians, Hobbes developed an absolutist theory of sovereign power, which required men to obey even an arbitrary ruler. Hobbes had already sketched the outlines of his theory in *The Elements of Law, Natural and Politic*, composed in 1640 and pirated in two tracts in 1649–1650. He was so worried by parliament’s likely reaction when it was called that he left England for Paris, where in 1642 he published *De Cive*, which was destined to become the most influential statement of his views on the continent. He remained in royalist circles in France, and it was there that he composed *Leviathan*, published in 1651. In writing this work, he set out to fight “for all kings and all those who under whatever name bear the rights of kings” (quoted in Skinner 1996, 331). But instead of seeking a divine right argument for kingship, Hobbes rooted his theory in human consent, as manifested in an original contract, entered into for prudential reasons. For Hobbes, the people had no unity before they created a sovereign to rule over them. Rather, they were in a “state of nature,” in which there was no law to impose obligations on people. In this state, each person had full liberty of action, and, given that rights consisted in liberties, “a right to every thing” (Hobbes 1991, 91). Every man was his own judge, for there was no common measure to determine matters which might cause disagreement. Disputes could not be settled by right reason, since there was no common standard of reason. As Hobbes put it in *De Cive*, “it is impossible that culpable and inculpable actions can be defined by agreement between individuals who are not pleased and displeased by the same things” (Hobbes 1998, 162). The state of nature was therefore inevitably a state of war. In such a condition, men would always defend themselves according their own particular judgments, and so would be weakened in the face of common enemies and against each other (Hobbes 1969, 188; Hobbes 1991, chap. 13; Tuck 1993, 309).

At the same time, nature impelled men to seek what was good for them, and avoid what was bad. The fundamental law of nature was to seek peace, as a means of self-preservation (Hobbes 1991, chap. 14). From this law, a second was derived, which was that each man should be willing “when others are so too [...] to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself” (ibid.,
This was reinforced by Hobbes’s third law of nature, which was that men should keep their contracts. Covenants, however, were not valid where there was a fear that one side would not perform. In the state of nature, therefore, where there was no guarantee that contracts would be performed, it was not unjust to fail to perform one’s agreement. Indeed anyone who performed first betrayed himself to his enemy, contrary to his inalienable right of defending his life and means of living (ibid., 96). For contracts of mutual trust to be valid, there had to be a superior to enforce them. This superior was the sovereign created by consent. How was this possible, if there could be no valid contract in the state of nature? Hobbes pointed out that as well as contracts in which one or both parties were left to perform in future, there could be mutual transfers or renunciation of rights. In creating the sovereign, each person renounced his right of governing himself to another body, on condition that all others did so as well:

A commonwealth is said to be instituted, when a multitude of men do agree and covenant, every one with every one, that to whatsoever man or assembly of men, shall be given by the major part, the right to present the person of them all, (that is to say, to be their representative), every one, as well he that voted for it, as he that voted against it, shall authorise all the actions and judgments of that man, or assembly of men, in the same manner, as if they were his own. (Ibid., 120–1)

Once this state was set up, each man had an obligation to obey it. Firstly, since it was an “injustice, and injury, voluntarily to undo” what was “voluntarily done” (ibid., 93), it would be wrongful for any subject to renounce his obligation to obey. The establishment of a civil power, by removing the fear of non-performance, gave validity to the contract of the people; and justice consisted in keeping valid contracts (ibid., 101). Secondly, only a fool would deny there was justice in keeping his promises, since the man who thought he could with impunity break his word would be liable to be cast out of society and left to perish, or else would rely only on the unpredictable errors of other men in not seeing his deception.

Hobbes made it clear that the contract creating the sovereign was one between the people themselves and not between them and the ruler. In monarchies, this meant that subjects could not dissolve the state and “return to the confusion of a disunited multitude” without the agreement of the monarch himself, since he was one of the original contractors—qua individual, not qua sovereign: unless he agreed, the others would break their contract with him (ibid., 122). It also meant that there was no contract which the sovereign was party to. Indeed, insofar as Hobbes argued that a wrong could only be done to someone with whom an agreement had been made or to whom something had been given as gift, a sovereign could by definition commit no injustice to his people (Hobbes 1998, 43–5; Hobbes 1991, 100–1; Hobbes 1969, 94; see Skinner 1996, 309–13). For Hobbes, the people were bound to obey the sovereign until such time as he could offer no protection for them.
In *Leviathan*, Hobbes developed a notion of representation which was particularly important providing a concept of “sovereignty as the property of an impersonal agency,” which was an important step in developing a modern concept of the state (Skinner 2002b, 368–9; see also Skinner 2002c). Hobbes argued that in their contract, the people created an “Artificial Man,” or state in which “the Soveraignty is in an Artificial Soul” (Hobbes 1991, 9). This artificial person was for Hobbes an actor who represented the people, who in turn were the authors of his acts (see ibid., 112–4). When each individual agreed to the appointment of one man “to bear their person,” he acknowledged himself to be the author of whatever acts were done by the bearer of sovereign power (ibid., 120). Since each man was the author of the sovereign’s acts, he who complained of injuries committed by the sovereign “ought not to accuse any man but himself” (ibid., 124).

In this process, all agreed to “submit their wills, every one to [the sovereign’s] will, and their judgments, to his judgment” (ibid., 120). It was the role of the sovereign to make the definitive judgment, to act as the arbitrator whose reason was to settle all controversies (ibid., 32–3, 469; Hobbes 1998, 51–2; Hobbes 1969, 90–1). For Hobbes, the very standard of justice, of right and wrong, was thus set by the sovereign (Hobbes 1991, 223, 183). “Where there is no common power, there is no law,” Hobbes noted, “where no law, no injustice” (ibid., 90). Law was “the public conscience” by which men had already agreed to be guided (ibid., 223). It was not that the sovereign had any greater access to truth; but his judgment was final and settled what would otherwise be divisive arguments. This meant that the sovereign could himself be subject to no law “for to be subject to laws, is to be subject to the commonwealth, that is to the sovereign representative, that is to himself; which is not subjection, but freedom from the laws” (ibid., 224). The sovereign united legislative, executive and judicial powers, for sovereignty was indivisible. Hobbes dismissed the notion of a mixed monarchy, in which there was a separation of powers. If the three component parts agreed, he said, they were as absolute a sovereign as a single power. On the other hand, it was an error to seek security in the disagreement of the branches, for if that occurred, the result was nothing other than war. “The division therefore of the sovereignty, either worketh no effect, to the taking away of simple subjection, or introduceth war; wherein the private sword hath place again” (Hobbes 1969, 115; Hobbes 1991, 124–7). The sovereign made the law of property, prescribing the rules by which each might know what was his. This made Hobbes defend such actions as the levying of ship money:

no private Man can claim a Propriety in any Lands, or other Goods from any Title, from any Man, but the King, or them that have Soveraign Power; because it is in virtue of the Soveraignty, that every man may not enter into, and Possess what he pleaseth; and consequently to deny the Soveraign any thing necessary to the sustaining of his Soveraign power, is to destroy the Propriety he pretends to. (Hobbes 1971, 73, cf. 64)
While Hobbes remained in royalist circles in the 1640s, by the time *Leviathan* was completed in 1651, at the height of the controversy over “engagement” with the new republic, he had come to endorse the arguments of *de facto* theorists that the consequences of not having a government were far worse than the inconvenience of submission. Submission to the sovereign was only required so long as the ruler provided the subject with protection (Hobbes 1991, 153). In his “Review and Conclusion,” Hobbes made it clear that any man living under the protection of the powers that existed, was submitting to them (ibid. 484–5; see Skinner 2002a).

### 3.3.4. Hale and the Revival of Common Law Constitutionalism

In the 1640s, common law constitutionalism was unable to provide a bridge between the parties to the conflict in the civil war, and by 1649, the king had lost his head and the country its crown.

Nonetheless, absolutist or parliamentarian theories of the constitution did not ultimately displace the common lawyers’ view of the constitution. With the Restoration of the monarchy in 1660, the Convention parliament resolved that by the ancient and fundamental law, the government should be by king, lords and commons. The king’s constitutional position was restored, and indeed his ministers restated the view that he was the legislator, and not merely of co-ordinate power with the two houses of parliament (Weston and Greenberg 1981, 156–61). This was a view echoed by Hale, who set out a common lawyer’s view in manuscripts written after 1660. As Hale put it,

> this Government is mixed, in some points, [...] being absolutely monarchical, in others mixt; as not to make laws, or after them, impose public taxes; and the king is bound to observe the directions of the laws, tho not under the coercive power of them; for such acts are void & the immediate instruments of them are liable to punishment & repair the damages. (Hale Undated (a), 222 r-v)

The king was bound by law in a number of ways. He could not legislate alone; so that “those actions of his which have not their formalities that the Law requires are made void,” whereas “those that have them are good though the matter be faulty, at least till duly repealed” (Hale Undated (a), 236v). Hale noted that “acts by him done or omitted contrary to the tenor of these Laws or Customs, which he is bound to observe in conscience, yet make him not liable to any personal loss or damage” (Hale Undated (a), 279). However, if the king exceeded his power, Hale argued, he would be subject to the *potestas irritans* of the judges. This was their power simply to ignore his actions where they were *ultra vires*. If the king’s act were void, moreover, then the ministers who put the law into execution were liable to the coercive law, to make satisfaction. At the same time, Hale accepted the traditional view that the king could dispense with statutes where he alone was concerned. Equally, where a statute prohibited
something which concerned the profit of the public, the king could dispense if he was “immediately intrusted in the managing thereof” (Hale 1975, 177). However, the king could not dispense with laws regulating *mala in se*, nor where the subject’s interest was immediately concerned (Hale 1924, 510).

Hale did not espouse a theory of resistance. Ultimately, he felt, the subject was “under the obligation of non-resistance and passive subjection” for otherwise he might violate his promise of obedience, which would go against the law of God (Hale Undated (c), 44). In general, he suggested, “the best means to remedy such excesses is to convince the Judgment of the Prince, if it may be, or by denying Supplies, for an application of an active force or over rigid remedies may endanger all” (Hale 1975, 15; Hale Undated (a), f. 245). For Hale regarded statutes as “a kind of reciprocal contract & stipulation between the King [and] his Subjects,” in which the subjects granted money, “and the king at their request grants them laws and liberties” (Hale 1924, 511).

3.4. Thomas Hobbes’s Challenge to the Common Law

If Hobbes’s notion of the sovereign posed a challenge to the common lawyer’s view of public law, he also presented a significant challenge to their conceptions of private law, and the judicial role. Although the elements of his views are to be found in *Leviathan*, they were set out more fully in his *Dialogue between a Philosopher & a Student of the Common Laws of England*, written in 1666 and published in 1681. Here he reiterated his positivist vision of law:

> A Law is the Command of him, or them that have the Soveraign Power, given to those that be his or their Subjects, declaring Publickly, and plainly what every of them may do, and what they must forbear to do. (Hobbes 1971, 71)

Hobbes ridiculed Coke’s view of law as artificial reason. If law were reason, he said, he might himself perform the office of a judge within a month and learn all the statutes in two (Hobbes 1971, 56, 84). But in fact, much of what Coke claimed to be law was grounded only in his own private opinion. It had no basis in statute and could be shown to be against reason. If Coke’s “definitions must be the rule of law,” Hobbes asked, “what is there that he may not make felony or not felony, at his pleasure?” (Hobbes 1971, 119; cf. 151–7). In fact, Hobbes argued, law was made not by wisdom but by authority, “the reason of this our Artificial Man the Common-wealth and his command” (Hobbes 1971, 55; Hobbes 1991, 187). It was the sovereign who determined what was to be punished. Even if wrongs such as theft, murder, or adultery were forbidden by the laws of nature, what counted as theft, murder, or adultery in society was “determined by the civil, not the natural, law” (Hobbes 1998, 86).

Hobbes spoke of “positive law” in terms of statute (Hobbes 1971, 58, 69), and noted that positive law could not be retrospective since there could be no obligation until it was promulgated (Hobbes 1991, 203–4). However, despite
these comments, he also acknowledged that not all law was statutory, and promulgated in advance by the sovereign. Laws could be made tacitly, and by adoption, as when the sovereign approved the sentence of a judge, even by silent acquiescence. Similarly, through the tacit acceptance of the sovereign, the opinions of jurists or long use could acquire the force of a law (Hobbes 1969, 190; Hobbes 1991, 84; Hobbes 1998, 162). In practice, if the sovereign was the formal source of all law, Hobbes noted that much of its content came from natural laws, which “have been laws from all eternity,” (Hobbes 1991, 197) or from reason, which “changes neither its end, which is peace and self-defence, nor its means, namely those virtues of character [...] which can never be repealed by either custom or civil laws” (Hobbes 1998, 54–5). In contrast to positive law, “Unwritten law is law which needs no promulgation but the voice of nature, or natural reason, such as are natural laws”:

For as it is impossible to write down ahead of time universal rules for the judgement of all future cases which are quite possibly infinite, it is understood that in every case overlooked by the written laws, one must follow the law of natural equity, which bids us to give equal to equals. And this is by force of the civil law, which also punishes those who by their action knowingly and willingly transgress natural laws. (Hobbes 1998, 161)

Natural equity, in the state of nature, was a virtue which disposed men to peace and obedience, though given the insecurity of that state, it would not often be acted on. In society, it became part of the civil law by adoption by the sovereign, for it was he who enforced it. As Hobbes put it, law was made not by the man who penned it, but by the sovereign who enforced it (Hobbes 1991, 110, 185; Hobbes 1971, 59).

For Hobbes, natural law consisted of rules found out by reason showing how best to preserve oneself and maintain peace (Hobbes 1991, 109). One of the laws of nature was not to judge in one’s own cause, but to submit to arbitrators, who had to deal equally between the parties: “The observance of this law, from the equal distribution to each man, of that which in reason belongeth to him, is called Equity” (Hobbes 1991, 108). As men in entering society were submitting to the arbitration of the sovereign, so the sovereign (who himself had a duty to follow natural law: Hobbes 1991, 231; Hobbes 1998, 83–4) had to decide between them according to equity. The same applied to the judges, in cases coming before them. Discussing unwritten law, Hobbes wrote,

in the act of judicature, the judge doth no more but consider, whether the demand of the party, be consonant to natural reason, and equity; and the sentence he giveth, is therefore the interpretation of the law of nature; which interpretation is authentic; not because it is his private sentence; but because he giveth it by authority of the sovereign, whereby it becomes the sovereign’s sentence; which is law for that time, to the parties pleading. (Hobbes 1991, 191–2)

Although Hobbes claimed that this would not constitute an ex post facto law, since “if the fact be against the law of nature, the law was before the fact”
(Hobbes 1991, 203), this argument was hard to square with his view that it was precisely “for want of a right reason constituted by nature” that an arbitrator was needed, by whose judgment contending parties would stand (Hobbes 1991, 33). It seems to suggest that it was only in the context of the hearing that the offence would be precisely defined, by the judge’s idea of what was equitable, in the process of adjudication.

Natural equity thus stood at the heart of Hobbes’s idea of the application of law, for the sovereign’s will was always presumed to be “consonant to equity and reason” (Hobbes 1991, 188). Even in interpreting statutes, judges should not follow the literal words, but should seek the equitable intention of the sovereign. Thus, “if the words of the law do not fully authorise a reasonable sentence,” the judges ought “to supply it with the law of nature” (Hobbes, 1991, 194). “Justice fulfils the law,” Hobbes said, “and equity interprets the law; and amends the judgments given upon the same law” (Hobbes 1971, 98–9). Indeed, the presumption that the sovereign acted according to natural equity was a very strong one, and irrebuttable in certain cases:

though a wrong sentence given by authority of the sovereign, if he know and allow it, in such cases as are mutable, be a constitution of a new law, in cases, in which every little circumstance is the same; yet in laws immutable, such as are the laws of nature, they are no laws to the same, or other judges, in the like cases for ever after. (Hobbes 1991, 192)

Hobbes was particularly sceptical about the value of precedent. To rely on the authority of precedent cases would make justice depend on the decisions of a few learned or ignorant men, “and have nothing at all to do with the study of reason” (Hobbes 1971, 115). It was not custom, but equity, which made a decision law (Hobbes 1971, 96–7). The most recent precedent was always to be preferred, being fresher in the mind and most recently approved by the sovereign (Hobbes 1971, 142).

In A Dialogue between a Philosopher and a Student of the Common Laws of England, Hobbes argued that English law itself derived from two sources: reason and statute. Treason, murder, robbery and theft were “Crimes in their own nature without the help of statute,” their criminality being constituted by the malicious nature of the culprit’s intention (Hobbes 1971, 111–2, 102, cf. 121). Hobbes’s argument was not always clear and consistent, for he also suggested that statutes were needed to give precise definition to mala in se such as treason, as occurred in 1352 when Edward III passed the statute of treasons (Hobbes 1971, 102, cf. 120). This fitted with his idea that inchoate natural law notions were defined in society by the sovereign’s commands. Moreover, he also stated in the Dialogue that murder, robbery and theft were “crimes defined by the statute-law.” However, he could state at the same time that “robbery is not distinguished from theft by any statute,” but only by reason (Hobbes 1971, 122, 118); and indeed medieval criminal law generally had little useful statutory definition. However, whether treason or theft were statu-
tory crimes or *mala in se* was not the essential point for Hobbes. In this tract, his aim was to show that heresy was not a crime, *either* by reason, *or* by statute—a point of some interest to Hobbes himself, given that he faced accusations of heresy for his arguments in *Leviathan* (Tuck 1993, 35–40; Hobbes 1971, 122–6).

Hobbes argued that judges had authority because of their position as the voice of the sovereign in court. In making their judgments, they looked to the natural equity which was the presumed will of the sovereign. They did not have authority as experts who had privileged access to the artificial reason of an ancient law which did not derive its force from the sovereign, as Hobbes read Coke to argue. However, Hobbes’s vision was hard to square with what courts actually did. In practice, most disputes in court were settled neither by the mere application of statutes nor by resort to natural equity, but centred on questions of property or crime whose rules derived from customary origins, and which had been elaborated over a succession of cases in court. What was missing in Hobbes’s treatment was an account of such rules and their derivation. His discussion of custom was especially uncomfortable.

For Hobbes, custom gained its authority by sovereign adoption. Only reasonable customs were law, for none could be presumed to have been adopted which were against reason or equity (Hobbes 1991, 184). Hobbes cited the common lawyers’ position for this, but overlooked their distinction between particular customs, which had to be proved reasonable, and the common law, whose reasonableness was presumed. Hobbes himself also divided local customs and general unwritten law. The former he saw in positivist terms: where a province in a commonwealth had its own customs, they were to be seen as laws anciently written or made known by previous sovereigns, which continued to be law by their adoption by the current sovereign. By contrast, if a reasonable unwritten law was generally observed in all the provinces, “that law can be no other but a law of nature, equally obliging all man-kind” (Hobbes 1991, 186). This definition presented problems for Hobbes’s understanding of English law. If provincial law were analogous to local customs, and all other unwritten law were analogous to common law, this would make the common law nothing but pure reason:

I deny that any custom of its own nature, can amount to the authority of a law: For if the custom be unreasonable, you must with all other lawyers confess that it is no law, but ought to be abolished; and if the custom be reasonable, it is not the custom, but the equity that makes it law. For what need is there to make reason law by any custom how long soever when the law of reason is eternal? (Hobbes 1971, 96–7)

Equally, in *Elements of Law*, he argued that customs against reason, however often repeated, could never abridge the law of nature; which could only be modified by consent and covenant, as in the creation of a sovereign, by which a man abridged himself of liberty (Hobbes 1969, 93).
This view made it hard for Hobbes to explain the rules of property. In the *Dialogue*, when the lawyer and philosopher turned to this subject, the following exchange took place:

*Philosopher*. [...] let us come now to the Laws of *Meum & Tuum*.

*Lawyer*. We must then examine the Statutes.

*Philosopher*. We must so, what they command and forbid, but not dispute of their Justice: For the Law of Reason commands that every one observe the Law which he hath assented to, and obey the Person to whom he hath promised obedience and fidelity. (Hobbes 1971, 158)

This was to see all property law as of positive imposition. However, this passage was followed by another, in which the philosopher argued that to understand Magna Carta, it was necessary to look into “the customs of our ancestors the Saxons [and] also the law of nature.” Hobbes did not discuss these customs, but he did argue that the fundamentals of English property law had natural origins. Thus, the laws of the Saxons, the philosopher said, were “no other than natural equity.” The law of inheritance, for instance, followed “a natural descent [...] and was held for the law of nature” (Hobbes 1971, 162–3; cf. Hobbes 1991, 137).

Hobbes’s discussion of punishment also showed some uncertainty about the nature of custom. The quantification of punishment, he said, could not be left to the discretion of each judge, since, “there being as many several reasons, as there are several men, the punishment of all crimes will be uncertain, and none of them ever grow up to make a custom” (Hobbes 1971, 140). Hobbes argued that punishments should be defined by statute, and where not, the judges should consult the king. However, penalties imposed by the judges on the basis of custom might be followed “from an assured presumption, that the original of the custom was the judgment of some former king” (Hobbes 1971, 142). Similarly, in *Leviathan*, he argued that where a certain punishment “hath been usually inflicted in the like cases,” a greater penalty should not be inflicted, not because the custom had authority in itself, but because of the expectation generated by the earlier punishment (Hobbes 1991, 203). His comment that judges should take into account such expectations might suggest that precedents might have to be taken into account. Yet Hobbes remained suspicious of precedent, and avoided any detailed discussion of how the unwritten law might generate rules.

Unlike Bentham, Hobbes did not develop a theory of legislation to accompany his positivist view of the sources of law, whereby all law had to come from a codified positive law. Instead, much of law was left to the equity of the judge speaking for the sovereign. He was therefore unable to explain sufficiently how unwritten, indifferent rules—such as the rules of property—could be known. They could not be found merely in the last judicial pronouncement: since that very pronouncement had been made in the context of earlier decisions. If natural law was the same the world over, it was evident that rules
of property varied, in the way that local customs did. While for Hobbes all customs had to be tested by reason, he could not ultimately show that the kind of knowledge of custom which common lawyers had was not necessary. In his discussions of the common law, Hobbes appeared to argue that the unwritten law was not Coke’s artificial reason, but natural equity. Yet, he had ultimately to admit that the “work of a Judge […] is very difficult, and requires a man that hath a faculty of well distinguishing of dissimilitudes of such cases as common judgments think to be the same,” and that it required both learning in the laws and skills of interpretation (Hobbes 1971, 115, 99–100). Yet his theory could not explain the nature of that knowledge.

3.5. History, Custom, and Authority in Selden and Hale

The challenge for thinkers such as Selden and Hale was to develop a vision premised on a command theory of law which could account for the role of custom and the reasoning of lawyers. The foundations of such a vision were laid before the civil war by Selden, and developed by Hale, in an explicit answer to Hobbes. For these writers, the common law had positive foundations in an historical past. Where Hobbes’s vision was ahistorical, seeing all law as derived from the current sovereign who derived his status from a contract which could not be broken, Selden and Hale saw the ruler as himself deriving his authority from an historical original contract which defined the sphere of his power, and determined the validity of his actions. Ultimate sovereignty rested in the parties to the original contract, who could modify it. But in that contract, they had created a system which could generate and modify valid rules. The validity of the customary rules of property and crime which the courts handled and developed were to be traced to this original contract. History therefore played a crucial part in their notion of authority.

Selden sketched out a history of English law prior to Henry I (in “whose time, or near thereabout, are the first beginnings of our Law, as our Lawyers now account”) in Jani Anglorum (Selden 1683, preface). He put particular stress on the legislation of successive kings, such as “Ina, Alfred, Edward, Athelstan, Edmund, Edgar, Ethelred, and Knute the Dane” (Selden 1683, 38). Many features of English law could be traced to early legislation: such as the origin of courts leet, justices and sheriffs (all in the reign of Alfred). Even some laws which were reckoned “among the most ancient Customs of the Kingdom” could be traced to post-Conquest legislation (Selden 1683, 66). Selden did note that laws “are made either by Use and Custom (for things that are approved by long Use, do obtain the force of Law) or by the Sanction and Authority of Law-givers,” but he spent relatively little time discussing pure custom. Even in the era of the ancient Britons, it seemed that law was controlled by experts. At that period, the “Druids were wont to meet, to explain the Laws in being, and to make new ones as occasion required” (Selden 1683, 93;
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cf. Selden 1725b, 8). From the Saxon era, he contended, new laws were made in assemblies.

Hale’s reading of Selden persuaded him that much of what was regarded as common law began as statute. However, he also acknowledged that much was introduced by custom (Hale 1971, 44, 67, 82). In general, the “formal and obliging Force and Power” of the common laws “grows by long Custom and Use” (Hale 1971, 17), and many of the key rules of inheritance, conveyance and contract “have not their Authority or Institution by Acts of Parliament” (Hale Undated (b), f. 33v). Following Selden, Hale showed that the common law was a mixture of British, Saxon, Danish and Norman law. In practice, it was “almost an impossible Piece of Chymistry to reduce every Caput Legis to its true Original.” Each part obtained its authority by its being received and approved in England (Hale 1975, 42–3). This however raised a presumption that it originated “from the just legislative authority of him or them that first had it.” Customary law, he said, “hath not the formality of other instituted laws, yet it hath the substance and equivalence of an institution by the legislative authority” (Hale Undated (c), f. 10v, cf. Hale 1975, 169). Equally important for Hale’s argument was the legislative confirmation of this law in the middle ages. Under William, “many of those ancient Laws [were] approv’d and confirm’d by the King and Commune Concilium,” while the Conqueror’s new laws “were not imposed ad Libitum Regis, but they were such as were settled per Commune Concilium Regni.” Similarly, the charters of John, which Hale elsewhere saw as affirming the common law, only obtained a full enactment in the reign of Henry III, “when the Substance of them was enacted by a full and solemn Parliament” (Hale 1971, 68, 70, cf. 7). For Hale, as has been seen, the location of “just legislative authority” could change over time, by modifications of the original contract, real or presumed: as it clearly had in England since the Saxon era. By that token, rules which might have originated in custom could continue to have validity when adopted by a polity whose legislative authority had changed. However, popular custom alone would no longer generate legal rules. For, as Hale put it, the custom which made up the common law was “not simply an unwritten Custom, not barely Orally deriv’d down from one Age to another; but it is a Custom that is derived down in Writing, and transmitted from Age to Age” and especially from the era of Edward I (ibid., 44). The “writing” he had in mind was of course that to be found in legal records. Custom was the source of the capitala legum, those fundamentals of English law with no traceable positive origin, such as the course of descent in property.

In contrast to Coke, both Selden and Hale saw the common law as a developing body. Hale compared it with Titius, who “is the same Man he was 40 Years since, tho’ the Physicians tell us, That in a Tract of seven Years, the Body has scarce any of the same Material Substance it had before.” The further laws proceeded from their original institution, he continued, the larger
and more numerous they became (Hale 1971, 40–1). The law grew both through the passing of new legislation and through judicial interpretation. Nevertheless, Hale was keen to stress that the judges were not legislators. Though their decisions were legally binding on the parties to a case, “yet they do not make a Law properly so called, (for that only the King and Parliament can do)” (ibid., 45). Indeed, Hale was keen to restrict the scope for judicial creativity. Answering Hobbes, he argued that judges should not follow their own natural reason, but should follow established precedents and rules. Law, he said, did not have the demonstrative certainty of mathematics. Although it might be possible to develop an abstract system rules of universal law, “when persons come to particular application of these common notions to particular instances and occasions, we shall rarely find a common consent or agreement among men” (Hale 1924, 502–3). For that reason, “the wiser sort of the world have in all ages agreed upon some certain laws and rules and methods of administration of common justice” (ibid., 503). For the sake of stability, it is reason for me to prefer a law by which a kingdom has been happily governed four or five hundred years, than to adventure the happiness and peace of a kingdom upon some new theory of my own, though I am better acquainted with the reasonableness of my own theory than with that law. (Ibid., 504)

For Hale, the law of reason alone was arbitrary and uncertain (ibid., 503). If judges were left to follow their own estimate of equity, they might be corrupt or partial, or produce contradictory decisions. Nor could they look just to the case before them. The expounder of the law, Hale said, “must look farther than the present instance and whether such an exposition may not introduce greater inconvenience than it remedies” (ibid., 504). To avoid the danger of arbitrariness, it was essential “that one age and one tribunal may speak the same things and carry on the same thread of the law in one uniform rule as near as is possible” (ibid., 506).

Hale’s advice to judges was therefore to follow settled rules where they could. Where a clear rule existed, the judge should apply it, as in the simple case of determining who was the heir to an ancestor. But what was a judge to do “if a case fall out that hath not been in terminis decided” (Hale Undated (b), f. 32)? These more complex cases required some deduction from the common law, “the great Substratum that is to be maintain’d” (Hale 1971, 46). Firstly, Hale said, the judge was to inquire “with all imaginable industry” into what had formerly been done in such cases, and not depart from such resolutions “without very evident and clear & unanswerable reason.” If there were no precedent resolutions, the judge should “keep his Reason as near as may be within the Cancelli of the Reason of the Law” and make analogies with similar cases, in order to maintain certainty. For a mischievous certain law, he observed, was better than an arbitrary one, since the former could be amended by act of parliament, whereas “there is no cure for the Inconven-
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ences of an Arbitrary Law.” Only “if there be no former decision, no legal reason or reason governed by the analogy of law to guide the judgment” could the judges resort to reason. But even here he argued, against Hobbes, that the judges’ “experience and observation and reading gives them a far greater advantage of judgment than the aery speculations” of philosophers (Hale Undated (b), f. 32–33).

Judges thus had a role to play in the development of the law, helping to accommodate it “to the conditions, exigencies and conveniencies of the people” (Hale 1971, 39). However, this was to be done by the reasoning of men learned in the principles and precedents of law. For Hale, a body of experts interpreted and developed a body of law which had originated in the past, by applying it to novel circumstances in ways which would be most faithful to the spirit of that law. Hale retained a critical view of many aspects of the common law, as befitted a man who had presided over a commission to reform the law in the interregnum (see Cotterrell 1968). Yet, he felt that change should be made by experts. He insisted that “nothing be altered that is a foundation or principal integral of the law,” for to do so might endanger its entire fabric. Further, any thing that could be done by the power and authority of the judges should be left to them. Only in matters which could not be changed should parliament intervene, and then it should act under the guidance of the judges (Hale 1787, 272). For Hale, it was imperative that lawyers and judges should engage in law reform, to prevent the work being done incompetently by unlearned men.

For Hale, the law thus developed, not through the changing customs of the people, but through the efforts of legislators and judges. He was very keen to show that there were settled and stable rules which were built upon by the judiciary. Nonetheless, certain questions remained from his discussion of judging. For instance, Hale said that individual decisions were “less than a law,” though they were great evidence of what the law was. Such a view of the judicial function made sense if one were to see the common law as a body of rules, whose meaning was debated in different cases, by men whose opinion would clearly be worth more than that “of any private persons” (Hale 1971, 45). However, he also argued that common law was to be found in judicial decisions “consonant to one another in the series and successions of time” (ibid., 44). Judicial decisions were not merely commentaries on an existing body of law, but themselves developed it. This raised the question in particular of how to account for those rules of law or bodies of doctrine which derived from judgments made on the basis of reason alone. Although Hale devoted little time to this problem, considering it as a relatively minor area, it was a subject which was much discussed a century later.
Selden and Hale presented a reorientated vision of the common law, which focused on law as the product of positive imposition. They saw custom as a set of positive rules originating in the past, which had been developed by judicial argument in court. In their vision, the law of nature played a muted role, as a premise of the system rather than as a working tool. This vision proved a particularly influential one on common lawyers, as can be seen from an examination of the most important English jurist of the eighteenth century, Sir William Blackstone. Blackstone’s principal work, *Commentaries on the Laws of England* (1765–1969), was the fruit of his lectures at Oxford, and were designed to give an introduction to the law to the gentleman (see Lieberman 1989, chaps. 1–2). They were the best and most elegant overview yet written, and one which aimed to examine all aspects of law. Blackstone was more an expositor and summariser than a deep thinker, and his theoretical positions were often inconsistent. Nevertheless, the prevailing idiom of his work was that of Selden and Hale, both in his understanding of the nature of the constitution and in his views on the foundations and workings of the common law. At the same time that Blackstone was working, a different and less positivist view of law was being developed to the north of the border. There, the most important published jurist of the Scottish Enlightenment, Lord Kames, developed a theory which sought to answer questions left unanswered by Blackstone’s vision, on different premises.


If Selden and Hale wrote in an era where the greatest constitutional contention revolved around the question of the nature and extent of royal prerogative power, the constitutional landmark dominating eighteenth century legal thought was the revolution of 1688. The decade preceding the revolution had seen a striking change in political language, with both supporters of the crown and its opponents moving away from common law constitutionalist positions. In the later years of Charles II’s reign, the notion that an ancient constitution existed came under renewed attack from royalist thinkers, who sought to argue that the king’s authority did not rest on the consent of the people. Attacks on the antiquity of parliament, which had been deployed during the civil war, were now rehearsed once more, to great effect. *The Freeholder’s Grand Inquest* written in 1644, probably by Sir Robert Filmer (1588–1653), was republished in 1679 (see Filmer 1991a, xxxiv–vi; Weston and Greenberg 1981, 115; Pocock 1987, 151). It argued that the House of Commons had no part of the
legislative power, but that “the king himself only ordains and makes laws, and is supreme judge in parliament” (Filmer 1991a, 72, 74). When an attempt to refute this was made by William Petyt (1641–1707) (Petyt 1680), who argued that there was a prescriptive right to representation in the Commons preceding the time of legal memory, he was answered by Robert Brady (d. 1700; Brady 1680). Brady used detailed research to show both that land law had been revolutionised by the conquest, and that the king’s council after that event was not attended by representatives of the community, but only by his tenants-in-chief. This had important political implications. For Brady, William and his successors were lawmakers, not bound by any immemorial constitution, nor by terms set with the consent of the people. The liberties enjoyed by the English—including their role in lawmaking—derived only from grants and concessions from the king (Brady 1685, preface).

Having attacked the historical version of their opponents, royalists did not now rest their own arguments for the crown’s power on history. Instead, they argued (in Brady’s words) that “the Kings of England hold their Crowns by the Laws of God and Nature, and therefore cannot be reputed of Human Institution” (Brady 1681, 31). This was to move the debate away from history altogether. A catalyst in this change in political language was the publication of Filmer’s Patriarcha (written before the civil war) in 1680 (Filmer 1991c). Filmer was unequivocal on the matter of consent: “we see the principal point of sovereign majesty and absolute power,” he said, “to consist principally in giving laws unto subjects without their consent” (Filmer 1991b, 177). Filmer based his thinking on divine right and patriarchalism. After the Fall, man was morally incapable of self-government, he argued: he could only be ruled by an authority sanctioned by God prior to human history. This was the power of kings, which was akin to that which God gave to Adam. The publication of Patriarcha drew important responses from both Algernon Sidney (1623–1683) and John Locke (1632–1704). In answering the royalist argument, these two writers developed political theories which laid stress on the sovereignty of the people. Both men moved in Radical Whig circles in the late 1670s and early 1680s, and both developed their arguments in order to show that the people had a right to rebel against an oppressive king.

Although Sidney was more eclectic in his arguments than Locke, neither based his theory on historical justifications or on the legal language of common law constitutionalism. “Axioms are not rightly grounded upon judged cases; but cases are to be judged according to axioms,” Sidney wrote:

Axioms in law are, as in mathematics, evident to common sense […] the axioms of our law do not receive their authority from Coke or Hales but Coke and Hales deserve praise for giving judgment according to such as are undeniably true. (Sidney 1772, 409–10; cf. Scott 1988, 38)

In his view, an unjust law was simply not law, and could be seen as such by even the meanest understanding. Against Filmer’s argument that government
came from God, Sidney saw it as a human institution, erected to promote the public good and to develop virtue. "As governments were instituted for the obtaining of justice," he wrote,

we are not to seek what government was the first, but what best provides for the obtaining of justice, and the preservation of liberty. For whatever the institution be, and how long soever it may have lasted, it is void, if it thwart, or does not provide for the end of its establishment. [...] If any man ask, who shall be the judge of that rectitude or pravity which either authorizes or destroys a law? I answer, that as this consists not in formalities and niceties, but in evident and substantial truths, there is no need of any other tribunal than that of common sense, or the light of nature, to determine the matter. (Sidney 1772, 404–5)

If obedience did not rest merely on the rightful origin of a ruler's power, he was only to be obeyed as long as he acted for the public good (see Scott 1991, chap. 11). In Sidney's view, the people of England had originally delegated their power to parliament, and the king was a trustee, without independent power. The people therefore had the right, acting through parliament, to resist a bad king. "[I]n all the revolutions we have had in England," Sidney wrote, "the people have been headed by parliament, or the nobility and gentry that composed it, and, when kings failed of their duties, by their own authority called it" (quoted in Scott 1991, 264).

In his *Two Treatises of Government* (1681), Locke also sought to justify rebellion, using the language of natural rights rather than that of the common law. Locke's social contract theory differed significantly from that of common lawyers such as Selden or Hale. Locke did conceive of natural law in voluntarist terms as the commands of God, arguing that "what duty is, cannot be understood without a law; nor a law be known, or supposed without a lawmaker, or without a reward and punishment" (Locke 1975, 74; cf. 352). However, in the *Second Treatise*, he did not conceive of the social contract as creating a state with sovereign powers whose valid commands had always to be obeyed. Rather, the government which was set up was seen to be the servant of the people, to protect their natural rights. Where for Selden and Hale, the positive laws of political society developed from natural law foundations, Locke rather saw potential conflicts between the demands of nature and the acts of political rulers.

Arguing against Filmer, he used the concept of the state of nature to show man's natural equality under God. There was a law of nature "which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that all being equal and independent, no one ought to harm another in his life, health, liberty or possessions" (Locke 1988, 271, §6; for a fuller discussion of Locke, see Riley, Volume 10 of this Treatise). Rights therefore existed before the origin of political society, notably rights of property. Whatever a man cultivated in the state of nature through his labour became his property (Locke 1988, 286–7, 290–1, 292–3, §§ 26, 32, 36). Men subsequently entered society to protect their property, which included life, liberty and estate (ibid.,
Political society was formed by an original compact, by which every man agreed with the others to “make one society, who, when they are thus incorporated, might set up what form of government they thought fit” (ibid., 337, §106). Locke explained that the “first fundamental positive law of all commonwealths is the establishing of the legislative power, as the first and fundamental law which is to govern even the legislative” (ibid., 332, §97). This legislative power thus created was the supreme power in the commonwealth (ibid., 355–6, §134), but it could never be arbitrary over the lives and fortunes of the people. For men could only give to the legislature the power they possessed in the state of nature; and since in that state each man had “no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth” (ibid., 357, §135).

Locke realised that natural law alone was not sufficient for social co-ordination. Political society was needed to create and enforce laws (ibid., 350–1, §§124–6). However, government only existed to promote the public good (ibid., 353, §131), and legislation which passed had to conform to the law of nature, the fundamental rule of which was the preservation of mankind (ibid., 358, §135, cf. ibid., 209–10, First Treatise §92). Central to Locke’s argument was the notion of consent: “the supreme power cannot take from any man any part of his property without his own consent” (Locke 1988, 360, §138). For Locke, the legislature was therefore only a fiduciary power to act for certain ends, and could be removed if it acted contrary to the trust reposed in it. The community always retained a supreme power of saving itself even from the legislature, if it should have designs against the people’s liberties and properties: “And thus the community may be said in this respect to be always the supreme power,” though “this power of the people can never take place till the government be dissolved” (ibid., 367, §149). When the rulers attempted to enslave or destroy the people, or attempted to rule for their harm, the people, “having no appeal upon earth they have a liberty to appeal to Heaven whenever they judge the cause of sufficient moment” (ibid., 379, §168).

Locke conceived of revolution as clearly a political event, rather than a legal judgment. Rebellion would come, not when a detailed analysis was made that a monarch had broken his contract with the people, or when the constitution collapsed, as it had in the 1640s, when constitutional actors ceased to act in legally valid ways; rather, it would come when a monarch’s consistent behaviour revealed an intention to act against the public good. Locke argued that the people would be slow to react, and would do so only “if a long train of abuses, prevarications and artifices, all tending the same way” made the ruler’s design to act contrary to their trust visible to the people (ibid., 414–5, §§223–5). Although Locke argued that a supreme legislature which betrayed its trust could be resisted, he felt that in England, there was little risk that parliament would take the subject’s property (ibid., 361, §138). The problem lay
rather with the king. For Locke, the monarch, as executive, was subordinate to the legislature, and any oaths of allegiance to him were conditional on his acting according to law. Once he ceased to do that, he became a private citizen, to whom no allegiance was due, the public “owing no obedience but to the public will of society” (ibid., 368, §151). Similarly, while the executive had to have discretionary prerogative powers, even to act against positive law, they were only to be used for the public good (ibid., 376–7, §163).

Locke based his arguments on a pure political theory, rather than on common law arguments or history, in part because in the late 1670s and early 1680s, it was difficult to use common law arguments, since the Stuarts acted “by colour of law.” For instance, lawyers agreed that the king had the power to dispense with laws, but disagreed over the extent of these powers (see Nenner 1977, 90–9). In any event, Stuart kings, having the power to remove judges, obtained a bench which was often willing to endorse its arguments for prerogative powers (Havinghurst 1950; 1953; Godden v. Hales (1686) Howell 1816–1826, 11: 1165–99). By the later years of the reign of Charles II, Whigs feared that the king wanted to rule in an absolutist manner, without consulting parliament. In this context, pamphleteers argued that not to call parliament was “expressly contrary to the common law, and so consequently of the Law of God as well as the Law of Nature” (Anon. 1681, 5; cf. Ashcraft 1986, 317). However, as Tories pointed out, since calling and dissolving parliament was one of the king’s prerogatives, it was hard to make a common law argument that he was obliged to call it (Scott 1991, 75). In his treatise, written during the political crisis of 1678–1681, Locke clearly had in mind the problems caused when the king used his prerogative powers in an illegitimate way, but which could not be challenged by courts exercising a kind of potens irritans (Locke 1988, 402–4, §§205–8). He was also concerned at the king’s dissolution of his parliament. The power to call parliament, he wrote, was not an arbitrary power to be exercised at pleasure, but was a public trust; and if the king hindered the meeting of the legislature, he placed himself at war with the people (ibid., 370–2, §§155–6). When Locke finally listed the factors which led to the dissolution of a government, he was in effect listing Radical Whig complaints against Charles II (ibid., 408–11; §§214–7, 219). However, if Charles’s actions were politically contentious, it was hard to show that they were clearly illegal.

4.2. Common Law Constitutionalism Reasserted: Blackstone and the Glorious Revolution

Charles II died peacefully in his bed in 1685. After three years on the throne, his brother, James II, fled England in 1688, to be replaced in a bloodless “Glorious Revolution” by William of Orange. On 28 January 1689, the Commons resolved
That King James the Second, having endeavoured to subvert the Constitution of the Kingdom, by breaking the Original Contract between King and People, and by the advice of Jesuits, and other wicked persons, having violated the fundamental laws, and having withdrawn himself out of his kingdom, has abdicated the Government, and that the throne is thereby become vacant.

(Quoted in Dickinson 1979, 74)

Many contemporaries were uncomfortable in attempting to justify the revolution. Most sought to avoid the Lockean argument that the king was only a trustee who could be removed if he acted against the common good, preferring the fiction of abdication. Equally, few supported the idea that kingship in England was elective. Great efforts were therefore made to show that William’s accession was in accordance with law, which the new king claimed he had come to defend (see Kenyon 1977; Pocock 1980; Goldie 1980; Kay 2000).

However, it proved extremely difficult to justify William’s accession on the grounds of James’s “abdication” alone. The revolution also had to be justified by accusing the king of breaching the original contract of government. This contract was (as Samuel Masters put it) “nothing else than a tacit agreement between the king and subjects to observe such common usages and practices as by an immemorial prescription have become the common law of our government” (quoted in Dickinson 1979, 78). The argument was not cast in Lockean terms that there was a popular right to rebel against a bad king who invaded their natural rights. Instead, many used language similar to that used in 1642, that the king’s actions, by stretching the bounds of the law, had provoked a constitutional crisis, for which there was no clear legal remedy. The king’s breaches were not minor, but effectively prevented the operation of law; and in this case, law ran out. One writer, who argued after 1688 that the king had no power to authorise his officers to commit illegal acts, and who claimed such acts could be resisted, admitted that there were no positive laws which determined what was to be done if the king assumed arbitrary power. Such, he said, were “odious Cases and not fit to be suppos’d.” However, while the law made no provision for them, in such cases, “it’s certain that every man is left to the Right and Law of Nature” (Anonymous Undated (b), f. 6v). The author of another tract similarly argued that

so long as any part of the constitution is preserved in such manner as to be able to rectify the maladministration of the rest, e.g., if a subject be oppressed, so long as the courts of justice are permitted to do right, he may by them be redressed: or if those courts are overruled yet so long as parliaments are suffered to be duly chosen & transact business, the corruptions of those courts may be rectified. And so long, I suppose, Arms ought not to be taken up. For that is the last remedy & then only lawful, when all other means of legal redress fail. (Anonymous Undated (a), f. 10v)

For many, this was what had occurred in 1688.

Eighteenth century jurists remained uncomfortable with explaining the revolution. On the one hand, 1688 settled the seventeenth century disputes between crown and parliament in the latter’s favour, and secured the Protestant succession so important to eighteenth century Englishmen. On the other
hand, the principle of revolution ran counter to the lawyers’ vision of an ancient, uninterrupted legal system. The difficulty of reconciling these positions can be seen in Sir William Blackstone’s mid-century efforts. He spoke of “those extraordinary recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against violence of fraud or oppression” (Blackstone 1979, 1: 243). When a quarrel arose between “the society at large and any magistrate vested with powers originally vested by that society,” he said, “it must be decided by the voice of society itself” (Blackstone 1979, 1: 205). However, Blackstone was happy to follow the line of the Convention parliament when explaining the Revolution. Given that a breach of contract by the king would entail a dissolution of society and a return to the state of nature—“wild extremes into which the visionary theories of some zealous republicans would have led them”—the Convention wisely held that James’s conduct amounted only to an endeavour, not an actual subversion of the constitution, and that this amounted to an abdication, “whereby the government was allowed to subsist, though the executive magistrate was gone” (Blackstone 1979, 1: 206; cf. 226, where he stated that James did break the original contract, and 148 where he spoke of abdication). In the end, Blackstone said that “this great measure” had to be accepted “upon the solid footing of authority” rather than on arguments from its “justice, moderation, and expedience.” Our ancestors, he said, had a competent jurisdiction to decide the question, and having settled it, “it is now become our duty at this distance of time to acquiesce in their determination” (Blackstone 1979, 1: 206; cf. Lobban 1991, 31).

While accepting the results of the revolution, Blackstone sought to give a view of the constitution which followed the position of Selden and Hale, and the proponents of a mixed and balanced government, rather than that of Locke. Neither Blackstone nor his successors in the Vinerian Chair at Oxford looked to the sovereignty of the people. Perhaps the most extreme endorsement of the anti-Lockean position came from Richard Wooddeson, the third holder of Blackstone’s chair. Although sceptical about the very idea of an original contract, feeling that the constitution developed through gradual change, he nonetheless asserted that popular consent to existing constitutional arrangements was not revocable, “at the will even of all the subjects of the state, for that would be making a part of the community equal in power to the whole originally, and superior to the rulers thereof after their establishment” (Wooddeson 1834, 1: 22). For these thinkers, sovereignty was located in the institutional structure of a mixed monarchy, created by past consent.

Although Blackstone sometimes spoke of sovereignty as lying in the legislature, he also talked of the king as “sovereign” (Blackstone 1979, 1: 47–8, 234). In his view, the king was not a mere trustee of the people, or an executive officer subordinate to parliament (cf. De Lolme 1821, 67). Supreme power “is divided into two branches; the one legislative, to wit the parliament,
consisting of king, lords, and commons; the other executive, consisting of the king alone” (Blackstone 1979, 1: 143). Parliament and crown were equal and distinct elements, though the king had to be represented in parliament in order to prevent any encroaching on the royal prerogative, which would weaken the executive (ibid., 51). Both were beyond control by the courts. “The supposition of law,” he wrote, “is, that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy” (ibid., 237). No court had jurisdiction over the king, for “the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, says Finch, shall command the king?” (ibid., 235). The very notion of a superior power to the king “destroys the idea of sovereignty”:

If therefore (for example) the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch of branches, in which this jurisdiction resided, would be completely sovereign. (Ibid., 237)

Nevertheless, regal authority and prerogative powers had been restrained since Saxon times (ibid., 230–1). For Blackstone, as for his seventeenth century predecessors, the bounds of the kings power were set by the original contract, and could be redefined and further limited by acts of parliament. If the king’s powers were limited by law, nonetheless he could do no wrong. What, then, was the remedy for executive oppression? Blackstone set out the law for various kinds of oppression. If it was of the kind which endangered the constitution, law gave no remedy; though the precedent example of 1688 demonstrated that in such a case the king would be deemed to have abdicated (ibid., 238). In case of “ordinary public oppressions,” the remedy was to indict or impeach the king’s ministers, for misconduct in public affairs was to be attributed to the ministers, rather than to the crown (ibid., 237, 244). In case of private injuries suffered at the hands of the crown, the party harmed had to seek a petition, granted as a matter of grace, which sought to persuade the crown that it had erred, rather than to compel it (ibid., 236). Finally, Blackstone stated that the law presumed that the king was incapable of thinking wrong: so that if he made a grant or a privilege contrary to reason or prejudicial to the commonwealth or any private person, the law would presume that the king could not have meant it, but was deceived, “and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents, whom the crown has thought proper to employ” (ibid., 239). If the presumption that the king would never act contrary to his trust was an example of Hale’s potens irritans, it was a very respectful one.

When came to legislation, the king-in-parliament had “sovereign and uncontrollable authority” and “absolute despotic power”:
It can regulate or new model the succession to the crown [...]. It can alter the established religion of the land [...]. It can change and create afresh even the constitution of the kingdom and of parliaments themselves [...]. It can, in short, do everything that is not naturally impossible.

(Pbid., 156)

Parliament was not subject to control by the courts, whose power was limited to the equitable interpretation of statutes and the development of the common law. For Blackstone, as for other eighteenth century jurists, abuses of power were thus to be controlled not by judicial, but by political means. The first way this was achieved was through the structure of the constitution, which balanced the three estates. “[T]he constitutional government of this island is so admirably tempered and compounded,” he noted, “that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest” (Blackstone 1979, 1: 51; cf. 149–51). In making this assertion, Blackstone was echoing themes from the seventeenth century; but the formulation of his ideas on the balanced constitution and the separation of powers also owed a great deal to the influence of Montesquieu’s discussion of the English constitution (see Carrese 2003, chap. 6). The second means was through political vigilance. Blackstone, a politician with strong country party tendencies, was all too aware that the preservation of the constitution was not merely a matter of mechanics, but required in addition a king manifesting “the highest veneration for the free constitution of Britain” and a people who would “reverence the crown, and yet guard against corrupt and servile influence from those who are intrusted with its authority” (Blackstone 1979, 1: 326). The safety of the constitution thus required the continuing healthy operation of various institutions, including parliament, crown and judiciary (see, e.g., Blackstone 1979, 1: 136–41).

4.3. Natural Law and Authority in Blackstone’s Thought

When discussing the nature of law, Blackstone appeared to take contradictory positions. On the one hand, he said that God had dictated a law of nature, which was binding all over the globe and was superior in obligation to any other law: “no human laws are of any validity, if contrary to this” (Blackstone 1979, 1: 41). On matters which were not indifferent, human laws were only declaratory of natural law. He spoke of absolute rights as “such as would belong to their persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it,” and noted that the aim of society was “to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature,” “which in themselves are few and simple.” By contrast, “[s]uch rights as are social and relative result from, and are posterior to, the formation of states and societies.” These rights, “arising from a variety of connexions, will be far more numerous and more complicated” and would “take up a greater space in any code of
laws" (ibid., 119–21). This seemed clearly to distinguish between natural rights, which came from God, and indifferent matter, which came from human legislation.

On the other hand, Blackstone also gave a positivist definition of law. Law, he said, “always supposes some superior who is to make it.” While God was the legislator of natural law, municipal law was “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong” (ibid., 44). In all governments, he added, there must be “a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii, or the rights of sovereignty, reside” (ibid., 49). And as has been seen, in England, this power lay in parliament. Scholars have long debated the apparent contradictions in Blackstone’s position (see Carrese 2003, 124–38; Alschuler 1996; Finnis 1967; Hart 1956; Lieberman 1989, chap. 1; Lobban 1991, chap. 2; Lucas 1963; Rinck 1960; Simmonds 1988). These contradictions may have been accentuated by his borrowing from sources which were incompatible in his introductory chapters.

In giving a positivist definition of law, Blackstone followed the eighteenth century norm. Those jurists who had not read Selden’s De Jure Naturali were likely to have been familiar with Samuel Pufendorf’s Of the Law of Nature and Nations, which was translated into English in 1703 (Pufendorf 1717; see Wood 1727, 8). John Taylor, who was familiar with both of these works, and whose work was itself drawn on by Blackstone, spoke of natural law as the command of God, and saw all civil law as derived from a positive lawmaker (Taylor 1755, 245). He also distinguished sharply between law and morals. In the case of law,

the legal necessity, which is produced by the command of a person invested with the proper authority, derives nothing of its effective power from the aptness, the conveniency, or the fairness of the duty enjoined. (Taylor 1755, 45)

Blackstone’s successors at Oxford also wrote in positivist terms. Thus, Sir Robert Chambers, who defined law in terms of the will of a superior, also made an important distinction between the positive law of society as the rule of man’s civil conduct, and the law of God and nature as the rule of his moral behaviour (Chambers 1986, vol. 1: 88, 91; cf. Wooddeson 1834, vol. 1: 30, 48).

In fact, Blackstone’s view of law was closer to Selden’s and Hale’s than Locke’s; and his Lockeian reference to absolute and relative rights at the outset of the Commentaries was misleading. For although there he seemed to suggest that absolute rights were more fundamental than relative rights, in the body of the text, he used the terminology in a different sense. The distinction between the two was used there not for philosophical, but for pedagogic purposes. The structure of his work, which sought to place English law in an institutional form, owed much to Hale’s Analysis, which adapted the distinction of the law of persons, things and actions found in Justinian’s Institutes (Cairns
Where in the Institutes, the law of persons related largely to issues of status and capacity, Hale adapted the model. His “law of persons” dealt with them both “absolutely and simply in themselves” and “under some degree or respect of relation.” The first of these covered the interest every man had in himself, including his liberty and reputation. The interest men had in goods was treated distinctly by Hale, “because they are in their own nature things separate and distinct from the person” (Hale 1739, 2–3). The second looked at persons in their relation to others, relations which were (in Hale’s terms) either political, economical or civil. This was an approach taken also by Thomas Wood (Wood 1720). Blackstone followed the same model in his structure, although he insisted more than his predecessors that the right to property was one of the absolute rights of persons, a categorisation which was in the event to cause him some discomfort (Blackstone 1979, 1: 134–6; 3: 138). The division between “absolute” and “relative” rights thus sought to distinguish between those which could be considered without reference to a person’s status, and those which were to be explained in the context of social relationships. Blackstone’s use of the terms “absolute” and “relative” in the introduction and in the body of his work was therefore inconsistent. Indeed, the very division between rights which were free-standing and those which were not was artificial, for he pointed out that “human laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society” (ibid., 4: 41).

In his discussion of substantive law, Blackstone made it clear that he did not regard “absolute” rights as either enforceable prior to the establishment of society, or as incapable of restriction. There was no indefeasible right to life or liberty, for society had the right to deprive a man of them even for committing only mala prohibita (ibid., 4: 8). Although there was a right to subsistence, it was one which came from the statutory poor laws, which (in Blackstone’s view) were imperfect (ibid., 1: 127, 347–8, 352). Similarly, if the right to property was founded in nature, “the modifications under which we at present find it [...] are entirely derived from society” (ibid., 134). Blackstone refused to commit himself on the precise origins of property, but for practical purposes regarded it as a civil right. “[W]e often mistake for nature what we find established by long and inveterate custom,” he wrote: “It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil right” (ibid., 2: 11). He therefore traced only very few of the positive rules of property law to nature. One example, derived from Justinian, was the right to acquire property in ferae naturae such as bees, by hiving them, which constituted an occupation of something hitherto free (ibid., 2: 292–3). Nevertheless, this right “may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community” (ibid., 4: 411). When it came to
real property, the law of nature’s title by occupancy was only to be found in one rule: if a man held an estate for the term of the life of another, and died without heir before that other, any third person could occupy and hold the land for the remainder of the term. Yet even this was scarcely a natural law form of occupation; for the new tenant would remain liable to the lessor for waste for payment of the rent reserved (ibid., 2: 25; cf. Coke 1794, 41b).

For Blackstone, all legal obligation in civil society came from positive law. “The absolute rights of every Englishman,” he noted, “as they are founded on nature and reason, so they are coeval with our form of government: their establishment (excellent as it is) being still human” (Blackstone 1979, 1: 123). The importance of human legislation is seen in his discussion of the four parts of a law: the declaratory, the directory, the remedial, and the vindicatory (see Finnis 1967). Some rights existed, he said, which God and nature had established. They did not need declaration by human legislation, for they were known to every man (Blackstone 1979, 1: 54). Thus, a man did not need to be told by the sovereign not to murder. At the same time, there were also “mixed” matters, neither wholly indifferent nor part of natural law. For “sometimes, where the thing itself has it’s rise from the law of nature, the particular circumstances and mode of doing it become right and wrong, as the laws of the land shall direct” (ibid., 55). Purely indifferent matters needed declaration by the state. Turning to the vindicatory part, Blackstone noted that “the main strength” of law derived from its penalty: “Herein is to be found the principal obligation of human laws” (ibid., 1: 57; cf. 4: 8). If some duties were defined by natural law, they were enforced by human punishments, which made the distinction between crime and sin. Both public and private vices were equally subject to “the vengeance of eternal justice,” Blackstone said, but only public vices were subject to human punishment. While some crimes were offences against the law of nature and others not, “yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man” (ibid., 4: 42).

Blackstone was known for his distrust of the competence of eighteenth century legislators, and for his Cokean view that it was dangerous to alter any fundamental part of the common law (ibid., 3: 267; cf. Lieberman 1989, chap. 2). He also often spoke of ancient Saxon laws and liberties as the foundation of the law. However, this should not mask his essentially legislative view of the foundations of the common law, which can be seen in his view of its history, much of which was taken from Hale. Although Blackstone argued that unwritten law obtained its binding power from immemorial usage (Blackstone 1979, 1: 64), he proceeded to show that the common law’s origins could be more precisely dated. Blackstone followed Selden in arguing that the common law included the customs of numerous nations, which had been moulded into a single code by several kings. In Alfred’s reign, he argued, local customs had grown so various that the king decided to compile his “dome-book or liber
CHAPTER 4 - THE AGE OF BLACKSTONE AND KAMES

judicialis, for the general use of the whole kingdom.” In turn, Edward the Confessor, finding three systems of law in place, “extracted one uniform law or digest of laws, to be observed throughout the whole kingdom” (ibid., 65–6). These two codes, Blackstone said, “gave rise and original to that collection of maxims and customs, which is known by the name of common law” (ibid., 1: 67; cf. 4: 405).

If much of the common law predated the conquest, however, “the fundamental maxim and necessary principle” that all land in England was held of the crown (see ibid., 2: 51, 105; 4: 411) was introduced later. Blackstone’s notion of feudalism borrowed heavily from Sir Martin Wright, who in turn built on the work of Thomas Craig (Craig 1934; Wright 1730; Cairns and McLeod 2000). Wright argued both that feudal tenures were established under William and that the notion that the king was universal lord of all territories was merely a fiction which was “nationally and freely adopted,” with the consent of the commune concilium (Wright 1730, 58–9, 71–2). Blackstone accepted this version of the origins of feudalism (Blackstone 1979, 2: 48–50; 4: 407–8). In his discussion of the historical rules of tenure, positive law, custom and legal decision mingled together. For example, he said that it had been determined “time out of mind” that a brother of the half-blood should not succeed to the estate, but that it should escheat to the king or superior lord. “Now this,” he said, “is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions” (ibid., 1: 70). If this seemed purely customary, the feudal rule of escheat, referred to here, was nevertheless to be traced to the post-conquest ‘statutory’ agreement. Although he did not articulate it, “time out of mind” here is best understood as meaning prior to 1189, the limit of legal memory. Blackstone’s ‘customary’ system was thus in many ways one which originated in a set of positive rules, which were subsequently developed by the courts.

Wright had also argued that at the time of the conquest, the English had been tricked by Norman lawyers, who penned the law in terms which would allow the introduction of an absolute feudal dependence, and who, by their subtle interpretations, expounded it in a way to establish oppressive feudal incidents (Wright 1730, 78–81). Blackstone repeated this view (Blackstone 1979, 2: 51; 4: 411), and asserted that, when they saw these oppressive incidents, the English sought “a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived” (ibid., 4: 418; 2: 52). This restoration was finally achieved in the reign of Charles II, when military tenures were abolished (ibid., 4: 431; 2: 77). In so arguing, Blackstone sought to persuade the reader that socage tenures—the prime form after 1660—“were relics of Saxon liberty” (ibid., 2: 81) dating from an age which (as he had earlier indicated) had traces of feudalism. This was hardly convincing history. Firstly, the argument that socage tenure “existed in the same state before the conquest as after” (ibid., 2: 85) was hard to square with his asser-
tion that after the conquest the English consented to the conversion of allo-
dial into feudal holdings (ibid., 2: 50). Secondly, Blackstone admitted that
many of the rules of property law could only be explained in the context of
the post conquest feudal system, such as the rule that all socage tenures ex-
cept those held in gavelkind were subject to escheat (ibid., 2: 72, 89, 244).
Similarly, primogeniture was part of the feudal system established by William,
superseding the equal partition which Blackstone argued was the general cus-
tom until the conquest (ibid., 2: 215; 1: 75; 4: 414, 406–7). Indeed, in
Blackstone’s view of history, it was gavelkind which was the most general form
of tenure before the conquest, rather than socage. In effect, what 1660
achieved was not the abolition of feudalism and the return to an ancient
Saxon law as much as the legislative removal of the oppressive incidents the
English had been deceived into accepting (see Willman 1983; Cairns 1985).

Besides complicating land law, the Normans also transformed the Saxon
system of justice. In place of the easy and simple method of determining suits
in the county courts, “the chicanes and subtilities of Norman jurisprudence
[took] possession of the king’s courts” (Blackstone 1979, 4: 409–10). The law
which should have been a plain rule of action now became instead an intricate
science. Blackstone noted that Norman lawyers had so interwoven their
finesses into the body of the legal polity that many of them could not now be
removed without injury to the substance. “Statute after statute has in later
times been made, to pare off these troublesome excrescences, and restore the
common law to it’s pristine simplicity and vigour,” Blackstone noted, “but
still the scars are deep and visible” (ibid., 4: 411). Because of this, modern
courts had to resort to fictions and circuities to achieve substantial justice. If
the common law was like an old Gothic castle, erected in the days of chivalry,
but fitted up for modern inhabitants, the approaches to justice were therefore
“winding and difficult” (ibid., 3: 268). Significantly, the key route to restoring
the law to its essential principles was by legislation. For Blackstone, the com-
plete restitution of English liberties achieved in the reign of Charles II was
done by statutes (ibid., 4: 432). In some cases, indeed, such as with habeas
corpus, these statutes gave better protection than ancient ones, such as Magna
Carta. (ibid., 1: 123–4; 4: 432). Thus, if Blackstone’s writings contained rhetor-
ical echoes of Coke’s ancient constitutionalism, it was evident that when
closely examined, he had a view of the foundation of the common law which
laid greater stress on moments of positive imposition.

Blackstone was not untypical in taking this approach, for it was echoed by
a number of judgments in the eighteenth century courts. As the Master of the
Rolls, Sir Thomas Clarke, put it in 1759, “most of our law as to its foundation
is positive” (Burgess v. Wheate, English Reports, 96: 78). Influenced by the re-
searches of Selden, Spelman and others, and the publication of Anglo-Saxon
law codes by William Lambarde and David Wilkins, judges as well as jurists
began to show a greater interest in tracing particular moments of origin for
legal rules. In Regina v. Maugridge in 1707, for instance, it was noted that the word “murder” was “framed by our Saxon ancestors in the reign of Canutus upon a particular occasion, which appears by an uncontested authority, Lamb 141” (English Reports 84: 1108; citing Lambarde 1644, 141). The court proceeded to trace the development of the changing meaning of the word since the era of Bracton to assist it in distinguishing between manslaughter and murder. In Rex v. Dwyer in 1724 (English Reports 25: 183), Chief Baron Gilbert explored the history of the concept of manslaughter by looking at the punishment for homicide in Anglo-Saxon law codes, and at the relationship between ecclesiastical and secular approaches to the problem in the centuries before and after the conquest. Similarly, in 1764, Lord Mansfield had to consider whether a legal judgment could be given on a Sunday (a key issue to determine the validity of a common recovery in the case before him). Although there was no direct authority, he noted that “the history of the law and usage, as to Courts of Justice sitting on Sundays, makes an end of the question” (Swann v. Broome, English Reports 97: 1000). Drawing on Sir Henry Spelman’s Original of Terms, he traced the evolution of the rules in canon law, and their adoption in secular courts. Even on matters which could be seen as questions of natural or divine law, therefore, judges often sought to explore how human institutions had developed rules rather than reasoning from first principles or scripture.

4.4. Blackstone and Judicial Reasoning

If the common law came from ancient positive institution, how was the content of that law to be known? For Blackstone, as for his predecessors, the rules of land law were to be derived from statutes, maxims and precedents; and he was able to set out these rules clearly in Books II and III of the Commentaries. His approach here echoed Hale’s idea that the lawyer built on and developed positive rules whose foundations lay in an historical past. When it came to these rules, Blackstone argued, judges were not free to act as they saw fit, but followed and applied the rules derived from precedent. At the same time, however, he controversially described judges as “living oracles, who had to decide in all cases of doubt,” in a way which appeared to give them greater power. For he argued that “where the former determination is most evidently contrary to reason,” the judge could depart from the old rule. In such a case, he was not making a new law, but “vindicating the old one from misrepresentation” (ibid., 1: 69–70). Such comments have led scholars to speak of a declaratory theory of law in the eighteenth century, by which the content of law was linked to its moral quality (see Berman and Reid 1996, 448; Evans 1987). But in fact, Blackstone accorded a much narrower power to the judge to disregard law than might at first appear. The example he gave of a judge’s decision which would not be law was extreme one: it was of a judge, familiar with
the rule against the half-blood inheriting, deciding that an elder brother could as a consequence of the rule seize any lands purchased by his half brother. Such a decision would be a merely arbitrary judgment without legal foundation: a logical non sequitur. To say that a judge could mistake the law was to describe what later judges referred to as a decision per incuriam, made in ignorance of authority. Such an opinion was hardly novel. Selden’s follower John Vaughan observed in 1674 that one court was not obliged to follow the decision of a prior court “unless it think that judgment first given was according to law. For any court may err, else errors in judgment would not be admitted, nor a reversal of them” (Bole v. Horton (1673), English Reports 124: 1113 at 1124).

Blackstone’s view can be put in context by referring to another common lawyer’s view of precedent. Edward Wynne, in Eunomus, published in 1765, argued (following Spelman) that when cases were first decided, it was on the basis of reason and the circumstances of the case. “[E]very day,” he said, “new cases arise, and are determined on their own reasons.” But these cases in turn became precedents. Moreover, “tho’ every Precedent must have a time to begin,” he argued,

Although acknowledging the problems caused by the inadequacy of mid-eighteenth century law reports, Wynne clearly stated a hierarchy in the value of precedents, from the single opinion of a judge at nisi prius up to the determination of a writ of error in the House of Lords, which he said was as high in authority as a statute (Wynne 1785, 3: 191–5). Certainly, dicta are to be found by judges like Lord Mansfield who denied that the common law was a system of precedent. “[T]he law of England, which is exclusive of positive law enacted by statute,” Mansfield once observed, “depends upon principles; and these principles run through all the cases, according as the particular circumstances of each have been found to fall within the one or other of them” (Jones v. Randall (1774), English Reports 98: 954 at 955). However, this comment was made in a case of first impression. To argue thus was not to go against the common law as a system of precedent, but only to say that in cases of first impression, judges decided on the basis of natural reason.

Eighteenth century judges accepted Hale’s idea that the law was developed by the judges through analogy and extension, and developed on foundations which had been authoritatively laid. The way this was done was explained by Justice Wilmot in giving an opinion to the Lords in 1758 on the operation of the writ of habeas corpus outside the Caroline statute (31 Car. II c. 2). Wilmot argued that writs of habeas corpus in cases of private custody had originated
in the era of the Restoration, by “a warrantable extension of a legal remedy in one case, to another case of the same nature.” The legality of this first extension, he said, was confirmed by its continued application by the judges for eighty years, for “the course of a court makes a law.” He noted that

The principle upon which the usage was founded, lay in the law; and the usage is nothing but a drawing that principle out into action, and a legal application of it to attain the ends of justice. It is upon this foundation only, that an infinite variety of forms, rules, regulations, and modes of practice in all Courts of Justice must stand, and can only be supported. (English Reports 97: 39)

Wilmot was thus clear that law was developed by the judges in the judicial forum. Like Hale, he also noted that the judges ensured that the law would develop to meet the people’s needs. Indeed, it would be endless
to enumerate instances where the King’s Supreme Courts of Justice in Westminster Hall have, for the ease and benefit of the suitors of the Court, reformed, amended, and new moulded and modified their practice, as from experience and observation they found it would best advance, improve, and accelerate the administration of justice. (Ibid.)

Such a vision of law, showing a developing body of the common law, growing from its original foundations over time, was clearly capable of explaining the content of the law of real property and crime and showing the core principles on which the law would develop. However, jurists taking this view had far greater difficulties when it came to explaining the law of obligations. Although he spoke of “the solemnities and obligation of contracts” as part of the common law (Blackstone 1979, 2: 68), Blackstone recognised that much of its content was newer, for “our ancient law-books” did not “often condescend to regulate this species of property.” In the law of obligations, there were few “positive” rules to be extended by analogy, and resort had perforce to be made to “reason and convenience, adapted to the circumstances of the times”—the kind of reasoning which Hale relegated to the last source to use (ibid., 2: 385). Blackstone therefore divided two kinds of law:

Where the subject-matter is such as requires to be determined secundum aequum et bonum, as generally upon actions on the case [torts], the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts [of law and equity] must submit to and follow the ancient and invariable maxims, quae relicta sunt et tradita. (Ibid., 3: 436)

Blackstone was confronted by the problem (which Hale had not addressed) that in many areas, the common law acted more like a system of remedies than as one of rules, enforcing obligations whose content was derived from outside the law (see Lobban 1991, chaps. 3–4). At the same time, the court of Chancery’s jurisdiction—of growing importance to the propertied and commercial society of the eighteenth century—was also rooted in notions equity and good conscience, as opposed to positive rules. This posed a problem for common law theorists. For cases involving obligations in the eighteenth cen-
tury often suggested that judges were simply enforcing a system of natural rules, or rules generated by community practice, making any positivist conception of the law untenable. Blackstone himself, for example, spoke of obligations in implied contracts as “such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law” (Blackstone 1979, 3: 161). Similarly, trespass, in its largest sense, was “any transgression or offence against the law of nature, of society, or of the country in which we live” (ibid., 3: 208). At the same time, in the early eighteenth century, a number of treatises were written on equity, whose principles were described in terms of natural law or “the original and eternal Rules of Justice” (Francis 1727, 2; cf. Fonblanque 1820).

Despite such language, Blackstone did not argue that there was a system of natural law which bound the parties and the judges prior to their decision. While the courts might recognise natural obligations, he considered that their formal binding authority came only with their legal recognition and definition. Where wrongs were committed, though “the right to some recompense vests in me, at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution” (Blackstone 1979, 2: 397; cf. 2: 438). If equity, reason or nature defined the general obligation, then, it was a judicial mechanism using positive law processes, which enforced it. Significantly, Blackstone argued that the obligation to accept the sentence of the court came not from a natural obligation, but from “the fundamental constitution of government, to which every man is a contracting party” (ibid., 3: 158). For he said it was part of the original contract of society to submit to the constitutions and ordinances of the state of which one was a member: “Whatever therefore the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge” (ibid.). The law for the parties effectively came from the judgment.

Moreover, both the judges administering the courts and the remedies they administered were seen to derive their authority from the sovereign. On the common law side, Blackstone argued, the remedies for breaches of obligations through the action on the case were to be traced to a positive origin in the second statute of Westminster, which empowered the issuing of writs adapted to the individual circumstances of the alleged wrong (Blackstone 1979, 3: 51). The origin of the Chancery’s jurisdiction was more controverted. By the early eighteenth century, many jurists also rooted its origins as a court to developments after the passing of the second statute of Westminster. According to Jeffrey Gilbert (in an argument accepted by Blackstone), this statute was not only used by the officers of the Chancery to make new writs, but it was also used in the reign of Richard II to erect a new jurisdiction, as the clerical Chancellor, John Waltham, used his power to devise the new writ of subpoena in order to develop a jurisdiction over uses, which had been devised
to evade the Statute of Mortmain (Gilbert 1758, 28–30; Blackstone 1979, 3: 51–2). This view of the Chancery as a belated bastard child of the second statute of Westminster was not entirely satisfactory, however. As Blackstone realised, the subpoena was not merely a duplicate of the action on the case, which, “might have effectually answered all the purposes of a court of equity; except that of obtaining a discovery by the oath of the defendant” (Blackstone 1979, 3: 51; emphasis added). Even those keenest to trace the precise statutory origins of the jurisdiction of the Chancery and to argue for its subordination to the common law had to admit that the court offered a distinct set of remedies (Acherley 1736, 10–3, 35–6).

For many, Chancery’s jurisdiction was better explained in different terms (see Bacon 1832, 2: 452, note (a)). For Lord Hardwicke, it derived from the “arbitrary, though sound discretion” which was reserved to the sovereign and his council for “causes of an extraordinary nature,” when regular courts were set up (Tytler 1807, 1: 239; cf. his argument in R v. Hare and Mann (1719), English Reports 93: 442). John Reeves towards the end of the century similarly saw the jurisdiction as derived from a delegation of the king’s council to the Lord Chancellor to act according to conscience (Reeves 1787, 3: 188–93). But whether the court’s jurisdiction originated from the delegation of the medieval king’s power to do justice or from a statutory origin did not affect the fact that the judges’ authority to decide cases derived from a sovereign source. By the eighteenth century, the rival views of the nature of the constitution which these theories of origin might once have represented no longer had much purchase; and indeed courts of law and equity no longer saw each other as rivals in the eighteenth century. Moreover, in many areas, the Chancery saw its rules as being as fixed as those of common law. By the eighteenth century, under the influence of Lord Chancellors Nottingham and Hardwicke, equity had begun to harden into a system of rules and precedents (see Nottingham 1954, xxxviii–lxxiii; Croft 1989). Eighteenth century lawyers rejected the Aristotelian idea of equity, and saw it increasingly as a system of rules. As John Mitford put it, “Principles of decision adopted by courts of equity, when fully established, and made the grounds of successive decisions, are considered by those courts as rules to be observed with as much strictness as positive law” (Mitford 1787, 4n). The court of Chancery and its equitable jurisdiction could thus be assimilated into the kind of common law theory which Blackstone espoused.

If Blackstone’s view of legal reasoning could account for the development of the common law from its foundational rules, and could also account for the constitutional system which allowed new rules to be forged in the courtroom, he had much greater difficulty in explaining the coherence of the rules thus newly developed, although this was something which was demanded by his project of giving an overview of English law. He did attempt a principled discussion of the law of obligations; but it was no easy task. Since there were no
English treatises on contract law until the end of the eighteenth century, and none on tort until the nineteenth, he had few sources to draw on (see Simpson 1987; Lobban 1997). His initial outline of contract law was thus not taken from authority; but neither was it based on the multiplicity of contractual remedies in English law (Blackstone 1979, 2: 442–70). Partially influenced by Roman law, he divided the subject into sections on “the agreement,” “consideration” and the different types of contract, or “the thing to be done or omitted” (ibid., 2: 442). The latter was in turn divided into four sections, on sale or exchange, bailment, hiring or borrowing, and debt. In spite of this arrangement, however, Blackstone had difficulty in describing a fixed system of contractual rules (see ibid., 2: 461). A large part of his problem derived from the fact that in practice, the English law of obligations remained largely a system of remedies. So large was the variety of obligations on simple contracts, for instance, that he postponed discussion of them to the section on remedies (ibid., 2: 465; 3: 153–66). The problem was even more acute when it came to torts. When discussing the remedy for consequential wrongs, the action on the case, Blackstone argued that “wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore wherever a new injury is done, a new method of remedy must be pursued” (ibid., 3: 123).

Blackstone’s discussion of obligations in effect failed to solve the problem presented by Hobbes’s view of adjudication. When faced with disputes in contract or tort, Blackstone’s—like Hobbes’s—judges appeared to decide only on the basis of natural equity, for the parties before them. He did not explain how a body of rules of obligation could evolve, or what principles could lie behind them. If law was to be more than case by case adjudication on the basis of equity, and if the development of that law was to be more than the accidental result of arbitrary choices by judges which bound later ones, some explanation needed to be made of how principles could be found in obligations as well as land law. Blackstone’s vision of the law as developing on a set of positive foundations rooted in an historical past did not promise a solution to this problem. As shall now be seen, a more coherent theory of the nature of obligations was to be found north of the border in Scotland. As shall now be seen, Scots writers took a different approach to legal theory, laying less stress on moments of positive imposition than the English writers we have considered.

4.5. Scottish Legal Literature before Kames

By the time that Blackstone began to compose his Commentaries, Scotland already had a well established tradition of institutional treatises, strongly influenced both by Roman law models and by continental natural law writers (see Cairns 1984b; Cairns 1997). Roman law had a far greater influence on Scots law than on English. Faced with a paucity of reliable texts on Scottish common law, fifteenth century Scots lawyers began to turn to the ius commune to
supplement and interpret the material they had. The process of Romanisation was further boosted when in 1532 a central College of Justice was set up, growing from an existing jurisdiction in the King’s Council to do justice when ordinary judges failed. This new court, which adopted a variation of the Romano-canonical procedure, was operated by a recognisable legal profession, composed of men who had practised in the ecclesiastical courts and who had some training in the learned laws (Cairns 2000, 57–74). By 1700, “Scotland was a country in which the current practice of Roman law [...] had become blended with Scottish source material to form what one might call the Roman-Scots law” (Cairns 2003, 226).

From the early seventeenth century, Scots lawyers began to attempt systematic explanations of their law. A pioneering effort was made by Thomas Craig, whose Jus feudale tribus libris comprehensum was written around 1600, though it was not published until 1655 (Craig 1934). As Cairns has shown, Craig made the “brilliant historical insight” that much of Scots property law was feudal in origin (Cairns 1997, 200). He used this insight to make sense of Scots land law, aiming to show that feudalism was itself a system of principles which could be resorted to when local custom did not provide an answer to a legal question (see Craig 1934, 1.8.16). Craig’s importance lays not in his jurisprudential understanding, however, but in his revealing the feudal nature of Scots law. A more sophisticated jurisprudential position was elaborated by James Dalrymple, Viscount Stair (1619–1695), who was Lord President of the Court of Session between 1671–1681 (when his opposition to religious tests disqualified him from office and led him to exile in the Netherlands) and from 1688 (when he returned with William of Orange) until his death (see Hutton 1981). Stair’s major work, The Institutions of the Law of Scotland, which was written by 1662, and published in 1681 (with a second edition in 1693), was greatly influenced by continental writers, notably Grotius (see in general Walker 1981). Stair sought to emulate those who attempted to make law into a rational discipline, in contrast to older treatises and commentaries in the Roman law tradition, which he said failed to argue “from any known principles of right” (Stair 1981, 1.1.17). Like Craig, he argued that Roman law was a source of law in Scotland only in the absence of local sources of law and where it was equitable (ibid., 1.1.16). Natural law and reason lay at the heart of Stair’s system. “Law,” he wrote “is the dictate of reason determining every rational being to that, which is congruous and convenient for the nature and condition thereof” (ibid., 1.1.1). Following Grotius, Stair at first appeared to take a realist position on natural law, describing it as what reason dictated (see Stein 1981, 181–2). The three precepts of Roman law, honeste vivere, alterum non laedere, suum cuique tribuere, were “that eternal law, which cannot be altered, being founded upon an unchangeable ground, the congruity to the nature of God, angels and men.” (Stair 1981, 1.1.1). God himself could not act against his divine perfection, and invariably governed himself by goodness,
righteousness and truth. However, the structure of the work, in which the concept of obligations played a crucial part, indicated a more voluntarist position, seeing law in terms of will, and reflecting Stair’s presbyterian theology (see Stein 1957, 4). For Stair (for whom “natural law” and “equity” were interchangeable terms)

The first principles of equity are these: 1. That God is to be obeyed by man. 2. That man is a free creature, having power to dispose of himself and of all things, insofar as by his obedience to God he is not restrained. 3. That this freedom of man is in his own power, and may be restrained by his voluntary engagements, which he is bound to fulfil. (Stair 1981, 1.1.18)

These three principles of right—obedience, freedom and engagement—informed the structure of the work. Stair described as “obediential” obligations those which “have their original from the authority and command of God.” They were contrasted with “conventional” obligations, which derived from contract or consent (ibid., 1.7.1; 1.1.19). However, even the obligation to keep one’s promises ultimately derived from the will of God (ibid., 1.10.1). Liberty, in turn, consisted in man’s freedom to act as he pleased “except where he is tied by his obedience or engagement (ibid., 1.2.3).

Conventionally enough, Stair rooted the origin of political society in consent, as people chose to refer their differences to a sovereign to determine. For Stair, “government necessarily implies in the very being thereof a yielding and submitting to the determination of the sovereign authority in the differences of the people” (ibid., 1.1.16). However, he was keen to counter the view that positive law was nothing more than the arbitrary will and pleasure of the lawgiver, since he saw that such a view would render hopeless his ambition of making law appear a deductive science. He answered it by arguing that positive law only existed to make declare equity—or natural law—or to make it effectual. “[E]quity is the body of the law,” he argued, “and the statutes of men are but as the ornaments and vestiture thereof” (ibid., 1.1.17). Thus, the first sovereign decided disputes by natural equity, and customs subsequently developed, arising “mainly from equity.” In this way, what was convenient and inconvenient could be “experimentally seen” over a period of time, attaining the force of law only if convenient (ibid., 1.1.15–16). Equity thus permeated the whole legal system and justified the attempt to systematise it. Nevertheless, law was more than natural equity. Stair pointed out that after the fall of man from paradise, men became depraved and unwilling to give each other their due. In this context, other principles were needed to make equity effectual. In particular, there were three principles of positive law: society, property, and commerce. While he noted that after the fall, men were willing to “quit something of that which by equity is his due, for peace and quietness sake,” it was clear that the principles of equity harmonised with the principles of positive law:

The principles of equity are the efficient cause of rights and laws: the principles of positive law are the final causes or ends for which laws are made, and rights constitute and ordered. And all
of them may aim at the maintenance, flourishing and peace of society, the security of property, and the freedom of commerce. (Ibid., 1.1.18)

Though influenced by the Roman model, Stair departed from the structure of Justinian’s Institutes in his work. At the outset, he indicated that he would structure his work around the concept of rights. Stair divided rights into three kinds. The first was personal liberty, or the power to dispose of one’s person. The second was dominion, or the power over property. The third was obligation which is correspondent to a personal right [...] and it is nothing else but a legal tie, whereby the debtor may be compelled to pay or perform something, to which he is bound by obedience to God, or by his own consent and engagement. Unto which bond the correlate in the creditor is the power of exaction, whereby he may exact, obtain, or compel the debtor to pay or perform what is due; and this is called a personal right, as looking directly to the person obliged, but to things indirectly as they belong to that person. (Ibid., 1.1.22)

When dealing with the nature of rights, Stair began with liberty, before dealing with obligations, and then with dominion. Moreover, unlike Justinian’s division of persons, things and actions (which “are only the extrinsic object and matter, about which law and right are versant”: ibid., 1.2.23), he examined firstly the constitution and nature of rights, secondly their conveyance, and thirdly their cognition (for instance by legal remedies). Stair’s notion of right was a useful analytical tool to give a well-ordered overview of Scottish private law. Nonetheless, it was clear that the concept of duty was in many ways more central to his understanding of law, for what made it peculiar, as Campbell has noted, “is its treatment of obligation as a limitation on liberty with consequent emphasis on the debtor’s duty rather than on the creditor’s right” (Campbell 1954, 30).

Stair’s Institutions was the first comprehensive overview of Scots law, and (by the nineteenth century) came to have a special status as an authoritative work (see Blackie 1981). In the eighteenth century, a number of other institutes were written which sought to systematising Scots law. Shortly before Blackstone began to lecture, Andrew McDouall, Lord Bankton (1685–1760) published his three volume Institute of the Laws of Scotland, which sought both to put Scots law into an institutional framework, and to make comparisons with English law. Scottish jurists by the mid eighteenth century were strongly influenced by the voluntarist approach of Samuel Pufendorf (see Moore and Silverthorne 1983), and Bankton’s view of law followed this voluntarism. He began by noting that only a superior could give laws, “for none other has power to command or forbid, which is the proper business of laws” (Bankton 1751–1753, 1.1.3). The rule set by law was the standard by which to judge right and wrong. By the law of nature, God “commands such actions as are agreeable to our rational nature” (ibid., 1.1.20). Equally, positive law not inconsistent with natural law was enacted with God’s sanction. It de-
rived its authority from God just as the bye-laws of a city derived their authority from the laws of the nation, so the laws of particular nations derived theirs from the universal law of mankind (ibid., 1.1.15). To break the law of one’s nation was thus to break the law of God. Nor was the sovereign bound by laws. While in a state where legislative power was lodged in more than one person, each of these individuals might be bound by law, an absolute sovereign was not so bound, “because his will is the law; but being subject to the laws of God and nature, he is thereby obliged to observe, in his commerce and transactions with his subjects, those rules which he hath prescribed to them as laws” (ibid., 1.1.68). If the sovereign’s command contradicted natural law, it did not bind in conscience, but the subject should offer passive obedience.

Bankton’s view of the origin of society followed the natural law model derived from Grotius and Pufendorf. Thus, he argued that property derived from agreement. Bankton added that natural law “prohibits all breach of faith, and commands us to be true to our engagements” (ibid., 1.1.30, cf. 32). The creation of property was followed by the development of more complicated kinds of contract, and the erection of a sovereign. This allowed for the development of circumstances in which timeless rules of natural law could be applied: “for example, before distinction of property took place, there could be no theft or robbery; but still it was an eternal truth, that to invade another man’s property, whenever such took place, was injustice, and consequently theft or robbery are against the laws of nature” (ibid., 1.1.21). Like Stair, Bankton divided obligations which depended on the will of God, and those which depended on the agreement of particular parties.

While eighteenth century Scots institutional writers, including Bankton and John Erskine (whose *Institute of the Law of Scotland* was published in 1773) developed more overtly voluntarist definitions of law than Stair had, they shared his aim of putting Scots law into a rational, deductive framework. Such an approach could successfully describe and account for the law which had developed. Moreover, it was able to put forward a natural-law explanation of obligations in a way which Blackstone had failed to do. Nevertheless, these theories were less able to show the principles underlying the development of law. The institutionalist approach could not explain why new rules might be needed at any particular point, nor did it give any guidance to the judge on how to formulate new rules. Yet in the commercialising society of the eighteenth century, it was as important to have an understanding of the principles of obligations, to show how they were to be developed, as an overview which rationalised those which existed. It was which Lord Kames sought to provide.

4.6. The Natural Jurisprudence of Lord Kames

The thinkers of the “Scottish Enlightenment” took a radically different approach from that of the earlier institutionalist writers. Many of them, includ-
ing Adam Smith and John Millar, lectured on jurisprudence (see Smith 1978; Haakonssen 1981 and 1996; Cairns 1988). However, their juristic works remained unpublished in their lifetimes, and the best known jurist of the Scottish Enlightenment was Henry Home, Lord Kames (see Lobban 2004). Where jurists north and south of the border had developed theories of natural law based on voluntarist principles, Kames’s natural jurisprudence was based on a different moral theory. Following Francis Hutcheson, Kames argued that man perceived his duties not by reason, divine law or self-interest, but by a moral sense, which allowed him to discern the qualities of right and wrong, just as he was able to perceive colour, taste or smell (Kames 1758, 69–70; Kames 1767, 3–7; Kames 1774, 2: 246). People instinctively approved of certain actions and disapproved of others. Let anyone, he wrote, “but attend to a deliberate action, suggested by filial piety, or suggested by gratitude; such action will not only be agreeable to him, and appear beautiful, but will be agreeable and beautiful, as fit, right, and meet to be done.” Mankind could know the laws that were fit for human nature, for “the laws which are fitted to the nature of man, and to his external circumstances, are the same which we approve by the moral sense” (Kames 1758, 34–5, 37).

Though he rejected Pufendorf’s voluntarism which other Scots lawyers adopted, Kames accepted his stress on human sociability. Observation of man’s nature, he noted, revealed that, unlike beasts of prey, man could only live comfortably in society (Kames 1758, 27–8; Kames 1774, 1: 356–7). However, rather than using this merely as a postulate in his moral theory, Kames used it empirically, noting that it was dangerous to “assert propositions, without relation to facts and experiments” (Kames 1758, 86; see Berry 1997). In Kames’s view, a theory was necessary which could describe the changes in the social condition of man, and consequential changes in ideas about duties. In the preface to his Historical Law Tracts, he famously criticised those who studied law as if it were a mere collection of facts. To make sense of the law, he said, one had to study it historically, and philosophically, searching for the underlying principles of doctrine, rather than merely describing it (cf. Lieberman 1989, chap. 7). “The law of a country is in perfection when it corresponds to the manners of the people, their circumstances, their government,” he wrote: “And as these are seldom stationary, law ought to accompany them in their changes” (Kames 1780, iii). Kames was hardly new in seeking to describe law in historical terms: From the early seventeenth century, there had been much research into the origin and nature of feudalism (notably by Craig), much of the learning of which had been incorporated into works such as Wright’s. The eighteenth century also saw numerous works which sought to explain the rules and procedures of the English superior courts in historical terms (e.g., Gilbert 1737; 1738; 1758; Boote 1766). Many of these works sought to trace the evolution of precise rules from the introduction of feudalism or the foundation of courts, showing their modification through statutes
or decisions. Although they showed a perception of legal change, such histories did not explain change in broader philosophical or social terms, but rather saw developments more in terms of moments of positive change. Edward Wynne, for instance, in his *Observations on Fitzherbert's Natura Brevium*, argued that the “greatest tho’ almost insensible change in regard to writs has been the work of time.” However, the agent of this change was generally judicial action: “the enlarging the practice of ejectments, and actions on the case, the extended dominion of rules of court, and the abolition of the feudal policy” (Wynne 1765, 14). The fullest history of English law of the eighteenth century itself sought to show how the law had developed through the interplay of litigation and legal argumentation in courts, and new legislation (Reeves 1787; cf. Lobban 1991, 50–6).

By contrast, in part under the influence of Montesquieu, a number of eighteenth-century writers, notably in Scotland, sought to show that law developed insensibly, following the manners of the people. One such was John Dalrymple’s history of feudalism in Great Britain. In it, he wrote that the transfer of the lord’s right to the escheated lands of his tenant to the king occurred in Scotland “without statute, without even a single decision.” This was a “very singular instance of the decay of the feudal law, how it melts away of its own accord [...] how the minds of men yield without force, when the variation of circumstances leads them into yielding” (Dalrymple 1759, 68). In similar vein, Kames’s history was philosophical, searching for the principles inherent in historical development, not the particular history of a single doctrine or the law of a single nation. He was not interested in reading from current doctrine backwards, to show how the law had arrived at its current state. Instead, he wanted a broader, universal history of matters such as crime, contract or property. This involved not merely tracing what records related, but supplying broken links in the historical chain “by collateral facts, and by cautious conjectures drawn from the nature of government, of the people and of the times” (Kames 1792, 25).

Kames’s conjectural history was linked to his moral theory. Kames was one of the first Scots to put into print the four-stage theory of social development, according to which societies progressed from the hunter-gatherer stage through to the pastoral, agricultural and commercial stages. For Kames, it was man’s nature, as well as economic need, which drove this development. Man was not “designed by nature to be an animal of prey,” so that his original precarious condition as a hunter or gatherer was not suited to his nature (Kames 1758, 77). His nature rather impelled him to become a shepherd, and to bring wild creatures under subjection. As these developments occurred, so property evolved. It did not come about by the exercise of reason, nor was it in Kames’s view (as it was in his friend Hume’s) a matter of convention. It was rather a matter of instinct, the result of man’s nature as a hoarding creature, which gave him a sense of affection for what he called his own.
In Kames’s view, the virtues which were necessary for social life were to be found inherent in man’s nature—such as the virtues of veracity, fidelity and trust. However, they were not fully formed in early societies, but became more refined as they developed. The savage state, he argued, was the infancy of mankind, in which the more delicate senses lay dormant. As society developed, and as education and reflection intervened, so the moral sense became more refined (Kames 1774, 2: 251; Kames 1758, 104–8). Indeed, it was only at certain stages of development that particular virtues developed. Hunter-gatherers, for instance, did not need covenants: they only developed in later societies as surpluses were produced which could be exchanged, and only found their full form in commercial society (Kames 1792, 66–7). As societies developed, so did conceptions of property. Where in the hunter-gatherer stage, property was associated only with possession, in later stages, men formed a stronger sense of connection with their beasts (in the pastoral stage) or their land (in the agricultural). Over time, the sense of property in goods or lands thus became separated from actual possession (Kames 1792, 100).

Kames saw parallels between the rise of property and the rise of government. Both began on weak foundations, but grew to a modern stability and perfection (Kames 1792, 103). In common with many of his contemporaries (and most notably his protégé Hume), he dismissed the idea that the duty to obey government was founded in an original compact (Kames 1778, 1: 341). This duty was rather rooted in human nature, since government was essential to society. However, it developed over time. The earliest governments, being concerned only with matters such as mutual defence against enemies, were simple (Kames 1774, 1: 390–1). But as wealth and ranks developed, selfishness stirred neighbours against each other, and a higher authority had to interfere in the disputes of private individuals. Government grew, when men first submitted their disputes to arbitrators, and subsequently when these became judges whose jurisdiction could not be refused (Kames 1792, 21; Kames 1777, 144). Jurisdiction first emerged in contractual disputes, and gradually extended to crime (Kames 1792, 26, 31, 46).

Kames’s conjectural approach allowed him to explore the principles behind the law of obligations, whose development over time had left far fewer traces than were to be found for land law. A universal history allowed Kames to trace the underlying principles of criminal law, delict and contract, as they had developed over time, in a way which would help guide judges in the future development of the law. For Kames, the concept of equity stood at the centre of his notion of legal change. Kames did not, like Stair, simply equate equity and natural law; nor did he see it as a technical system of procedure or jurisdiction. Equity was the vehicle through which, over time, the law recognised obligations and made them binding. The principles of equity could thus explain how and why new obligations came to be recognised at law. Although he accepted Shaftesbury’s notion of a moral sense, Kames did
not (like Shaftesbury) believe that there was a duty of universal benevolence. In a manner reminiscent of the natural jurists’ division of perfect and imperfect rights, he distinguished between duties, which were actions necessary for the support of society, the breach of which were universally regarded as wrong, and acts of benevolence, which earned praise for the actor, but whose neglect was not condemned (Kames 1758, 43). However, for Kames, the line between duty and benevolence was not a fixed one, for in certain contexts, benevolence could become a duty. An examination of human nature revealed that benevolence was directed at those nearest to hand. The further away the subject, the more the feeling diminished (Kames 1758, 60; Kames 1774, 1: 367, 372). The closer the connection between the parties, the more benevolence became a duty. Thus, in the relationship between parent and child, mutual benevolence was an active duty: “Benevolence among other blood-relations is also a duty; though inferior in degree; for it wears gradually away as the relation becomes more distant” (Kames 1767, 15). Over time, what had been regarded as benevolence could be transformed into duty, if it were susceptible to being made into a rule. The “duty of benevolence arising from certain peculiar connections among individuals,” he said, “is susceptible in many cases of a precise rule. So far benevolence is also taken under the authority of the legislature, and enforced by rules passing commonly under the name of the law of equity” (Kames 1758, 102). What was originally a rule in equity thus became over time a rule of common law: “But by cultivation of society, and practice of law, nicer and nicer cases in equity being daily unfolded, our notions of equity are preserved alive; and the additions made to that fund, supply what is withdrawn from it by the common law” (Kames 1778, 27).

4.7. Kames’s Theory of Obligations

Kames used his theory of the moral sense and social development as a foundation on which to build a theory of obligations. The principles of obligation were to be found in the moral sense. This moral sense was a common sense: “That there is in mankind an uniformity of opinion with respect to right and wrong, is a matter of fact of which the only infallible evidence is observation and experience” (Kames 1774, 2: 251). However, he admitted that this sense was not found in equal degree in all individuals or in all societies. Indeed, “the moral sense, in some individuals, is known to be so perverted, as to differ, perhaps widely, from the common sense of mankind” (Kames 1767, 23; cf. Kames 1774, 2: 251). For Kames, the moral sense developed in a social context, and it developed over time. It was relatively undeveloped in the infancy of mankind, when men followed custom, passion, imitation, but it was refined when the taste in morals developed. If in advanced societies, some might still be found who did not have the sense of right and wrong, this no more proved
its non-existence than the fact that freaks existed proved there was no human form. However, this made him stress the fact that any inquiry concerning the moral sense had to be limited to “enlightened nations.” Kames’s view of a moral sense common to mankind was essential to his theory of law. For he said that if there were no common standard to determine controversies, “courts of law could afford no resource; for without a standard of morals, their decisions must be arbitrary, and consequently have no authority or influence” (Kames 1767, 10–1). However, as shall be seen, he was ultimately unable to produce a theory of the law of obligations based on the moral sense, and had to resort at crucial points to an incompatible principle of utility.

Kames used his theory of human nature and his conjectural history to explain the distinction between crimes and delicts, and the different approaches they took to liability. He argued, firstly, that those who committed crimes instinctively felt a sense of remorse, while those who were its victims felt a desire for revenge, particularly for intentional harms (Kames 1774, 2: 246; Kames 1792, 4–5). By contrast, those who committed unintended harms felt bound in conscience to make reparation, though they did not feel deserving of punishment. Kames argued, secondly, that the treatment of crimes and delicts had distinct historical origins. In his view, the jurisdiction over delicts developed first. For men were willing from an early age to submit their differences over property to arbitrators, who were made into binding judges when parties began to dispute their decisions. By contrast, where the wrong was an intentional harm, men driven by the passion of revenge were less willing to give up this power to another body, and it was only over time that the government took on this power (Kames 1792, Tract 1, passim).

As a consequence of their different natures, delicts and crimes were dealt with differently. Discussing delicts, Kames took the view that, in order to determine whether a wrong had taken place, regard had to be given to the common sense of mankind, rather than the unreliable individual reaction of the victim. Common sense dictated that a person had to compensate for harms done which were foreseeable, for “when we act merely for amusement, our nature makes us answerable for the harm that ensues, if it was either foreseen or might with due attention have been foreseen” (Kames 1774, 2: 278–9). However, he noted that where a man had a privilege, or right, a different standard was to be invoked. In these situations, the man causing harm had to pay only for harms directly caused by his acts, but not for those which were only foreseeable consequences. For as Kames pointed out, if the mere possibility of harming others restrained men from exercising their rights, they would do nothing, which would both render their right without use, and be inexpedient for society (Kames 1774, 277–8; Kames 1778, 1: 47). Discussing the question of determining the standard of liability of the wrongdoer, Kames noted that in delicts, the standard was an objective one. It was “the common sense of mankind that determines actions to be right or wrong” (Kames 1767,
23; cf. Kames 1774, 2: 274–5), rather than the subjective one of the individual. The fact that man might by nature be rash would not excuse him.

For Kames, the standards of liability in crime and delict were distinct. In delict, the opinion of either of the parties could not be taken as the standard. Rather,

there must be an appeal to a judge; and what rule has a judge for determining the controversy, other than the common sense of mankind about right and wrong? But to bring rewards and punishments under the same standard, without regarding private conscience, would be a system unworthy of our maker; it being extremely clear, that to reward one who is not conscious of merit, or to punish one who is not conscious of guilt, can never answer any good end. (Kames 1767, 35)

When it came to criminal liability, then, it was the subjective intention of the defendant which had to be taken into account, rather than any objective standard, for the moral sense dictated that one should be punished only for one’s intended acts.

Although the notion of crime had originated in the victim’s desire for revenge, the determination of what constituted a crime was not left to the individual reaction, but to the decision of public authority. As Kames put it,

in regulating the punishment of crimes, two circumstances ought to weigh, viz. the immorality of the action, and its bad tendency; of which the latter appears to be the capital circumstance, as the peace of society is an object of much greater importance, than the peace, or even life, of a few individuals. (Kames 1792, 54)

As this comment indicates, when it came to the detailed elaboration of his theory, Kames did not rely wholly on a theory of the common sense as an explanatory factor, but rather invoked the notion of utility. Kames sometimes spoke of the two notions as complementary. Thus, he argued that the rule that men should act with care was “a maxim founded no less upon utility than upon justice” since “society could not subsist in any tolerable manner, were full scope given to rashness and negligence, and to every action that is not strictly criminal” (Kames 1774, 2: 291–2; cf. Kames 1778, 1: 89, 144). Moreover, he declared that “we must not do ill to bring about even the greatest good” (Kames 1774, 2: 267). At some points, he therefore suggested that the function of utility was to go further than justice in repressing wrongs. “Wrong must be done before justice can interpose,” he wrote, “but utility lays down measures to prevent wrong” (Kames 1778, 2: 84). Elsewhere, however, he noted that equity might have to be sacrificed for the sake of utility. Thus, he noted that “equity, when it regards the interest of a few individuals only, ought to yield to utility when it regards the whole society.” Kames gave a number of examples where utility had to preponderate since the interest of society was “by far the more weighty consideration” (Kames 1778, 1: 24, 76). This was especially the case with commercial matters. Thus, he admitted that
according to the moral sense, where a purchaser suffered from making a mistake of quality by buying goods which were of lesser quality than he had presumed, the vendor should not profit, but the contract should be undone. However, Kames argued that in commercial reality, this could not be done, nor could the price be abated since it “would destroy commerce.” Noting that “equity may be carried so far as to be prejudicial to commerce by encouraging law-suits,” he argued against the *actio quanti minoris* which was given in Roman law to a purchaser who by ignorance or error paid more for a subject than it was intrinsically worth: “the principle of utility rejects it, experience having demonstrated that it is a great interruption to the free course of commerce” (Kames 1778, 1: 271–2). Similarly, discussing unequal bargains, Kames noted that

though for the sake of commerce, utility will not listen to a complaint of inequality among *maiores, scientes, et prudentes*; yet the weak of mind ought to be excepted; because such persons ought to be removed from commerce, and their transactions be confined to what is strictly necessary for their subsistence and well-being. (Kames 1778, 1: 103)

In Kames’s theory, utility and equity were ultimately not incompatible, insofar as he maintained that utility should never be used for the purpose of positive injustice. Instead, utility set limits to how far the courts would enforce claims of justice, turning benevolence into duty. However, this function of utility in effect undermined Kames’s ability to develop a theory of obligations based on a concept of the moral sense which would explain how the law would continue to develop. Ultimately, Kames failed to articulate a successful theory of obligations on the foundations of the moral sense. Although his moral theory proved influential, notably in late eighteenth century America, his legal arguments proved less persuasive on both sides of the border, and by the nineteenth century, his influence waned. One reason for this was that his aim was to write a treatise which would draw on the case law, and therefore influence the practice, of both England and Scotland, and promote a closer union between the two. If Scots lawyers found some of his doctrine idiosyncratic, early nineteenth century English equity lawyers found that his work addressed too few of the questions which concerned their practice.
5.1. The Common Law Mind and the American Revolution

In 1766, parliament passed the Declaratory Act, proclaiming that Westminster had full power to make law binding the colonies “in all cases whatsoever.” The notion of parliamentary sovereignty which it reflected was one generally accepted by eighteenth century English lawyers. The triumph of parliament in the revolution of 1688 was supposed to have secured liberty from despotism; and the language of English politics was henceforth much less legalistic than it had been in the seventeenth century. The structure of the balanced constitution was widely lauded, receiving Montesquieu’s seal of approval. Anxiety about arbitrary government now centred not on the structure of government, but on its operation. Opposition politicians feared that patronage and electoral corruption would increase the influence of the crown and its ministers, and thereby upset the balance. In this context, the rhetoric of civic virtue became more prominent, as “country party” ideologists drawing on the works of Machiavelli and James Harrington urged active political participation to prevent corruption (see Pocock 2003; Robbins 1959; Dickinson 1979). Politicians who argued that parliament was bound by the constitution understood it more in terms of its political spirit than in strictly legal terms. For Radical agitators, meanwhile, the prime remedy to political ills was not to declare limitations on the power of parliament, but to ensure greater representation of the people in the institutions. From the other side of the Atlantic, however, things looked altogether different. To Americans, parliament in the mid-eighteenth century came to look like an institutional equivalent of the Stuart kings, willing to interfere arbitrarily with their property rights. The Declaratory Act brought to a head a clash between two distinct visions of the common law, derived from the same tradition: an English positivist view centred on parliamentary sovereignty, and an American conception, which invoked fundamental, customary rights, which could not be removed by the legislature (Greene 1986a; Greene 1994; Reid 1986; Reid 1987; Reid 1991; Reid 1993).

The crisis was precipitated, when, at the end of the Seven Years War, British governments sought to make the colonies help defray the costs of imperial defence, for instance through the Stamp Act of 1765, which imposed taxation aimed at raising revenue, rather than at regulating imperial trade. In reply, Americans protested against the imposition of taxes by a parliament in which they were not represented. As the Stamp Act Congress put it, “it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no taxes be imposed on them but with their own consent” (Morison
1965, 33). As protest increased, so parliament began to interfere with Americans’ own institutions, violating rights conferred by royal charters, and hindering rights to assemble and petition. In 1768, for instance, New York’s General Assembly was suspended, while in 1774, legislation unilaterally revoked parts of Massachusetts’ charter of 1691. Other constitutional rights came under attack, notably the right to trial by jury. Americans were alarmed by the extension of the juryless Vice-Admiralty courts in the 1760s, and by moves to make judges more dependent on the crown (Reid 1986, 178–84; Bailyn 1965, 68). Moreover, in 1769, parliament voted that treasons committed in America could be tried in England under a statute of 1543; while five years later the Administration of Justice Act, passed after the Boston Tea Party, provided that law enforcement officers charged with any offence carried out in the course of their duties could be tried in England (Reid 1991, 281; Reid 1993, 17–22).

Americans responded to these measures by invoking language reminiscent of Coke’s ancient constitutionalism, claiming rights found “in that most excellent monument of human art, the common law of England” (Adams 1977, vol. 1: 86, quoted in Thompson 1998, 46–7). In 1774, the first Continental Congress resolved that “our ancestors, who first settled these colonies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England” (Morison 1965, 120; cf. Reid 1986, chap. 14), and that these rights had descended to their heirs. They were entitled to enjoy such rights “as their local and other circumstances enable them to exercise and enjoy.”

The crucial principle Americans found in the common law was that of consent and participation, in both legislation and adjudication. As John Adams saw it, both the jury and the House of Commons dated from Saxon times, and fulfilled similar constitutional functions. “As the constitution requires, that, the popular branch of the legislature should have an absolute check so as to put a peremptory negative upon every act of the government,” he wrote, “it requires that the common people should have as complete a control, as decisive a negative, in every judgment of a court of judicature” (quoted in Reid 1986, 51). Since it was not practicable for Americans to send representatives to Westminster, the first Continental Congress resolved, their consent could only be given in local assemblies.

Any notion that Americans had rights derived from the common law which could not be altered by parliament was, however, difficult to prove to the satisfaction of English lawyers, who took a more technical view of the common law. Indeed, the very idea that Americans had carried the common law with them had taken some time to gain acceptance, and case law gave ambiguous authority. According to Calvin’s Case (1608) (English Reports 77: 377), while lands inherited by the king continued to be ruled by their own laws, he was free to alter the law in any land which was conquered. If he introduced the
common law into these lands, parliament’s supremacy accompanied it. Lawyers like Blackstone continued to hold that the American colonies had indeed been conquered, and that the “common law of England, as such, has no allowance or authority there,” though they were subject to the control of parliament (Blackstone 1979, 1: 105). Americans countered that (except for New York and Jamaica), the colonies had not been conquered, but were settled by Englishmen. It was not until the turn of the eighteenth century that case law and opinion established that where new territory was settled by Englishmen, they carried the common law with them; though it was also stated that they were bound by statutes which named them (see Blankard v. Galdy (1694), English Reports 87: 359, and English Reports 91: 35; Dutton v. Howell (1694), English Reports 1: 17; Anonymous (1722), English Reports 24: 646).

By the time this question was settled, the crown had already created colonial legislatures under charters. In the 1760s, many Americans argued that royal charters merely confirmed ancient rights, which did not derive from the king’s grant alone (Reid 1986, 162ff.). Nonetheless, it was impossible to argue for an institutional ancient constitutionalism in America. Firstly, the structure of governments created in the various colonies differed from each other, and often fell far short of the ideal. Richard Henry Lee commented in 1776, “With us [in Virginia] 2 thirds of the Legislature, and all the executive and judiciary Powers were in the same hands—in truth it was very near a Tyranny” (quoted in Wood 1993, 201). Secondly, charters creating American legislatures confirmed the pre-eminence of Westminster. The power to disallow legislation in the colonies at variance with those in the metropolis was retained by the crown, and regularly exercised in the eighteenth century by the Privy Council. In 1696, parliament also asserted its power to declare void laws and customs inconsistent with its legislation. Similarly, colonial charters from the late seventeenth century reserved a right of appeal from colonial courts to the crown, effectively codifying the idea that all subjects had the right to appeal to the justice of the king (see Smith 1950, 74ff.). This was a significant deviation from English constitutional practice, for it had been enacted in 1641 that “neither his Majesty, nor his Privy Council, have or ought to have any jurisdiction over the property of subjects, but that the same ought to be tried and determined by the ordinary courts, and by the ordinary course of the law.”

Colonial legislatures and courts were expected to pass and apply laws which would be “as consonant and agreeable to the laws and statutes of this our realm of England as [...] the circumstances of the place will admit” (Thorpe 1909, vol. 89: 1865). However, it was unclear how much of the common law actually applied in America. Substantive law at the periphery could vary significantly from the metropolitan model, as it was adapted to local circumstances by the magistrates applying it, and judges had great discretion in deciding what was and what was not suitable law for the colonies (see Goebel 1969; Haskins 1960, chap. 8; Konig 1979, 37). Moreover, when American
rules were challenged in appeals, the Privy Council’s decisions proved inconsistent, showing that even Whitehall was unclear how far the precise rules of the common law were to be followed on the frontier (Smith 1950, 562–72). It often remained unclear whether the common law to be applied in the colonies was the current law (as explained, as the case might be, by legislation postdating the colonial settlement), or that at the time of settlement. Similarly, it might be unclear whether statutes predating the settlement applied in the colonies, or were not to be applied since they were unsuitable for them (Smith 1950, 487–95). As a result, many an early eighteenth century commentator complained that it was almost impossible to know what law was in the colonies (see, e.g., Greene 1986b, 26; Smith 1950, 472).

This made it impossible for Americans to make the kind of precise legalistic arguments in defence of their rights which Selden had made in seventeenth century England. Indeed, when Americans thought of the common law, it was often more as a set of broad principles, a kind of mentalité, rather than as the kind of reasoning which would find favour in Westminster Hall. As Robert Beverley wrote, early Virginian courts determined every thing by the standard of equity and good conscience. They used to come to the merits of the cause, as soon as they could without injustice, never admitting such impertinences of form and nicety, as were not absolutely necessary. (Beverley 1705, 19–20)

Faced, in the 1760s, with an assertion of parliament’s sovereignty, American lawyers therefore found themselves in difficulties in their attempts to marshal common law arguments against Westminster. When James Otis sought to argue that the power of parliament was limited by a fundamental law, he echoed Coke’s voice in Bonham’s case in stating that “an act against the constitution is void: an act against natural equity is void” (Adams 1850–1856, vol. 2: 522, see also Bailyn 1965, 449; cf. Adams 1977, vol. 1: 152). Nevertheless, Otis at the same time argued that “[t]he power of Parliament is uncontrollable but by themselves, and we must obey,” adding that there would be “an end of all government” if subjects “or subordinate provinces should take upon them so far to judge of the justice of an act of Parliament, as to refuse obedience to it” (Bailyn 1965, 448). Otis’s apparently contradictory position has been much debated (see Bailyn 1965, 102, 416–7; Bailyn 1992, 176–81; Wood 1993, 263–4; Grey 1978, 872). He appeared to take the view that parliament would only enact such legislation if it were misled or mistaken, and that the constitution was so arranged that the legislature and courts would “inform” each other of mistakes (Bailyn 1965, 455). This argument assumed that the legislature would not want to violate constitutional fundamentals, and would correct its own legislation if it interfered with people’s rights, once the equitable interpretation of the courts showed the violation of these norms. If this was Otis’s view, however, it was answered by the Stamp and Declaratory Acts, which showed that parliament was not, after all, acting in error.
Much American writing of the later 1760s contained the language of disappointed loyalty mingled with protest. Writers like John Dickinson noted that the connection with the mother country was a necessary one. "We are but parts of a whole," he said, "and therefore there must exist a power somewhere to preside, and preserve the connexion in due order" (Morison 1965, 39). For men like him, when parliament legislated for trade, it was for the benefit of the empire as a whole; but when it legislated to raise internal revenues without consent, the rights of Americans were invaded. There was much political debate over the nature of representation, with imperialists making the argument that the House of Commons did not represent only its electors, but "virtually" represented all England, and by extension, the empire (see Jenyns 1765; Wood 1993, 173ff.). This view was challenged by American Whigs, who argued that while members of parliament and electors in England would both be bound alike by acts passed, and thus might share a community of interests, "not a single actual elector in England might be immediately affected by a taxation in America" (Dulany 1765, 10). This argument proved politically persuasive, by 1783, even to the British. However, until the revolution, it remained legally difficult to challenge parliament’s authority to legislate on matters internal to the colonies.

Otis himself admitted in 1764 that in “special cases,” parliament could legislate, though he added that the spirit of the constitution “must make an exception of all taxes, until it is thought fit to unite a dominion to the realm” (Bailyn 1965, 467). A decade later, when John Adams and James Wilson attempted a legal argument to deny parliament’s authority to legislate, they cited as authority an argument made in Blankard v. Galdy by Sir Bartholomew Shower. Drawing on a case concerning Ireland from 1484, cited by Coke (English Reports 77: 1388), Shower had claimed that residents of Jamaica were not bound by English statutes since they sent no representatives to Westminster (Adams 1977, vol. 2: 351; Wilson 1896, vol. 2: 531). However, the precedent was problematic, for both Shower and Coke added the rider that a colony was bound by a statute if specifically named. Adams and Wilson sought to answer this by arguing that such comments were obiter dicta. Those attempting a legal argument were also faced with the problem of precedent, for Britain had in the past legislated for the colonies, as for instance with the Post Office Act of 1713 (Reid 1991, 246–73). Before the Stamp Act, men like Otis accepted such legislation on the basis that it was enacted for the benefit of the people and was therefore not an imposition (Bailyn 1965, 468). By 1774, however, Thomas Jefferson, denounced the Post Office Act as part of a series which “too plainly prove a deliberate and systematical plan of reducing us to slavery.” His view was simple: “The true ground on which we declare these acts void is, that the British parliament has no right to exercise its authority over us” (Jefferson 1999, 69). Wilson similarly was in the end prepared to abandon the legal argument, and argue as a matter of principle that the
mere fact than an unrepresented colony was named could not confer absolute power on the distant legislature. Even a thousand judicial decisions, he argued, could not make this law.

As the 1770s progressed, the debate over the relationship between metropolis and periphery constantly ran up against the issue of sovereignty. Westminster and its agents rejected the idea that it only had authority to legislate for imperial matters. “I know of no line,” Governor Thomas Hutchinson told the Massachusetts General Court in 1773, “that can be drawn between the supreme authority of Parliament and the total independence of the colonies: it is impossible that there should be two independent Legislatures in the same state” (Wood 1993, 344). By now, an increasing number of American Whigs accepted this logic. The argument now moved from the idea that parliament was bound by a customary constitution to respect the rights of Americans, to the notion that the colonies and Great Britain were separate states under the same king. “Those who launched into the unknown deep, in quest of new countries and habitations,” James Wilson wrote, considered themselves the king’s subjects, but did not consider themselves represented in or bound by parliament. “They took possession of the country in the king’s name,” he said, “they established governments under the sanction of his prerogative, or by virtue of his charters” (Wilson 1896, vol. 2: 537; cf. Hamilton 1961–1987, vol. 1: 90, 102).

An argument for this position could be made using the language of the common law. Citing Calvin’s Case, Adams argued that the colonists’ allegiance was to the natural person of the king, not to the body politic of Great Britain (Adams 1977, vol. 2: 347–8). Alexander Hamilton invoked the language of feudalism, pointing out that, as feudal overlord, the king was the original legal proprietor of all land in England. “Agreeable to this rule,” he proceeded, “he must have been the original proprietor of all the lands in America, and was, therefore, authorized to dispose of them in what manner he thought proper” (Hamilton 1961–1987, vol. 1: 93, 108). Hamilton examined a number of sixteenth and seventeenth century grants and charters, showing that no power over the colonies was given to parliament, but that the early Stuart kings rather regarded their American colonies as being beyond the realm and jurisdiction of parliament. In the colonies, he suggested, the crown gave up sole legislative and executive powers by instituting governments on the English model.

The argument that American rights derived from charters granted by kings was nevertheless a difficult one to sustain. Firstly, not all the colonies had charters, and where charters had been granted, they varied in detail. Secondly, the crown had revoked charters in the past, treating them as grants rather than as contracts of government. Thirdly, politicians in London considered colonial charters as essentially of the same type as corporation charters, which were subject to the jurisdiction of parliament. By that view, colonial assemblies and governors were similar to mayors and aldermen, with the power to
issue by-laws (Reid 1991, 172ff.). In any event, many Americans also felt uncomfortable with rooting their rights in a feudal past, and sought to move away from such legalistic arguments. Adams argued that seventeenth century monarchs, acting under the influence of canon and feudal law, erroneously thought they “had a right to all the land their subjects could find,” and the settlers, equally deluded, accepted lands granted by charters presuming regal authority. If the argument was effective in denying any parliamentary authority, Adams did not accept the legal premises behind the original grants (Adams 1977, vol. 2: 331). Jefferson agreed: “Our ancestors,” he said, “were farmers, not lawyers. The fictitious principle that all lands belong originally to the king, they were early persuaded to believe real; and accordingly took grants of their own lands from the crown” (Jefferson 1999, 78).

By 1774, Adams and Jefferson therefore argued that the rights of the colonists were to be found more in nature than in the common law constitution. For Jefferson, the settlers had a natural right to emigrate in search of new habitations, and to establish “new societies, under such laws and regulations as to them shall seem most likely to promote public happiness” (Jefferson, 1999, 65). This, Adams said, was precisely what the Plymouth planters had done, having bought land from the Indians and exercised “all the powers of government, legislative, executive and judicial, upon the plain ground of an original contract among independent individuals for 68 years” (Adams 1977, vol. 2: 317). This led easily to an argument that the relationship between the colonists and the king was one defined by an original contract, confirmed by charters (ibid., 321, 331, cf. Hamilton 1961–1987, vol. 1: 90). Charters were not grants from an absolute monarch, but had their binding force “wholly from compact and the law of nature” (Adams 1977, vol. 2: 354).

Where did this leave the common law? Adams said that New Englanders obtained their laws “not from parliament, not from the common law, but from the law of nature and the compact made with the king in our charters” (Adams 1977, vol. 2: 328). Jefferson agreed: having settled the wilds of America, the emigrants “thought proper to adopt that system of laws under which they had hitherto lived in the mother country” (Jefferson 1999, 66). The common law in America came not from ancient custom or inherent authority, but from free choice. In this context, the legalistic arguments of Westminster Hall, were replaced by Lockean natural law arguments. “The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records,” Hamilton wrote: “They are written, as with a sun beam, in the whole volume of human nature, by the hand of the divinity itself” (Hamilton 1961–1987, vol. 1: 122). Arguing that no man in a state of nature had the right to deprive another of his life, liberty or property, he noted that all governments could only arise from compacts between the ruler and ruled, and “be liable to such limitations, as are necessary for the security of the absolute rights of the latter; for what original title can any man or set of men have, to
govern others, except their own consent?” (Hamilton 1961–1987, vol. 1: 88). As Jefferson saw it, “every society must at all times possess within itself the sovereign powers of legislation.” While bodies were in existence to which the people had delegated those powers, they alone exercised such powers. But when they were dissolved, “the power reverts to the people, who may exercise it to unlimited extent” (Jefferson 1999, 76–7).

In 1776, Jefferson drafted the Declaration of Independence. Its preamble was cast in the language of natural law, proclaiming the “self-evident” truths that all men were created equal and endowed with unalienable rights to life, liberty and the pursuit of happiness. The main body of the text however was an indictment of the king, relating “a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states” (Jefferson 1999, 102–3). George III was accused of acting in a tyrannical manner, of combining with the British parliament to subject Americans to a “jurisdiction foreign to our constitution,” of “taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments,” and of abdicating “government here, by declaring us out of his protection and waging war against us.” 1776 was America’s 1688, as Jefferson perceived (Mayer 1994, 37). It was constitutionally justified by Blackstone’s principle that if the magistrate subverted the constitution, he could be said to have abdicated. Yet it was a political, rather than a legal event, looking not to Coke, but to what Adams in 1775 called the revolution principles “of Aristotle and Plato, of Livy and Cicero, of Sidney, Harrington and Locke” (Adams 1977, vol. 2: 230). Moreover, removing the king forced them to follow the Lockean route rather than the Blackstonian one. For there was no replacement king to fill George III’s shoes, nor was there a local aristocracy to preserve the balance. Instead, the revolution returned power to the people a whole.

5.2. The Federalist Idea of a Constitution

“How few of the human race have ever enjoyed an opportunity of making an election of government, more than of air, soil, or climate for themselves of their children!” (Adams 1850–1856, vol. 4: 200). In May 1776, under John Adams’s urging, the Continental Congress, faced with Westminster’s declaration that the colonies were in a state of rebellion, declared that all authority under the crown should be suppressed and that new constitutions should be drafted (Wood 1993, 132). By 1777, each of the colonies had drafted constitutions, generally on the model of their previous instruments of government, but usually with a significantly weakened executive. The constitution makers, under the influence of a Radical Whig suspicion of the tendency of power holders towards corruption, sought to strengthen legislatures and to make them as representative of the people as possible (Wood 1993, 161ff.). At the
same time, several of the constitutions gave constitutional protection to key rights, such as trial by jury or freedom of the press. Virginia’s bill of rights declared that all men were by nature free and equal and had certain inherent rights which they could not contract away: “namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety” (Swindler 1973–1988, vol. 10: 49). Such instruments reflected a Lockean view, affirmed in Jefferson’s later comment that the true of legislation was “to declare and enforce only our natural rights and duties, and to take none of them from us” (Jefferson 1892–1899, vol. 10: 39, quoted in Mayer 1994, 75).

In spite of these declarations, however, the state constitutions of 1776–1777 reflected more strongly the notion that there had to be a supreme law-making power in the state, and that it had to be under the control of the people. The new democratic legislatures soon proved troublesome. In the aftermath of the war of independence, with many states in financial crisis, and many individuals in debt, legislatures began passing acts issuing paper money, giving debt relief, and setting aside contracts, thereby undermining rights of property (see Madison, Hamilton, and Jay 1987, 25). The new constitutions, which were not the creatures of special conventions but of ordinary legislatures, were not treated as supreme governing laws. A number of state legislatures in the 1780s amended their constitutions through ordinary legislative procedures, acting as if they were as sovereign within their domain as Westminster (Wood 1993, 275). In this context, writers began to argue that constitutions should be seen as fundamental laws limiting the power of the legislature. John Adams was the first to argue that constitutions should be drawn up by representatives of the people in conventions, whose proposals would subsequently be ratified by the people, and which would not be capable of being changed by ordinary legislation (Thompson 1998, 39–43; cf. Jefferson 1892–1899, vol. 3: 225–91). This procedure was adopted in Adams’s native Massachusetts in 1780. The notion developed that a constitution was a social contract between the people, with governments being merely the people’s magistrates (Wood 1993, 281–91).

By the 1780s, it had become clear that the constitution of the Union also needed revision. When the Articles of Confederation were passed by the Continental Congress in 1777, it was assumed that republican government required the creation of small states. There was no attempt then to create a national unified government, but only a confederation to fight the war against Great Britain. Each state retained its sovereignty and independence, as well as every power, jurisdiction and right not expressly delegated to the United States. The only institution created was the single chamber Continental Congress, and government was administered by a committee of this body. It had no power to tax directly, but could only demand quotas and requisitions from the states, which were free to collect them in their own way. It had no power to
regulate commerce. Legislation required the assent of at least nine states, while changing the Articles required unanimity among the thirteen. With the Continental Congress unable to enforce its decisions, and states unable to agree, and following their own paths, the union looked increasingly weak. The incentives for co-operation diminished with the end of the war, and many feared that confederation might collapse as states looked to their own interests. In this context of crisis, a Virginian initiative led to a meeting at Annapolis in 1786 to debate how to resolve disputes in interstate commerce. Among the few delegates attending were James Madison of Virginia and Alexander Hamilton of New York, who wanted a convention to discuss all the political and economic problems facing the nation. Though the Continental Congress did not call one, it soon endorsed a convention, for the purposes of revising the Articles.

The framers of the Constitution meeting at Philadelphia in 1787 had to reconcile two presumptions which lay behind the revolution, which seemed to have come into conflict in the decade thereafter: the notion that there were natural rights which needed protection and the idea of popular sovereignty. It also had to address the problem of the relationship between the national government and the state governments, seeking to resolve in the United States the question which had agitated imperialists in the 1760s, whether sovereignty could be divided. During the discussions and negotiations at the convention, and with strong guidance particularly from Madison, answers were gradually found to these questions. After the constitution was drawn up, and pending its ratification in state conventions, Madison, Hamilton, and John Jay set out a defence of the document in a series of articles, the *Federalist Papers*, under a single *nom-de-plume*, Publius.

In this work, it was demonstrated that the constitution was not to be an agreement of sovereign states, but would rather be a fundamental law deriving its authority directly from the sovereign people (Madison, Hamilton, and Jay 1987, 184). As Madison explained in *Federalist* No. 46, the federal and state governments were “different agents and trustees of the people, constituted with different powers and designed for different purposes” (ibid., 297; cf. Banning 1995, 139). There would therefore be no *imperium in imperio*. It was also eventually agreed at the convention that the federal government needed to have power directly over the people, on whom it depended for its authority, rather than acting through a power of compelling the states to comply with its decrees. Arguing for such a power in *Federalist* No. 15, Hamilton said that the very notion of government implied the power of making law. Essential to the idea of a law, he added, was “that it be attended with a sanction,” for without the threat of “punishment for disobedience,” it would be mere counsel. Such a penalty could only be inflicted through courts acting on individuals, or through military force exerted against bodies politic. “In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state
of war; and military execution must become the only instrument of civil obedience,” he said: “Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it” (Madison, Hamilton, and Jay, 1987, 149, cf. 203).

If Congress was to have strong powers, how was it to be prevented from acting arbitrarily? The solution adopted was to ensure a separation of powers between branches of government whereby each branch would be responsible to the people, and would guard against abuses by the others (Wood, 1993, 447ff.). In Madison’s view, Montesquieu had not favoured a total separation of powers, but rather feared that where all the power of one department was exercised by the same hands which had all the power of another, a free constitution was subverted (Madison, Hamilton, and Jay, 1987, 304). He pointed out that although state constitutions had sought to include the separation, the legislature had a tendency to draw “all power into its impetuous vortex” (ibid., 309). Hamilton agreed that while the people could never betray their own interests, they might be betrayed by their legislatures. Therefore, it was safer to have “the concurrence of separate and dissimilar bodies” in every public act, which meant giving a presidential power to veto legislation (ibid., 372). For Madison, “a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard” against encroachments (ibid., 312). “Ambition must be made to counteract ambition,” he said: “The interest of the man must be connected with the constitutional rights of the place” (ibid., 319).

Madison’s awareness that the political working of the constitution was as crucial as its structure was also reflected in his arguments that the people’s rights could be better protected in a larger union than in small republics. The legislation of the previous decade had shown him that people had a tendency to pursue their own selfish ends, and that minorities were liable to oppression by majorities. In Federalist No. 10, he argued that a well constructed Union would be able to “control the violence of faction.” Man’s very nature, he said, contained within it the seeds of faction, for men had different capacities and “unequal faculties of acquiring property.” Every society necessarily broke into “different interests and parties.” Although little could be done to control the causes of faction, the principal task of modern legislation was the regulation of their ill effects (ibid., 124–5). In small pure democracies, he said, it was relatively easy for one faction to dominate in the legislature, and to promote its particular interests; but in a large representative republic there would be two natural checks against it. Firstly, unworthy men were less likely to be elected in large states, for the votes of the people would tend to go to “men who possess the most attractive merit and the most diffusive and established characters,” whose wisdom “may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary of partial considerations.” Secondly, the larger the extent of the republic, the
larger the number of distinct interests and parties. By extending the size of the republic, “you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens” (ibid., 126–7). While all authority in the republic would be derived from and dependent on society, “the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority” (ibid., 321).

The question of what the relative powers of the federal and state governments should be proved highly controversial, both in 1787 and in the decades which followed. The constitution defined some powers as exclusive to the national government and some as concurrent with the states. The federal government was given power to raise taxes, borrow money, “to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes,” to coin money, to declare war and to raise armies. It also obtained power to “make all Laws which shall be necessary and proper for carrying into Execution” the powers given it under the constitution. Under the constitution, the states were forbidden from passing ex post facto laws, or laws “impairing the obligation of contracts.” The wording of the constitution proved controversial, for Anti-Federalists feared that it conferred too much potential power to the centre. In the *Federalist*, Madison and Hamilton sought to address these fears, claiming that these clauses were inserted in a defensive spirit, to guard against any attempts “to curtail and evade the legitimate authorities of the Union” and thereby sap its foundations (ibid., 224).

Madison agreed that without the “necessary and proper” clause, the constitution would be a dead letter, while a complete enumeration of all the powers to be given to Congress “would have involved a complete digest of laws on every subject to which the Constitution relates” which would have been far too extensive (ibid., 289). They also gave a defensive interpretation of the clause stating that the constitution and the laws and treaties of the United States made under its provisions “shall be the supreme Law of the land.” Hamilton defended it in positivist terms. “A LAW, by the very meaning of the term, includes supremacy.” If a federal law were not supreme, it would be a mere treaty, dependent on the good faith of the parties to uphold it (ibid., 225). According to federalist theory, a failure to stipulate that federal law would be supreme would be to make the new union as weak as the old confederation. In practice, it would be limited to its enumerated powers (ibid., 143). Where the Anti-Federalists were afraid of their opponents’ ambitions for the United States, Madison pointed out that the people’s attachments were primarily to their states, so that even federal representatives would look first to the interests of their local constituents (ibid., 299). The people’s loyalty, Hamilton agreed, would always be directed primarily to the state, which administered ordinary civil and criminal justice, and which was “the immediate and visible guardian of life and property” (ibid., 156–7).
Leading Anti-Federalists, notably in Virginia, continued to oppose ratification of the constitution. Men like George Mason felt that, with its powerful Senate and President, federal government would “commence in moderate aristocracy,” and would be likely to terminate in either “a monarchy or a corrupt oppressive aristocracy” (Bailyn 1993, vol. 1: 349). As draftsman of Virginia’s bill of rights, he was especially concerned at the absence of such an instrument in the constitution, which left ambiguous implied powers with the centre. In the end, after prolonged debates, ratification of the constitution was secured, in return for its amendment to include a bill of rights. Why had such an instrument initially been excluded? Madison had clearly seen the dangerous tendency of the post-1776 democracy to invade private rights, and regarded the constitutional prohibition on the states on passing ex post facto laws and laws interfering with contracts as “a constitutional bulwark in favor of personal security and private rights,” necessary in light of the confederation experience (Madison, Hamilton, and Jay 1987, 288). Indeed, he perceived that people’s rights were more likely to be threatened by state legislatures than by Congress, and hence supported the proposal in the Virginia plan of a national power to veto state legislation considered contrary to the articles of union. Though largely designed to prevent state encroachments on national powers, it was also a tool to protect individual rights (Banning 1995, 117–27). At the national level, rather than proposing a bill of rights, the Virginia Plan sought to set up a Council of Revision, on the model of New York’s 1777 constitution, comprising the executive and a number of judges with power to examine and reject every act of the national legislature. However, both this and the national veto were rejected by the convention.

However, the Federalists remained initially unconvinced of the need for a bill of rights. Hamilton pointed out that instruments such as Magna Carta or the Petition of Right were reservations of rights not surrendered to the king. “Here, in strictness,” he countered, “the people surrender nothing; and as they retain everything they have no need of particular reservations” (Madison, Hamilton, and Jay 1987, 475). Any enumeration of the rights which were protected would be dangerous:

“They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? (Ibid., 476; cf. James Wilson, in Bailyn 1993, vol. 1: 64, 808)"

“Let any one make what collection or enumeration of rights he pleases,” James Iredell told North Carolina’s ratifying convention, “I will immediately mention twenty or thirty more rights not contained in it” (quoted in Sherry 1987, 1163). However, Anti-Federalists took the reverse view, arguing that all rights not expressly reserved had been granted by implication to the rulers. In the end, Madison was won over to their view that such an instrument was
needed, and it was he who prepared it (Banning 1995, 265–7). He may have been motivated in part by a desire to remove an obstacle to ratification; but he was perhaps also influenced by the arguments in favour of a bill of rights put forward by his friend Jefferson (Mayer 1994, 155–8). Although Madison, having lost his federal veto, supported the idea that some parts of the national bill of rights should extend to the states, this was rejected by the Senate. The first ten amendments were duly ratified on 15 December 1791.

5.3. Early Ideas on Judicial Review

If the constitution was a supreme law, how were breaches of it to be dealt with? Despite the eighteenth-century American experience of having laws and judgments subjected to the scrutiny of the Privy Council, the notion of judicial review was still undeveloped in the debates in 1787. Discussing the “necessary and proper” clause, Hamilton noted that “the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last” (Madison, Hamilton, and Jay 1987, 224–5). If the national legislature exceeded its powers, Madison wrote, its success would depend in the first instance on “the executive and judiciary departments, which are to expound and give effect to the legislative acts” and in the last resort on the people, who could annul their acts by displacing them at elections (ibid., 290). If this was to suggest a judicial role, James Wilson noted that the judges might not be strong enough to prevent encroachment: “Laws may be unjust, may be unwise, may be dangerous, may be destructive,” he wrote, “and yet not be so unconstitutional as to justify the Judges in refusing to give them effect” (Farrand 1937, vol. 2: 73). He therefore sought judicial participation on a Council of Revision.

Nonetheless, there were already by 1787 some signs of state courts asserting a power of judicial review. In the Virginian case of Commonwealth v. Caton of 1782, Judge George Wythe stated that if the legislature should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet [it] at my seat in this tribunal; and, pointing to the constitution will say, to [the legislature], here is the limit of your authority; and hither, shall you go, but no further. (Quoted in Snowiss 1990, 18)

A similar position was taken in the North Carolina case of Bayard v. Singleton in 1787 (1 Martin 42) in which the court refused to proceed under a statute which allowed a judge to settle certain disputed titles to property without a jury, declaring that by the constitution of the state, “every citizen had undoubtedly a right to a decision of his property by a trial by jury” (quoted in Sherry 1987, 1143). James Iredell, who was counsel in the case, had already argued in the press that legislation inconsistent with the constitution was void. If judges applied it, they would be “disobeying the superior law” and acting
“without lawful authority.” Since judges acted “for the benefit of the whole people” and were not “mere servants of the Assembly,” they would usurp no power in refusing to apply unconstitutional laws (Iredell 1858, vol. 2: 148). These were not the only cases to raise the notion of judicial review, but they were perhaps the first to link it to constitutions.

Although setting up a Supreme Court whose power extended “to all Cases, in Law and Equity, arising under this Constitution,” the constitution did not grant an explicit power of review to judges. However, Alexander Hamilton, in interpreting it in Federalist No. 78, took up Iredell’s arguments. He pointed out that the constitution gave only limited powers to the government, and that such limitations could only be preserved if the courts had the power to pronounce unconstitutional acts void. The constitution was to be regarded as a fundamental law, whose meaning was to be determined by the judges, just as they determined the meaning of ordinary legislation (Madison, Hamilton, and Jay 1987, 438–9; cf. Oliver Ellsworth’s comments quoted in Casto 1995, 213; Wilson 1896, vol. 1: 416–7; cf. Carrese 2003, chap. 8). This did not mean that the judicial branch was superior. Indeed, it was the least dangerous branch, since it had no influence over the sword or the purse, and had no force or will, but only judgment. Rather, it was the people’s power which was supreme, and which was to guide the judges (Madison, Hamilton, and Jay 1987, 438–9). In fact, for Hamilton, the constitution bound even the people until “by some solemn and authoritative act” they “annulled or changed the established form” (ibid., 440).

This theory of judicial review was clearly informed by a notion of statutory construction whereby a superior constitution controlled the inferior statute. However, some also felt that the legislature had no power to pass legislation inconsistent with natural justice. In his lectures at the College of Philadelphia, James Wilson approvingly cited Dr. Bonham’s Case, and dismissed the doubts of Blackstone and Woodeson that it would be subversive of government to allow judges to pronounce as void statutes against the law of nature (Wilson 1896, vol. 1: 413). Moreover, judges in a number of early cases in both state and federal courts did invoke natural law and common law constitutionalism when exercising judicial review (see Bowman v. Middleton 1 Bay (SC) 252 (1792) at 254–5; and VanHorne’s Lessee v. Dorrance (2 US (2 Dall.) 304, 308 (1795))). One New Hampshire Supreme Court judge indeed went so far as to observe that the jury was expected “to do justice between the parties not by any quirks of the law out of Coke or Blackstone—books that I have never read and never will—but by common sense as between man and man” (quoted in Sherry 1992, 177).

With this in mind, some historians have argued that the founders intended to give protection not merely to the constitutional rights set out in the text, but to broader natural rights. Debate has centred on the meaning of the Ninth Amendment. This clause, which stated that the “enumeration in the
Constitution of certain rights shall not be construed to deny or disparage others retained by the people” was clearly designed to address the concern that any enumeration of protected rights might imply governmental power to infringe non-enumerated ones. For some historians, the clause was only designed to prevent Congress from exceeding its enumerated powers (see McAfee 1990; 1992a; 1992b; Wilmarth 1989; Amar 1998, 123; cf. Michael 1991). Others, however, have argued that the founding fathers were committed to a broader notion of natural rights protected by an unwritten constitution. They suggest that the written constitution was not considered as the only source of fundamental law; and that the Ninth Amendment was intended to guarantee protection of unspecified, natural rights (Grey 1978; Sherry 1987; 1992; Massey 1992; Barnett 1989).

The Founders’ precise intent is impossible to recover, given the uncertain articulation of ideas on judicial review in 1787–1788. However, question of whether judges should look to natural law was debated by the Supreme Court judges in *Calder v. Bull* in 1798 (3 US (3 Dall.) 385). Justice Chase appeared to endorse a natural law view when he noted that there were “certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power.” He proceeded to say that a statute “contrary to the great first principles of the social compact” could not be “considered a rightful exercise of legislative authority” (ibid., 388). By contrast, Justice Iredell observed that if a legislature passed a law within the general scope of its constitutional power, a court could not void it “merely because it is, in their judgment, contrary to the principles of natural justice,” for ideas of natural justice were not regulated by any fixed standard.

If this rhetoric suggested divergent views of the court’s power, Chase and Iredell agreed that the court should only intervene (as Iredell put it) “in a clear and urgent case.” Chase himself had articulated the rule that in cases of doubt, the benefit should be given to the legislature and the statute allowed to stand (*Hylton v. United States*, 3 Dall. 171, 175 (1796)). This may have reflected a reticence in the 1790s for one branch of the constitution to interfere with the acts of another. Thus, in 1791, President George Washington consulted Jefferson over whether he should veto Hamilton’s plan to create a national bank. Though Jefferson felt the measure was unconstitutional, he advised Washington that the veto should only be used in clear cases of error by Congress; and in the event Washington declined to exercise the veto (Mayer 1994, 197). It has been argued that judicial review in the era before John Marshall became chief justice was limited to legislation which was concededly unconstitutional, and that “[d]eterminations of unconstitutionality were not then legal acts but public or political ones” (Snowiss 1990, 37). By this view, judges saw themselves as political defenders of a social contract, and their interventions were in effect political substitutes for revolution. Nevertheless, while it is true that courts in the 1790s did not look exclusively to constitu-
tional texts, they were moving towards a more textual approach. As Judge St. George Tucker of Virginia observed in 1793, the constitution was not an ideal thing, but a real existence: “its principles can be ascertained from the living letter, not from obscure reasoning or deductions only” (quoted in Snowiss 1990, 26).

5.4. The Supreme Court under John Marshall

In 1801, John Marshall was appointed Chief Justice of the Supreme Court by President John Adams. He was to dominate the court for 34 years and to forge a new constitutional jurisprudence for the United States (see Haskins and Johnson 1981; White 1988; Currie 1985; Faulkner 1968; Shevory 1989; Shevory 1994; Hobson 1996; Johnson 1997; Newmyer 2001). He played a crucial role in cementing the judiciary’s role as a fully co-ordinate branch of government, and ensured that the Supreme Court would be the key interpreter of the constitution. Marshall’s appointment came at a difficult time for Federalists. After the defeat of John Adams in the election of 1800, the Supreme Court bench was the only institution controlled by men of their persuasion. The new Republican president, Thomas Jefferson, had always been suspicious of judicial discretion, and of judges independent of the people (see Mayer 1994, 259). As President, he was sceptical of any idea that the judges should have the sole power to interpret the constitution, holding that it should be for the legislature and executive to determine whether they were acting within its bounds within their respective areas. If they erred, they would be evicted from office by the people. In this atmosphere of political partisanship, in 1806, an unsuccessful attempt was made by the Republican Congress to impeach Justice Samuel Chase, which was seen by many as an assault on the independence of the judiciary (Schwartz 1993, 57–8).

At a time when the Republicans sought a narrow view of the constitution, Marshall took a broad view. A committed Federalist, he feared that the Union was under threat from the centrifugal forces of the states, and therefore sought to defend the strong powers of the central government as a counter-weight to the states. Moreover, he sought a well-regulated democracy, where the excesses of the people would be held in check. He was also committed to the principle of the rule of law, with the highest law being the constitution. Marshall defended the principle of the rule of law and asserted the court’s powers to declare statute unconstitutional in 1803 in Marbury v. Madison (5 US (1 Cr.) 137 (1803)). The case arose from the last-minute appointments made by John Adams, at the end of his presidency. In the rush of last minute duties, John Marshall, at the time secretary of state, had failed to deliver William Marbury’s commission as a justice of the peace, although it had been signed by the President. Marshall’s successor, James Madison, refused to deliver it, and Marbury sought the court’s aid to compel him to do so by a
mandamus. It was a particularly difficult case for Marshall, as it was evident that the executive was likely to ignore any mandamus issued. In his judgment, Marshall therefore sought to assert the court’s powers, but without endangering its ability to exercise them. He criticised Madison’s failure to deliver the commissions, saying that he had a duty to conform to the law. However, having noted Marbury’s vested right, he ruled that the court had no jurisdiction to grant a remedy. Section 13 of the Judiciary Act of 1789, which purported to give the court powers to issue a mandamus, was unconstitutional, for it sought to enlarge the original jurisdiction of the Supreme Court which had been set by the constitution. Marshall was careful to assert the court’s power to review even federal statutes. He noted that the people had an original right to establish such principles of government as they felt were conducive to their happiness. However, since the exercise of this right was a “very great exertion,” he said—in a comment which showed both an implicit criticism of Jefferson’s earlier views that constitutional disputes should be settled by conventions and his own distrust of placing too much power in the hands of the people—that it should not be frequently repeated. Rather, it was, he said, “the very essence of judicial duty” to determine the question in cases of conflict between the constitution and legislation. Any doctrine which denied the court this power “would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits” (ibid., 176, 178): It would allow legislation in effect to alter the constitution. Marshall’s declaration of the power of judicial review was not novel, but its context was politically highly significant.

It has been suggested that Marshall helped to inspire a more textual approach to the constitution, reading it as a positive controlling statute (Snowiss 1990, 77, 113ff.). In Marbury, for instance, he repeatedly stressed that the constitution was written and should be treated as a superior law. However, he also declared in a subsequent case that “we must never forget that it is a constitution that we are expounding” (McCulloch v. Maryland 4 Wheat 316, 407 (US 1819)). While he saw the written constitution as a supreme law made by the people, he sought to interpret it using the broad, “equitable” canons of interpretation derived from the common law tradition, rather than in a narrow, strict way. Marshall did not see the constitution as static, but interpreted it in such a way as to extend to new situations. This can be seen in his decision in Dartmouth College v. Woodward (17 US (4 Wheat) 518 (1819)), in which he interpreted the contract clause in the constitution, which forbade states from passing laws “impairing the obligation of contracts” (Article I, Section 10), in such a way as to insulate corporations from interference by the state. The case centred on an attempt by the New Hampshire legislature in 1816 to alter the charter of a college incorporated by royal charter in 1769, and to put it under the control of a board of overseers appointed by the governor. For Marshall, the original charter was to be interpreted as a contract.
Discussing how far the contract clause extended, Marshall accepted that the clause could not be read to extend to contracts such as marriage, thereby invalidating divorce laws. However, looking to the mischief of state laws before 1787, Marshall said that the clause was intended to relate to “contracts respecting property, under which some individual could claim a right of something beneficial to himself” (ibid., 628). Admitting that the case before him had not been in the framers’ minds in 1787, he stated that the constitution should be interpreted according to its own words, and cases which fell within these words should only be excepted if it was clear that the framers would have excluded them, had they considered them (ibid., 644). He took a similar approach to the text in Sturges v. Crowninshield (17 US (4 Wheat) 122 (1819)), in which the court voided a retrospective bankruptcy statute. Discussing whether the framers had intended to cover bankruptcy laws, Marshall observed that the court should only disregard the plain meaning of a provision on the grounds that the framers “could not intend what they say” if the “absurdity and injustice” of applying the provision would be “monstrous” (ibid., 202–3).

Marshall’s broad constitutional interpretation was often guided by principles drawn from natural law (see Lynch 1982; Wolfe 1986, 112–3; White 1988, 604–6; Currie 1985 128–32; Snowiss 1990, 126–30; Hobson 1996, 78; Newmyer 2001, 210–66). This can be seen from his first case turning on the contract clause, Fletcher v. Peck (10 US (6 Cranch) 87 (1810)). In this case, a challenge was made to a Georgia statute of 1796 which declared void all sales of land made under a statute of 1795. This statute, which authorised the sale of thirty five million acres of Yazoo land at less than two cents per acre, had passed after members of the legislature were assigned shares in the purchasing companies (see Magrath 1966). Nevertheless, the Supreme Court declared the second statute void, with Marshall holding that the legislature could not revoke a grant after it had been made. He interpreted the grant of land as a contract, and hence covered by the words of the constitution, holding that a grant contained an implied promise by the grantor not to reassert the right conveyed. He also ruled that the contract clause did not merely apply to private contracts, but also to those involving states. At the same time, he invoked general principles of justice. “It may well be doubted,” Marshall said, “whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where they are to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation” (ibid., 135). Justice Johnson similarly declared the statute void “on a general principle, on the reason and nature of things [...] which will impose laws even on the Deity” (ibid., 143). This was to say that there were vested property rights which could not be violated by legislation.

In interpreting the text, Marshall and his brother justices continued to draw on arguments based on natural law. In Terrett v. Taylor (13 US (9
Cranch) 43 (1815)), while denying the legislature's power to repeal statutes creating private corporations, Joseph Story declared that his opinion stood “upon the principles of natural justice, upon the fundamental laws of every free government” as well as “upon the spirit and letter of the constitution of the United States” (ibid. 52). Marshall himself invoked deeper principles in one famous dissent. In Ogden v. Saunders (25 US (12 Wheat) 213 (1827)), he found himself in a minority in holding that even prospective state bankruptcy laws fell foul of the contract clause, for they interfered with the private contracts between debtors and creditors. For Justice Johnson, such a conclusion could only result from “a severe literal construction” of the constitution (ibid., 286). However, Marshall argued that the aim of the constitution was to create a single commercial nation, which involved reducing the state's powers to legislate on contractual matters. In arguing that such laws did impair the obligation of contract, he sought to rebut the majority's view that since contracts derived their force from positive law, a prospective law could hardly impair the obligation it created. For Marshall, “individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties” (ibid., 346).

Marshall made use of the contract clause to protect private property rights from legislative interference. He also used the commerce clause to defend the powers of the federal authorities from encroachment by the states, preventing the states from developing their own commercial policies. The key case heard by Marshall's court was Gibbons v. Ogden (22 US (9 Wheat) 1 (1824)), which concerned New York legislation which granted exclusive privileges to operate steamboats within the state. In the case, Marshall ruled that licenses granted under an act of Congress gave full authority to vessels to navigate, notwithstanding any New York statute to the contrary. The state law was void, insofar as it conflicted with federal law. In so deciding, Marshall rejected a narrow construction of the constitution “which would cripple the government, and render it unequal to the objects for which it is declared to be instituted,” and sought rather to look at the words in their natural sense (ibid., 188–9). The word “commerce,” he said, should not be read to mean only traffic or the buying and selling of goods, but included all branches of the commercial intercourse of a nation, including navigation. Although Congress did not have the power to regulate commerce purely internal to a state, power over any commerce which extended beyond the bounds of the state was vested in Congress as absolutely as it would be in a single government. This was to attempt to strike a balance between federal and state jurisdiction. Marshall was treading on contentious ground. Republicans remained committed to the idea that the constitution had to be narrowly construed, to prevent what St. George Tucker called “imperceptible usurpations of power” (quoted in Currie 1985, 170). President James Monroe himself stated in 1822 that the only power
granted to Congress by the commerce clause was to impose “duties and im-
posts in regard to foreign nations and to prevent any on the trade between the 
States” (quoted in Schwartz 1993, 49).

In a number of other cases, Marshall used the constitution to define the 
relation between the states and the federal government. Crucial here was the 
case of McCulloch v. Maryland (17 US (4 Wheat) 315 (1819)). At issue in the 
case were the questions of whether Congress could charter a national bank (as 
had been done first in 1791, and once again in 1816), and whether a state 
could tax it (as Maryland attempted to do in 1818 by imposing a stamp tax on 
all banks not chartered by the state legislature). In the case, the Supreme 
Court gave a robust defence of national powers. The court was presented with 

rival Jeffersonian and Hamiltonian versions of the constitution. Counsel for 
Maryland argued that the constitution was an act of sovereign and independ-
ent states, and that the powers delegated to the federal government had to be 
exercised in subordination to the states. Rejecting this view, Marshall stated 
that the constitution was an act of the people as a whole, and that the federal 
government, “though limited in its powers, is supreme within its sphere of ac-
tion” (ibid., 405). Although Marshall noted that the power to create a bank 
was not one of the enumerated powers of Congress, he said that a constitution 
could not contain details of all the powers conferred. The nature of a consti-
tution required that only its “great outlines” and “important objects” should 
be set out, and that “the minor ingredients which compose those objects 
[should] be deduced from the nature of the objects themselves” (ibid., 407). 
Takin


up the arguments Hamilton had urged on Washington when proposing the First National Bank in 1791, Marshall stressed that Congress had im-
plied powers to pass laws “necessary and proper” for executing its enumer-
ated powers. Where Maryland sought a narrow interpretation of this clause of 
the constitution, Marshall took a more expansive view. In his view, the words 
did not restrict Congress to laws essential for carrying through the enumer-
ated powers. Rather, if the end was legitimate and within the scope of the con-
istution, then the appropriate means were constitutional. Since the constitut-
ion was “intended to endure for ages to come,” it would have been unwise to 
have prescribed the means by which it should always operate, in the manner 
of a legal code. To have done so would have “been to deprive the legislature 
of the capacity to avail itself of experience, to exercise its discretion, and to 
accommodate its legislation to circumstances” (ibid., 415). At the same time,
he ruled that while the state had the power to tax, this power could be re-
strained where it was “in its nature incompatible with, and repugnant to, the 
constitutional laws of the Union” (ibid., 425).

Marshall’s ruling came at a time when a Jeffersonian notion of states rights 
was being reasserted, particularly in Virginia. Marshall’s decision was severely 
criticised, notably by Spencer Roane, President of the Virginia Court of Ap-
peals. In a series of essays, Roane reiterated the view that the United States
was a compact not of one sovereign people, but of the peoples of different
states. He argued further that the Supreme Court could never be an impartial
judge in any contest between a state and the national government, as it would
be judging in its own cause. Since that the compact was between sovereign
states, only they could decide if the compact had been broken (see Gunther
1979, 138–54). Similarly, John Taylor argued that the Supreme Court was not
given unlimited jurisdiction to interpret the constitution, since such a power
would allow it to remove any constitutional limitation. The power to interpret
the constitution could not be the exclusive preserve of either the federal or
state courts. Rather, both had jurisdiction within their own sphere. As Con-
gress could not repeal state laws, so the federal judges could not control state
judgments, nor could they pronounce on the constitutionality of state laws
(Mayer 1994, 281–2). Marshall replied to Roane, denying his premise that the
constitution was a compact between states. He repeated the classic Federalist
notion that the judiciary, who were only agents of the people, were the safest
body to which to entrust the power of decision. He added, moreover, that the
national government would be entirely undermined if great national questions
were to be decided “not by the tribunal created for their decision by the peo-
ple of the United States, but by the tribunal created by the state which con-
tests the validity of the act of congress, or asserts the validity of its own act”
(Gunther 1979, 213).

The power of the Supreme Court to review the judgment of a state court
had already been challenged in 1816 in Martin v. Hunter’s Lessee (14 US (1
Wheat) 304 (1816)) in which Joseph Story had delivered the judgment. Vir-
ginia’s Court of Appeals maintained that section 25 of the Judiciary Act which
attempted to extend the appellate jurisdiction of the Supreme Court to state
courts was unconstitutional, and that it had its own power to interpret the
constitution. Story however confirmed the jurisdiction of the Supreme Court.
Noting that the constitution was made by the people, and not by the states in
their sovereign capacities, he stated that “appellate jurisdiction is given by the
constitution to the supreme court, in all cases where it has not original juris-
diction.” This view was reiterated in 1821 by Marshall in Cohens v. Virginia
(19 US (6 Wheat) 264 (1821)). In this case, he stressed that the general gov-
ernment was supreme in its sphere, and rejected the idea “that the nation
does not possess a department capable of restraining peaceably, and by au-
thority of law, any attempts which may be made, by a part, against the legiti-
mate powers of the whole” (ibid., 377).

Marshall was the dominant force in his time on the bench. In his judg-
ments, he cited relatively few precedents, preferring broad arguments from
principle. He never forgot that the constitution was a written text to be inter-
preted. In a time when the supreme court’s role was often controversial, he
ensured that its role was anchored in the original act of the people, rather
than in a vaguer idea of fundamental law. Nonetheless, he treated that act as a
constitution, and not as a statute, and one that had to be interpreted expansively. At the same time, his interpretations, notably of the contract clause, were informed by background natural law ideas on rights, notably of property, which had to be preserved. In the era between the framing of the constitution and the death of Marshall, a new notion of judicial review was thus developed in America. Although there were some antecedents to be found in English law, notably *Bonham's Case*, the common law gave very few materials on which to build this jurisprudence. Instead, judicial review was a fruit of the revolution, informed by the natural law thinking which had provoked revolt, but focused on the foundational text agreed in 1787.

5.5. Federalist Jurisprudence

If Marshall's Federalist vision was expressed through his decisions on the bench, a more scholarly view of it was also presented by two other Supreme Court Judges, James Wilson and Joseph Story, and by Chancellor James Kent of New York. While defending a vision of the constitution shared by Marshall, these men also defended and developed a view of the common law in America at a time when it was under attack. Although the common law had been venerated in the 1760s and 1770s, in the decades after the Revolution, there was increasing scepticism about its value. Firstly, it was associated with technicalities and tricky lawyers, who were perceived to conspire against the simple justice demanded by the people (Miller 1966, 99ff.). Secondly, it was associated with England and its corrupt monarchical system. As a result, a number of states forbade the citation of British cases after 1776 (Chroust 1965, vol. 2: 64–8; Waterman 1969). By the 1820s, there were strong calls for a code and much criticism of judge-made law (see Cook 1981).

“*No man can tell what the common law is,*” Robert Rantoul argued in 1836, in Benthamic vein, “*therefore it is not law*” (quoted in McClellan 1971, 91). It was against such a background that Wilson, Story and Kent developed their jurisprudence. Jurists of Wilson’s generation defended the Revolution in Lockean terms, and rejected Blackstone’s positivism. However, in an era of increasing calls for codification, Federalists wanted both to preserve the common law, and to defend the role of the expert judge as expounder of law. They therefore turned to a defence of that law as a customary system, developed by the judges, which reflected an inductive natural law. Like Blackstone, however, they were not often deep juristic thinkers, and so tensions sometimes remained in their theoretical ideas.

Born near St. Andrews, in Scotland, in 1742, James Wilson had emigrated to America in 1763, where he had studied law with John Dickinson. Having played an important part in the making of the constitution, he was appointed to the Supreme Court in 1789, where he served until his death in 1798. In 1790, he was also appointed law professor at the College of Philadelphia (see
Wilson told his auditors there that the common law was the wisest of laws (Wilson 1896, vol. 1: 423). It had been carried to America by the settlers, who had only taken as much of the common law as was suitable to their situation, and who were not bound by subsequent alterations, since “to such alterations they had now no means of giving their consent” (ibid., 462–4). For Wilson, the common law was indeed purer in North America than in England: it “bears, in its principles, and in many of its more minute particulars, a stronger and a fairer resemblance to the common law as it was improved under the Saxon, than to that law, as it was disfigured under the Norman government” (ibid., 445).

Wilson described the common law as a developing customary system, reflecting the needs and manners of the people. In doing so, he drew largely on the ideas of seventeenth century common lawyers such as Coke and Hale, while rejecting the positivist positions adopted in England. Following Hale, he argued that the common law was a developing body. “The jurisprudence of a state, willing to avail itself of experience, receives additional improvement from every new situation, to which it arrives,” he wrote, “and, in this manner, attains, in the progress of time, higher and higher degrees of perfection, resulting from the accumulated wisdom of ages” (ibid., 454). The common law had wrought out “errors, distempers, and iniquities” and reinstated “the nation in its natural and peaceful state and temperament” (ibid., 457). Following Bacon, he also stated that the virtue of the common law was that it looked primarily at particular cases, which were only gradually reduced to general rules. Citing Coke, he described it also as a social system, able to settle questions by drawing on sources outside itself.

Wilson rejected Pufendorf’s notion that law came from the command of a superior, which (he said) had been adopted by Blackstone. For Wilson, all law was based on consent, not command. It was “a general convention of citizens” (ibid., 91). The very “notion of a superior” was “unnecessary, unfounded, and dangerous” (ibid., 88). Governors were only trustees, for the people could have no superior. For Wilson, the most significant source of law was custom, which carried “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” (ibid., 57). By a process of trial and experience, he said, “our predecessors and ancestors have collected, arranged, and formed a system of experimental law, equally just, equally beautiful, and, important as Newton’s system is, far more important still” (ibid., 184). Wilson’s rejection of a positivist view of law also influenced his explanation of the origins of law. He argued that while monarchy was probably the oldest form of government, the first kings were elected and had few powers. “The first kings were, indeed, properly no more than judges,” he said, “who had no power to inflict punishments by their own authority, and without the consent of the people” (ibid., 350).
Although Wilson admitted that God’s will was the source of moral obligation, he rejected the idea that its content could be discovered by the use of reason. Rather, following Kames, he said that moral obligations were known by intuition. This could be seen in the fact that children had a sense of right and wrong, as well as in the pleasures which were derived from aesthetic experience (ibid., 110). Like Kames, he argued that the moral sense was to be found in savages, but in a less developed degree; and that it was in developed societies that one saw the moral sense most refined, for reason illustrated and proved what the moral sense suggested (ibid., 114). In his view, the law of nature was therefore immutable, having “its foundation in the nature, constitution, and mutual relations of men and things,” but also “progressive in its operations and effects,” which helped to explain the developing nature of the law (ibid., 124, 127).

James Kent (1763–1847), a Federalist New York lawyer, was appointed to a law professorship at Columbia College in 1793, which he held until 1797. In the following year Governor John Jay appointed him to the bench of the New York Supreme Court, where he sat until 1814, when he was appointed Chancellor. Having resigned in 1823, he returned to lecture at Columbia College in 1824, giving the lectures which would be published between 1826 and 1830 as Commentaries on American Law (see Langbein 1993; Horton 1969). Like Wilson, Kent also premised his view of the common law on a foundation of natural law. He explicitly rejected the idea, derived from Hale and mentioned by eighteenth century English judges (e.g., Wilmot J. in Collins v. Blantern (1767), English Reports 95: 850 at 853; see also: this volume, chap. 4), that the common law had a positive origin, consisting of statutes worn out by time. For him, the common law was “the application of the dictates of natural justice and of cultivated reason to particular cases,” and a “collection of principles, to be found in the opinions of sages, or deduced from universal and immemorial usage” (Kent 1844, vol. 1: 471–2). Using Blackstone’s terms, he spoke of absolute rights to personal security, liberty and to acquire property, noting that these were “natural, inherent and unalienable” (ibid., vol. 2: 1). Having read Kames’s Sketches of the History of Man, he also spoke of a sense of property inherent in the human breast, which developed over time as man advanced towards civilisation (ibid., vol. 2: 318).

Kent’s theoretical discussions of the foundations of the common law were not profound, and in some areas, seemed inconsistent. This can be seen in his discussion of the origin of property. On the one hand, he challenged Blackstone’s comment that the power to transmit property by will did not derive from natural law, but came from society, countering that the right to provide for one’s offspring “is dictated by the voice of nature.” For Kent, a sense of personal property was the first to develop in early societies. The natural and original mode of acquiring property, he said, was through occupancy, and was founded on feeling prior to reason. At this stage, property ended when occupation ended. On the other hand,
Property in land was first in the nation or tribe, and the right of the individual occupant was merely usufructuary and temporary. It then went by allotment, partition, or grant from the chiefs or prince of the tribe to individuals; and, whatever may have been the case in the earliest and rudest state of mankind beyond the records of history, or whatever may be the theory on the subject, yet, in point of fact, as far as we know, property has always been the creature of civil institutions. (Ibid., vol. 2: 319–20)

Kent’s theoretical inconsistencies may be explained by the fact that he was attempting to write an institute explaining and legitimating the common law. Thus, he had to explain the fundamental maxim of property law that all land was held of the king, which had been adapted in America to the “settled and fundamental doctrine” that all titles were “derived from the grant of our own local governments, or from that of the United States, or from the crown, or royal chartered governments established here prior to the revolution” (ibid., vol. 3: 377). Kent’s natural law was in effect closely tied to the English common law. Thus, the right to personal security in America was guarded “by provisions which have been transcribed into the constitutions in this country from *magna charta*, and other fundamental acts of the English parliament” (ibid., vol. 2: 11). Kent’s view of the common law was not parochial, however. He wrote that:

In its improved condition in England, and especially in its improved and varied condition in this country, under the benign influence of an expanded commerce, of enlightened jurisprudence, of republican principles, and of sound philosophy, the common law has become a code of matured ethics and enlarged civil wisdom, admirably adapted to promote and secure the freedom and happiness of social life. (Ibid., vol. 1: 342)

Moreover, in his work, he went out of his way to incorporate into his work learning and citation from continental legal materials, though foreign examples were cited “primarily to show that the foreign source was congruent with the result that the English common law reached” (Langbein 1993, 570).

By contrast with Wilson and Kent, Joseph Story was a Republican in his youth. Born in Massachusetts in 1779, he built a successful law practice in Salem, before his election in 1805 to the Massachusetts legislature, and in 1808 to the national House of Representatives, where he sat as a Jeffersonian. Nonetheless, he very quickly tired of party politics, and found that his beliefs were more suitable to Federalist than Republican positions (see McClellan 1971; Dunne 1970; Newmyer 1985). Story became ever more conservative and suspicious of popular assemblies, and ever keener to preserve the union, and in later life was a strong opponent of Jacksonian democracy. Throughout his life, Story devoted much time to scholarly exposition of the common law, and he remained a prolific publisher. In 1809, he edited Joseph Chitty’s treatise on Bills of Exchange and two years later produced editions of Edward Lawes’s treatise on assumpsit and Charles Abbott’s on shipping. In 1811, he became the youngest ever appointee to the Supreme Court, and was to prove
the most scholarly member of the court. In 1829, Nathan Dane offered $10,000 to endow a chair at Harvard, on condition that Joseph Story was appointed to lecture on natural law, commercial and maritime law, equity and constitutional law. Story’s presence gave great cachet to the law school, while his tenure of the Dane Professorship underlined his scholarly credentials. It was from lectures then delivered that he published his great commentaries on equity jurisprudence, the conflict of laws, and the constitution, as well as a number of other treatises on law (Chroust 1965, vol. 2: 201; Story 1832; 1833; 1839a; 1839b; 1841; 1843; 1845; 1846).

For Story, the “whole structure of our present jurisprudence stands upon the original foundations of the common law” (Story 1833, vol. 1: 140, §157). Although he felt that the common law had adapted to American conditions, he wrote to an English correspondent in 1840 that every American lawyer “feels that Westminster Hall is in some sort his own” (quoted in Miller 1966, 125). He therefore sought to develop the intellectual ties between lawyers in the two countries. Like Wilson, he defended an incremental common law. “The narrow maxims of one age,” he said, “have not been permitted to present insurmountable obstacles to the improvements of another” (ibid., 127). He thus rejected the idea that the common law was “an absolutely fixed, inflexible system,” noting instead that it was “a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country” (Story 1852, 702). It had always been administered by practical men, he argued, rather than speculators. “Common sense,” he said, had “powerfully counteracted the tendency to undue speculation in the common law, and silently brought back its votaries to that, which is the end of all true logic, the just applications of principles to the actual concerns of life” (quoted in McClellan 1971, 85 and Newmyer 1985, 244–5). Story continued to remain wedded to common law principles of interpretation. This led him controversially (and unsuccessfully) to maintain that the federal courts had a common law jurisdiction over crimes, even after the Supreme Court had ruled that no such authority existed (see Jay 1983a; Jay 1985b; Palmer 1986; Preyer 1986; Presser 1991). For Story, the constitution and the laws of the United States were predicated on the existence of the common law. It would be extraordinary, he said, for the common law to be the basis of the jurisprudence of the states “and yet a government engrafted upon the existing system should have no jurisprudence at all” (Story 1833, vol. 1: n. 141, §158).

Like Kent, Story did not spend much time setting out his theoretical premises, and when he did, the positions he set out were not wholly consistent. His views were set out in two entries written for Francis Lieber’s *Encyclopaedia Americana* in the 1830s. In a contribution on “Natural Law,” he set out a voluntarist theory which owed a great deal to Pufendorf. The obligatory
force of natural law, he argued, came from God’s will, which it was man’s duty
to ascertain and obey. Story followed Pufendorf’s division of duties to God, to
oneself and to others, as well as the division of perfect and imperfect rights.
He described the evolution of political society as families grew into tribes and
thence into larger associations, and argued that government arose from volun-
tary consent, long acquiescence or superior force (McClellan 1971, 317). The
right to property, he said, “is a creature of civil government.” Similarly, while
the obligation of contract was conformable to God’s will, it was only in civil
society that contracts could be properly enforced. In every society, he said, it
was indispensable “that there should be somewhere lodged a power to make
laws for the punishment of wrongs, and for the protection of rights” (ibid.,
320–2). Similarly, in his essay on “Law, Legislation and Codes,” Story stated
that legislation “includes those exercises of sovereign power, which perma-
nently regulate the general concerns of society.” Law was defined as “a rule,
prescribed by the sovereign power of a state to its citizens or subjects, declar-
ing some right, enforcing some duty, or prohibiting some act” (ibid., 357).

Nevertheless, Story also severely qualified the role of his legislature. “Law
is founded, not upon any will,” he said, “but on the discovery of a right al-
ready existing; which is to be drawn either from the internal legislation of hu-
man reason, or the historical development of the nation” (ibid., 354–5). The
office of legislation was “not so much to create systems of laws, as to supply
defects, and cure mischiefs in the systems already existing” (ibid., 363). Story
said that in the origins of society, principles of natural justice were recognised
before any common legislature was created. Habits became customs, which in
turn became rules. He therefore dismissed those who traced the origin of the
English common law to positive legislation, observing that much of that law
was of modern growth, independent of legislation. Not only did every system
of law begin in custom, but customary law provided the bulk of any system.
“A man may live a century, and feel (comparatively speaking) but in few in-
stances the operation of statutes, either as to his rights or duties,” Story wrote,
“but the common law surrounds him, on every side, like the atmosphere in
which he breathes” (ibid., 365). Even when statutes were passed, parties had
the right to litigate all questions to discover the meaning of the law. Since it
would be “obviously unfit” for the legislature to settle its own meaning retro-
spectively, it was left to the courts to settle the meaning of laws. “When, then,
in America and England, it is asked what the law is,” he said, “we are ac cus-
tomed to consider what it has been declared to be by the judicial department,
as the true and final expositor” (ibid., 358).

Story shared Wilson’s Baconianism and his view of the evolution of law. If
natural law was universal, its application depended on local and historical cir-
cumstance, and its principles should be sought inductively. For Story, a sci-
ence of law could be created through proper classification, systematisation and arrangement (see LaPiana 1994, 35; Newmyer 1985, 281–9). In common with a number of early nineteenth century American jurists, Story did not seek to separate law and morals, but saw them as interacting. This attitude led him, both on the bench and in print, to support the notion of vested rights and obligations derived from sources beyond law. He was willing therefore to invoke the “great principles of Magna Charta” in defence of property, and to declare that “government can scarcely be deemed free, when the rights of property are left solely dependent upon the will of a legislative body, without any restraint” (McClellan 1971, 214; Miller 1966, 228). Discussing Ogden v. Saunders, he stated that obligations were measured

neither by moral law alone, nor by universal law alone, nor by the laws of society alone; but by a combination of the three; an operation, in which the moral law is explained, and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. (Story 1833, vol. 3: 243, §1372)

While contractual obligations could not exist contrary to positive law, they could “exist independently of it; and it may be, exist, notwithstanding there may be no present adequate remedy to enforce it” (ibid., vol. 3: 247, §1376).

Like John Marshall, he thus considered that the obligatory force of a contract derived primarily from universal or natural law.

The eclectic nature of early nineteenth century American legal thought is perhaps best reflected in the lectures of David Hoffman. A leading member of the Maryland bar, in 1817 he published A Course of Legal Study, and in 1829 Legal Outlines, based on his course of lectures at the University of Maryland (see King 1986, 160–80). Hoffman was widely read, and he drew on Hobbes and Locke, Grotius and Pufendorf, Hume, Smith, Ferguson and Kames, as well as Bentham. His Legal Outlines set out a theory of natural law. “Natural jurisprudence,” he wrote, was “fixed and immutable in her decrees” and was ascertained by reference to “the intrinsick character of man in all ages.” Civil jurisprudence, by contrast, was variable, and derived its principles from what was “extrinsically added to the character of man” (Hoffman 1836, 10). For Hoffman, natural law contained rules of conduct which promoted human felicity. In explaining this, the influence of his Scottish reading was evident. Mankind, he argued, had a particular moral constitution, which distinguished it from other creatures. Sociability and the pursuit of happiness was in man’s nature. He was particularly keen to establish (against the polygenetic theory found in Kames’s Sketches of the History of Man) that all humanity had a common root, in order to show that human ideas on obligation were neither limited to particular communities, nor resulted from mere expedience (ibid., 33–6). Man’s nature made him sociable, and sociability was essential to his happiness. “To this foundation,” he wrote “may be referred the duties of benevolence and affection, of mildness, of charity, of compassion; of all those natural
sentiments, in short, which have no relation to positive institutions, and which are found existing through the earth, independently of them” (ibid., 42–3). Man’s need to be sociable was also, however, the foundation of government. Again echoing Scottish readings on the moral sense, he wrote that man had a sense of the beautiful and deformed in morals, which allowed him to be a judge of the actions of others, and of his own acts (ibid., 65).

Hoffman was not especially concerned with whether the motivation behind moral obligation was labelled reason, moral sense or utility. Indeed, in his work he referred to all three terms, though the key point was that man’s essential nature had to be pursued. To be obliged to obey the law of nature, he wrote, “is to be under a moral necessity of consulting our happiness by those modes which right reason, conscience, and just experience have found best for that purpose” (ibid., 70). The foundation on which moral obligation was built was, he added, “Happiness, or (in its other name) Utility” (ibid., 71), while natural law was “a system of rules of action suitable to promote the greatest utility to man in all stages of his being; an abstract perfection, after which legislation labours in all modifications of human existence and society” (ibid., 86).

Drawing on eighteenth century natural jurisprudential sources, Hoffman proceeded to discuss perfect and imperfect rights, natural and adventitious rights, and alienable and inalienable rights. “The primary object of society and law is to protect our absolute rights, these being the gift of nature, and essential to our well-being,” Hoffman wrote, “the secondary object of law is to guard us in our relative or adventitious rights, these being posterior to, and merely consequent upon the formation of society and laws” (ibid., 121). He then listed as absolute the right to life, to the fruits of one’s labour, to reputation, to personal liberty, to patrimony and to bequeath by will. When he came to define law “in the concrete,” however, he gave a positivist definition. Law, he wrote, always supposed a superior, competent to prescribe a rule, and a sanction” (ibid., 253). For Hoffman, it was inconceivable for law to spring from any other source than a “supreme power.” While the original authority to make laws came from a compact of the people, laws subsequently made came from the legislature. Moreover, “if the law be made by the legislature, then the whole community, quoad the law, is the inferior, and the legislature is the superior” (ibid., 268). Even customary law was not itself law until it was “established as valid by the judicial power, which itself springs from the legislative power, or from the constitution (ibid., 270). Hoffman had read Bentham, and was influenced by the Englishman’s view of motives, though he found Bentham’s Introduction to the Principles of Morals and Legislation, “very peculiar, and a little too eccentric for a work so grave and didactic” (ibid., 291). Moreover, under Bentham’s influence, he did give an outline of the categories of a code. Nonetheless, Hoffman also portrayed the common law as historical and evolutionary, and as the offspring of experience, and saw practical dangers in experiments at codification (Miller 1966, 127, 252).
When it came to the constitution and matters of public law, American legal thinkers and practitioners in the half-century following the revolution were able to develop a theory which saw authority as deriving from a constitution agreed by the people, a constitution which was interpreted by the judges. However, when it came to private law, those who resisted a codification which would make all law the positive act of the legislature were less able to offer a coherent jurisprudential vision of law. Some, like Wilson, aimed to create a coherent theory which could explain the common law without resort to Blackstone’s positivism, by rejecting the sources the commentator had relied on in favour of a newer, Scottish moral theory. Others, however, were less concerned with consistency, and were happy both to speak in a positivist language when it came to discussing abstract questions, while using the language of custom or nature when it came to the common law. In part, this was because men like Kent or Story were not setting out to answer philosophical questions, but rather to digest and explain the materials which practitioners and students needed in an expanding society.
Hobbes’s attack on the common lawyers had presented jurists with the problem of how to reconcile a view which conceived of law in terms of authority, rather than reason, with the existence of a body of rules which were developed by courts over a period of time. Hale’s answer to Hobbes was to agree with his positivist conception of law, but to argue that the foundational rules of English law had originated in a past agreement, and were subsequently developed by judges. He had shown that judges, who had expertise in the law and experience of the world, could apply the rules of law to the new facts which came before them, judging when an old rule should be extended by analogy, and when there had to be resort to reason. However, while he spoke of the law as growing, Hale did not give a very detailed account of the methods judges were to use in developing the law, particularly in novel cases. Nor did his successor, Blackstone, add a great deal of enlightenment. Indeed, if the commentator was able to show that the fundamental rules of property could be clearly summarised and applied, in many other areas of crucial importance in a commercialising society, he was unable to explain how judges developed law, save by referring to ideas of natural equity.

When Jeremy Bentham (1748–1832) attended Blackstone’s lectures at Oxford, he therefore found that many fundamental questions about the nature of common law reasoning remained unanswered, hidden beneath a rhetoric which tended to invoke custom and the law of nature at the same time that it lauded parliamentary sovereignty. Bentham was to look more clearly than any previous writer at how the common law sought to develop its rules; and the closer he looked, the less adequate he found it. He saw that earlier common law writers had not solved the problem of how to show the law to be authoritative and coherent. Ultimately, Bentham felt that the common law could not adequately generate the rules which were needed for social co-ordination, and he derided the idea that there was a natural law which could be used by judges in the process of adjudication. The only solution to the problem was to create a comprehensive code issued by the sovereign legislature based on the principle of utility. The intellectual project of creating a code occupied him for the rest of his life and remained unfinished at his death in 1832 (see Dinwiddy 1989b; Lieberman 1989, 219–90; Long 1977, 13–25; Crimmins 1990, 28–40; Burns 1989).

In the 1770s, Bentham worked steadily on analysing legal concepts, in order to clear the ground for his legislative project. At the same time, he sought to set out the principles on which a code could be established. In 1776, he published part of his critique of Blackstone, A Fragment on Government, and in 1789, he published An Introduction to the Principles of Morals and Legisla-
Moreover, a preliminary outline of a code, written in the mid-1780s, formed the basis of the *Traité de Législation Civile et Pénale* edited by Étienne Dumont in 1802. However, much of his most important early theoretical work, notably *Of Laws in General*, was not published until the twentieth century, and much important material remains unpublished. From the mid-1780s, Bentham’s focus of attention turned to more practical projects, including his plan to construct a Panopticon prison (Semple 1993). He also wrote on matters such as the Poor Laws, Police and Political Economy. In the era of the French Revolution, he began to consider constitutional questions more directly, as well as turning his attention to matters of judicial and legislative organisation. In 1803–1808, he composed the material for his *Rationale of Judicial Evidence* and wrote other works on judicial organisation. Frustrated by the failure of his Panopticon project, Bentham now became increasingly critical of vested interests, particularly in the state, law and church. Convinced that real reform would be impossible under current political arrangements, by 1809 he converted to the cause of radical political reform (Dinwiddy 1975). Henceforth, he gave increasing attention to the problem of sinister interests and how they could be controlled within a constitutional system. He also now began to solicit invitations to write codes of laws for various states, including the United States. In the 1820s, Bentham worked on a *Constitutional Code*, hoping to see its implementation in Portugal or Greece (see Bentham 1998; Rosen 1992). A first volume was published in 1830, and Bentham turned to writing more on civil law matters, beginning to plan the outline and purposes of a civil code. By the end of his life, he was still engaged on manuscripts entitled “Blackstone Familiarised,” and had yet to complete a code of laws. By then, however, he had a large following of disciples, both in England and abroad, and had played a significant role in a transformation about legal thinking in England.

### 6.1. Jeremy Bentham on the Foundations of Law

Following Hume, Bentham rejected the common lawyers’ notion that political authority rested on a social contract (Bentham 1977, 97). Instead, he defined political society in terms of the people’s habit of obeying the commands of a certain sovereign ruler. “A number of persons accustomed or agreed to act in all things as a certain person or persons shall command,” Bentham wrote, “is called a State” (Bentham Manuscripts, UC Ixix, f. 87; cf. Bentham 1970, 1).

For Bentham, it was in man’s nature to seek happiness, which was best promoted in political society. For if a state of nature was a state of liberty, it was also one of great insecurity (Bentham 1970, 253–4; Bentham 1838–43, 3: 219). However, there was no single point at which people emerged from the state of nature into a political society. The habit of obedience was cultivated by experience, which had patriarchal roots. “It is in the bosom of a family,” he wrote,
“that men serve an apprenticeship to government” (Bentham Manuscripts, UC lxix, f. 204; cf. Bentham 1838–1843, 2: 542; see Long 1977, 31–5, 211; Burns 1993). It was when people saw the good of government that the habit emerged.

Bentham’s concept of the habit of obedience has been much debated. H.L.A. Hart argued that the concept is unable to account for the normativity of a sovereign’s command: it cannot explain the development of criteria determining the validity of laws, or explain such notions as legally limited government. For Hart, if the command of a lawgiver acts as a “content independent and peremptory” reason for obedience, the fact of the command is not a reason in itself for normative acceptance (Hart 1982, 243). There must rather be an external, social rule, generating a “general recognition in a society of the commander’s words as peremptory reasons,” something like his own “rule of recognition” (Hart 1982, 258; Hart 1994, 91–110). Hart’s view has been challenged by Gerald Postema. He points out that for Bentham, political society was not a collection of individuals who happened to obey one man. Rather, the obedience given to any particular law of any ruler rested on a general habit of obedience, which had foundations in a broader custom or disposition (Postema 1986, 218, 240). Bentham’s understanding, he suggests, was not far from Hart’s, for his habit of obedience was interactional, not mechanical. In Bentham’s view, for a command to count as law, each person addressed had to accept it as authoritative law, which depended in turn “on one’s beliefs and expectations regarding the behaviour and attitudes of most of the other members of the community” (ibid., 237). Like Hart himself, Bentham felt that the foundations of law “do not consist in acceptance of some indefinitely specified set of substantive legal or constitutional standards, but rather in certain morally neutral, formality- (or “pedigree”-) defined criteria of validity” (ibid., 262). For Bentham, subjects were thus only in the habit of obeying the laws of a recognised sovereign which were passed in a recognised way. Certain formalities were needed for the passing of a law, since without them people would not know what were the authentic commands of the sovereign (Bentham 1970, 126n; cf. Postema 1986, 239). Hence, they would not obey laws not validly passed, since they would not be recognised as laws.

At the same time, there was also a substantive basis to the habit of obedience. It existed if a sufficiently large number of people obeyed a ruler, from a conviction that his rule was necessary for their happiness. Although the habit was “at present firmly rooted in our own and every other civilized nation that we know of” (Bentham Manuscripts, UC lxix 69, ff. 203–4), Bentham pointed out that it was in fact never perfect. The state of nature and perfect political society were therefore poles: the more disobedience existed, the more society was like a state of nature. The habit was “more or less perfect, in the ratio of the number of acts of obedience to those of disobedience” (Bentham 1977, 430 note o, 14). A certain level of obedience was necessary to constitute a government, but even this was liable to suffer periodic interruptions (ibid., 433–4).
However, society could not subsist if every man could disobey any law he disliked. People were therefore bound in conscience to observe the laws of their country, unless they were persuaded by a “thorough and reflective conviction” of their inutility (ibid., 86). Bentham’s theory also explained how revolutions occurred and sovereignty was lost. If enough people came to the conclusion that the probable mischiefs of rebellion exceeded the probable mischiefs of obedience, the juncture for resistance arrived (ibid., 57, 481). There was no common sign by which this juncture could be known. Each individual would act on “his own internal persuasion of a balance of utility on the side of resistance” (ibid., 484). Resistance would be a political act and each person resisting would know that his act was illegal and that he would be liable to be punished for it (ibid., 25). For instance, Bentham said that if the legislation were passed to give statutory force to royal proclamations, I will take up arms, that is if I can get what I think enough to join with me: else I will fly the country. I well know I shall be a Traitor and a Rebel: and that as such the Legislature would act consistently and legally in setting a price upon my head. (Ibid., 57; cf. ibid., 436)

Bentham’s revolution was thus defined in sociological rather than legal terms. Political society would be dissolved when a sufficiently large number of people chose to rebel and succeeded (cf. ibid., 491). In effect, this discussion sought to provide a more convincing explanation of the revolution of 1688 than was to be found in Locke’s contractual theory in the Second Treatise (cf. ibid., 442–3).

Revolution, or its prospect, was not however the only limit to the ruler’s power. Bentham acknowledged that a ruler could set limits to his own power by “constitutional laws in principem,” a “transcendent class of laws,” which “prescribe to the sovereign what he shall do” (Bentham 1970, 64). These were covenants entered into by the ruler concerning his conduct. Such limitations were not judicially enforced, for “within the dominion of the sovereign there is no one who while the sovereignty subsists can judge so as to coerce the sovereign” (Bentham 1970, 68; cf. Bentham 1977, 487–8). However, his acts might be considered unconstitutional, “by being repugnant to any privileges that may have been conceded to the people whom it affects” (Bentham 1970, 16). Constitutional laws in principem therefore rested on the moral or religious sanctions, which experience showed were effective in keeping the sovereign in check (Bentham 1970, 70–1). They also set new standards for the habit of obedience. “The effect of such a concession,” Bentham said, “is to weaken on the part of the people, in the event of its being violated, that disposition to submission and obedience, by which the power of the sovereign, in point of fact, is constituted” (ibid., 16). While succeeding sovereigns would not be bound by the covenants of earlier ones, it would become customary for them to adopt them, for the obedience of the people would come to be conditional their adoption (ibid., 65–6).
At some points in his early writings, Bentham spoke of the limitations on the sovereign in a way as to suggest that any act by the sovereign exceeding them would be regarded simply as *ultra vires*. Once the supreme body had marked out bounds to its authority, “the disposition to obedience confines itself within these bounds” and “beyond them the subject is no more prepared to obey the governing body of his own state, than that of any other” (Bentham 1977, 489). This was to suggest that the people would simply ignore some of the sovereign’s mandates, although in all other respects they would continue to obey him. In illustrating this, however, Bentham gave examples from federal constitutions, such as the Swiss cantons or the Holy Roman Empire, rather than domestic ones (Bentham 1977, 484 note k, 489).

Bentham’s early work did not look in detail at questions of constitutional law, for he then regarded it as the least important aspect of law for the reformer (Hume 1981, 77). At this point, Bentham saw government in private law terms, as a trust (Bentham 1970, 249, 86). However, from around 1788, Bentham began to look more deeply at constitutional questions, and to reformulate his terms. In the years before the revolutionary Reign of Terror in France, and again after 1809, Bentham began to develop a democratic theory of government which would culminate in his *Constitutional Code* in the 1820s. In these writings, Bentham took up the question, raised in the *Fragment*, of how to blend the interests of the governors and the governed. In doing so, he began to recast his notion of sovereignty, and ceased to talk of constitutional laws *in principem* (see Burns 1973). He now distinguished between two aspects of sovereignty. The first was the sovereign efficient power (Hume 1981, 116), or Supreme Operative Power as he later called it. This was “the power by which every thing that is done in the way of government is done” (quoted in Rosen 1992, 65). In his *Constitutional Code*, the Supreme Operative Power effectively took the place of the “sovereign” of his earlier work. The supreme legislature, which held this power, was omnicompetent and had the “power of imposing upon persons of all classes, obligations of all sorts, for purposes of all sorts, and with reference to things of all sorts: obligations such as are not capable of being annulled or varied by any other power in the State” (Bentham 1983, 41; Bentham 1989, 6). By contrast, the Sovereign Constitutive Power, which rested in the people, was “the power of determining at each point of time in the hands of what individual functionary or individual functionaries the correspondent operative power shall at that time be lodged” (quoted in Rosen 1992, 65). For Bentham, potentially everyone should share in the power to constitute the governors, but only the latter should have the power to make law.

“The sovereignty,” he now wrote, “is in the people” (Bentham 1983, 25). There has been some debate among scholars whether this change in his discussion of sovereignty represents a change in his theory. According to H.L.A. Hart, Bentham’s later formulation involved “a quite different theory of law”
from his earlier language (Hart 1982, 228). Hart argued that whereas Bentham’s earlier writings saw law in terms of commands issued by the sovereign, the constitution which conferred the supreme constitutive power on the electors was itself a law which derived its status not from any command, but from the fact that it was generally acknowledged to be in force. Moreover, he claimed that Bentham’s new definition could not constitute a general theory, since he himself acknowledged that there were states—such as hereditary monarchies—lacking a supreme constitutive power. Against this view, however, it may be suggested that Bentham’s later constitutional thought was in effect a refinement of his earlier ideas, linked to a positive programme of political reform (cf. Postema 1986, 261).

For Bentham, of course, the people had always “constituted” the government by the fact of their obedience (see Bentham 1989, 279). The Constitutional Code was a mechanism to make the influence of the people over the government more direct and constant. “The true and efficient cause and measure of constitutional liberty, or rather security,” he wrote, “is the dependence of the possessors of efficient power upon the originative power of the body of the people” (Bentham 2002, 409). Bentham’s aim now was to create a chain of responsibility leading ultimately to the people and to make the particular interest of the rulers mirror the universal interest of the people. The two powers were interdependent. For Bentham, the Supreme Operative Power

performs the office of the main spring in a watch; the [Supreme Constitutive Power] that of the regulator in a watch. Without the regulator, the main spring would do too much: without the main spring, the regulator would do nothing: viz. one with one another and antagonizing with one another, in so far as they are aptly proportioned to each other, they will do that which is required. (Bentham 1989, 135)

Bentham was clearly aware that in most states—notably in hereditary monarchies—the power of locating the ruler did not directly lie with the people (see Bentham 1838–1843, 9: 97). In seeking to put the power of location and dislocation directly in the people via regular elections, he was therefore seeking to establish the best possible constitutional system, with the least scope for misrule (see Bentham 1989, 53, 117; see also Schofield 1991–1992). Outside a representative democracy, the control people exercised over their rulers was blunt. While they always had the power of dislocation, it could scarcely be effected in a monarchy “without either a homicide or a war” (Bentham 1838–1843, 9: 103, cf. Bentham 1990, 122). Moreover, although rulers might be influenced to act for the good of the community by “fear of inferior sufferings,” such as popular obstructions to the exaction of taxes, or the execution of judgments (Bentham 1990, 124), they were often able to hide their sinister interest, and make the people believe that the government was acting for their good (see Bentham 1989, 152–82). In the system of the Constitutional Code, there would be no need for substantive limitations on government, since the
checks built into the system would prevent the ruler from acting against the universal interest.

The constitution itself was made by the legislator. As Rosen has argued, for Bentham, the origin of constitutive power came in the operative power of government itself (Rosen 1992, 65–6). He did not see constitutions as the organic product of community custom, nor as the creation of the people as a whole. Rather, he retained a patriarchal view of constitution-making. A people, needing a government, would follow the ruler who could give them the constitution which satisfied them. He was himself attracted by the prospect of writing a constitution for Greece, seeing it as a “clean slate,” a place which had not yet acquired settled habits of rule and obedience (Rosen 1992, 99; cf. Bentham 1990, 146). The *Constitutional Code* was thus a law set by the legislator and enforced ultimately by the moral sanction of the Public Opinion Tribunal, or the people, just as the constitutional laws *in principem* which he had previously discussed were seen as laws set by the sovereign enforced by the moral sanction (see Bentham 1990, 30, 139; cf. Ben-Dor 2000, 183–4). The principles of the constitution, Bentham made clear, were not to be protected by any form of judicial review (Bentham 1983, 45).

The persistence of the system rested ultimately on the holders of the supreme operative power acting in accordance with the people’s constitutional expectations. It was, Bentham admitted, conceivable that the holders of this power might conspire to change the constitution in ways that were harmful to the interests of the people. In so doing, the legislature might be acting in a legally valid way, given their power to change any part of the code. In such a situation, the only redress was mass petitioning by the people, demonstrating to the chief executive “a contest tending to a revolution” (Bentham 1989, 35). For those living under the *Constitutional Code*, however, the juncture of resistance was more clearly signalled than in a monarchy:

> Upon [the people’s] compliance or non-compliance, all power, as has been seen, necessarily depends. On any occasion towards producing, on their part, non-compliance, all that can be done by a constitutional code, is to give them the invitation. If by such invitation, power is not limited, by nothing else can it be limited. (Bentham 1838–1843, 9: 120)

The invitation Bentham here had in mind was to an act of revolution. This would still be an act of political judgment: since the legislature had power to alter even constitutional rules (Bentham 1983, 44), revolt would only ensue when the change in the system was so great in the people’s eyes as to justify resistance (but contrast the views of Ben-Dor 2000, 157).

Bentham’s idea that the constitutional rules were created by the ruler, but generated expectations in the public, led to his holding something of a teleological view of constitutional development, leading to the system of democracy he championed. In his view, people entered political society to obtain happiness. Over time, concessions, such as Magna Carta or the Bill of Rights,
were made by rulers, which both generated expectations which would not otherwise have existed, and which gave some kind of security against misrule. Change was also promoted when rulers violated expectations. So long as a monarch ruled in accordance with popular expectations, “the people would not be likely to feel much inclination to change: but, supposing them at any time infringed by him, it would be for them to make themselves amends, and provide for that purpose whatsoever security seemed to them most efficient” (Bentham 1990, 140, 127n). Nonetheless, Bentham remained pessimistic in the 1820s about the prospects of change. England, he said, would not establish a real constitution “till the present system of corruption has dissolved in its own filth.” At the same time, while her political system remained unreformed, she would not get rid of that corruption (Bentham 1995, 127). Bentham’s increasingly polemical writings of the 1820s were clearly aimed at persuading the people of the malign effect of sinister interest. If a government was in its very essence acting in opposition to the universal interest, he wrote, it was useless to replace the current rulers with a new set acting under the same system, since they would be subject to the same temptations of sinister interest. In such a situation, all a man could do was either to lie down and submit “or rise up—and in conjunction with as many as he can get to join with him, rise up and endeavour to rid the country of the nuisance” (Bentham 1989, 128).

6.2. Bentham’s Critique of the Common Law

“The property and very essence of law,” Bentham wrote, “is to command” (Bentham 1970, 105). Law was “an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons” (ibid., 1). It involved coercion: “To make a law is to do evil that good may come” (ibid., 54). Moreover, “Command, prohibition, and permission” all “point at punishment” (ibid., 133). In Bentham’s analysis, there were thus two parts to a law: a directive part, which contained the complete expression of the legislator’s will concerning an act, and a prediction of punishment. For law to be effective, the prediction had to come true, and so the legislator had to “issue a second law, requiring some person to verify the prediction that accompanied the first” (ibid., 137–9). This subsidiary law was addressed to the judge, and was accompanied by a host of subsidiary laws regulating procedure and the enforcers.

In setting out his understanding of law, Bentham argued that what many saw as the traditional sources of the common law were not in fact law. Firstly, he attacked the idea that the validity of a law depended on its consonance with the law of nature (Bentham 1977, 52–4). Natural law, he said, gave no precepts by which men were commanded; and even if such precepts existed, there would be no need for reason to attempt to infer God’s will (ibid., 13–4,
22). In fact, what men called the law of nature was “neither a precept nor a
Sanction, but the mere opinions of men self-constituted into Legislators” (Bentham Manuscripts, UC xcvi, f. 109, quoted in Lieberman 1989, 230). If a
judge said that a law was contrary to reason, all he meant was that he disliked
it (Bentham 1977, 198). Bentham argued that reason offered no fixed and cer-
tain standard on which men could agree (ibid., 159), and that it was always
better to talk of utility when judging a law. Nevertheless, utility could not be
used as a criterion of validity, for society could hardly subsist if every man
could declare a law void and disobey it simply because he felt it was inexpedi-
ent (ibid., 25). Utility could guide individuals in determining whether they
disliked a law strongly enough to resist it (ibid., 86); but it could not tell a
judge whether a law was valid or not.

Secondly, Bentham attacked the notion that the common law came from
the immemorial custom of the people, and in so doing attacked Blackstone
for his historical inconsistencies (ibid., 178–9, 133). No single item of the
common law, Bentham wrote, seemed to fit the image of immemoriality which
Blackstone claimed for the whole system (ibid., 164). This immemoriality was
a fiction of the lawyers:

A Decision of Common Law upon a new point never seems to have set up de novo the general
rule that may be deduced from it. It supposes contrary to the truth that rule to have been set
up already. It supposes therefore that the rule ought always to have been conformed to. It can
fix no era to its commencement. (Bentham Manuscripts, UC lxix, f. 6)

Bentham pointed out that unwritten law was “made not by the people but by
Judges” (Bentham 1977, 223). Customs which existed in the community—
customs in pays—were not obligatory. To be legalised, they required an act of
public power: the intervention of judges, whose orders the community in
question were in the habit of obeying (ibid., 232). Moreover, these judges
“must not be persons of that assemblage of whose acts the Custom has been
composed” (ibid., 183). Law, as command, could not arise spontaneously
from the community:

who is it makes a Custom? (I mean a custom in pays that is become a legal one) any one? no,
but the Judge who first punishes the non-observance of it after it has become a custom in pays.
(Ibid., 191; cf. ibid., 188–9)

For Bentham, the custom of the courts—customs in foro—were more impor-
tant than the customs of the country. Not only did superior court judges con-
tr ol the law without reference to community custom, but their treatment of
local customs was designed to maximise their own power and to marginalise
local courts. By requiring that local customs be shown to have an immemorial
existence, they shut their eyes to the fact that they had also been legalised
through judicial acts in local courts. However, in being able to point to a time
before the custom in question had been pronounced in court, judges could
conclude that it could not have generated strong expectations in the community, and that it would not be against utility to deny it. Thus was their own power over the law bolstered (ibid., 235–6).

In explaining how judges decided cases, Bentham pointed out that judges were motivated by considerations of utility. There were two relevant kinds. Firstly, original utility concerned acts which directly produced a balance of pain over pleasure. Certain acts were so clearly harmful, he argued, that people committing them would have a natural expectation of punishment by those in authority, without having to be told in advance. Thus, a foreigner accused of theft, fraud or assassination could not plead ignorance of the local laws, since “he could not but have known that acts, so manifestly hurtful, were everywhere considered as crimes” (Bentham 1838–1843, 1: 323; cf. Bentham 1970, 215; Bentham Manuscripts, UC lxx (a), f. 119). Secondly, utility resulting from expectation concerned acts which caused pain resulting from the disappointment of previously generated expectations (Bentham 1977, 231). Such expectations could vary. Although, for instance, it would be equally unjust to commit murder in Kent or Essex, it would be just to have equal inheritance in Kent, and primogeniture in Essex, because the rules followed local expectation (Bentham Manuscripts, UC lxx (a), f. 19). Local customs could therefore generate expectations prior to the establishment of any particular rule of law, generating reasons for the courts to take them into account (e.g., Bentham 1977, 334, 306 n. c; cf. Bentham Manuscripts, UC lxix, f. 72*). “Where Original Utility is neuter, as in many points relating to the course of succession,” Bentham wrote, the judge should “consult popular Expectation—From thence results a derivative Utility—where that Expectation is neuter, Utility follows Certainty fixed on either side” (Bentham Manuscripts, UC lxx (a), f. 20; cf. Postema 1986, 227–8).

Nonetheless, the most important expectations were generated not by community custom, but by legal decisions (Bentham 1977, 233). If a passive custom—such as allowing others to walk over one’s field—could arise spontaneously, it only became a right when legalised by a court which punished the denying of entry. Discussing the origin of property, Bentham said that when a man found something and conceived that it would give him pleasure, he occupied it and gained “a Pleasure of Expectation” of possession (Bentham Manuscripts, UC lxx (a), f. 12). Mere occupancy therefore generated expectations which should be recognised by law. However, until they actually were thus recognised, a man’s occupancy was precarious, and limited to that which he could defend for himself (Bentham 1838–43, 1: 30; cf. Kelly 1990, 82–3).

This meant that if some laws developed from spontaneous customs which were legalised by judges, it was more frequent to find legal decisions which were based on the appearance of a single example of conduct. Bentham gave the example of perjury. The judges first decided this, he said, not on the basis of a custom of not committing perjury, but because of the mischievousness of
the first example brought before them (Bentham 1977, 218). Indeed, a single
decision could generate a custom. Thus, Bentham said that the rule of primo-
geniture emerged when an elder brother first asked a court to punish his
younger brother for entering the land:

From that time, younger brethren seeing this to be the case, fell into the custom of yielding to
their elders: and thus it became a custom that the eldest brother shall be heir to the second, in
exclusion of the youngest. (Ibid., 185)

In another example, he wrote,

[w]hen the corrupting of another man’s wife for instance was an act constantly follow’d in past
instances when detected by a certain punishment [...] the observation of such uniformity of
punishment in past instances of corruption had begot an uniformity of forbearance in subse-
quent instances of temptation, an uniform disposition in persons at large to expect such pun-
ishment. (Bentham Manuscripts, UC lxix, f. 142)

This was again to suggest that custom followed law.

If legal decisions could generate expectations which subsequent courts—
and legislators—could not disregard, such expectations did not generally de-
rive from single decisions. Rather, there had to be a custom among the judges
to follow a rule, seen either in a succession of cases, or by the habit of superior
courts overturning lower courts which violated the rule. However, it was pre-
cisely in the articulation of rules that the common law was most lacking, for it
was unable to generate rules which would give a clear focus for expectations.
The elements of the common law, Bentham wrote, were real commands re-
specting individual actions. But the “body composed of them is fictitious. It is
not the work of authority. It is left to every man to compose for himself at his
own hazard, according to his own authority” (Bentham Manuscripts, UC lxix,
f. 115). General rules had to be inferred from the reasons given by judges for
their decisions, or from “an uniformity observ’d in the application of punish-
ment to particular actions fashioned by abstraction of the unessential circum-
stances to sorts of actions” (Bentham Manuscripts, UC lxix, f. 107). While
statute announced the rule for all to know, common law could never be
known. All that a citizen or judge could do was to attempt a prediction of how
the judge would decide. Furthermore, the common law was ex post facto law
(Lieberman 1989, 238). Just as a master waited until a dog misbehaved and
then beat him for it, so “They won’t tell a man beforehand what it is he should
not do [...] they lie by till he has done something which they say he should not
have done, and then they hang him for it” (Bentham 1838–1843, 5: 235).

Although Bentham continued to insist that the common law was a “non-
entity,” which did not exist (Bentham 1998, 123–4), he did not deny that
there were rules to be found in its materials. While the number of maxims of
law was infinite—since any one could make a maxim—the number of rules
different in substance, though vast, was “limited by the number of customs
and judicial usages they serve to announce” (Bentham 1977, 191). He therefore argued that where doctrines had been established by express decisions, and even where settled opinions existed which people were “accustomed to take for Law,” they should be followed (ibid., 149). The rule regarding inheritance of the half-blood, for instance, “is supposed to be the determination of a court competent to determine,” he said: “that being the case, so long as it remains uncancellation by a superior court it must be law” (ibid., 204). However, Bentham was dissatisfied with the rules to be obtained from the common law. Firstly, he worried about the authority of judges to make law. Although they constantly protested that they did not make, but only declared law, Bentham pointed out that where the rule in question had never previously been articulated, the judge “in so declaring it, and acting upon it, take[s] upon himself to make a law” (Bentham 1998, 126). But in his view, a judge had no title to make law. Secondly, he saw that the stage had been reached where much detail about law could not be known. If everyone knew from experience that courts upheld people’s engagements and dispositions of property, they could not know the myriad of exceptions and qualifications of the rule, made by the courts (Bentham 1838–1843, 6: 520). Furthermore, the material to be drawn from case law was uncertain, for it was open to objections, forced constructions and distinctions being raised in any case. Moreover, if any court could overthrow the authority of a particular rule, “in this way may the authority of the whole system of Common Law be shaken: shaken, and with it, in so far as the contrariety is known, the confidence hitherto so generally, but always so unwarrantably, reposed in it” (Bentham 1998, 131). For Bentham, the common law had reached a crisis point in which many of the rules to be teased out of it were unjust or unsuitable, but could not be departed from by judges without undermining the stability of expectations. He came to argue that common law judges should follow a path of stare decisis (Postema 1986, 192–6). In deciding cases, he therefore argued, judges should always follow the line of analogy rather than utility, so that they did not assume the role of the legislator, and so that those citizens who acted in any new case could better be able to conjecture beforehand what would be the decision in the case (Bentham Manuscripts, UC lxiii, f. 49). However, he came to realise that this attitude was ultimately unsustainable:

If the laws are not in harmony with the intelligence of the people—if the laws of a barbarous age are not changed in an age of civilization, the tribunals will depart by degrees from the ancient principles, and insensibly substitute new maxims. Hence will arise a kind of combat between the law which grows old, and the custom which is introduced, and in consequence of this uncertainty, a weakening of the power of the laws over expectation. (Bentham 1838–1843, 1: 325)

For Bentham, the time was ripe to recast the law, for the common law was inefficient and unsuitable for the modern age. The time had come, he argued, to rethink the form of the law.
In understanding Bentham’s critique of the common law, his historical understanding of the development of law should not be overlooked. All law, he said, began in an *ex post facto* way. In the infancy of jurisprudence, “there was no such thing as any command to men not to steal, but if a man stole, an order went out to another man to go and hang him” (Bentham Manuscripts, UC lxix, f. 98). This “arbitrary mode of judicature” was unavoidable before “that general and habitual course of submission, which is necessary to the establishment of legislative authority, had taken root” (Bentham 1838–1843, 6: 529n). Indeed, there was a time, he suggested, when unwritten law was a blessing. Until the emergence of the fictitious rules of common law, every decision was “completely arbitrary: every Judge had to begin afresh.” But once the judges and others were able to deduce general rules from past practice, these rules “formed—not only a light, by which the paths taken by succeeding Judges were lightened,—but a barrier, by which they were in some degree kept from going astray” (Bentham 1998, 136). Indeed, before legislation could be embarked upon, there had to be a stock of cases which had already been presented for adjudication before a judge, providing experience for the lawmaker (ibid., 226). However, once a regular legislature was set up, the mass of fictitious law became a nuisance. By that token, the common law was imperfect and outdated. It needed to be recast into statutory form.

6.3. Bentham’s Code

By the 1780s, Bentham had become convinced that it was not enough to digest existing law into statutory form: rather, a whole new *pannomion* had to be constructed. However, in seeking to outline the principles of morals and legislation, he became troubled by the question of the boundary between the penal and civil branches of legislation. To understand this, he concluded, one needed to understand “what sort of thing a law is” (Bentham 1996, 282). In determining this question, Bentham noted that every complete law terminated with the creation of an offence and comprised both penal and civil parts (Bentham 1970, 209, 196). Intellectually, the two parts stood together. They needed to be separated out for the purpose of discourse, or good arrangement (ibid., 197). Thus, a legal title to a piece of property was defined by the penal prohibition on all save the title-holder from meddling with it; but a law forbidding entry to property by those without title also required the exposition of what “title” meant (ibid., 182, 177). Similarly, a law regarding offences against the person might exempt particular people from punishment in certain cases, including husbands, parents or judges. Their powers were exceptions to the law, which might “constitute the matter of several bulky titles,” none of which perhaps referred to punishment. These titles would constitute a part of the civil branch of law (ibid., 200–1).
In constructing a code, Bentham argued, the legislator should strive to make laws which were complete in expression, containing complete commands, and in design. As things stood, however, the parts of every code of laws lay scattered up and down at random, “with little notice taken of their mutual relations and dependencies” (ibid., 159). A law was incomplete in its design, he said, if it appeared to regulate all manner of things not intended to be covered. An example was the well-known Bolognese law punishing anyone who drew blood in the streets, which required interpretation by judges (ibid., 161). Whether they read it expansively or restrictively, their reading would alter the law (ibid., 163). A complete law, by contrast, could not have any unexpressed exceptions. It would be the measure of the citizen’s conduct and of the judge’s decision, while the legislator would “be able to see from the code what he had done and what remained to be done.” In a system constructed on this plan, “a man need but open the book in order to inform himself what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency.” There would be “no terrae incognitae, no blank spaces” (ibid., 346).

No such code was yet in existence. “Before any such specimen can be found,” Bentham argued, “a perfect plan of legislation must first have been produced: perfect in method at least, whatever it be in point of matter” (ibid., 183). With this in mind, Bentham began in the late 1770s, to construct “an expository treatise of universal Jurisprudence” which would represent the rights, powers, duties and restraints which subsisted in any state (Bentham Manuscripts, UC lxix, ff. 126–7). This would ascertain the universal terms by which the “terms of the particular jurisprudence of any country” were explained (Bentham Manuscripts, UC lxix, f. 152). Bentham thus engaged in an analytical exercise to determine the meaning of legal terms, such as possession, or right. At the same time, however, he also set himself a normative task, for as a substantive law reformer, he wanted to construct a system based on the principle of utility. The rules concerning what was meet and what unmeet for punishment, and the principles on which the division of offences were based, Bentham argued “will hold good, so long as pleasure is pleasure, and pain is pain” (Bentham 1838–1843, 1: 193). His task was to work out these principles, “To make a (perfect system of) good laws will be acknowledged to be none of the easiest tasks,” Bentham wrote in 1775, “but this task, arduous as it is, is a light and easy one in comparison of that of giving a systematical development of principles on which those laws are grounded” (Bentham Manuscripts, UC xxvii, f. 148). “When a model of absolute perfection is once exhibited,” he wrote, “the business will be to make the institutions as nearly conformable to it as they will bear” (Bentham Manuscripts, UC xxvii, f. 126). Bentham noted that he was only concerned with “human nature in general: the particular dispositions and exigencies of particular countries did not come within my plan” (Bentham Manuscripts, UC xxvii, f. 152). “To apply such of
these general principles then as are applicable to the particular institutions of
his own country, and to supply such other general principles as the exigencies
of these particular institutions may require” was a work for the particular law-
ners of every other country (Bentham Manuscripts, UC lxix, f. 14).

For Bentham an “all-comprehensive code of substantive law” was re-
quired, each part of which would be present to the minds of the people to
whom it was addressed (Bentham 1838–1843, 2: 13). Nothing would be law
which was not in the code. If individual events could not be foreseen, their
species could be. “A narrow-minded and timid legislature waits till particular
evilshave arisen, before it prepares a remedy,” he wrote, “an enlightened leg-
islature foresees and prevents them by general precautions” (Bentham 1838–
1843, 3: 205). In such a system, there would be no need for legal inter-
pretation. “A Vocabulary once composed, the Law will cease to be a science,”
Bentham said, “The only questions debated in Courts of Justice would be
questions of Fact” (Bentham Manuscripts, UC lxix, f. 134). In the future,
technical lawyers would disappear: “they will then be Orators. The Advocates
will remain, when the legislator is no more” (Bentham Manuscripts, UC lxix,
f. 181). Indeed, if statute law were what it should be, “the science of Jurispru-
dence would be at an end,” for knowledge of statute would require no more
science than knowledge of newspapers did (Bentham Manuscripts, UC lxix, f.

This would suggest that judges under the code were merely to apply the
law in a mechanical way (Letwin 1965, 128; Lobban 1991, 145). Bentham’s
desire to reduce the judicial role is evident from his efforts to narrow the role
of legal interpretation. In his early writings, he suggested that where the legis-
lator had failed to express his will clearly because of “haste or inaccuracy of
language,” or inadvertence, then “strict” interpretation was permitted to at-
tribute to the legislator the will supposed to have been entertained at the time
of making the law (Bentham Manuscripts, UC c, f. 90; cf. Bentham 1977, 99,
115). However, his entire legislative project was designed to clarify the lan-
guage, and thereby to reduce the scope for inadvertence. Chapter 16 of the
Introduction to the Principles of Morals and Legislation was hence designed to
give the legislator guidance so that he would not misexpress himself, some-
thing which would “render the allowance of liberal or discretionary inter-
pretation on the part of the judge no longer necessary” (Bentham 1970, 240).

Against this, Gerald Postema has suggested that Bentham sought in his
code to combine general guidelines with flexibility in adjudication, giving in-
itutional expression to a system of equity. The legislator provided the judge
“not with fixed rules, but with appropriate powers; he should set out funda-
mental ends, and include instructions, or the best evidence available, on the
best means for achieving these ends” (Postema 1986, 406). The judge would
therefore be free to decide individual cases on direct-utilitarian lines. As Étienne Dumont put it,
this Code will rather be a set of authentic instructions for the judges, than a collection of peremptory ordinances. A greater latitude of discretion will be left to them than was ever left by any Code: yet their path being every where chalked out for them, as it were between two parallel lines, no power that can be called arbitrary is left to them in any part of it. (Bentham 1998, 116)

In support of his interpretation, Postema points out that in his writing on judicial procedure, Bentham insisted that there should be no inflexible rules. “Of the several rules laid down in this code,” there was no one “from which, in case of necessity, the judge may not depart.” However, for every departure from the rules, the Public Opinion Tribunal would seek a reason, and the reason would “consist in an indication of the evil which, in the individual case in question, would result from compliance with the rule” (Bentham 1838–1843, 2: 32, quoted in Postema 1986, 411). Ultimately, the judges would be controlled not by rules, but by their responsibility to the Public Opinion Tribunal. For Postema, Bentham’s comments to procedure also applied to the whole code. Yet this may be doubted (see Dinwiddy 1989a). While Bentham was sceptical about the value of fixed rules of procedure, preferring a “natural” form in which the judge acted as a kind of paterfamilias, his vision of substantive law required clear rules to focus expectation. As P. J. Kelly has pointed out, if individuals and judges only respected a right when a utility calculation justified their doing so, “that right will not serve as a condition of expectations” (Kelly 1990, 64). If his substantive rules were merely general guides, they would fall into the common law’s trap of being simply too indeterminate. Bentham’s motto for the good citizen stated in the Fragment was “To obey punctually; to censure freely” (Bentham 1977, 399). Just as the common law judge should not alter the law, and assume the legislator’s role, neither should the judge under the code.

There were, of course, cases in which it would unjust to apply the rule in the code, or where a new rule was needed. However, for Bentham, in such cases, the judge’s views should form the basis for legislation. In his early writing, he stated that where a liberal interpretation of the law was needed, the judge should declare openly that he had made such an interpretation, “at the same time drawing up in terminis a general provision expressive of the attention he thinks the case requires, which let him certify to the legislator: and let the alteration so made if not negatived by the legislator within such a time have the force of law” (Bentham 1970, 241). This idea was later incorporated into the Constitutional Code. Where it appeared to the judge that the execution of a judgment in accordance with the code would “be productive of injustice, and thence of contravention to the intentions of the legislature/or,” he could propose an amendment to the law. Three decrees would be issued, one putting into execution the law as it stood, one putting into execution the law as amended, and one suspending both until the legislature had made its will known (Bentham 1838–1843, 9: 508). The judge could propose amendments to the code, but any policy changes were for the legislature (ibid., 505–6).
Similarly, matters of contested interpretation would be referred to the legislature for ultimate decision (ibid., 502–3). Bentham admitted that this procedure might create retrospective law. This, however, was ultimately a lesser evil than the “production of evil” which would follow “by admission or omission of this or that word in a law, through inadvertence or otherwise.” Indeed, “giving execution and effect to the imperfectly expressed portion of law in question” might render “a severer shock” to “public confidence, than by forbearance to do so” (ibid., 509). However, the better expressed the law, the less occasion there would be for such amendment.

The content of the code would not be static. The number of laws would change, “owing to the continual occasion there will ever be for new” ones (Bentham 1970, 172). For Bentham, the form of the code—the categories developed in his legal metaphysics—would remain the same, but the content could grow and be fleshed out in detail. Classes of offences, he noted, could be distinguished from one another ad infinitum. However narrowly a class was defined, it could be made to contain any number of subordinate classes. At any single point, there would be only so many offences provided against in the code—*species infima*ae—“as there happens to be thought occasion to distinguish” (Bentham 1970, 170–1). It might be found necessary over time to include more divisions, reflecting new separate species of delinquency (see James 1973, 109). Bentham was worried that the growth of law might upset the symmetry of the code, and so in his later writings, he proposed the office of a conservator of laws who would “propose for the substance of the new law, a form adapted to the structure of the Code” (Bentham 1998, 265).

For Bentham, the categories of law were as universal as the principles of pleasure and pain. Local sensibilities, and expectations generated by existing laws and practices, might generate local substantive differences between systems, Bentham admitted; but they would diminish over time under the guidance of a legislator. In 1782, Bentham wrote that a legislator should have before him both an ideal body of law, and a list of the circumstances influencing sensibility in the country for which he was drawing a code, including moral and religious ones (Bentham 1838–1843, 1: 173; cf. Bentham 1970, 244). A law might be good for one country and bad for another, “because in one nation the people may be disposed, in another they may not be disposed to acquiesce in it” (Bentham Manuscripts, UC xxvii, f. 121). However, he also believed that prejudices “may be got over with a little management” (Bentham 1838–1843, 1: 182). In a well-constituted government, he said, men’s religious sensibilities weakened, and their moral sensibility became more conformable to the dictates of utility (Bentham 1996, 68). For Bentham, it was ultimately preferable to have a foreigner draw up the code of laws, for universally applying circumstances were much more extensive than local, exclusively-applying ones. The outlines of a code, the great *genera* of injuries, would be universally the same. Only the detailed species would dif-
fer according to sensibility: and filling this out could be left to a local legisla-
tion committee (Bentham 1998, 291–2).

In the event, Bentham never completed a workable code of laws. He
found that, while he could draw up an analytical language, a code would
never be complete in the abstract. It required location in a particular context,
where policy choices would be made. This can be seen from his discussion of
the distinction between civil and criminal law and their content. For
Bentham, since all law terminated in an offence, “no very explicit line of dis-
tinction” could be drawn between penal and civil law (Bentham 1970, 209).
Their separation was for convenience of discourse, with the “circumstantive”
matter dealt with in the civil part, and the “penalizing” in the penal part
(ibid., 199; cf. 218–9). Bentham noted, however, that another distinction, be-
tween civil and criminal law, was often spoken of. In describing wrongs as
“criminal,” people looked to their mischievousness, odiousness and the quan-
tum of punishment annexed to them. They also spoke of the actor’s criminal
consciousness, making intention a distinguishing characteristic. For Bentham,
these distinctions between “civil” and “criminal” wrongs were unstable.
Firstly, the degree of mischievousness of an act, its odiousness or the magni-
tude of punishment annexed to its commission were all open to so much vari-
ation that it was impossible “so far to mark out the boundaries of the criminal
branch of the law as to determine with precision what offences it shall not ex-
tend to” (ibid., 210–11). Secondly, the notion of intention could not be the
basis of a distinction, for in “certain cases where the mischief is such as ap-
ppears to be very great, rashness and heedlessness, without criminal conscious-
ness, are put upon the footing of criminality” (ibid., 217). Thirdly, the quan-
tum of punishment imposed reflected a policy choice which had been made.
The treatment of offences, he said, “as every one knows is in great measure
different in different countries; so that it can never come under any single de-
scription whatsoever” (ibid., 210). Moreover, “the same offence at different
times and places will stand, and to different persons will appear to stand, in a
different light in point of criminality” (ibid., 217).

Fleshing out the detail of the civil law also proved difficult. In some areas
of private law, universally applicable legal principles could be established, for
instance that “[e]ntire liberty for contracts” should be the “general rule,” and
that the sovereign declare some kinds of contract invalid, such as those
against the public interest, the parties’ interest or those of a third party (Bent-
ham 1838–1843, 3: 190). Bentham similarly listed some factors which might
vitiate any contract, including mistake, misrepresentation, incapacity and du-
ress (Bentham 1838–1843, 6: 514; cf. ibid., 1: 330–2,). However, his discus-
sion of other areas of private law, such as property law, was informed by
policy choices. These choices were utilitarian ones: the promotion of subsis-
tence, abundance, equality and security. In his later work, Bentham discussed
the disappointment-prevention principle as a principle on which “the law of
property rests” (Bentham 1983, 345; cf. Kelly 1990, 175). Frederick Rosen has suggested that this principle was elaborated as part of Bentham’s project for radical reform, when he sought to justify compensating office holders who might otherwise oppose constitutional reform (Rosen 1983, 129; cf. Kelly 1990 176–7). It was thus a principle introduced to balance a policy of reform with the need to respect existing expectations. Bentham realised that the legislator never began with a clean sheet, but always worked in the context of expectations generated by existing practices. The legislator could modify the existing patterns of expectations, but in so doing, he needed to act cautiously. The security-providing principle, which advocated an equal distribution of rights protecting person, property, condition and reputation, needed to be balanced by the disappointment-prevention principle. A redistribution of property on utilitarian lines could best be achieved through regulating the laws of succession. Bentham thus held out the idea of the perfect utilitarian code as the long-term goal. But the disappointment-prevention principle acted as a brake on the speed at which the goal would be achieved (Kelly 1990, chap. 7).

6.4. The Foundations of John Austin’s Jurisprudence

Although John Austin (1790–1859) declared that his aim in life was only to disseminate the doctrines of Jeremy Bentham, it was the younger man who became the most influential English jurist of the nineteenth century (see Rumble 1985, 17–8; Hamburger and Hamburger 1985, 29; Morison, 1982; Agnelli 1959; Moles 1987; Löwenhaupt 1972; Lobban 1991, chap. 8; see also Schofield 1991). His life, however, was largely unsuccessful and unfulfilled. Appointed to a chair of Jurisprudence and the Law of Nations at the University of London in 1826, he began lecturing in 1829, after spending six months preparing in Germany. However, he lectured only until 1833, having attracted very small classes (Rumble 1996). Although he published The Province of Jurisprudence Determined in 1832, it was not until its republication after his death in 1859 that it made a considerable impact (Stephen 1861, 474; cf. Rumble 1991). Austin’s reputation was enhanced in 1863 with the publication of his Lectures on Jurisprudence, which were drawn from his courses prepared three decades earlier. His work was now widely read and reviewed, and soon became the standard fare for students in jurisprudence as legal education began to revive (Lobban 1995).

Austin was certainly more congenial to the conservative legal profession than the radical Bentham, many of whose ideas stood at the core of his theories. Although a committed Benthamite as a young man, sharing the master’s radicalism (see Austin, 1824), his political views grew increasingly conservative (Austin 1859). Unlike his mentor, moreover, Austin sought to reform rather than revolutionise the English legal system. Under the influence both
of Bentham and German legal scholars, he developed an analysis of legal concepts to help make sense of the law he found, and to point the way to reform (Schwartz 1934; Campbell 1957–1959; Lobban 1995). Where Bentham’s work was designed for the service of the censor, Austin devoted little time to the science of legislation, confining jurisprudence to an analysis and description of positive law. It was not that he had no interest in legislation. The *Province* included a lengthy discussion of the principle of utility in which he stated the hope that ethics could become a science capable of demonstration; while in 1844 he expressed a desire to write a general work “to show the relations of positive morality and law [...] and of both to their common standard or test” (Austin 1873, 141; Ross 1893, 201). However, Austin never completed the project, and the rigid separation of law and morals in his jurisprudence led many to see him as the ideal theorist for the growing nineteenth century state.

For Austin, jurisprudence was concerned with positive laws “considered without regard to their goodness or badness” (Austin 1873, 176–7). The separation of law from morality, which stood at the heart of his project, prevented morality becoming the measure of law’s validity, and meant that law would not be the touchstone of morals (Hart 1957–1958, 596–9; Stumpf 1960, 117–20). However, the distinction Austin drew between law and morality was more a practical one than a philosophical one. For Austin, law “properly so called” was a command issued by a determinate rational being, backed by the threat of a sanction, or punishment (Austin 1873, 93–4, 356). This was a voluntarist definition of law, which applied to both human and divine law, and which aimed to counter the notion that law could be known by an innate moral sense (ibid., 221n, 148–56). There were three types of such laws “properly so called.” Firstly, there were those which God set to man, backed by sanctions which came “by the immediate appointment of God” (ibid., 174, 106). Secondly, there were those set by political superiors to inferiors, or by private individuals in pursuance of legal rights which derived from those political superiors. These laws were backed by political sanctions. Finally, there were rules of positive morality which did not come directly or indirectly from a sovereign or God, but “being commands (and therefore being established by determinate individuals or bodies), they are laws properly so called: they are armed with [moral] sanctions, and impose duties, in the proper acceptation of the terms” (ibid., 184). A rule imposed by a club on its members was therefore a rule of positive morality, but one which could be properly styled a “law” (ibid., 187).

In contrast to laws properly so called, there were also rules of positive morality such as those of fashion or honour, which could only be called law by analogy, since there was no determinate group or individual which commanded the conduct, and no determinate person to impose the sanction. A breach of etiquette might make it likely that conduct would be disapproved of, which in turn might make it likely that a member of the group would in-
flict an evil. But insofar as it was not determinate, it was not properly called a law. Austin included international law under this heading, defining it as “positive international morality.” It was *morality* since its rules did not derive from a political superior; but, since they were set by general human opinion, they were *positive* rules, which could be identified by the jurist without regard to their quality, and be studied as a practical science.

Austin distinguished positive human law from other laws “properly so called,” not by its philosophical nature, but by the nature of the body issuing and enforcing the command. Positive law, or law “strictly” so called, was set by a sovereign to members of the independent political society over which it ruled (ibid., 181). Every such law presupposed a *polis* or *civitas*. Austin’s definition of the province of jurisprudence as the study of positive law was therefore aimed to focus the student’s attention on the body of rules enforced by the courts, rather than on any other body of enforceable rules. What, then, was the relationship between positive and divine law? Following William Paley (Paley 1785), Austin argued that a benevolent God designed human happiness, and therefore enjoined all acts which tended to it. Utility was the index to divine commands. “Knowing the tendencies of our actions, and knowing his benevolent purpose,” he said, “we know his tacit commands” (Austin 1873, 109). However, if utility should be consulted by the legislator when making positive law, it was not, for Austin, a standard against which to test its validity. Indeed, Austin did not recognise the potential problem of positive human laws which so clearly violated divine ones that they ought to be disobeyed. Utility, he argued firstly, could not clearly be perceived by isolated individuals, but could only be properly understood in a social context (ibid., 151). This was to argue for a rule-based utilitarianism, by which the whole tendency of any kind of action was considered, rather than the individual act.

“The question to be solved is this,” he said: “If acts of the class were generally done, or generally forborne or omitted, what would be the probable effect on the general happiness or good?” (ibid., 110). Utility demanded rules, because individuals would be partial or misinformed in calculating utilities for their own situation. Secondly, utility was itself a fallible test, one which would never perfectly replicate the divine will but could at most approximate to it (ibid., 141–2). Instead of a notion of divine law undermining human laws, Austin’s invocation of the principle of utility allowed him to defend a command-based theory of law against notions such as the moral sense theory which he felt might allow individuals to disobey too easily.

Austin’s principle of utility was as much descriptive as prescriptive. Legislators and judges, by and large, did (he thought) follow what utility dictated. If they failed to do so, the public would initially criticise them by invoking arguments from utility, and ultimately rebel. In general, utility dictated obedience to governments: “Disobedience to an established government, let it be never so bad, is an evil: For the mischiefs inflicted by a bad government are
less than the mischiefs of anarchy” (ibid., 121). Nevertheless, under a bad government, the utilitarian rule of obedience might be dislodged by a direct calculation weighing the mischief wrought by the existing government against the benefit attending a new one (ibid., 122, 221n, 287n). If resistance led to better government, then it would be useful, for the anarchy of revolution would be short, while the benefits of better government would be more permanent. Austin acknowledged that such resistance would undermine the legal system. In a manner reminiscent of Bentham, he noted that it would be “illegal or a breach of positive law, though consonant to the positive morality which is styled constitutional law, and perhaps to that principle of utility which is the test of positive rules” (ibid., 275). Again like his master, however, he noted that if the community and government considered their relative positions from the viewpoint of utility, they would come to compromises short of revolution (ibid., 122).

For Austin, the sovereign in a state, who issued the commands which made up positive law, was legally illimitable, for the notion of a limited sovereign was “a flat contradiction in terms” (ibid., 270). Austin’s identification of the sovereign echoed Bentham’s, while modifying the master:

If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent. (Ibid., 226)

Just as Austin’s definition of positive law was a practical one, which sought to demarcate the rules he was interested in studying from others which might philosophically be denominated law, so his definition of political society sought practically to demarcate the societies he was concerned in studying from those he was not. Native North American tribes, which occasionally came together under one leader to repel common enemies before dispersing again into families rendering obedience to their own chiefs, were not in his view political societies, since there was no habitual obedience to one common leader. That being so, by definition, there could be no positive law common to the community, but only customary rules, set by general opinion but not enforced by legal or political sanctions. Nevertheless, Austin admitted that if one applied the term “political” to very small societies, each independent family could indeed be seen as an independent community under a head, in which case the same customary law would fall into his definition of positive law. Austin rejected this, arguing that a “political” society had to be a large one, or there would be no concept of a “natural society” (ibid., 238–9). Austin’s distinction between these societies was a practical one, for his main concern was to mark out a subject for law students in London, who wanted to make better sense of the law in their country than Blackstone had been able to do. Since he was interested in the study of broader systems of law, and “the various principles common to maturer systems” (ibid., 1107), he chose to ex-
clude tribal societies. Austin however admitted the indeterminacy of his definition. For he admitted that one could never fix precisely the number of people necessary to constitute a political society (ibid., 239). Moreover, in borderline cases—as in England during the civil war—it might be impossible to settle the question of when a natural society became a political one, even if all "the facts of the case were precisely known" (ibid., 234). If Austin's subject was law as enforced by the state, the question whether in particular contexts a state existed or not could not ultimately be settled by definition.

Austin's notion of sovereign constituted by a habit of obedience was criticized by Hart in terms which echo his criticisms of Bentham. The mere fact of obedience, Hart said, could not explain the continuity of sovereignty and the persistence of laws made by past sovereigns, as well as the legal limitations which exist on sovereign power (Hart 1994, 51–61). However, like Bentham, Austin did not regard the habit as merely a regular course of conduct shared by many. Rather, he stated three reasons why people obeyed governments, each of which was related to the principle of utility. Firstly, people perceived that the end of government was human happiness. This alone would suffice if government were perfect. Since that was not the case, there was a second reason for obedience: people feared the anarchic consequences of disobedience. The third reason for obedience was custom or sentiment having "no foundation whatever in the principle of general utility" (Austin 1873, 302). However, even here, calculations of utility entered indirectly. Indeed, "a perception, by the bulk of the community, of the utility of political government, or a preference by the bulk of the community, of any government to anarchy," Austin said, "is the only cause of the habitual obedience in question, which is common to all societies, or nearly all societies" (ibid., 303). This was not merely uncritical obedience.

Austin's view on how the habit of obedience limited government echoed Bentham's. In defining the sovereign as legally illimitable, Austin was concerned with the power of the supreme authority within the state. If sovereigns had the power to change constitutional law, any laws which they imposed on themselves or their successors would be "merely principles or maxims which they adopt as guides, or which they commend as guides to their successors in sovereign power. A departure by a sovereign or state from a law of the kind in question, is not illegal" (ibid., 271). Nevertheless, the conduct of earlier sovereigns did generate expectations in the population. An act would be regarded as unconstitutional if it was inconsistent with a maxim or principle adopted by the sovereign, or habitually observed by it, for it would thwart the people's expectations "and must shock their opinions and sentiments" (ibid., 274). This, in turn, would affect their habit of obedience. Therefore, although the monarch was superior to the governed in being able to enforce his will, "the governed, collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of
rousing to active resistance the might which slumbers in the multitude” (ibid., 99). Indeed, “the power of the sovereign flows from the people, or the people is the fountain of sovereign power” (ibid., 304). For that reason, “every government defers habitually to the opinions and sentiments of its own subjects” (ibid., 248, 242). However, by Austin’s definition, that which limited the sovereign could not be law. Since the sanction on the sovereign—disobedience—was exerted by an indeterminate body, it was by his definition not law properly so called, but a law set by opinion.

Austin also considered the question of how sovereigns succeeded each other. He recognised that, in order to have a stable society, those who succeeded to sovereignty “must take or acquire by a given generic mode” of succession (ibid., 196). Indeed, he argued, Rome had suffered since there had been no mode of “legitimate” or “constitutional” imperial succession which was “susceptible of generic description, and which had been predetermined by positive law or morality” (ibid., 197; cf. ibid., 274). Similarly, in a country governed by a multitude, he said, constitutional law determined which people exercised sovereign powers, and how such powers were shared. This was “a compound of positive morality and positive law” insofar as the limits of the power of the collective sovereign body were set by morality, while the rights of individual members of the body were determined by law. Where a collective sovereign body existed, questions of succession could be settled by law. In a country governed by a monarch solely, however, the constitutional rules which determined the person who would bear the sovereignty was “positive morality merely” (ibid., 73). Austin’s view of law as a command made him unable to explain how a court might decide as a matter of law between two rival claimants to a throne in a country governed solely by a monarch. For Austin, in such an interregnum, the courts would have no authority derived from a sovereign, since there would be rival claimants to sovereignty. The court might act of course as adviser to the people, on the question of whom to obey, providing a focus for their expectations, thereby giving a potential political settlement of the question, by guiding the matter of obedience. However, by Austin’s legal definition, this would be an interregnum, where it would be unclear who was the sovereign.

There has been much discussion of Austin’s difficulty in locating where sovereignty lay in a number of actual societies, and hence in determining whether his sovereign was only a formal postulate or a verifiable political fact (see Stone 1964, 73; Moles 1987, 71; Lobban 1991, 245–53; Morison 1958–1959, 221; Rumble 1985, 91–2). Austin sought to locate sovereignty precisely in Great Britain and the United States, in arguments which often look uncomfortable. In so doing, he did not focus on the immediate holders of political power. In Britain, he argued, sovereignty lay jointly in the king, the peers and the body which elected the House of Commons (Austin 1873, 253). Austin argued that members of the Commons were not delegates, but merely (implied)
trustees, in order to avoid holding that sovereignty might oscillate between the crown-in-parliament and the crown, peers, and electorate, according to whether parliament was sitting or not. There had to be continuity of sovereignty, even during elections. After an election, sovereign power was exercised by the crown-in-parliament. The implied trust could therefore not be legally effective, since parliament could repeal any law binding members of parliament as trustees, without the direct consent of the electorate. The trust was only effective if backed by the sanctions of positive morality. Although sovereign power was exercised by governors, then, this power itself rested on a wider set of public expectations and social practices. The sovereign was the source of law; but it was itself constituted by what public expectations recognised as that source (cf. Kelsen 1961, xv). Austin recognised that this could be formalised. For he noted that there could be extraordinary legislatures which themselves laid down constitutional rules which bound the ordinary legislatures: rather in the manner of American constitutional conventions.

For Austin, the sovereign was the formal source of all laws enforced by the system. Divine law, natural law or custom might be the “remote cause” of a law, “but its source and proximate cause is the earthly sovereign, by whom it is positum or established” (Austin 1873, 565–6). All judge-made law was equally “the creature of the sovereign or state,” so that custom could not be seen as law until it was applied by the courts (ibid., 104, 554). Until then, rules of conduct adopted spontaneously by communities were only rules of morality, enforced by the disapprobation or approval of conduct by the community. Austin rejected the view that customary law was positive law by virtue of its immemorial usage, noting that if customs were already binding as law, there would be no need for courts to expound them. In any event, much judiciary law was not of ancient origin, but built either on recent customs or on the judges’ own conception of public policy or expediency (ibid., 556). This was to argue that the common law was in effect (as Bentham had put it) the custom of the courts, not the custom of the country. Austin’s categorisation of custom attracted much later criticism (see Hart 1994, 44–9), but his position that customs were not law until enforced by courts was perhaps less contentious than it seemed. It was, in one sense, a tautology: if the definition of positive law was that it was a rule enforced by the state, customary rules did not become law until they were enforced by the state’s agencies. Nor were the courts legally obliged to apply the norms of customary law. While there might have been a high level of public expectation that they would, Austin was aware of enough decisions contrary to customary practice to see that the link was not a direct one.

6.5. Austin and Common Law Reasoning

Austin’s definition of the sovereign owed much to his reading of Hobbes and Bentham. Like them, he faced the problem of how to regard legal rules which
did not derive from legislation. Hobbes, of course, failed to account for a body of such rules, while Bentham sought their translation into a code. Austin was much less insistent than his mentor on codification, seeing it as only a late stage in legal development, and was more explicit in putting the code into an historical context of the development of law. At first, he said, rules were developed by custom or usage. They were subsequently adopted by judges in tribunals, and extended and developed by consequence and analogy. Judges then began to introduce new rules by themselves. This stage was followed by the rise of legislation, the interpretation of which generated new judiciary law and statute law. The conception of a code was the final stage in legal development. It would supersede all other law but would nonetheless need perpetual amendment (Austin 1873, 655–7, 697).

Criticising Bentham for being “disrespectful” towards the judges, Austin countered that judicial legislation was “highly beneficial and even absolutely necessary.” It had often made up for the negligence and incapacity of the legislature. Austin therefore set out to defend a common law approach, and to argue that a set of rules could be teased out of a system in which judges were not mere arbitrators, but subordinate legislators. Kept in line by the influence of public opinion, by the supervision of the legislature and courts of appeal, and by the legal profession itself, judicial legislation was not arbitrary, uncertain or incoherent (ibid., 224n, cf. 666). Moreover, while judicial commands were often occasional or particular, “the commands which they are calculated to enforce are commonly laws or rules.” If judge-made law were “merely a heap of particular decisions inapplicable to the solution of future cases,” he wrote, it would not be “determinate law,” but arbitrary adjudication (ibid., 686, 96). Discussing the Chancery, Austin therefore defended the following of precedent, saying that courts which decided “arbitrarily in every case, could not exist in any civilised community.”

Where did these rules come from? Austin admitted that the first decision on any point in equity must have been arbitrary (ibid., 640). However, the judge’s aim in court was not to establish rules, but to decide cases: he “legislates as properly judging, and not as properly legislating” (ibid., 642). New rules were thus not overtly introduced. Instead, judges claimed to ascertain existing law by interpretation or analogy. In words which reflected a common law mentality, Austin said that if a new rule

obtains as law thereafter, it does not obtain directly, but because the decision passes into a precedent; that is to say, is considered as evidence of the previous state of the law; and the new rule, thus disguised under the garb of an old one, is applied as law to new cases. (Ibid., 548)

The rule was to be found in the ratio decidendi of a case, discovered by a process of induction and abstraction (ibid., 643) Although not a command in form, this was “itself a law,” proceeding from the sovereign and capable of performing the function of a guide to conduct when statutes were wanting
Nor was it (as Bentham would say) fictitious, for if it was known to be the legislator’s will “that the principles or grounds of judicial decisions should be observed as rules of conduct by the subjects, and that they should be punished for violating them, the intimation of the legislator’s will is as complete as in any other case.” In effect, the tacit command issued by the sovereign remained constant: to act or forbear from whatever acts were described in case law. Case law was thus analogous to “all the expository part of statute law,” which did not contain the actual command, but described the acts forbidden or permitted (ibid., 663).

Nevertheless, this argument contained difficulties for Austin’s theory. The command in question might be indeterminate, for the ratio in novel cases was a new ground, not previously law (ibid., 649). Nor was this a problem confined to novel cases, for interpretation and analogical reasoning played a large role throughout case law (ibid., 66). Judges constantly made and applied new rules, analogous to existing ones (ibid., 661). A new case could often not be decided under the old rule since it fell outside its scope, but if it bore a generic likeness to the precedent case, the judge would perceive that both cases should be governed by the same rule. Since the new case could not fall under the existing rule, “a new rule of judiciary law, resembling a statute or rule by which the latter is comprised, ought to be made by the court, and applied to the case in controversy” (ibid., 1039–40). The court, extending the ratio of the first case by analogy, in effect identified a broader rule which encompassed both cases and applied it, and in the process made new law (ibid., 1040). Law thus grew; but its growth also involved the making of choices. The analogical reasoning Austin discussed here differed importantly from syllogistical reasoning, for it dealt with contingent matter, which reflected experience, while the resemblances identified between cases were not absolutely certain or necessary. Judges were therefore not simply applying a pre-existing law, but were extending it, by building on experience and public expectation, which might itself limit what they could do (ibid., 668).

Austin was in fact sceptical about quite how determinate rules could ever be (ibid., 683). If in theory a perfectly precise system of rules could be generated, such an “ideal completeness and correctness” was “not attainable in fact” (ibid., 1032). In practice, a judge faced with two indefinite rules, and a case which resembled both in different ways, would be faced with a competition of opposite analogies. Moreover, the rules of case law were necessarily indeterminate, for the terms used by the judge were “faint traces from which the principle may be conjectured” (ibid., 651). Austin therefore admitted the difficulty of extracting the ratio decidendi from cases (ibid., 671). Furthermore, “we can never be absolutely certain that any judiciary rule is good or valid law,” sufficiently to know that it would be followed in future (ibid., 677). Whether or not a certain ratio would be followed in later cases might rest on the number of instances in which it had already been followed, or on
its consistency with the wider legal system, or on the reputation of the judge making the initial decision. Even if a ratio decidendi had come to be accepted as a rule, moreover, it could cease to be law, if the ground of the decision ceased (ibid., 652).

Austin’s analysis of judiciary law thus sought to defend the common lawyers and their expertise (cf. ibid., 634). However, it did not fit well with his theory of law, for it was hard to square the ratio decidendi with a command theory. If the public were commanded to obey the rules of judicial law, there was no way of telling definitively what the rationes were which composed those rules. Nor was the judge commanded to follow the ratio, for as a subordinate legislator, he could depart from precedent when he felt the reason of the rule had gone. In many ways, indeed, Austin’s judiciary law looks more like his “positive morality” than his “positive law.” For the “rule” was essentially set by the opinion of judges and jurists. Indeed, Austin said that while it was true that a new rule of judiciary law was always ex post facto, the decisions of the courts were often anticipated by the opinion of private practitioners, which “though not strictly law, performs the functions of actual law, and generally becomes such ultimately” (ibid., 673; cf. ibid., 667). The people’s conduct was thus guided by what the law probably would be seen to be by the judge. Austin effectively failed to solve the problem faced by earlier jurists of how to reconcile the common law’s creation of rules with a positivist theory. The closer one examined the evolution of judge-made law, the less it seemed to fit the command theory.

6.6. Austin’s Analytical Jurisprudence

Austin sought in his lectures to analyse notions common to all legal systems, effectively developing what Bentham called a legal metaphysics. There has been much debate over whether this enterprise was a formal and rational one, in which the aim was to develop a framework of concepts with which to analyse the law of existing systems, or an empirical and inductive one, in which his classifications were generalisations from experience (see Stone 1950, 138; Lobban 1991, 225–6, Cotterrell 2003, 59, 81–3; Rumble 1977–1978, 77–9; Hart 1957–1958; Morison 1958–1959, 225; Morison 1982, 145–6). Austin argued that while every legal system had its own specific characteristics, there were also common “principles, notions, and distinctions.” Although many of them were to be found in the “scanty and crude systems of rude societies,” they were to be found more fully elaborated in maturer systems (Austin 1873, 1107). General jurisprudence was concerned with the exposition of principles which were abstracted from these positive systems. Its object was “a description of such subjects and ends of Law as are common to all systems; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions” (ibid., 1112).
CHAPTER 6 - THE AGE OF BENTHAM AND AUSTIN

This was an exercise in definition, not one of observation. Austin described his task as that of analysing “necessary principles, notions, and distinctions.” They were necessary, and not contingent, because “we cannot imagine coherently a system of law” at least in a mature society “without conceiving of them as constituent parts of it” (ibid., 1108). Once law was defined as a command, other definitions followed formally from it. Thus, having defined moral and religious rights as “imperfect” because they were not enforced judicially, he could declare that every “right” was the creature of law (ibid., 354). Austin’s definitions followed as a matter of logic. By issuing certain people with commands to forbear from certain actions in regard to other determinate parties, the former were placed under an obligation or duty, and the latter were invested with a right (ibid., 408). However, defining the nature of rights in the abstract said nothing about their content. To understand the nature of rights more fully, “[w]e must take a right of a given species or sort, and must look at its scope or purpose,” which meant “the end of the lawgiver in conferring the right in question” (ibid., 409). His definitions would create a structure of concepts with which to analyse the content of a legal system, but without dictating that content.

In setting out his definitions, Austin had a reformist aim, for he wanted to make legislators and lawyers aware of issues which might remain hidden, to enable them to make better law. This can be seen in his discussion of intention and negligence. For Austin, “[i]ntention, negligence, heedlessness, or rashness, is of the essence of injury or wrong,” for unless a person knew or might have known that he was by his act violating his duty, the sanction threatened by the sovereign could not influence him (ibid., 474, 485). However, these various states of mind were different, and might connote different offences. They needed to be distinguished to avoid confusion and lack of order (ibid., 478). Although Austin’s own distinctions between these states of mind was not wholly consistent (ibid., 442–4; cf. Smith 1998, 122–7), the point behind the exercise was important: clarity of definition would allow the jurist more clearly to distinguish, for instance, offences such as murder and manslaughter. Some scholars have pointed out that in seeking fundamental, necessary notions, Austin might be taken as subscribing to a kind of natural law theory whereby substantive answers would be dictated by his definitions. However, his aim was not to flesh out the content of the duties in question, but only to point to the range of possibilities to be considered by the law-maker. Thus, while he might show the legislator that murder was distinct from manslaughter, he would not prescribe the relative penalties for these offences. Nonetheless, doing nothing more than merely pointing out the possibilities was still reformist in nature, and would help clarify what a utilitarian legislator should best do (cf. Austin 1873, 485–6).

Austin aimed at the same time to create a structure of categories into which the substantive law could be organised. This was, in effect, the same
task that civilian Institutists, and Hale and Blackstone, had set themselves (cf. Hoeflich 1985). Austin’s map of the law sought to show that legal categories could not be divided according to distinct types of law, but that all law had to be related to rights and duties emanating from the sovereign. He therefore rejected both the traditional division of law into distinct substantive categories of public and private, and the division of private law into the substantive law of persons and of things. In Austin’s categorisation, the law of persons was concerned with questions of status, whereas the law of things was concerned with rights and duties “in so far as they are not constituent or component elements of status or conditions” (Austin 1873, 42, cf. 713). This division was one of convenience only, established since any rule or principle would be understood more easily if abstracted from the particular modifications which came with certain statuses (ibid., 785, 775). For Austin, it made sense to place public law, or that which regarded the status of rulers, under the law of persons, as “our own admirable Hale” had done, rather than under a separate heading (ibid., 70–1n, 416, 752, 776–7; cf. 786). Austin equally felt that the Roman division of the jus personarum, jus rerum and jus actionum was a logical error, for the latter, rather than being a separate genus, was merely a species of the other two. All the general matter of the law of actions, Austin argued, should be distributed under the law of things, while the particular procedures used by persons of a given status (such as children) should be gathered under the law of persons (ibid., 751, 761). Finally, Austin made a further distinction between jura in rem and jura in personam. The former were rights residing in persons which availed against other persons generally, such as property rights, whereas the latter availed exclusively against particular specified individuals, such as contractual rights (ibid., 381).

With this set of concepts in place, Austin showed how the matter of a legal system should be distributed. He divided the law of things into two main categories. Firstly, there were primary (or principal) rights and duties, which were those not arising from delicts. This category divided further into rights in rem, which were largely rights in property, rights in personam, which were contractual rights, and combinations of these kinds of rights, such as mortgages or assignments (ibid., 788–9). Secondly, there were secondary (or sanctioning) rights, which concerned matters of civil delict and crime. Delict was in turn divided into those rights arising from infringements of rights in rem and those from infringements of rights in personam. This arrangement was aimed to make better sense of existing law and to provide a model against which to measure it, by revealing inconsistencies such as that seen in the English division of real and personal property (ibid., 59–60n). However, his arrangement sat uncomfortably with his jurisprudence. As Mill and Holmes later pointed out, the concept of duty was more central to his theory than the concept of right, for his jurisprudence suggested that all law was derived from duties imposed on individuals by sovereign commands (Mill 1863, 453).
Austin’s organising structure focused primarily on rights of property and contract which were acquired not by direct commands but as a result of power-conferring rules. But, as Hart pointed out, his command theory was unable to account for such rules (Hart 1994, 27). Given the organisation of his material in the body of the lectures, it is unlikely that Austin failed to notice the problem. Unfortunately, his lectures broke off when he was discussing titles to property, and before he came to discuss contracts, and he left only fragmentary notes of his ideas in these areas. However, the material which remains shows that he did not see primary rights as deriving directly from commands. He argued that while property rights were sometimes conferred immediately by the law, as where statutes conferred monopoly rights on individuals, in most cases they were conferred through “intervening facts” to which the law annexed rights as consequences (Austin 1873, 906). Since laws could not be made for every property transaction, titles were necessary as signs to determine the commencement and end of rights and duties. They showed which persons belonged to the class of property owners who had rights conferred on them by law (ibid., 912). At the same time, it was the legislator who chose which facts had legal rights assigned to them as consequences, a choice which was made according to utility. A law or command therefore ultimately stood behind the facts.

According to Hart, a description of rights such as these in terms of commands and sanctions could only be done by using the strained argument that the treatment of (say) a contract which failed to observe the required formalities as null and void was a “sanction” (Hart 1994, 33–5). Austin did on occasion treat nullification as a sanction, notably in discussing the courts’ refusal to enforce contracts which did not comply with the evidentiary requirements of the Statute of Frauds. But it is significant that in these discussions, nullity was for the most part treated as a sanction when discussing “accidental,” as opposed to “essential” elements of a contract, such as the requirement to provide preappointed evidence of a transaction, imposed in order to protect weak parties from inconsiderate engagements. These elements (Austin showed) could be policed by other sanctions, such as fines (Austin 1873, 522, 921–3, 934, 940). Although it would have been possible to do so, Austin did not in fact discuss nullity in general terms as the sanction behind primary rights. However, this means that he simply did not fully address the problem Hart pointed to.

Austin’s difficulty, it may be suggested, was that he failed to develop clearly the notion of a “complete” law, such as developed by Bentham. There are some suggestions in his work that he was aware of the need for such a notion, for he acknowledged the centrality of the imperative part of law, and indicated that in “describing the primary right and duty apart” he was fragmenting distinct aspects of a complete law (ibid., 794–5). He also acknowledged the centrality of the penal part of law:
There is often to be found no definition of a particular right, only an approximation to a definition, in so far as the acts and forbearances which are violations of it are declared to be crimes or injuries, and described in that portion of the law which relates to crimes and injuries. (Ibid., 795)

However, where Bentham began with an analysis of offences, Austin spent little time looking at penal law. His map of the law left unstated the command which his theory claimed was at the root of the system. Instead, he began with primary rights, “those which exist in and per se: which are, as it were, the ends for which law exists” (ibid., 789).

To some degree, Austin, looking through common law lenses, failed to grasp the nature of Bentham’s definitions and divisions, which had clearly divided the rights set out by the law, from the very flexible rules of procedure used in vindicating those rights. “If I adopted the language of Bentham,” he wrote, “I should style the law of primary rights and duties, substantive law; and the law of sanctioning or secondary rights and duties, adjective or instrumental law” (ibid., 788). Austin criticised Bentham for including both penal and civil law under substantive law: for “all rights of action arising out of civil injuries are purely instrumental or adjective; as well as the whole of criminal law and the whole law relating to punishments.” Although he admitted that the scope of a right of action was distinct from the procedure used when the right was enforced, “still it is impossible to extricate the right of action itself from those subsidiary rights by which it is enforced” (ibid., 792). Unlike Bentham, Austin did not seem concerned to define the imperative parts of law, but preferred, in a way almost reminiscent of Blackstone, to describe remedies. Yet this left gaps in his picture of law. Thus, he argued that secondary rights and duties presupposed that obedience to the law was not perfect, since they arose from imperfect obedience. “If the obedience to the law were absolutely perfect,” he said, “primary rights and duties are the only ones which would exist; or, at least, are the only ones which would ever be exercised, or which could ever assume a practical form” (ibid., 790). Yet this left unclear what the command would be which gave birth to these rights.

Austin proved a popular theorist for the common lawyers. His analytical scheme of concepts proved invaluable to those who accepted his general theory of law as command, but who also endorsed his defence of the judicial role in the common law. However, Austin’s attempt to reconcile a Benthamic theory with the method and content of the common law was not successful. For if the theory was founded on a notion of commands, he found it difficult to relate the substance of private law to a set of commands. In later life, Austin resisted all encouragement to publish his jurisprudential work. It has been suggested that one reason for this may have been that as he became older and more conservative, he ceased to believe in many of the utilitarian intellectual premises which lay behind his earlier work (Hamburger and Hamburger 1985, chap. 9). Austin’s pen only began to flow freely once more when he
came to writing conservative pamphlets. It may be speculated, however, that Austin’s jurisprudential writers’ block may have come from the difficulty of reconciling the command theory of the *Province* with his discussion of the purposes and subjects of law.
Building on the ideas of Bentham, John Austin developed an analytical jurisprudence which was to prove highly influential in the later nineteenth century. Although based on a command theory, Austin’s version was made more palatable to common lawyers since he argued against Bentham that law could be generated from the decisions of judges, and since he did not call for the abolition of the common law and its replacement by a code. While being the clearest exposition yet published of how the common law might generate rules, tensions remained in Austin’s theory. For although his analytical jurisprudence was premised on a definition of law as command, many of the rights and remedies he described were not clearly related to commands, while the closer one looked, the harder it was to see the rules which came from judicial decisions in terms of commands.

Jurists who succeeded Austin in the mid-nineteenth century began to challenge his idea that all legal rules came from commands. In an era when evolutionary theories were increasingly in vogue, they returned to an historical approach to their subject, in the search for principles which underlay the development of legal rules. Their approach to history was more akin to that of Kames (who remained largely unread in the later nineteenth century) than to that of Selden or Hale, for they sought less the positive origins of the common law or its doctrines than principles of law which could be seen to emerge over a period of development. In this chapter, we shall consider two jurists in particular who used history, albeit in very different ways. In England, Sir Henry Maine sought to develop a theory which would explain the evolution of a modern, individualistic political society, while showing that an Austinian approach was unsuitable to pre-modern societies such as India. In America, Oliver Wendell Holmes looked to history not for a grand evolutionary theory, but rather to explain and rationalise the doctrines of the common law. Ultimately, however, history proved unable for both of these jurists to answer the questions left open by analytical jurisprudence. By 1900, Holmes had come to the conclusion that the Austinian project of uncovering coherent legal principles was doomed never fully to succeed. His conclusions opened the way for a much more sceptical approach to law in the early twentieth century.

7.1. The Early Career of Sir Henry Maine

Henry Maine’s *Ancient Law*, which qualified and questioned many of Austin’s assumptions, was published in 1861, the year when Austin’s *Province* was republished. Henceforth, English jurisprudence was seen to have two ap-
proaches: Austin’s analytical one, and Maine’s historical one (Stephen 1861; Harrison 1879). Maine had a glittering career which was in many ways the antithesis of Austin’s. Born in 1822, he become a tutor at Trinity Hall, Cambridge, in 1844, before being appointed Regius Professor of Civil Law at the university at the age of 25. In 1853 he became Reader at the Council of Legal Education established by the Inns of Court, teaching jurisprudence and Roman law. Maine’s lectures proved highly popular, and attracted a broad range of auditors (Cocks 1999). In 1861, Maine was appointed legal member of the Governor-General’s Council in India, where he remained until 1869, when he returned to the post of Corpus Professor of Jurisprudence at Oxford University. He continued to advise the government on Indian matters, and was knighted in 1871. Six years later, he was elected Master of Trinity Hall, Cambridge and appointed Whewell Professor of International Law. Throughout these years, he remained a prolific writer, contributing regularly to periodicals and newspapers, as well as publishing his lectures. After Ancient Law, he published Village Communities in the East and West (1871), Lectures on the Early History of Institutions (1875) and Dissertations on Early Law and Custom (1883). These scholarly works were succeeded by Popular Government (1885), made up of four essays previously published in the Quarterly Review, in which he lamented the rise of democratic politics. After his death, Frederick Pollock and Frederic Harrison edited and published his Cambridge lectures on International Law (1888). Unlike Austin’s, Maine’s star burned bright during his lifetime, but his reputation rapidly declined after his death, as scholars questioned his detailed suggestions, and largely eschewed his broad, comparative and historical approach to jurisprudence (see Feaver 1969; Cocks 1988). English legal history would flourish in the age of F. W. Maitland, but English jurisprudence remained largely analytical and positivist, rather than historical.

Ancient Law was published at a time when many theorists were increasingly hostile to speculative, a priori methods, and were looking for an inductive, historical approach to their subjects (Feaver 1969, 41–2; Stein 1980, 88). Such an approach was to be found especially in the geological research of Sir Charles Lyell (Lyell 1830–1833) and in the science of comparative philology. The latter was most associated with the work of Max Müller, who lectured on comparative philology in Oxford in the 1850s, and whose Lectures on the Science of Language appeared in the same year as Ancient Law (Burrow 1966, 149–53). Müller popularised the idea of an Aryan race which was the primitive ancestor of the Europeans. By tracing the common roots of words, he argued, one could trace something of the nature of primitive society (see Stocking 1987, 56–62; cf. Burrow 1967). At the same time, English historians, such as Maine’s contemporary J. M. Kemble, were increasingly influenced by German historiographical approaches, notably that of Niebuhr (Burrow 1981, 119–20, 162–3; cf. Cocks 1988, 20–1; Allen 1978, 97–101; Stocking 1987, 117–8). Moreover, after the publication in 1859 of Charles Darwin’s The Ori-
gin of Species, there was bound to be a receptive audience for theories tracing the evolution of law.

_Ancient Law_ was not however a Darwinian theory. Equally, while the work did show the influence of geological, philological and German historiographical approaches (see Maine 1901, 3, 119, 121–2), it was only in his later works that Maine extensively developed his Teutonic history, his notion of common Aryan ancestry, and his comparative interest in other primitive societies. By contrast, this first book focused largely on the history of Roman law, and drew on the work of Germans such as Savigny. Maine’s focus on Roman law was hardly surprising, given that _Ancient Law_ grew out of his teaching of the subject at a time when there was a growing interest in England in Roman law as a repository of universal legal principles (see Graziadei 1997). Maine had himself played an important part in encouraging a revival of legal education in England in the 1850s, emphasising historical and philosophical as well as practical learning (Brooks and Lobban 1999). His own attitude to Roman law can be seen from an article he published in 1856, in which he argued that it had a vocabulary of concepts and terms which were necessary for clear thought, but which were lacking in England (Maine 1856, 8). Maine argued that by learning the terminology of Roman law, fundamental legal conceptions could be clarified, and a clearer, more consistent, language could be put in place for legislative draftsmen to use. Indeed, he said, Roman law was “fast becoming the lingua franca of universal jurisprudence” (ibid., 17). While acknowledging that there were traces to be found of Roman law in the medieval common law, he observed that

It is not because our own jurisprudence and that of Rome were once alike that they ought to be studied together—it is because they will be alike. It is because all laws, however dissimilar in their infancy, tend to resemble each other in their maturity; and because we in England are slowly, and perhaps unconsciously or unwillingly, but still steadily and certainly accustomed ourselves to the same conceptions of legal principle to which the Roman jurisconsults had attained after centuries of accumulated experience and unwearied cultivation. (Ibid., 2)

On a practical level, Maine felt that English jurists needed to have a better mastery of legal terms before they attempted to codify existing law into a single body, something he felt was desirable.

Thus far, Maine’s approach did not seem much at odds with that of Austin, who had himself argued that codification could only come at a certain stage of development. However, in his lectures, Maine stressed the development and changes in Roman law in ways not done by Austin, and as early as 1853 he was showing an interest in theories of legal progress (Cocks 1988, 30). His interest in these matters may have been increased as a result of the Indian Mutiny in 1857. Having shown no interest in the subject before, between August 1857 and May 1858, almost all of the thirty four articles he contributed to the _Saturday Review_ concerned Indian questions. It was at this point that he discovered
village communities, describing the discovery as being “like the first glimpse of a great truth in a course of physical experiment” (quoted in Stocking 1987, 121). Maine’s new interest in India was to transform his interests, taking him from the history of Roman law to a wider history of law in Aryan societies. Nonetheless, in his work, he remained more an essayist than a scholar. Often the master of the memorable phrase, he largely eschewed detailed research of his own, drawing instead on the works of continental scholars, newly edited texts on ancient Irish law, and reports generated by Indian bureaucrats, as well as material drawn from private conversations, novels and even street-songs (Maine drew especially on Von Maurer 1856; Morier 1870; De Laveleye 1870; Nasse 1871; Sohm 1911; see also Maine 1871, 115).

7.2. Ancient Law

*Ancient Law* was not a work aimed at an audience of legal practitioners (cf. Tylor 1871a, 177). Although Maine focused on key areas of law, such as property, wills, contract, and delict, he had no theory to explain their essential nature, nor did he seek to give guidance to judges in solving cases. On the contrary, he contended that it was an error for jurists like Austin to assume that there were permanent and necessary notions in law (cf. Maine 1871, 4). As an example, he pointed out that none of the features which modern jurists held to be essential to the notion of a will—that it took effect at death, that it was secret and revocable—were to be found in the testaments from which modern wills descended (Maine 1901, 174). The very concepts jurists saw as essential to law changed over time. Moreover, the changes they underwent were not to be explained by an “internal” history of logical development. Doctrinal developments were often haphazard or accidental; but they had to be seen from a wider perspective of social change. For Maine, legal doctrines were not inevitable, but were shaped by society. Nevertheless, the theorist could trace trends in the evolution of societies. Maine’s evolutionary theory at the same time challenged the universality of the central plank of Austinian thought: that law was in its nature the command of a sovereign.

Maine set out a six stage theory of legal development. At first, before the idea had taken root that there might be a distinct legislator, judgments were made by heroic kings deciding not on the basis of prior law, but through divine inspiration (Maine 1901, 8). No custom preceded the judgment. Custom was rather moulded on a succession of such decisions. Over time, the people’s belief in the wisdom of their kings eroded, when they experienced weak rulers, and a second stage ensued. This was the era of rule by oligarchs not claiming divine inspiration, but acting as the repositories of the law: “Customs or Observances now exist as a substantive aggregate, and are assumed to be precisely known to the aristocratic order or caste” (ibid., 12). This stage was succeeded in turn by the age of codes. For Maine, the principal impetus to-
wards writing down the law was simply the discovery of writing, and these codes were not based on any principle, but only recorded existing usages (ibid., 14–15). However, once primitive law was embodied in a code, its spontaneous development ended, and henceforth, all changes in the law were “effected deliberately, and from without” (ibid., 21).

Maine argued that the stage at which a society put its law into a code determined whether it would be stationary or progressive in nature. In Rome, law was codified early, in the Twelve Tables. By contrast, in India, a religious aristocracy was able to retain its power for much longer; and when their usages were put into a code, in the Laws of Manu, they included “not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed” (ibid., 17). The lateness of the codification of Hindu jurisprudence meant that it suffered under “an immense apparatus of cruel absurdities” engrafted onto it by irrational imitation of sound customs, and India remained stationary while Rome progressed. Maine argued that in a progressive society, social necessities and opinions always ran ahead of law. Its happiness depended on how the gulf between them was closed. This was done, successively, by fictions, equity and legislation. By “fiction,” the first vehicle of change, Maine meant the general pretence that the law was static and unchanging, when it was in fact extended and applied to new situations (ibid., 26). Both Roman *responsa prudentum* and English case law worked on the assumption that they were merely restating the principles of existing law, when in retrospect it was evident that they had changed the law. Although this process was useful in the early stages of development, fictions made the law harder to understand. Modern English law, Maine therefore felt, had to be pruned of these fictions before it could be put into a harmonious order.

The second vehicle of change was equity, or natural law. This was a separate set of principles, regarded as having an intrinsic ethical superiority. Once the Romans had applied Greek ideas on natural law to the *ius gentium*, Maine argued, they regarded the latter not as an inferior law only applicable to non-Romans, but as a universal law which could be used by the Praetors to restore what they considered a simpler, and more natural, order. Maine drew parallels between the Praetor and the English Lord Chancellor. In both Rome and England, he said, the systems of equitable jurisprudence came to be as fixed as law—“as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal” (ibid., 68–9).

The vehicle of change in the final era discussed—the one to which Maine devoted least time—was legislation. This era was presided over by a Benthamic sovereign, for both an autocratic prince or a parliamentary assembly, which passed legislation, were to be seen as “the assumed organ of the entire society.” Although the legislature might be restrained by public opinion, it was in theory empowered to pass any legislation it desired, for the obligations imposed derived solely from “the authority of the legislature” and not from
“the principles on which the legislature acted” (ibid., 29). By describing such a legislature as appropriate to contemporary society, and by supporting codification (cf. Maine 1871, 60), Maine showed that he did not seek a different theory of legislation or adjudication for modern polities from that provided by Bentham and Austin. Indeed, by placing the good of the community above any other objective, he said, Bentham had given “a clear rule of reform [...] and thus gave escape to a current which had long been trying to find its way outwards” (Maine 1901, 78–9; cf. Maine 1875a, 227).

Maine’s prime target in Ancient Law was rather the natural law tradition represented by Rousseau (Maine 1901, 92). Rousseau’s error was to construct an a priori theory developed from considering an imaginary individual in a state of nature, which Maine regarded as “a social order wholly irrespective of the actual condition of the world and wholly unlike it” (ibid., 89). In speaking of individuals in this state who acquired property by occupation, and who contracted with others to create civil society, natural lawyers read a simplified present into the past (ibid., 249–50). In fact, Maine observed, the very notion that occupancy conferred rights could only be found in developed societies where concepts of property and ownership had already been established (ibid., 256). As one reviewer pointed out, Maine’s historical approach showed that “no system of law has ever yet looked upon the community as an aggregate of individuals,” and that none “had ever renounced its paramount right to mould inheritance, obligation, contract, and wrong in any way it pleased” (Harrison 1861, 472–3). Maine agreed with Bentham that societies always modified their laws according to their views of general expediency. However, he did not find this observation particularly useful in itself. It was more important to uncover the impulse which motivated ideas of expediency. Bentham’s error, he said, was to focus only on the modern world. His was “the error of one who, in investigating the laws of the material universe, should commence by contemplating the existing physical world as a whole, instead of beginning with the particles which are its simplest ingredients (Maine 1901, 119). To understand how and why laws had changed, it was essential to turn to history.

In Ancient Law, Maine sought to trace law’s evolution from a primitive patriarchal society to a modern individualistic one. Drawing on a variety of sources, from the Bible, through Tacitus to the Code of Manu, and supported by the history of Roman law, Maine argued that early societies were not collections of individuals, but were aggregations of families, which were treated like perpetual and inextinguishable corporations. The family was headed by the eldest male, who was absolutely supreme within the household. The fact that he could rule by despotic commands accounted for the scanty number of rules of law (ibid., 126). Households were united by common kinship, or at least the fiction of it. In ancient societies, the family unit was defined by agnatic kinsmen, that is, all those descended through the male line (ibid., 148–
Over time, this family unit began to weaken, while both the state and the individual strengthened. Initially, civil laws had only been the Themistes of a sovereign, a developed form of the isolated commands issued by heads of households. They were commands addressed only to family units, and were like modern International Law, “filling nothing, as it were, excepting the interstices between the great groups which are the atoms of society” (ibid., 167). Gradually, however, the sphere of civil law enlarged itself, for as societies progressed, “a greater number of personal rights and a larger amount of property are removed from the domestic forum to the cognizance of the public tribunals” (ibid., 167). Individuals now came to replace the family as the units of civil laws, and the tie between them which replaced the rights and duties derived from the family was that of contract. As Maine put it in his most famous aphorism, “the movement of the progressive societies has hitherto been a movement from Status to Contract” (ibid., 170).

Having set out this theory of development, Maine showed how legal concepts centred on the individual emerged from older family-based forms. Maine claimed that since Roman law “transformed by the theory of Natural Law” had bequeathed the idea that the normal state of property was individual right, the scholar had to look to India and eastern Europe to understand the nature of primitive joint property (ibid., 259–60). By comparing these societies, he said, one could see the gradual disentanglement of separate rights of property from the blended rights of a community, as the patriarchal family divided into separate households, and these in turn were supplanted by the individual (ibid., 269–70). However, for his detailed discussion of how property came to circulate and be held by individuals, Maine turned again to the history of Roman law, much of which he borrowed from Savigny (see Pollock 1890, 152–3; Pollock 1893, 112–3). In early patriarchal societies, he said, the alienation of any of the family’s patrimony was difficult to achieve, and could only be done by the use of solemnities scrupulously adhered to (Maine 1901, 271–2). Since this impeded the free circulation of things, “advancing communities” devised means to overcome this problem. While articles of great value—such as land, slaves and beasts of burden in Rome—could only be transferred through a formal procedure of mancipation, less important items—res non mancipi—were permitted to be transferred more easily, by delivery (traditio). The subsequent history of Roman property law, Maine said, was the history of the assimilation of the former to the latter kind of property, which was achieved by fictions and equity (ibid., 277–9). Similarly, the trend of European legal history, he said, was to see the assimilation of the rules of landed property into the rules of personal property, thereby facilitating transfer.

The ancient Roman formal conveyance, the mancipium, was also the source of the two key modern institutions by which individual property was transferred, the will and the contract (ibid., 204). In early societies, Maine said, testate succession was rare, since inheritance involved succeeding to the
entire legal position of the *paterfamilias*, rather than carrying out his intentions after death (ibid., 181). As it was only required when there was no kin to succeed the *paterfamilias*, the early will was “not a mode of distributing a dead man’s goods, but one among several ways of transferring the representation of the household to a new chief.” It was therefore linked to the practice of adoption—as it continued to be in stationary India (ibid., 193–4). The ancestor of the modern will was the Roman plebeian will, an *inter vivos* conveyance alienating the family and its property to the person named as heir. This descended from the ancient formal Roman conveyance, the *mancipium*, which was modified when a less formal type of will was gradually permitted by the Praetors. Nonetheless, even these developments did not entail a desire by testators to dispose of their property as they liked (ibid., 203–4, 223). Rather, Maine suggested that the idea of a will as giving the testator power to divert property away from his family, or to bequeath uneven portions, dated only from the middle ages, when “Feudalism had completely consolidated itself” (ibid., 224). The crucial change effected by feudalism was the introduction of primogeniture, which disinherited all the children save one.

Modern ideas on contract were equally the product of the development of civilisation, rather than being universal notions. Early law, Maine said, only sanctioned promises accompanied by elaborate ceremonies: it was not the internal intentions of the parties but external acts which mattered. Contracts, like wills, developed from conveyances. At first, the Romans had used the same word—*nexum*—for all solemn transactions, and the same forms used to convey property were used in the making of a contract (ibid., 318, 322). The two concepts became separated over time in commercial contexts, as vendors gave credit to purchasers of goods, delaying the completion of the *nexum*. With the development of new contractual forms, the obligation became more central than the formalities. Having traced the evolution of the four Roman consensual contracts, Maine sought to prove that what were often seen as the oldest, and most natural forms of contractual obligation, pacts, were in fact the product of a longer development.

Maine also discussed the development of torts and crime, an area which illustrated the development of the state. The older a code was, he argued, the more prominent and minute was its penal code. This did not however imply a strong legislator (ibid., 368). For, in early societies, penal law was essentially the law of torts or delicts, where the victim prosecuted with a view to financial compensation, and the courts acted as arbitrators. Maine argued that the formalities used at the start of Roman litigation were thus a ritualised version of more a primitive state, in which the parties in the middle of a quarrel agreed to submit to arbitration by the Praetor. The compensation awarded reflected what would have been extracted by a man seeking vengeance (ibid., 375–6). It was only gradually that the state took more general cognisance of criminal law. Initially, if an offence against the community was committed, it was not left to
the courts to redress, but a legislative act was passed to punish the wrongdoer. Drawing on Roman sources, Maine outlined the evolution of the idea that crime was an injury to the state through four stages. At first, the commonwealth avenged itself by isolated acts against the wrongdoer. A second step was taken when the number of such offences had grown to such a level that the legislature delegated its powers to particular commissions to investigate and punish. In the third, commissions were appointed before any offence had been committed. Finally, these commissions were made into permanent benches of judges, and certain acts were declared to be crimes (ibid., 385).

Fluently written, and avoiding difficult detail, *Ancient Law* proved immensely popular, catching the enthusiasm of the time for grand historical explanations of the growth of civilisation. Nonetheless, theoretical shortcomings remained. Maine did not attempt a theory of why societies progressed, which was rooted in the nature of humanity, as Kames had done. His was rather a description of aspects of the development towards a modern individualistic society (Burrow 1991; Cocks 1991; Collini 1991). Moreover, his vision of the *telos* sometimes lacked theoretical coherence. For instance, he clearly approved of the movement towards the contract-based modern society and abhorred any fetters which governments sought to impose on the freedom of contract. He consequently praised the science of political economy, which was “directed to enlarging the province of Contract and to curtailing that of Imperative Law, except so far as law is necessary to enforce the performance of Contracts.” In modern society, he argued, legislation was unable to keep up with human activity:

and the law even of the least advanced communities tends more and more to become a mere surface-stratum having under it an ever-changing assemblage of contractual rules with which it rarely interferes except to compel compliance with a few fundamental principles or unless it is called in to punish the violation of good faith. (Maine 1901, 305–6)

This view, which represented the politically conservative Maine’s hostility to an interventionist state, was hard to reconcile either with his historical argument that legislation was the modern means by which law and opinion were kept united, or with his Benthamic definition of the modern legislator. It was also hard to square with his description of the evolution from a society in which the *paterfamilias* subjected his family to his arbitrary imperative commands towards a state based on law. The emancipation of the individual from the family was described as necessarily accompanied by a growing number of private law rules, effected by fiction, equity and legislation, and regulated by public authority. This raised the question of the jurisprudential basis of civil law—Maine’s “surface-stratum”—and the relationship between the penal and civil branches which had so concerned Bentham. However, Maine ignored the question, and failed to define what he meant by his legal terminology and to relate it to his wider theory. For contemporary readers, however, this hardly
mattered: for a definition of legal terminology, they could always read Austin. Maine’s theory thus seemed to show the march of history towards a society whose law could be analysed in Austinian language; and then to describe the modern state in terms congenial to the mid-Victorian generation which looked to a \textit{laissez-faire} state rather than one associated with Bentham’s Panopticon.

7.3. \textit{After Ancient Law}

On his return from India, Maine sought to develop some of the theories put forward in \textit{Ancient Law}. His later work exhibited far less interest in the evolution of Roman doctrines, however. Instead, Maine now looked more to evidence from Germanic communities, ancient Ireland, and India, that “great repository of verifiable phenomena of ancient usage and ancient juridical thought” (Maine 1871, 22; Maine 1875b, 10). This later work has received a mixed reception from scholars. While some have argued that he now set the terms of debate for a generation of writers on the evolution of property and political institutions, others have seen a decline in his work as a jurist, with Maine “no longer sure of his capacity to produce some all-embracing theory which could account for the totality of legal phenomena” (Collini, Winch, and Burrow 1983, 210; Cocks 1988, 111, 101). This later work is important, both for its development of themes found in \textit{Ancient Law}, and for some new ambitions. This can be seen by looking at Maine’s aims in these works.

Firstly, Maine sought to address policy questions. His work always had a reformist element to it. At the very least, he felt that comparative law could show that the results produced by the tortuous and technical common law system could be reached by “shorter routes” (Maine 1871, 6). Moreover, given that English property law needed explanation in historical terms, Maine’s analysis of the roots of absolute and common property contributed both to an understanding of that law, and to facilitate reform as a result of that understanding (Maine 1901, 292–3). Indeed, some reviewers, notably Mill, used his ideas to challenge the very system of land tenure in England by which 30,000 families controlled almost all the soil, even if Maine did not endorse such views (Mill 1871, 549; cf. Maine 1875b, 30). In \textit{Village Communities in the East and West}, Maine sought to address Indian policy questions in particular. In his view, British policymakers who did not properly understand Indian society had erred in trying to apply juristic and economic ideas which were not suitable to the subcontinent. The often disastrous land policy of Indian governments resulted from a failure to understand the nature of Indian village tenures (Maine 1871, 105).

Maine also showed the error of applying the conclusions of political economy in India, as if they were timeless and universal. While the lessons of this science were appropriate to modern individualistic societies, they were
not usable in ancient ones. Members of village communities, he said, such as existed in India, did not exchange goods on the basis of market principles, but according to custom. Indeed, the very concept of absolute property bearing competition value and capable of creating a fund from which rent could be paid was the product of a lengthy evolution, which may have been completed in England, but had not been in India (see ibid., 159, 185). Maine argued that political economists assumed that practice universally reflected theory, assuming that certain motives always acted on human nature without a clog. This was to ignore the “frictions” generated by custom and inherited ideas. His aim was to show that these frictions were themselves capable of scientific analysis (Maine 1875b, 32, 37).

It was in this context that a second feature of Maine’s later work emerged: its focus on the nature of customary law, and its accompanying critique of the relevance of Austin’s theory to primitive societies. Maine accepted that Austinian analysis was essential to give “clear ideas either of law or of jurisprudence,” and held that his idea of sovereign commands “correspond to a stage to which law is steadily tending and which it is sure ultimately to reach” (ibid., 67, 70). Nonetheless, these ideas were not only philosophically inappropriate in explaining the nature of Indian customary law, but their application in India had undesirable consequences. Indian village communities, he said, were managed by elders who acted both in a quasi-legislative and a quasi-judicial way, declaring the custom of the community. Once declared, it was regarded as having always been the custom (ibid., 74, 110). This was a living law, but one which did not use the terms of Austinian jurisprudence. Customary law was enforced only by the general disapproval of the community if its norms were violated. There was no concept of rights or duties here: “a person aggrieved complains not of an individual wrong but of the disturbance of the order of the entire little society” (Maine 1871, 68). When the British introduced courts of justice with compulsory execution of decrees, they therefore wrought a significant change, for rigid sanctions were introduced which had not hitherto existed. Given the interdependence of Austin’s concepts, the concomitant notions of command, right and duty were also necessarily imported. This had the effect of revolutionising Indian law and ossifying custom. For where it had once been flexible and organic in the hands of the village elders, it now became fixed in the records of the courts, and was obeyed not as usage, but as a command of the sovereign (ibid., 72). With this system in place, if an Indian lawyer found no local rule in the books, he looked to England to help him out. This made Maine pessimistic for the future of Indian customary law. As he saw it, the only way forward was to enact uniform, simple codes of law for India.

In the Early History of Institutions, Maine articulated more clearly his theoretical criticism of Austin. Looking at India, he questioned whether “the force which compels obedience to a law [had] always been of such a nature
that it can reasonably be identified with the coercive force of the Sovereign” (Maine 1875a, 375). Runjeet Singh, the ruler of Punjab, he noted, had been an absolutely despotic ruler, yet it was to be doubted “whether once in all his life he issued a command which Austin would call a law” (ibid., 380). Instead the rules under which the Punjabi people lived were “administered by domestic tribunals in families or village-communities,” units too small to count as Austrian political societies. Nor could it be said that Runjeet Singh commanded the laws in the sense that he had the power to change them, for Maine said it would never have occurred to him to alter them. Throughout the east, Maine said, rulers raised taxes and armies, and issued occasional commands to their followers, punishing disobedience severely. But they did not change the law.

If Austin’s theory was logical for a homogeneous community with “a Sovereign whose commands take a legislative shape,” it was inappropriate for eastern societies, where the people derived their rules from customs regarded as always having existed (ibid., 399–400, 392). Moreover, to say that the customs observed in the Punjab—an independent political society—were merely “positive morality” until they were enforced by courts was “a mere artifice of speech” (ibid., 364). Maine’s point was well received by many scholars, who came to consider Austin’s view of custom inadequate (e.g., Holland 1900, 57). However, Austin’s very definition had sought to exclude the primitive societies Maine discussed, for pragmatic reasons: he had only wished to analyse those legal concepts which were applied in a court-based system, such as was to be found in England. As Maine made clear, the Indian communities he discussed did not have this system of courts until introduced by the British. Moreover, Maine’s notion of customary law was not aimed at assisting the jurist seeking to understand and apply the law in court. As he saw it, in primitive societies, it is extremely difficult to draw the line between law, morality, and fact. It is of the very essence of Custom, and this indeed chiefly explains its strength, that men do not clearly distinguish between their actions and their duties—what they ought to do is what they have always done, and they do it. (Maine 1871, 191)

Maine’s comments on custom thus sought to show how Austin’s ideas could not be applied in India, and to show that a different understanding of rules and norms was required if one sought to understand primitive society. However, this insight was not used to examine modern English law. Nor did Maine seek to address the problem long faced by common lawyers of explaining the evolution of customary common law rules.

A more significant challenge to Austin’s notion of law perhaps came from his theory—which echoed Kames’s—that law emerged in an adjudicative rather than in a legislative context. Drawing on his comments in Ancient Law on the origins of Roman jurisdiction, he argued that courts originated in the
attempts of rulers to channel private quarrels and acts of revenge. In early society, he wrote, “Courts of Justice existed less for the purpose of doing right universally than for the purpose of supplying an alternative to the violent redress of wrong” (Maine 1875a, 288). The judicial power of the state was slow to emerge because its coercive power was weak. Too weak to forbid “high-handed violence” or even to assume “active jurisdiction over the quarrel which provoked it,” early authorities sought to limit the quarrel by “prescribing forms for it, or turning it to new purposes” (ibid., 265–6). Disputes could be controlled by referring them either to immediate or future arbitration. They could also be judicialised by allowing the claimant to seize the goods of the absent defendant, in order to force him to come to later arbitration. The traces of such a system were to be found in the Roman Pignoris Capio, and in English and Irish rules on distress. Maine argued that there was increasing regulation by the rulers of this process, beginning with such rules as to what kinds of property could be distrained and how, and leading to a moment when the entire process was in the hands of the sheriff. However, it took a long period of time before the state was strong enough to take the whole dispute into its own hands from the beginning (ibid., 268–9). Procedure was thus the heart of early law. As he famously put it, “substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see law through the envelope of its technical forms” (Maine 1883, 389; cf. Maine 1875a, 252). In this argument, Maine made the crucial point that the decisions courts made reflected the feelings and expectations of the society which resorted to them. However, he did not develop a theory about those feelings and expectations. He remained more interested in giving an “external” description of law and societies developed, than in giving an “internal” discussion of how courts should proceed.

Maine’s later work is significant for a third ambition. In it, he tried to complete his theory of the evolution of a modern individualistic society by tracing the development of individual property out of the system of joint-property to be found in primitive communities bound together by kinship and custom (Maine 1875a, 65–8). In this enterprise, Maine had to explore the nature of land tenure, and the role of feudalism in social development, matters he had touched on in Ancient Law, but had not explored in detail. These questions could not be answered by looking at Roman law, but had to be explored by looking at Indian, Irish, Russian, and Slavonic societies. In examining these societies, Maine abandoned his earlier distinction between progressive and stationary societies, and sought instead a theory of development which would embrace all Aryan societies. For Maine, India was now to be seen as a living example of Europe’s past, where “these dry bones live” (Maine 1871, 103, 148).

By tracing the process by which kinsmen settled on land, and how ideas regarding property subsequently altered, he argued, one could trace both the evolution of modern notions of sovereignty and modern notions of landed
property (Maine 1875a, 77). In *Village Communities*, Maine dated the beginning of the development towards private property (and hence also towards contract) from the moment when families first began to acquire separate lots on the arable mark of the village (Maine 1871, 80, 112). In *Early History of Institutions*, he traced it to an earlier stage still: “from the moment when a tribal community settles down finally upon a definite space of land,” he wrote in, “the Land begins to be the basis of society in place of the Kinship” (Maine 1875a, 72). Its evolution could be seen by comparing the Hindu Joint Family, the southern Sclavonian house community, and the Russian village community (ibid., 80–8). The first of these was held together only by ties of blood, rather than land. Instead of having particular holdings in any piece of land, “the various households reclaim the land without set rule.” In the second stage, the joint family had expanded by adopting outsiders, and had “settled for ages on the land.” This stage saw the rise of “the system of exchanging lots” of land. In the third stage, the village was made up of a collection of separate dwellings, and village lands were no longer the collective lands of the community. In this society, “the portions of land are enjoyed in severalty”: arable lands had been fully divided, pasture partially divided, and only waste remained common (ibid., 113). These separate holdings, Maine suggested, were the ancestors of socage tenure and equal inheritance. However, there were also other forms of modern property which derived from feudalism, which he now sought to explain more fully than before.

In *Ancient Law*, Maine had seen feudalism as a “mixture of refined Roman law with primitive barbaric usage” (Maine 1901, 135). The feudal system, he said then, grew from benefices granted by barbarian invaders of Roman provincial lands, in return for military service. Although the lord with his vassals “may be considered as a patriarchal household, recruited, not as in the primitive times by Adoption, but by Infeudation,” it was transformed by Roman law, for lawyers familiar with Roman jurisprudence introduced conceptions of absolute proprietorship which were alien to archaic patriarchy (ibid., 229–38). In *Village Communities*, however, following Von Maurer, Maine argued that all primitive proprietary systems had a tendency to develop into feudalism (Maine 1871, 21). Although communities were first democratic, leadership in them was often accorded to the person regarded as having the purest line of descent from the common ancestor of the village. This man’s power gradually grew into a kind of lordship, as he began increasingly to sever his land holdings from those of the rest. In this process, waste land came to be regarded as the lord’s waste, and the commoners seen to have acquired their rights only on the sufferance of the lord (ibid., 141–2). Over time, “a group of tenants, autocratically organised and governed,” replaced “a group of households of which the organisation and government were democratic” (ibid., 133–4). For Maine, this was a desirable development, for an autocratically governed manorial community was better able to bring into cultivation waste
lands than a village community. Whereas pre-feudal holdings were enslaved to the rules of custom, the holding of the lord was a kind of absolute property, which could be exploited efficiently (ibid., 164). Studying the village community had not given Maine Rousseau’s love of the primitive past.

Maine expanded his theory in *The Early History of Institutions*, where he traced the transmutation of the patriarch into a chief over time. In the house community, he said, the eldest male need not be the parent of everyone in the household, but was regarded as having the purest blood line. Neither *paterfamilias* nor owner of the family property, he was “merely manager of its affairs and administrator of its possessions” (Maine 1875a, 117). Over time, the tradition which connected the chief with the common ancestry of all the kinsmen decayed. However, as he lost authority derived from blood-ties, he was able to consolidate his power through military leadership. Drawing on the Brehon laws (ibid., 130), Maine argued that the chief was both a military leader and rich in cattle, gained from the spoils of war. At the same time, his power over waste land allowed him to increase his wealth, which in turn helped the feudal relationship to evolve, as inferiors put themselves under his protection, both in order to acquire cattle and to obtain security (ibid., 142, 157–8, 166–7).

If socage tenure derived from “the disentanglement of the individual rights of the kindred or tribesmen from the collective rights of the Family or Tribe,” absolute ownership and primogeniture therefore derived from “the special proprietorship enjoyed by the Lord, and more anciently by the tribal Chief, in his own Domain” (ibid., 120, 126). Nonetheless, both the rise of the modern state and the evolution of property as an exchangeable commodity required the collapse of the feudal groups (Maine 1875a, 86–7). Maine did not devote much attention to the decline of feudalism, regarding this as nothing less than the later history of western societies. However, in an essay on the decay of feudal property in France and England, he pointed out that kings were merely to be seen as lords of very exalted manors (Maine 1883, 306). In contrast to the French, he argued, English kings allowed no lord to be absolutely interposed between themselves and their subjects, while they also interfered in ways to weaken the manorial court, and to facilitate the expansion of socage tenures. Maine clearly approved of the fruits of this development. There could, he felt, “be no material advance in civilisation unless landed property is held by groups at least as small as families.” He therefore supported reforms which would make land freely exchangeable (Maine 1875a, 126; Maine 1883, 325).

Maine’s discussion of property thus sought to complete the analysis begun in *Ancient Law* of the development of modern, individualistic, property-holding societies, while also showing the different roots of varying kinds of property which still existed. Thus, he argued, there were still vestiges of the common cultivating community in England, which could not be explained in terms of feudal rules, but had to be understood in different terms (Maine 1871, 90ff.). Although critics like Harrison argued that the historical method
was useless for the daily practice of law (Harrison 1879, 120), Maine’s historical approach offered a way to understand the nature of extant property law which was potentially as useful as that of the analysts—who for the most part had avoided detailed discussion of this area.

Although Maine’s broad brush proved an inspiration to others, the detail of his arguments was soon eroded. As Pollock wrote to Holmes, “I do not think [he] will leave much mark on the actual structure of jurisprudence, although he helped many others to do so” (Howe 1961, 31). Anthropologists challenged his patriarchal view of early society, Romanists qualified the history on which much of his early work relied, while historians of medieval law challenged his conclusions on feudalism (see Maine 1883, chap. 7; Macfarlane 1991; Cocks 1988, 23; Pollock and Maitland 1968, 2: 240–4). Although he was followed in the field by Paul Vinogradoff, historical jurisprudence failed to establish itself among jurists, where Austinian analysis, suitably qualified, continued to hold sway. Instead, historians such as Maitland turned to the detailed research into the feudal era which Maine had eschewed.

Maine’s legacy was ambiguous, for he made important qualifications to the Austinian vision, without clearly setting out the agenda or goals of historical jurisprudence. Maine showed that law functioned in a different way in primitive societies, and thereby opened a path for legal anthropologists to explore. However, short of a few generalisations, he did not himself set out to explore the nature and working of customary law in such communities. Equally, Maine importantly showed that there were no universal, necessary notions in law. However, he did not use this observation to argue that one could rethink modern concepts of contract or property. Instead, since he saw a society based on contract as the natural result of progress, for Maine the evolution of these modern concepts was a necessary accompaniment to progress. Explaining the current meaning of these notions was still left to the analysts. Maine’s project stressed how law changed and developed, reflecting the society in which it was to be found. However, his aim in this project was in large part to show how societies such as nineteenth century England had developed to arrive at their current state. Although he argued that to understand the present, one had to look at the primitive atoms of which it was composed, he was more concerned with the intermediate developments through which the system had been transformed, including, most importantly, feudalism. Nonetheless, his own theories of feudalism were flawed, and invited specialist scholars to make revisions. Maine’s point that a better understanding of past developments would help give a better understanding of present law was hardly a new one; but in the event, the kind of detailed historical research provided by men like Maitland was of limited relevance to lawyers. Maine’s vision was a useful ideal corrective to the legal evangelism of English administrators in India. But his intellectual horizons remained by the fact that he wished, as far as England at least was concerned, to remain on the same ground as Austin.
7.4. The Rise of Formalism in America

The same era, after 1860 which saw the ascendency of Austinian ideas in England also saw the decline of natural law thinking in America (Nelson, 1974). Austin himself began to be read in America and a new “formalist” approach emerged (Feldman 2000, 91; LaPiana 1994, 77; King 1986; Sebok 1998, chap. 2). This approach involved looking at law from within, considering legal doctrines but not their social contexts. Formalists saw law as a science, in which a limited number of overarching principles and categories could be obtained by reasoning inductively on the materials of the legal system found in case law. These principles formed a conceptually coherent system from which answers to legal questions could be rationally deduced. Legal problems could thus be solved by using demonstrative, rationally uncontroversial, formal reasoning.

This kind of approach to law was encouraged by two developments, Firstly, beginning in New York in 1848, procedural reforms abolished the old forms of action, replacing them with a single civil action in which only the facts which constituted the cause of action could be pleaded (LaPiana 1994, 70–5; Friedman 1985, 391–411). Lawyers now had to understand the principles on which the law was based, rather than following the forms of action. Secondly, the postbellum years also saw the transformation of American legal education (Stevens 1983, 35–91). Mid-nineteenth century legal education at Harvard and elsewhere, largely in the hands of practitioners, had become little more than a formality (LaPiana 1994, 48–54). However, legal education was revolutionised after 1869, when Christopher Columbus Langdell (1826–1906) was appointed professor and dean of the Harvard Law School (Carter 1997). Langdell’s most famous innovation was to introduce the case method of teaching. In place of simply lecturing on principles, or seeking to impart information, he required students to explain the arguments presented in a defined number of cases, while he questioned them on the arguments presented, thereby helping to extract principles from the cases. Although he wrote relatively little, Langdell came to be seen as the father-figure of formalism. In 1870, he published the first part of a casebook on Contracts, with the full text following in 1871. It echoed the method of his classes: cases were presented in chronological order, but without a commentary. It was only in his second edition of 1879 that he added a summary of the topics covered in the cases at the end, discussing his views as to whether the cases were rightly decided or not (Langdell 1879). In 1880, this summary was separately published. Although he also published another casebook, as well as a number of articles (Langdell 1872; Landgell 1908), his main influence came through his teaching and that of his followers.

For Langdell, law was an autonomous, technical science (Gordon 1995, 1245). The main business of the lawyer was to study the law “as it is”. The study of law as it ought to be was not “specially” the concern of lawyers
Langdell and his followers sought to remove any political element from legal questions, searching for the pure principles of the common law. They were therefore primarily interested in private law, untouched by statute and unaffected by state regulation. Statute law was seen as haphazard, while public law was excluded from the teaching curriculum as unsuitable for scientific study (Grey 1983, 34). Langdell’s highly logical approach to the law led him to denounce certain views of law as wrong, and to ignore broader questions of justice. For instance, he rejected the recently formulated mailbox (or postal) rule, according to which a contractual offer was deemed to have been accepted as soon as the letter of acceptance was put in the post, as doctrinally incorrect. He acknowledged supporters of the rule “claimed that the purposes of substantial justice, and the interests of the contracting parties as understood by themselves” would best be served by it. But this, he said, was “irrelevant” (Langdell 1880, 20–1; Grey 1983, 4–5; Sebok 1998, 84–6). Langdell clearly felt that judges could get the law wrong, and sometimes exasperated his colleagues with his view that law was something different from what the judges said it was (see LaPiana 1994, 19; Carter 1997, 54n).

Some scholars have therefore seen Langdell as striving to uncover a science of self-evident immutable and unchanging principles, in the manner of latter day natural lawyer (Gilmore 1977, 42–3). Others, such as Holmes, suggested that he was rather striving for logical cohesion in law. “[T]he end of all his striving, is the logical integrity of the system,” Holmes wrote: “he is less concerned with his postulates than to show that the conclusions from them hang together” (Holmes 1995g, 103). Langdell clearly sought principles to direct the lawyer. A true lawyer, he wrote, was one who had such a mastery of the principles and doctrines of law that he was able “to apply them with constant facility and certainty to the ever-tangled skein of human affairs.” The number of fundamental doctrines was smaller than was usually supposed, he said, which would be seen if each were “classified and arranged [...] in its proper place” (Langdell 1879, viii, ix). However, these principles were not the abstractions of natural law, but were to be taken from cases, found in the library, which Langdell said was the laboratory of the legal scholar (Carter 1997, 76). Langdell’s principles and doctrines were not timeless, for he insisted on the development of law over time, as his chronological listing of cases demonstrated. Law could never be a purely deductive science: it has not the demonstrative certainty of mathematics; nor does one’s knowledge of it admit of many simple and easy tests, as in case of a dead or foreign language; nor does it acknowledge truth as its ultimate test and standard, like natural science; nor is our law embodied in a written text, which is to be studied and expounded, as is the case with the Roman law and with some foreign systems. (Quoted in LaPiana 1994, 57)

There was nothing inevitable about the evolution of certain doctrines in the common law. In some areas—as with the original establishment of the doc-
trine of consideration—Langdell noted that it might have been more rational to take a different course; but the issue was by now settled (Langdell 1880, 60–1). Nonetheless, coherent principles and doctrine could be extracted from cases, and any legal decision inconsistent with them was anomalous. At the same time, an anomalous decision which was followed by judges in later cases could itself develop into a doctrine which would have to be accommodated by the theorist (Grey 1983, 25–6). Langdell’s task was thus best to make sense of the common law tradition, and to encourage judges to reason in the best manner possible to find answers dictated by the principles of the system (Sebok 1998, 95).

Langdell’s desire to present rational and coherent principles of the common law was hardly new; but the context in which he wrote changed the nature of the undertaking. Langdell needed to engage in a similar task as Blackstone, but without relying on natural law or the forms of action to give organising categories. In place of a multiplicity of large treatises describing particular areas of law, organised according to factual subject matter—what T.E. Holland might have called mere indexes to the chaos of the common law—Langdell sought to outline the essential principles of key areas such as contract. Nonetheless, the assumptions of his “scientific” method were in some ways flawed. His classifications and arrangements were designed to be descriptive of legal principles, yet in the process of selecting and ordering cases, he was himself giving a prescriptive view (Carter 1997, 59). The Harvard method helped the student to learn to think like a lawyer. But it did not necessarily give an overview of all the essential principles of law.

Langdell’s view also left some questions unanswered, about how law developed. He did not discuss the jurisprudential issues of the nature of law or sovereignty. If this reflected the fact that he was more concerned with explaining doctrine than elaborating theory, it nevertheless created problems for his view of law, and how it developed. Although he has sometimes been seen as a positivist (Sebok 1998, 91), Langdell did not look to a legislator to generate new rules. Nor did he regard the common law as a set of rules resting either on a positive past set of capitāla legum elaborated by judges or on a natural law derived from divine commands. At the same time, he did not develop a theory of how law reacted to changing demands in society. This begged the question of how law changed. For Langdell, Thomas Grey argues, “the fundamental principles of the common law were discerned by induction from cases; rules of law were then derived from principles conceptually; and finally, cases were decided, also conceptually, from rules” (Grey 1983, 19). This meant, Grey argues, that it was the legal scientist who was the key to progress in Langdell’s common law, for it was the scholar or scholarly lawyer who discovered previously unrecognised principles that both explained existing decisions and reflected the changing needs of society (ibid., 31). However, this view (never fully articulated in these terms by Langdell) entailed some problems. If it was
part of the jurist’s role to reflect the changing needs of society, he would become in some sense a legislator or policy maker, which would raise questions about the nature of his authority and about the true source of his principles. If, on the other hand, the only source he used was the law as found in cases, this again the question of how law developed in court. If Langdellian judges were constrained to follow only the true doctrines and principles of the law, then the only motor of legal change might turn out to be judicial errors which took root. As shall now be seen, these kinds of questions were taken up by Oliver Wendell Holmes.

7.5. The Early Work of Oliver Wendell Holmes

Born in 1841, Oliver Wendell Holmes was always as interested in scholarship as in success at the bar. He began to write book reviews for the American Law Review from its launch in 1867 (the year when he also entered legal practice) and edited the journal from 1870–1873. At the same time, he worked on the twelfth edition of Kent’s Commentaries with James Bradley Thayer and lectured at Harvard on constitutional law. In 1880, he delivered a series of lectures at Boston University, which were published in the following year as The Common Law. Although he accepted an invitation to join Harvard Law School, the success of his magnum opus seemed to dull Holmes’s enthusiasm for scholarship, and he left Harvard after only three months in 1882 to become Associate Justice of the Supreme Judicial Court of Massachusetts. He began to produce significant works of scholarship again in the 1890s, publishing a series of articles and speeches. In 1903, after twenty years on the Massachusetts bench—an intellectually unfulfilling time, when Holmes was given little scope and showed little appetite for applying his broad theoretical ideas about law—he was appointed to the United States Supreme Court, where he sat until his retirement in 1935 (see Howe, 1963; White 1993; Tushnet 1977).

Holmes’s ideas on law developed and changed over time. Much of The Common Law was a reworking of articles written in the 1870s, a decade when his intellectual approach changed in significant ways. As a result, it has been described as a book “at war with itself” (Gordon 1982, 720–1). While regarded as a classic of American scholarship, it “is very rarely read in its entirety, and perhaps even less rarely understood” (White 1993, 149; cf. Horwitz 1992a, 32; Alschuler 2000, 131). Indeed, rather than being a consistent legal thinker, it has been said that Holmes’s “greatest gifts and most ardent tastes were for clarifying aperçus, rather than for systematic thought” (Howe 1963, 281; cf. Touster 1982, 684). As a result, Holmes’s thought has been interpreted in various different ways over the years (see White 1971). He has often been seen as part of a revolt against formalism, which was to lead to legal realism (White 1963, chap. 5; Twining 1973b, 15–20). Unlike the formalists, he did not distrust legislation or public law, and encouraged judges to be aware
of policy. Moreover, his famous dissents, notably in *Lochner v. New York* (1905) made him appear to be a progressive liberal, at a time when formalism was associated with the conservatism of the turn of the century Supreme Court majority (see Grey 1983, 34–5; Gordon 1995, 1250–1). On the other hand, a number of recent scholars have held that there were in fact close affinities between Holmes and Langdell, and that his apparent break with formalism was not as abrupt as was once argued (Gilmore 1974; Gilmore 1977; Touster 1982; Grey 1989). Indeed, one recent commentator, who describes Holmes’s insights as unoriginal and his thinking as muddled, sees him as marching arm-in-arm with Langdell in a “revolt against natural law” (Alschuler 2000, 100). Furthermore, on the bench, he often remained drawn more to broader philosophical questions than to policy ones, and often took positions at odds with his liberal reputation (Rogat 1962–1963; Rogat and O’Fallon 1984).

Holmes’s early writings were concerned with the Austinian project of analysing “the fundamental notions and principles of our substantive law,” and arranging the content of law logically “from its *summun genus* to its *infima species*” (White 1993, 130; Holmes 1923, 219; Holmes 1995e, 47). Nor did he ever wholly abandon this commitment (see Holmes 1995i, 388). Nevertheless, he did not see the common law as a matter of deduction. “It is the merit of the common law,” Holmes wrote in 1870, “that it decides the case first and determines the principle afterwards.” It was only after a certain time that it became necessary to “reconcile the cases,” and “by a true induction to state the principle which has until then been obscurely felt” (Holmes 1995a, 213). Holmes therefore was sceptical of projects of codification. A code could never be perfect, he said, for new cases would always arise which had been unprovided for. If the code had to be rigidly followed, the court would have to “decide the case wrong”; if not, it would be little more than a “text-book recommended by the government.” If he opposed a code, he nonetheless felt that such a text would be of value, and in a number of articles written in the early 1870s, he sketched out an arrangement of law around the concept of duty (Holmes 1995c; Holmes 1995d). Though he rejected Austin’s arrangement based on rights, holding that duties preceded rights both logically and chronologically, his analysis was premised on the Austinian assumption that legal sanctions were the defining characteristic of law (Howe 1963, 68).

At the same time, Holmes qualified Austin’s command theory. He pointed out that the definition of law as the command of a political superior was “of practical rather than philosophical value.” “[B]y whom a duty is imposed,” he noted, “must be of less importance than the definiteness of its expression and the certainty of its being enforced” (Holmes 1995a, 215). In the nature of things, a dress-code might be as much a law to a person subject to it as a statute. Philosophically, there might therefore be “law without sovereignty” or law generated by other bodies “against the will of the sovereign” (Holmes
If this was to acknowledge the point that Austin was primarily concerned only with those rules which happened to be enforced in courts, Holmes showed that this had ramifications which Austin had missed. For if the law relevant to lawyers consisted of what courts enforced, then jurists would need to look at a wider range of sources than Austin had allowed to understand those rules. Holmes pointed out that even if the will of the sovereign was the formal source of law, “lawyers’ law” was made by judges, who had other motives besides the will of their sovereign. Moreover,

whether those motives are, or are not, equally compulsory, is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence. Singular motives, like the blandishments of the emperor’s wife, are not a ground of prediction, and are therefore not considered. (Ibid.)

The sovereign was in fact weaker than Austin suggested. A statute was only “law” insofar as people believed that it would induce judges to act in a certain way, and shaped their conduct accordingly; but judges could ignore precedents and render statutes meaningless by interpretation. To understand law, one therefore had to look at what motivated the judge. To see whether a judge would be induced to act, one first had to look at the facts which might suggest a rule of law to him, which were multifarious. In some cases, Holmes said, “the fact, the belief which controls the action of judges, is an act of the legislature; in others it is public policy, as understood by them; in others it is the custom or course of dealing of those classes most interested; and in others where there is no statute, no clear ground of policy, no practice of a specially interested class, it is the practice of the average member of the community” (Holmes 1995d, 330).

As he reflected on these issues, Holmes began to think of law less in terms of duties and sanctions than in terms of liabilities and remedies. “A legal duty cannot be said to exist,” Holmes said, “if the law intends to allow the person supposed to be subject to it an option at a certain price” (Holmes 1995b, 296). A protective tariff, he pointed out, did not create a duty not to import goods, but merely imposed a tax on doing so. Equally, in civil litigation, “[l]iability to pay the fair price or value of an enjoyment, or to be compelled to restore or give up the property belonging to another, is not a penalty.” Strictly speaking, a command, and a consequent duty, did not exist unless the breach of it was denied all protection by law, for example by invalidating contracts to perform the forbidden act. By this definition, there were very few strict commands and duties imposed by law (at least outside the criminal law), but the law rather taxed certain conduct. Liabilities, moreover, could be imposed solely on grounds of public policy, regardless of questions of fault, if desired (ibid.; cf. Grey 1989, 830–1).
Holmes thus began to develop the idea that law reflected contingent policy choices; but he continued to seek an arrangement of the law and a set of concepts which could give it coherence. At the same time, his notion that law was to be found in what the courts enforced made him ever more sceptical about claims that pure, timeless, concepts could be found; and he became increasingly interested in looking at history as a way of understanding the law. Challenging Austin’s notion that culpability, as a matter of logic, was “an essential component part” of liability (Austin 1873, 474), he pointed out that some wrongs given a remedy at common law imposed a strict liability, some involved culpability as an essential element, and some fell in between. These distinctions could not be explained a priori, but were rather the result of development:

Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally have been drawn a little further to the one side or to the other. The distinction between the groups, however, is philosophical, and it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty. (Holmes 1995d, 327)

Exactly where any line was drawn was “a question for Mr. Darwin to answer.” As Holmes looked at history, he discovered (as Maine had before) that doctrines which were justified in a certain way in modern society in fact originated in different contexts with different justifications. There was, he said, a “paradox of form and substance” in the development of the law. In form, the growth of law was seen to be logical, and theory taught that each decision followed syllogistically from existing precedents. But in substance, law did not develop in this way. It developed according to “considerations of what is expedient for the community.” This meant that many “precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten.” It was hence pointless to see the law as a purely formal system: law always approached but never reached logical consistency, for “It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off” (Holmes 1995f, 75–6; cf. Holmes 1923, 35–6). Reviewing Langdell’s casebook, he reiterated this view in a famous phrase:

The life of the law has not been logic: it has been experience. The seed of every growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the newcomer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. (Holmes 1995g, 103)
7.6. Holmes’s The Common Law

These words, echoed on the first page of *The Common Law*, seemed to promise a jurisprudence exploring the relationship between the law and the forces external to it which determined its growth (Touster 1982, 684). Yet this was not a work sensitive to historical contexts or to the complexity of social relations. Much of its history was either that of doctrine, as traced through reported cases, or was premised on universal psychological truths read into the primitive past. In this work, Holmes not interested in writing a theory of historical development or a legal anthropology: he was still searching to make sense of the common law, as in their ways, Blackstone and Austin had sought to do. “I shall use the history of our law,” he declared, “so far as it is necessary to explain a conception or interpret a rule, but no further” (Holmes 1923, 2).

For Holmes, to understand law, one had to look at what judges did. Judges were not arbitrary legislators, but were motivated by influences which came from the community, including custom or expectation. To that extent, law was a product of its community, mediated by judges. He also felt that the jurist could discover the best interpretation of the community’s law, by looking at the history and policy of its doctrines. But because he felt that the law had to reflect the community’s needs and desires, he was prepared to criticise ancient doctrines if they no longer served any purpose or lacked a coherent basis.

In this work, Holmes reiterated his scepticism of the power of *a priori* reasoning. His target in *The Common Law* was not Langdell, but German jurists, notably in their theories of possession (Reimann 1992). “The first call of a theory of law,” Holmes observed, “is that it should fit the facts,” for law, “being a practical thing, must found itself on actual forces” (Holmes 1923, 211, 212–3). “Every right,” he said,

is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him [...] any word which denotes such a group of facts connotes the rights attached to it by way of legal consequences. [...] There are always two things to be asked: first, what are the facts which make up the group in question; and then, what are the consequences attached by law to that group. The former generally offers the only difficulties. (Ibid., 214–5)

In *The Common Law*, Holmes sought to look at the material of the common law to tease out the principles which best explained it. In seeking an organising principle in the 1870s, he had come to focus his attention on liability as the key notion, rather than duty. His larger task now was to discover a “general principle of civil liability at common law” (ibid., 77). The key to this liability was to be found in a theory of torts: the very area which had hitherto produced no general theory, and which (in the era of the abolition of the forms of action) most needed one. One possible theory, Holmes noted, was to say that man acted at his peril, and was liable for any damage caused by his
voluntary actions regardless of whether harm was intended or due to his negligence. According to this view, “the party whose voluntary conduct has caused the damage should suffer, rather than the one who has no share in producing it” (ibid., 82, 84). Although there was some older case law to support this proposition, Holmes doubted whether this was in fact the theory of the common law (ibid., 89). Instead, he said, the general principle of the common law was that losses from accidents lay where they fell, even where the instrument of misfortune was a person. Accidents, he noted, could not be foreseen, and hence could not be avoided. Liability was only imposed when the defendant had a choice to avoid the consequence of his act. This meant that he had to be able to foresee the consequence, since “[a] choice which entails a concealed consequence is as to that consequence no choice” (ibid., 94).

In developing this argument, Holmes drew on early-modern English case law, as well as contemporary American decisions, to show that the “act-at-peril” theory could not explain the cases of the common law. However, Holmes was not merely interested in making sense of the decisions of the past, for he also said that it was not supportable on grounds of policy. “As action cannot be avoided, and tends to the public good,” he said, “there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor” (ibid., 95). Similarly, he felt it was undesirable policy for the state to make itself into a mutual insurance company against all accidents by providing the means of compensating those who suffered from the acts of others, through its laws and courts. Thirdly, Holmes invoked justice. It was no more just, he said, to make a man indemnify another for a harm which he caused, but which could not have been foreseen, than it would be “to compel me to insure him against lightning” (ibid., 96).

Having rejected the strict liability theory, Holmes turned to the second theory, which rooted liability in the personal culpability of the defendant. Holmes rejected Austin’s contention that since sanctions were penalties for disobeying the sovereign’s commands, they should only be imposed where there was subjective fault (Austin 1873, 440, 474, 484). Instead, he said, the law created an objective, external standard of liability, considering what would be blameworthy in the average man. Courts could not take into account personal blameworthiness, for “the impossibility of nicely measuring a man’s powers and limitations is far clearer than that of ascertaining his knowledge of law.” But in any case, “when people live in society” it was “necessary to the general welfare” to set up “a certain average standard of conduct” (Holmes 1923, 108). The standard of liability of the “ideal average prudent man” was “under given circumstances [...] theoretically always the same” (ibid., 111). Holmes admitted that there were cases involving strict liability, such as Rylands v. Fletcher in 1868 (LR 3 HL 330, 339), which imposed such liability on the owner who kept anything on his land likely to do harm if it escaped. Liability was imposed here not because it was wrong to keep poten-
tially hazardous things on land. It was rather the result of a policy choice; for "as there is a limit to the nicety of inquiry which is possible in a trial, it may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken" (Holmes 1923, 117).

Although the common law used the language of morals in attributing liability, it was not, Holmes argued, concerned with personal morality. The internal state of a wrongdoer’s conscience was wholly irrelevant: “[A] man may have as bad a heart as he chooses,” Holmes observed, “if his conduct is within the rules” (ibid., 110). The law referred to a moral standard—that of the reasonable man—only to give them a fair chance of avoiding doing harms before they were held responsible for them. This was a matter of policy. “It is,” he said, “intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury” (ibid., 144).

The community’s sense of reasonableness was to be taken initially from the decision of a jury. However, standards thus articulated could be fixed as law by the courts, giving clearer rules for guidance (ibid., 112). When courts submitted questions involving the standard of conduct to juries, Holmes said, it was because they did not entertain “any clear views of public policy applicable to the matter” and felt that answers should rather be dictated by men of practical experience. The conclusions they reached would reveal either that the conduct complained of was generally regarded as blameworthy, in which case it could be set down as law, or juries would oscillate without giving a clear lesson, and the court would have to make up its own mind on the standard to be set. In either case, the jury’s role would diminish, and individual judges would come to understand “the common sense of the community in ordinary circumstances far better than an average jury” (ibid., 123–4, cf. 151). The jury’s role would remain strongest in the “debatable land” or the penumbra where lines had to be drawn to demarcate where one general principle began and another ended (ibid., 126).

For Holmes, the objective, external standards thus derived did not apply only in tort but also in other areas. In a largely analytical chapter on contract law, he noted that the law had nothing to do with the actual state of the parties’ minds, but judged people by the external evidence of their conduct (ibid., 309). Thus, he said, “a representation may be morally innocent, and yet fraudulent in theory of law,” if made by a person while aware of facts which by the average standard of the community were sufficient to give him notice that it was probably untrue (ibid., 325). Moreover, many key questions—such as where to draw the line between conditions and warranties, or how large a defect in the quality of goods would void a contract for repugnancy—were to be settled by experience, not logic (ibid., 312, 332). As with his analysis of torts, Holmes felt his analysis of contract law could have practical benefits. A correct understanding showed that contract law essentially concerned a pro-
misor’s assumption of risks. The contractual promise was only to pay in case the events promised did not occur, and so the promisor was free to break the contract if he chose (ibid., 300–2). This analysis helped clarify questions on the law of damages. If breach of contract were regarded in the same way as a tort, he said, the party in breach would be held liable for all the consequence of a breach which had been brought to his attention in the course of performance. Yet the proper view was that a party to a contract only undertook the risks which were present to the parties mind when they made the contract.

In seeking to show that criminal liability was also based on the same theory as liability in tort, Holmes rejected two rival theories of punishment. According to the first, punishment aimed to reform the criminal. This theory was easily disposed of. If it were true, Holmes said, the incorrigible would never be punished, prisoners would be released as soon as they were reformed, and no one would ever be sentenced to death (ibid., 42). According to the second theory, the aim of punishment was retribution. The criminal, who had committed a wrong, had to be punished in proportion to the severity of the crime, in order to pay for the harm done by the crime. Holmes associated this theory with the philosophy of Kant and Hegel, which rejected any utilitarian justification of punishment on the grounds that it treated the criminal as a means, rather than as an end. Holmes answered this by saying that “[i]f a man lives in a society,” he was indeed liable to find himself treated as a means; “No society has ever admitted that it could not sacrifice individual welfare to its own existence.” Even private relations were shaped by “justifiable self-preference” (ibid., 44, 43). Rules of law could accordingly not be based on a principle of absolute unselfishness. Instead, the purpose of punishment was to induce external conformity to any rule which criminalized activity. This meant that the law was prepared to punish people even where they were ignorant of the law. Here, “[p]ublic policy sacrifices the individual to the general good” (ibid., 48).

As in the law of torts, internal motivations were irrelevant: the law required the individual at his peril to come up to a certain standard. However, this standard was not to be determined in the abstract, for instance only by a calculation of utility. As with civil law, so criminal law also involved notions of blameworthiness, for any law “which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear” (ibid., 50). The standard imposed had to reflect the general moral feeling of the community, for “[t]he first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong” (ibid., 41). Just as he sought to explain the existing law of torts, so Holmes sought to explain current principles of criminal law. He admitted that not all was susceptible of consistent explanation, for much of it was the product of haphazard historical developments (ibid., 73). Nevertheless, a theory of liability could be put forward. In general, the test of criminality was the degree of danger which expe-
rience showed was likely to attend acts in certain circumstances. In imposing liability, the law did not require actual wickedness, but only the failure to act up to the standard of the prudent man (ibid., 75). However, in some cases, the legislator could impose a higher degree of risk on the actor, for reasons of policy, to prevent consequences which were not foreseen by common experience. This was done, for instance, by the felony-murder rule, under which a person was liable for murder when a killing inadvertently resulted during the commission of a felony (ibid., 59).

Holmes’s three chapters on tort and crime were largely “doctrinal” discussions which sought to explain the current principles of law in the clearest way. Elsewhere, he turned to history. His first chapter on “Early Forms of Liability” sought to give historical backing to his argument that while law used the language of moral fault, it “was constantly transmuting those moral standards into external or objective ones, from which the actual guilt of the party is wholly eliminated” (ibid., 38). Drawing on the work of anthropologists such as Tylor (Tylor 1871b), Holmes argued that in early societies, law was concerned only with intentional wrongs. It aimed to satisfy a desire for vengeance, which was initially aimed against the offending object, itself regarded as blameworthy. Over time, liability was transferred to the owner of the offending object, who was allowed to compensate the victim, in lieu of surrendering it (Holmes 1923, 10). Gradually, the notion developed that liability attached to the owner. When this occurred, his surrendering of the offending object came to be seen as an means to limit his liability, and this right was in many cases removed, and replaced by an action to enforce the owner’s general personal liability (ibid., 15). It was not a strict liability, however. The owner of an offending animal was not simply substituted in its place, but instead, “the ground [of liability] seems to have been the owner’s negligence” (ibid., 23). The owner in effect came to be punished for being at fault in not coming up to a certain standard. If this looked like a simple historical progression, Holmes nevertheless stressed that policy always intervened. Thus, modern law still treated ships, which were inanimate objects, in a primitive way, as if they were endowed with personality. This was done because it was “supported by an appearance of good sense,” and because the judges felt it was reasonable to treat the inanimate ship as if it were alive (ibid., 28–9). It was, in effect, an example of the paradox of form and substance.

Holmes’s history thus helped to justify his broader conclusions regarding liability. However, he was less interested in developing the kind of grand theory Maine had set out than in demonstrating that all law was ultimately traceable to considerations of what was currently expedient for the community. History reinforced Holmes’s ideas on the contingency of law. As he saw it, since law was always situated in a society, and could never be a timeless perfection (ibid., 36), the theorist had to seek the most coherent theory of law for the present. History played a useful, if often negative, part in this enter-
prise: “When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times,” he argued, “we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory” (ibid., 37). In his chapter on “Bailment,” Holmes presented a detailed doctrinal history aimed at challenging the current doctrines on the liability of common carriers, by showing that the rules of law here were neither consistent nor rational but reflected particular policy choices dating from the eighteenth century which were unsuitable for the present. He similarly used history to question the doctrine under which the masters were made liable for the acts of their servants. He traced this liability to that of the Roman *paterfamilias* for his slave, which had been extended by analogy to other cases. The modern law could only be explained “by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves” (ibid., 232). As a result, conflicts arose between the demands of tradition and the instincts of justice which could not be resolved by logic. Judges seeing this, he suggested, should refuse to carry the doctrine any further. If history could reveal flaws in doctrine, it could also be used to explain the nature and growth of a useful doctrine. Thus, Holmes approved of the development of the doctrine of consideration in contract law, and traced its evolution from an accident of procedure into a doctrine of substantive law (ibid., 273–4, 289). For Holmes, then, doctrines could be explained by reference to their history. But if the jurist found no coherent explanatory principle—or if the principle was merely the remnant of ancient forms which could not be justified by modern policy—then the law should be reformed.

Holmes’s approach to doctrine in *The Common Law* was largely a pragmatic one. Pragmatic philosophers, such as Charles Sanders Peirce and William James, who Holmes knew via the Metaphysical Club, argued that knowledge was to be grounded in the habits and practices of social life, rather than in a set of rationally certain principles (Menand 2001, 201–5, 339–47; Grey 1989). Theory sought to make sense of current experience rather than explaining absolute truths; so that if a theory lost its usefulness, it had to be modified or abandoned. In this vein, Holmes sought to create a theory which could best make sense of the law as it had developed in its history, while making sure that those rules were useful for the present day. Doctrine should follow what was convenient, not merely what was logical. Holmes thus rejected Langdell’s logical argument against the mailbox rule by noting “[i]f convenience preponderates in favor of either view, that is a sufficient reason for its adoption” (Holmes 1923, 305).
7.7. Holmes’s Later Work

Having in the 1870s arrived at a view that judges could develop coherent doctrine, by the 1890s Holmes began to have doubts about the possibility of executing the enterprise. Most importantly, he began to doubt the external theory of liability which stood at the heart of The Common Law (see Horwitz 1992a; Horwitz 1992b, 109–43). In “Privilege, Malice and Intent,” Holmes noted that in some situations, men were not liable for harms which they foresaw would harm others, as when one shopkeeper drove another out of business by opening a rival shop. Although it did damage, such an act was classed a privilege, not as a harm. Holmes noted that the line between privilege and harm was drawn by considerations of policy. In the example given, it was “the economic postulate that free competition is worth more to society than it costs” (Holmes 1995h, 373). Crucially, the external standard could have no application in privilege cases, for the actor was precisely aware of the consequences of his action.

This raised the problem of how to decide when the exercise of a privilege became a harm. Holmes had in mind in two recent English cases: Mogul Steamship Company Ltd v. McGregor ([1892] App Cas 25), which held that it was lawful for merchants to combine to exclude a competitor by offering rebates to clients who refrained from dealing him; and Temperton v. Russell ([1893] 1 QB 215), which held that it was unlawful for a trade union to instruct its members not to handle the goods of a supplier, who dealt with firms using non-union labour. In both cases harm ensured from the exercise of the privilege not to deal with certain people. Following the House of Lords’ view on the first case, Holmes suggested that a person’s motive in acting might be relevant. Since there was “no general policy in favor of allowing a man to do harm to his neighbour for the sole pleasure of doing harm,” a privilege could be lost if used for a malicious motive. Such an argument of course brought in the very subjectivism Holmes’s external standard had sought to eliminate. At the same time, however, there was also a policy issue: the policy allowing the defendant freedom of action might be qualified to forbid him “to use for the sake of doing harm what is allowed him for the sake of good” (Holmes 1995h, 375). By this account, the ground of decision rested less on motive than on “a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants.” This raised the possibility that “judges with different economic sympathies” might decide such cases differently” (ibid., 376). It also meant that such cases could not be decided by an objective test such as the standard of the community’s morality, as reflected in the reasonable man. Policy now became central. “The time has gone by,” Holmes said, “when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies” (ibid., 377). Judges
had to make legislative choices, which should be articulated clearly and explicitly, and not left as “unconscious prejudice or half conscious inclination.”

Holmes took this further in 1897 in “The Path of the Law.” In many ways, Holmes at this time still retained his earlier ambitions to seek “an accurate anatomy” of the legal system, based on an external standard of liability (Holmes 1995j, 401, 395). He also endorsed his older methodology:

The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price. (Ibid., 404)

Moreover, he reiterated that logic was not the only force at work, for in law, many matters were “battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place” (ibid., 397).

Holmes now famously articulated his “bad man” theory, which stressed the separation of law and morals. The law might attach certain consequences to acts, he said, but it was not concerned with their morality. To understand the law, “you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience” (ibid., 392). Law was not an a priori system generating abstract answers. The jurist therefore had a more practical job of prediction: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law” (ibid., 393). However, Holmes did not argue that there could be no such thing as a body of law. Law reports abounded with scattered predictions of what would be done in a following case. The job of the jurist was “to make these prophecies more precise, and to generalize them into a thoroughly connected system” (ibid., 391).

Much of the “Path” thus restated views which Holmes had held in the 1870s and early 1880s. However, there was now a change of tone, with greater emphasis on policy. “I think,” Holmes now said, “the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage” (ibid., 398). For Holmes, the future now became more important than the past. Though the study of history was still necessary as a “first step toward an enlightened scepticism” regarding existing rules, he now looked forward “to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them” (ibid., 402–3; cf. Holmes 1995k, 412). For the rational study of law, “the man of the future is the man of statistics and the master of economics”
(Holmes 1995j, 399). Answering legal questions would entail more attention to answering policy questions, which would be done by specialists in those areas. Thus, a judge who had to decide what terms were implied in a factory worker’s contract of employment was making a decision of policy, which could be seen as “a question for scientific determination, that is, for quantitative comparison by means of whatever measure we command” (Holmes 1995k, 415).

Where in The Common Law, Holmes felt that certain rationally justifiable principles of law which reflected the felt necessities of the community could be teased out of its history, and could be used to generate answers to legal cases, in the 1890s, he rejected the notion that the historical common law could be interpreted in a way that reflected the needs of the community, and saw that the judge might have a far greater role in policy. Indeed, he said, where there was a conflict between rival social desires in cases, “the judges are called on to exercise the sovereign prerogative of choice” (ibid., 419). The choices were neither dictated by the legal system, nor was there a single answer to be found in the community’s desires. Rather, the answer had to be found in considering the consequences of the decision, which required an awareness of an end in view. This in turn might take the jurist into the realm of social science and make the judge into a pragmatic or utilitarian decision-maker.

Holmes’s argument in the “Path” has generated a vast amount of debate and interpretation (see especially Burton 2000; Alschuler 2000, chap. 7 and sources cited at 200–2). His prediction and “bad man” theories have been viewed variously as the progenitors of an amoral jurisprudence suitable only for totalitarian regimes (see Seipp 1997, 554–5), of an economic approach to law which focuses on rational economic agents who see legal rules in terms of prices for action, and of a Realist approach requiring a sceptical treatment of rules. Holmes’s short address thus opened the way for many approaches in the twentieth century which conceived of law in instrumental terms, and abandoned the search for deeper principles within the law. However, we should note that in this address, he was not seeking to put forward a complete theory of law, but had more limited aims. Holmes was not intending to set out an “external,” sociological theory of the behaviour of legal institutions or its actors. According to such a theory, a “bad man” predicting behaviour would first want to weigh the chances of his being apprehended or prosecuted, and so would examine the behaviour of all actors within the system, and not merely the judge. Moreover, regarding the latter, he would take into account any factor which might motivate the judge, down to his choices for breakfast. But Holmes was not concerned with these wider sociological questions. He focused on the workings of court, and on predictions of motives which would apply “in the generality of cases.” The prediction his bad man was interested in concerned how courts would treat doctrine.

If Holmes did not seek to create a theory of law based on examining the workings of courts from a external point of view, his concentration on the
predictions made by a bad man was nevertheless criticised by H.L.A. Hart for ignoring the “internal point of view.” As Hart pointed out, actors in a legal system do not merely obey rules because they predict they will suffer sanctions if they disobey. Rather, participants within a legal system recognise certain rules as creating obligations. An understanding of law requires not merely the external view which observes regularities of behaviour, but also an internal view which explains why people treat rules as reasons for action. Both Holmes and Hart agreed that there were both good and bad men in any society (Hart 1994, 90; Holmes 1995j, 392). Why then did Holmes focus his attention on the bad man? One reason was that unlike Hart, Holmes’s aim was not to understand the larger theoretical question of the nature of law in society, which needed to be explained by considering the internal motivations of the good man. His audience was one of law students, and his aim was to teach them to think like “the practitioner who counsels private clients” (Grey 1989, 835). They needed to be able to identify the content of rules at the point of their application in court. This was best done by looking from the view of those, as Hart would put it, “who reject the rules and attend to them only from the external point of view as a sign of possible punishment” (Hart 1994, 91). The hard outer edges of law were best identified by seeing how the system handled those who breached the rules. Holmes was also making a point about the separation of law and morals. He did not intend to argue that the two were unrelated. Indeed he cautioned against being taken as a cynic, noting that “law is the witness and external deposit of our moral life” (Holmes 1995j, 392). He rather wanted to argue that moral words which appeared in legal texts should be read not in their moral sense, but in their legal sense (see Luban 2000, 40).

This narrow focus meant that Holmes’s prediction theory simply did not address certain questions. Most crucially, he avoided addressing the “internal” point of view of the judge. Judges could hardly be seen as “bad men.” Moreover, the prediction theory was unable to tell them what to do. An attempt has been made to “save Holmes’s account” by pointing out that “if the law is ultimately a prediction of what the highest judges will do, it is meaningless to ask how they can use prediction to discover the law”; for law is not a thing they discover, but it is their activity: “they just act as best they can” (Posner 1990, 225). This is to say that judges make law when they act, in a pragmatic way, by weighing past expectations, possible consequences and policy considerations. However, there are two difficulties with this interpretation. Firstly, Holmes said he did not “expect or think it desirable that the judges should undertake to renovate the law” (Holmes 1995k, 418). Secondly, an argument that judges decided pragmatically on a case by case basis raised problems for a theory which suggested to lawyers that doctrinal developments could be subject to prediction. In any event, the working of the legal system as a whole could not be explained in terms of predictions. As has often been pointed out, a predic-
tion theory which focused on judicial behaviour presupposed the existence of a legal system, which was itself defined by rules, and which could not ultimately be explained in terms of predictions (see Twining 1973a, 284). What gave the judges authority needed a broader explanation of the judicial system as a whole. This needed a larger theory of society, whether based on a social contract, habit of obedience or rule of recognition.

On occasion, Holmes gave hints that the broader theory of law to which he would subscribe would echo a Benthamic or Austinian view of sovereignty based on a habit of obedience (see Pohlman 1984, 64). He wrote to Harold Laski in Austinian terms that while the sovereign was legally illimitable, there was a “large margin of de facto limit in the common consciousness that various imaginable enactments would provoke a general uprising” (Howe 1953, vol. 1: 115; cf. Holmes 1995j, 393). Moreover, on occasion, he showed signs of understanding the “internal” viewpoint (see Holmes 1995l, 447). However, this was not much explored in the “Path.” It may be suggested that Holmes did not devote much time to developing a Benthamic theory of sovereignty, since it would not much assist his quest to make sense of doctrine and what the courts did. He had himself spent too much time revealing the problems in Austin’s attempt to reconcile such a theory with an idea that coherent doctrine could be drawn from cases to make such an attempt himself. Instead, his earlier work suggested the need for a theory of law which would explain how law emerged from society, through the voice of the judges. In the “Path,” this theory ran out. Holmes had long held that the lawyer could only predict, and not know as a matter of logic how doctrine would develop in courts. But in viewing law as susceptible to prediction by lawyers, Holmes had implied that judges would know how to find and develop the law. In the “Path,” however, he retreated from a notion that a legal theory could guide the judge. At the end of the address, however, Holmes appeared to indicate a continuing belief in the possibility of a grand theory, which would help guide the evolution of law. Holmes praised recent improvements in theory, and argued that abstract speculations translated into practical benefits. Citing the “works of the great German jurists” he had derided in the Common Law, he observed “how much more the world is governed to-day by Kant than by Bonaparte” (ibid., 405). He ended his address by speaking of the “remoter and more general aspects of the law” which gave it “universal interest,” through which the lawyer became “a great master in your calling” (ibid., 406). All this seemed to imply that law was not just the arbitrary decisions of judges, but the quest for better, authentic answers. Those answers, Holmes now seemed to suggest, were to be found with the assistance of other sciences than those of the jurist.

By 1900, then, the grand aim of jurists to develop an overarching theory of law which could explain and make sense of doctrine appeared to have run into the ground. Austin’s attempt to show that the jurist could put existing common law into a coherent framework by using the analytical jurisprudence
CHAPTER 7 - THE AGE OF MAINE AND HOLMES

derived from a Benthamite command theory was undermined by the insights of successor jurists such as Maine whose history revealed that law did not originate in command, and that in many contexts, the Austinian theory was an inappropriate one to use. Maine's work showed that law reflected its society, and underwent changes as society changed. Maine did not seek to challenge the relevance of Austin's jurisprudence for contemporary society, however, and was not much interested in current legal doctrine. By contrast, Holmes sought to engage in the Austinian project of finding a coherent explanation of existing doctrine by examining what happened in court. Although Holmes claimed not to have been much influenced by Maine, he shared the Englishman's notion that law changed as societies changed. Until the 1890s, he appeared to believe that coherent doctrine could be found not in the abstract, but in the practices of the community's courts. To some degree, his efforts paralleled those of Lord Kames, though unlike Kames, Holmes did not build his jurisprudence around a moral theory which could explain legal development. In the end, he came to believe that no coherent theory could be found to explain law, though he appeared to hope that other sciences might in future generate answers. Early twentieth century jurists thus retreated from the grand ambitions which had driven common law jurists for three centuries. In early twentieth century England, jurisprudence remained a barren field (see Cosgrove 1996, chap. 6); while in America, Holmes's path seemed to point towards scepticism.
In the previous chapters, we have traced various attempts by English-speaking jurists to explain the nature of law and legal reasoning. As has been seen, in the early seventeenth century, particularly as exhibited in the work of Sir Edward Coke, the common law was seen as a system of reasoning on the basis of customary foundations. Common law reasoning was a forensic exercise, with lawyers in court using an “artificial” reason, drawing on logical and rhetorical skills, to apply broad principles or maxims of the common law to the complexities of the case before them. Coke himself was a champion of this view of the law, in part to defend the common law as the particular preserve of judges. However, his view was problematic in a number of respects. Firstly, Coke’s vision made it difficult to explain and rationalise the content of the law. If law was portrayed as the specialist knowledge of lawyers, how could people be sure that the reason of the judge was not merely arbitrary? Secondly—and most importantly in the early seventeenth century—the notion that the common law was an immemorial system explained by the reasoning of the judges failed to provide convincing arguments against a king threatening to act in ways which were seen as arbitrary, by invoking a royal prerogative beyond the ambit of the common law. The nature of the relationship between the common law and royal prerogative was not one which could be settled on the basis of the pronouncements of “artificial reason” alone.

In the context of the constitutional crises of the early seventeenth century, a number of theorists therefore began to think about both the nature of the constitution, and the nature of law, in different ways. In the work of John Selden and Matthew Hale, there was a move away from Coke’s concept of the law as artificial reason based on an immemorial constitution to a more positivist conception of law as the command of a sovereign ruler, who derived his authority from an original agreement with the people, which determined both the extent of the ruler’s powers and the criteria of validity for his acts. For Selden and Hale, law was to be seen more in terms of authority than in terms of reason. I have used the term “positivism” to describe their view; but this is not to suggest that they considered that positive law was arbitrary or immoral, or that law and morality might be opposed to each other. Rather, their command-based theories of law were built on natural law foundations: in particular, the obligation, derived from God’s command to the sons of Noah, to keep one’s promises. All human law, Selden argued, was based ultimately on the law of nature, but it developed in particular contexts through the mechanisms of human institutions. If Selden and Hale articulated this theory in a novel way, there were also sixteenth century versions of a theory by which obedi-
ence was morally due to the positive law enacted by the constitutionally established authorities. Both Christopher St. German and Richard Hooker had developed theories which rooted ultimate political power in parliament, whose authority came from the consent of the people, and whose enactments were to be obeyed since it was to be presumed that in the complex matters of human affairs—which were matters of probability rather than certainty—the enactments of parliament would be the best. For thinkers such as these, law was to be seen as a command which came from human imposition (either current or past), and which was to be presumed to be consonant to natural law. The law of nature was not a standard by which human law could be judged, except in the simplest and most obvious cases.

Selden and Hale abandoned Coke’s idea of an immemorial constitution with timeless ancient rights, and instead saw the constitution and laws as developing on positive foundations. This allowed answers to questions about the extent of royal power to be sought in historical records. It also allowed the law to be seen as a developing body, whose principles and rules could be traced over time, and whose content could be explained in a systematic manner. In the mid-seventeenth century, common lawyers like Hale had come to agree with Hobbes that law was based on authority. Hobbes’s attack on Coke (elaborating arguments found in *Leviathan*) set out a powerful argument rooting all law in the commands of the current sovereign; but he did not (as Bentham later would) propose a complete code of laws to be issued by the sovereign. This presented a problem for his theory of law, for it left him unable to explain the content of the rules of law, notably in crucial areas such as the law of property which did not rest either on the legislative pronouncements of the sovereign or on the latest *dictum* of a court. Hobbes, of course, was not a common lawyer and was not seeking to develop a theory which could explain the workings of a system of private law. But Hale, who answered Hobbes, was such a lawyer, and he was aware of the need to account for a system of rules of law which developed over time, but owed their validity to authority rather than mere reason. In Hale’s thought, the common law was built on original positive foundations, and was developed over time by the application of these original rules by judges to new situations. Custom and authority were thus linked. The judges could develop the law on the basis of reason alone, he argued, but only in the last resort.

Hale was the first common lawyer since Bracton seriously to contemplate putting the content of the common law into a comprehensive framework. However, he never completed his plan and his task was in effect executed by Blackstone in the eighteenth century. It has often been assumed that Blackstone, writing after 1688, took a Lockean view of the law, based on a theory of natural rights. But in fact, his vision—inconsistent and incoherent as it sometimes seemed—stood in the “positivist” tradition of Selden and Hale. His constitutional ideas echoed theirs, for he rooted sovereignty in the crown-
in-parliament, rather than in the people directly; and like them he saw the law in terms of a set of original positive rules agreed over time. If this could explain the rules of property and crime, however, he had far greater difficulties in explaining the law of obligations, which was increasingly important in the developing eighteenth century commercial society, in those terms. Blackstone was able to present a theory which could account for the validity of rules elaborated in court by judges drawing on sources extraneous to the common law, by arguing that the flexible remedies offered by the courts derived from positive foundations empowering the judges. But he could not explain the coherence of these rules and how they should develop.

The vision espoused by Selden, Hale and Blackstone may have been the dominant common lawyers’ view in England by the mid-eighteenth century; but it was not the only one available. By the mid-eighteenth century, this vision was facing challenges on a number of fronts. The first challenge to the English common lawyer’s view came from across the Atlantic, where American Whigs challenged the very positivist premises on which the notion of parliamentary sovereignty was based. They did not accept the historico-positivist view of the origins of the common law, which permeated the work of Selden, Hale and Blackstone. Instead, they held to a vision of ancient fundamental rights reminiscent of Coke’s jurisprudence. One reason for this was that the “technical” view of the common law espoused in England, which sought precise authority for propositions of law, often did not work well in America. For the status of particular legal rules was often uncertain in the new world, and here the common law was seen more as a set of principles, a mentalité rather than a technical toolbox. In America, this mentalité focused in particular on the fundamental principle that all law required consent. This was an idea associated with the common law; but it also informed broader political theories which sought to root sovereignty in the people. As lawyers on both sides of the Atlantic in the 1760s and 1770s began to dispute the meaning of the common law, and as Americans found it increasingly difficult to make conclusive arguments in terms of this law, so many of them began to move away from Coke’s common law language to John Locke’s natural rights language.

Americans, like Englishmen, based their ideas of a constitution on the principle of consent, as found in an original contract. However, their vision of this contract was very different from that of Hooker, Selden or Hale. Unlike the English common lawyers we have explored, they did not see all law as coming from the command of the superior sovereign constituted by an original contract between various interests, which could not be changed without the consent of all parties. For them, the constitution was instead made by a sovereign people, conferring power on governors who were trustees, while retaining sovereignty. The premises of their constitutional theory lay in a Lockean view of natural law. They took this a step further by creating a written constitution as a supreme law. It was on the basis of this text that writers like Alexander Hamil-
ton and judges like John Marshall developed the idea of judicial review. Although English lawyers had from the sixteenth century developed canons of interpretation which allowed equitable readings of statutes, they had not (despite the celebrated dicta of Coke in Bonham’s Case) argued that the common law could directly control parliamentary statutes. However, in America, the constitution was seen to be supreme above ordinary legislation, and guarded by the judiciary. While the Supreme Court judges began to look primarily to the words of the text in constitutional adjudication, they still made use of natural law concepts beyond the text itself in their decision making.

American and English thinking about the nature of sovereignty and the role of the judiciary in the constitution thus diverged in the eighteenth and early nineteenth centuries. However, when it came to private law, American lawyers in the early nineteenth century continued to embrace the content of the common law, eschewing demands for codification. Indeed, in many ways, the treatises written by men like Kent and Story were well in advance of those written by their English counterparts. If they accepted the common legal heritage, they nonetheless espoused different views of the basis of authority on which it was built: Blackstone’s “positivism” was not the only available view.

One of the positions they followed was that developed in Scotland by Lord Kames, who put forward a distinct jurisprudential theory around the same time that Blackstone was writing his Commentaries. While a number of Scottish institutional writers, under the influence of Pufendorf, had developed voluntarist definitions of law, Kames (following Shaftesbury and Hutcheson) looked to a natural jurisprudence based on the moral sense inherent in mankind, refined into the common sense of the community. A Scottish judge, working in a legal system in which little legislation was passed by a sovereign parliament now seated in Westminster, Kames sought a theory which could explain the development of the principles of law—and notably of obligations—without recourse to positive enactment. Instead of seeking to explain the positive foundations of particular rules (as English jurists did), or to put them into a comprehensive institutional structure (as his Scottish antecedents and contemporaries did), he sought to explain the principles of law by relating them to the nature of man in his social context. Kames’s attempt was to develop an “external” theory of legal development which would explain the “internal” workings of legal doctrine over time. In the end, however, Kames’s theory was a noble failure, for it did not solve the problem he had set himself: to root the principles on which legal obligation developed in a theory of man’s moral nature. The master and friend of both David Hume and Adam Smith, he ultimately invoked both the principles of a moral sense and of utility without fully reconciling them in his theory.

The most celebrated attack on Blackstone came not from American Whigs nor from enlightened Scots, however, but from another Englishman, Jeremy Bentham. Bentham’s attack on the common lawyers embraced both private
and public law. Following Hume, the young Bentham rejected the kind of contract theories espoused in America and by Blackstone and his common law predecessors, using instead the concept of the habit of obedience as the foundation of his theory of political society. In his mature work, he developed a theory according to which law was the command of a Supreme Operative Power in a state, which itself owed its authority to the Supreme Constitutive Power, or the people. He sought in this way to reconcile a positivist vision of law with a democratic political structure in which all the holders of political power would be responsible to the people. From his early career, Bentham had attacked the notion that there was a higher natural law, with authority to control positive human law. In his view, natural law amounted to no more than private opinion. He therefore rejected the natural law on which earlier thinkers had built their theories of law, looking instead to the principle of utility, and on the social fact of a habit of obedience. It was this which lay beneath his division of law and morals. Bentham did not hold that moral principles were irrelevant to law for ultimately the habit of obedience depended on the number of people whose sense of utility made them continue to obey the sovereign. However, he felt that while the habit remained in place, the validity of a law could not be determined by invoking purely moral principles. A legal system had to be explained in terms of an authoritative system of laws derived from the sovereign. It could not be understood in terms of vague moral principles.

Like his common law predecessors, Bentham thought of law in terms of authority rather than reason; but as a young man, he realised that the common law could not be conceived of as law in those terms. He felt that Blackstone’s attempt to explain and justify the common law had failed: and that in place of the common law with its fictitious commands, a complete code of laws would have to be enacted. Bentham was convinced that a rational code could be constructed, based on the principle of utility and taking into account the various sensibilities found in human nature; and he spent much of his life outlining the principles of such a code. The Pannomion would be the answer to the problem left unresolved by Hobbes. A system of law would be created, derived directly from the sovereign lawgiver, and leaving no terra incognita for judges to explore. Nonetheless, he never completed his task; and indeed, he found that, since the legislator had to work in the context of existing expectations (which themselves might derive from the inferential rules to be found from the common law), such a code would be difficult to construct.

Although there would be many projects for codification in both Great Britain and America in the nineteenth century, a code never came about. Instead, in England, John Austin tried to adapt the Benthamic vision to the common law. Austin derived his command theory and his concept of a political society largely from Bentham. However, he attempted to accommodate into this framework both existing judicial practice—the common law form of adjudication which Bentham had abhorred—and the existing substantive law.
It was this which made him such a popular and influential jurist in the nineteenth century. But in fact he ran into difficulties in both areas. His attempt to explain the *ratio decidendi* of common law cases in terms of sovereign commands ultimately did not work. Equally, he had problems in explaining the content of the common law in terms consistent with his Benthamite positivist theory. Austin certainly developed an analytical jurisprudence of abstract concepts with which to think about law. However, this jurisprudence was based on a concept of rights rather than duties, and Austin did not spell out where those rights come from. They were not in his theory clearly related to commands in the way Bentham had attempted to sketch out. Since the content of the common law which he outlined was not clearly related to a notion of command, and since its intrinsic content was not coherent, Austin was only able to offer a set of tools with which better to handle the materials one had, without fully explaining them. In effect, he was unable to complete the project of providing a coherent account of the common law as a system of rules which derived from the authority of a sovereign’s commands.

Austin’s jurisprudence proved highly influential in both England and America after 1860. Although his idea of law as the command of a sovereign legislator sat ill with the theory of the American constitution, his analytical jurisprudence, which sought to uncover the “principles, notions, and distinctions” common to all mature legal systems, proved congenial to scholars on both sides of the Atlantic, who saw the common law as a developing system and who sought to make sense of it. Thus, scholars like Langdell, who focused on private law, felt that law was an autonomous, technical science. It was not the mere will of the legislator, but rather there was a logical and coherent structure within the law, which could be uncovered by the trained jurist examining the materials generated by case law. This approach assumed an innate coherence in the law, but without explaining the law’s foundations. It was to accept one part of Austin, while ignoring the other.

Austin continued to maintain a grip over many university law courses, notably in England, in the later nineteenth century. Nevertheless, this era saw two attacks on his theory of law by those who conceived of it as a social artifact, and who felt it needed to be understood through its history. In England, his jurisprudence was attacked by Henry Maine in a number of ways. Firstly, Maine attacked Austin’s positivism, showing that his definition of a law was not one which could be applied universally. Maine showed that law often grew through a process of adjudication, in systems based on customary expectations where the judge could not be seen as a subordinate legislator. A colonial administrator, Maine showed in particular that Austin’s theories were not helpful when applied to Indian society. Secondly, Maine showed that there were no necessary and timeless principles in law, but that the very structure of legal ideas reflected the societies in which they were to be found; and that they changed over time. Maine sought to trace the evolution of law “from sta-
CONCLUSION

tus to contract,“ from the patriarchal family to the modern individual. In his project, he was not concerned with understanding the internal doctrine of particular areas of law, nor was he concerned with how judges would develop doctrine in future. Nor, indeed, did he challenge Austin’s understanding of current law in advanced societies. Instead, he aimed to show that in order to understand the nature of law and its basic premises, one had to look not at an abstract theory of sovereignty but at its external and social history over time.

In America, the Austinian vision came under attack from Oliver Wendell Holmes. Holmes shared many of Austin’s aims. He also sought to develop an analytical framework which would explain the law which had developed over time; and he sought to relate this to a theory of the nature and foundations of law in a way Langdell had failed to attempt. Moreover, like Maine, Holmes realised that law could not be seen merely from the jurist’s “internal” point of view. He found both Austin’s notion that all law derived from the commands of the sovereign and Langdell’s assumption of an innate rational coherence in law to be unsatisfactory. Holmes had the insight that law came not from an abstract source, but from what courts in fact did. It reflected the policy choices made by societies at various points in time. Substantive law was thus not a formal science, but followed perceptions of expediency. But unlike Maine, Holmes was also interested in the doctrinal developments of modern private law, seeking to explain the principles on which the law grew. His ambitions were thus in some ways similar to those of Kames; and he developed a similar view of the nature of obligation to Kames’s, based on an external “objective” standard of liability. Holmes did not derive this notion from a conjectural history and theory of the moral sense, as Kames did. Instead, he sought the best interpretation of his community’s laws as found in the records of its legal history and practice. However, he found in these sources a notion of the law not unlike Kames’s common sense, for he argued that law reflected the “felt necessities” of a community.

Just as Kames’s theory ultimately lacked the coherence which would allow it to fulfil the author’s aims, so Holmes came to realise the flaws in his theory of the common law, which undermined his aim to make the law a matter of juridical prediction. Besides seeking to explain the law in terms of what the community had done, Holmes also spoke of what was the best policy for the community. In his earlier thought, he felt that the best policy was to be found in the actual practices of the community. However, by 1890 he had come to doubt whether there was an objective sense of community values, which the jurist could uncover and use. Law was to be seen more clearly in terms of policy choices, the content of which could neither be determined from within the law, nor found in a cohesive set of community values. The grand jurisprudential project of explaining the nature and coherence of legal doctrine, and relating it to a theory of the foundations of law, which jurists had been working at in the period we have been covering, thus remained unachieved.


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