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DOCTOR BONHAM'S CASE: STATUTORY CONSTRUCTION OR CONSTITUTIONAL THEORY? *

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When James Otis argued the *Writs of Assistance Case*¹ in 1761, invoking Coke's statement in *Dr. Bonham's Case*² that an Act of Parliament "against common right and reason" is void,³ he laid, said Justice Holmes, "one of the foundations for American constitutional law."⁴ A tide of criticism has washed over *Bonham's Case*, pouring into every crevice of Coke's citations,⁵ and making it slippery footing for proponents of judicial review. But if we are to understand the impact of Coke's words on his contemporaries and on Colonial America we must, in Plucknett's words, "try to divest ourselves for a moment

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¹ Paxton's Case, Quin. 51 (Mass. Super. Ct. 1761).

² 8 Co. Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610). The pleadings are at 8 Co. Rep. 107a, 77 Eng. Rep. 638. For citations to the literature, see Thorne, *Dr. Bonham's Case*, 54 L.Q.R. 543 (1938); J. W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 32 (2d ed. 1961) [hereinafter cited as GOUGH]; 1 L. BOUDIN, GOVERNMENT BY JUDICIARY 75-77 n.2 (1932).

³ 8 Co. Rep. at 118a, 77 Eng. Rep. at 652.

⁴ O. W. HOLMES, *John Marshall*, 178 Mass. 624, 625 (1901), in COLLECTED LEGAL PAPERS 266 (1920).

⁵ For caustic criticism of Coke's citations, see 1 L. BOUDIN, *supra* note 2, at 492-517. See also Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926) [hereinafter cited as Plucknett].

of the critical habits of the modern historian," who can draw on resources that were inaccessible in earlier times,⁶ and "see the case as it would have appeared to a seventeenth century lawyer."⁷ So viewed, a respectable case can be made for Colonial reliance on Coke. Not that the validity of Coke's statement is essential to sustain the structure that the Founders went on to build. The animating force of an idea is not necessarily measurable by its verity. "We may deny, for example, the validity of belief in the supernatural, but we cannot deny its tremendous power."⁸ Though one may doubt a divine revelation to Mohammed, Mohammedanism nevertheless swept the world. The importance of Coke for judicial review does not therefore depend on whether he correctly stated the then existing law, but rather on the fact that at the time of the Constitutional Convention, Colonial America believed he did, and proceeded to act on that belief. Nonetheless, it is my theme, a lawyer of the seventeenth or eighteenth century might justly understand Coke to have meant exactly what he said: that courts could declare void statutes which were against "reason," a word that had a special meaning for the time: first, because of reiterated acceptance of that opinion for upwards of one hundred years after it had been uttered, and second, because the words seemed to reflect the legal tradition of the preceding centuries. This is not the prevailing view, and I beg to be indulged in an attempt to rehabilitate Coke's statement as a source of what we term "judicial review."

In the years preceding 1787, there was little or no incentive to go behind Coke's statement, the more so because it was congenial to the Colonial forces that were mounting an attack on parliamentary claims of supremacy.⁹ Blackstone, who first articulated the claim for the

⁶ Plucknett 40-41, 45.

⁷ *Id.* at 41. See also Thorne, *Introduction to A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES* 12-13 n.12 (S. Thorne ed. 1942) [hereinafter cited as Thorne, *Introduction*].

⁸ H. MULLER, *THE USES OF THE PAST* 36 (1952). For years France was wracked by dissension about the Dreyfus case largely because of popular belief in a false version of his "guilt" propagated by the army. "What acted on public opinion in the Affair was never what happened but what the Nationalist press and whispered rumor said happened." B. TUCHMAN, *THE PROUD TOWER* 180-81; see *id.* at 171-226 (1965). Charles G. Haines noted "the influence on legal thinking of incorrect facts and incorrect assumptions when such facts and assumptions are believed to be true." C. G. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 91 n.7 (2d ed. 1932).

⁹ "In the American colonies the [Glorious] Revolution meant something different. Parliament was not their hero but a distant and unsympathetic body in whose deliberations they had no part. When it aroused their resentment, therefore, it was natural to remember the teaching of the great Chief Justice" Plucknett 69. "It is the tradition of Coke's time that passes over to the American colonies, for it is upon the methods and constitutional views of Coke that the colonial lawyers were nurtured." Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 563 (1938) [hereinafter cited as Goebel].

supremacy of Parliament in 1765,¹⁰ referred to Coke as an object of "great veneration and respect," a "man of infinite learning in his profession, [whose] writings are so highly esteemed, that they are generally cited without the author's name."¹¹ Jefferson recorded that there never was "one of profounder learning in the orthodox doctrines of the British Constitution or what is called British rights" than Coke.¹² Coke's statement had been repeated (though without citation) by Chief Justice Hobart in 1614;¹³ it had been approved by Chief Justice Holt;¹⁴ and it had been taken up in the *Abridgements*.¹⁵ Colonial lawyers may therefore be pardoned for not going behind Coke to his hoary citations, if they were indeed accessible.¹⁶ In the eyes of the Colonists, "reiterations of the dictum by Coke's successors on the bench, and by commentators, had given to it, by the middle of the eighteenth century, all of the character of established law."¹⁷

Professor Crosskey stated that the effects of Coke's "ill-founded ideas . . . were almost immediately wiped out, by 'the glorious Revolution' of 1688"¹⁸ In the seventeenth century the issue was "between parliament and the king, and in this the courts and parliament were allies."¹⁹ The "Glorious Revolution," to be sure, established the power of Parliament vis-à-vis the King; but Chief Justice Holt apparently concluded that it left Coke's view untouched, for shortly thereafter—in 1702—he stated that Coke's statement is "a very reasonable and true saying."²⁰ The fact that the Revolution secured

¹⁰ "The omnipotence of Parliament was not the orthodox theory of English law, if orthodox at all, even in Holt's time. It was first formally adopted . . . in Blackstone's Commentaries. . . . Down to the Revolution the common legal opinion was that statutes might be void as 'contrary to common right'" Pollock, *A Plea for Historical Interpretation*, 39 L.Q. Rev. 163, 165 (1923). Moreover, "for well over a century legislative activity in the colonies had been subject to the test of conformity with English law. Thus, the common law system had itself served as a standard of right, in a sense as a sort of constitution." Goebel 567.

¹¹ 1 W. BLACKSTONE, COMMENTARIES *72.

¹² Quoted in E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 31 n.45 (1914). In New York, ". . . Coke was by all odds the writer most used and cited. There are many indications that this was true in other provinces." Goebel 564 n.25.

¹³ Day v. Savadge, Hobart 85, 87, 80 Eng. Rep. 235, 237 (C.P. 1614), discussed in text accompanying notes 114-15 *infra*.

¹⁴ City of London v. Wood, 12 Mod. 669, 687, 88 Eng. Rep. 1592, 1602 (K.B. 1702) discussed in text accompanying notes 120-22 *infra*.

¹⁵ See discussion in text accompanying notes 123-25 *infra*.

¹⁶ Cf. Plucknett 45. Only one *Year Book* appears among several catalogues of well-known private libraries in New York, in the library of Judge William Smith. P. HAMLIN, LEGAL EDUCATION IN COLONIAL NEW YORK 171-96 (1939). As late as 1766, Chief Baron Comyns of the Court of Exchequer lists in his *Digest* the medieval precedents cited by Coke, under Comyns' citation of *Bonham*, giving them credit in reliance on Coke. 4 J. COMYNs, DIGEST 340 tit. "Parliament" (1766).

¹⁷ Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 104 (1910). Horace Gray made a similar observation 100 years ago in his appendix to Josiah Quincy's *Massachusetts Reports*. QUIN. 526 (1865) (App. I).

¹⁸ 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 941 (1953).

¹⁹ GOUGH 49 (footnote omitted).

²⁰ City of London v. Wood, 12 Mod. 669, 687, 88 Eng. Rep. 1592, 1602 (K.B. 1702).

judicial tenure during good behavior²¹ might have persuaded the Colonists that it sought to strengthen rather than weaken the judiciary. The "omnipotence of Parliament," said Sir Frederick Pollock, "was first formally adopted . . . in Blackstone's Commentaries."²² Without mentioning either Coke or Holt, Blackstone acknowledged that "it is generally laid down more largely, that acts of parliament contrary to reason are void," but rejected the proposition because "to set the judicial power above that of the legislature . . . would be subversive of all government,"²³—a statement that 150 years of American history effectively refutes. Madison certainly did not conceive in 1785 that Parliament had become uncontrollable, for he stated, "*The Judiciary Department* merits every care[.] Its efficacy is Demonstrated in G. Brittain where it maintains private Right against all the corruptions of the two other departments" ²⁴

Sound or not, Coke's statement became a rallying cry for the Colonists when it was resoundingly invoked by Otis: if an Act of Parliament had the effect claimed, he argued, it would be "against the Constitution" and therefore void.²⁵ His argument put a legal footing

²¹ S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 178 (1965). The judicial tenure provision of the Act of Settlement was designed to stiffen judicial backbones against royal encroachments. C. McILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 77 (1910). True, the Act of Settlement of 1700 made judges removable on an address of both Houses of Parliament, but that procedure had not been employed prior to 1787, and was employed for the first and only time in 1830, when an Irish judge was removed. H. W. R. WADE, *ADMINISTRATIVE LAW* 281 (2d ed. 1967).

²² Pollock, *A Plea for Historical Interpretation*, 39 L.Q. REV. 163, 165 (1923).

²³ 1 W. BLACKSTONE, *COMMENTARIES* *91. In fact, Blackstone had not quite sorted out his own ideas. Although he stated that parliament enjoyed uncontrollable power, even to enact unreasonable laws, *id.*, he uneasily noted that "the omnipotence of parliament" is "a figure rather too bold." *Id.* at *161. He repeated the traditional learning that "no human law has any validity, if contrary to" natural law. *Id.* at *41. He also emphasized that the "absolute rights" of Englishmen included "personal security," "personal liberty," and "private property," *id.* at *127, *129, and stated that the law "will not authorize the least violation of" private property. *Id.* at *139.

In his contribution to the *ENCYCLOPEDIA BRITANNICA* (1953 ed.) on Blackstone, F. W. Sherwood states that "Whether through the natural conservatism of a lawyer, or through his own timidity and subserviency as a man and a politician, he is always found to be a specious defender of the existing order of things." *Id.* at 687.

²⁴ 2 J. MADISON, *WRITINGS* 170 (G. Hunt ed. 1901).

²⁵ 2 J. ADAMS, *LEGAL PAPERS* 127 (L. Wroth & H. Zobel eds. 1965). James Otis left no doubt that it was for the courts to declare such act void. He said, for example, that "the judges of the executive courts have declared the act 'of a whole Parliament void.'" Otis, *The Rights of British Colonies Asserted and Proved*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 408, 455 (B. Bailyn ed. 1965). Again, "it will not be considered as a new doctrine that even the authority of the parliament of Great Britain is circumscribed by certain bounds which if exceeded their acts become those of mere power without right, and consequently void. The judges of England have declared in favour of these sentiments, That acts against the fundamental principles of the British Constitution are void," citing Coke, Hobart and Holt. *Id.* at 476 (footnote omitted); *cf. id.* at 449-50. True it is that in the same pamphlet Otis said that the Parliament was "uncontrollable but by themselves They only can repeal their own acts." Quoted in B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 179 (1967) [hereinafter cited as BAILYN]. Here Otis exhibits some of the confusion that earlier beset Chief Justice

under Colonial resistance, and gave a fresh vitality to Coke that is evidenced by a number of citations in the years that immediately followed.²⁶ The most extensive exposition was that of James Varnum in the 1786 Rhode Island "paper-money" case, *Trevett v. Weeden*, a cause célèbre which Varnum broadcast in pamphlet form.²⁷ If these citations are scattered, they are countered by only one citation of Blackstone.²⁸ And the statements by Lieutenant-Governor Thomas Hutchinson in Massachusetts, that "the people in general" relied on Coke, indicate that such reliance was not limited to published citations.²⁹ Thus, the argument that Coke had been discredited does not rest on

Holt, see text accompanying notes 120-22 *infra*. But as Professor Bailyn notes, Otis' contemporaries were "unencumbered by Otis' complexities," BAILYN 180, and they fastened on the idea that an act contrary to the Constitution is void. This was the argument made by John Adams, with Otis concurring, in 1765, in opposition to the Stamp Act. Memorial of Boston, Quin. 200, 202 (1765).

What "Constitution," asks Professor Bailyn, BAILYN 176. I would say, the only "Constitution" that was known to a 17th- or 18th-century lawyer, the "supremacy of law," which is discussed below. Lieutenant-Governor Hutchinson did not misunderstand, for he wrote on September 12, 1765: "[O]ur friends to liberty take the advantage of a maxim they find in Lord Coke that an Act of Parliament against Magna Carta or the peculiar rights of Englishmen is *ipso facto* void." Quoted in Plucknett 63. Similar deductions had been drawn by Justice Symonds in Massachusetts 100 years earlier, see note 118 *infra*. So too, Jefferson regarded Coke as profoundly learned in the "orthodox doctrine of the British Constitution or what is called British rights," quoted in E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 31 n.45 (1914), rights which Blackstone himself considered to be "absolute." See note 23 *supra*. In 18th-century America, Bailyn tells us, "It was taken as a maxim by all . . . that it was the function of the judges 'to settle the contests between prerogative and liberty . . . to ascertain the bounds of sovereign power, and to determine the rights of the subject,'" BAILYN 74. When the Colonists felt themselves threatened by legislative oppression they not unnaturally again looked to the judges to "ascertain the bounds of sovereign power, and to determine" their rights.

²⁶ When Justice William Cushing, later a member of the Supreme Court, wrote John Adams, "I can tell the grand jury the nullity of acts of parliament," Adams replied, "You have my hearty concurrence in telling the jury the nullity of acts of parliament." 9 J. ADAMS, *WORKS* 391 n.1, 390 (C. F. Adams ed. 1854). In 1766, a Court of Hustings in Virginia held that a law of Parliament imposing stamp duties in America, binding on Virginia, was unconstitutional. 5 J. B. McMASTER, *A HISTORY OF THE PEOPLE OF THE UNITED STATES* 394-95 (1905). In 1772, Mason argued, citing *Bonham's Case*, that a Virginia Act making certain Indians slaves was "void," because "contrary to natural right and justice." *Robin v. Hardaway*, Jeff. 109, 114 (Va. Gen. Ct. 1772).

²⁷ *Trevett v. Weeden*, 4 Am. St. Tr. 548 (R.I. Super. Ct. 1786); Proceedings Against the Justices, 4 Am. St. Tr. 586 (R.I. Gen. Ass. 1786). The cases are abstracted in 1 J. THAYER, *CASES ON CONSTITUTIONAL LAW* 73 (1894), discussed in C. G. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 105-12 (1932).

²⁸ *Rutgers v. Waddington* (N.Y. Mayor's Ct. 1784), 1 J. THAYER, *CASES ON CONSTITUTIONAL LAW* 63 (1894), discussed in C. G. HAINES, *supra* note 27, at 98-104. The Blackstonian argument is quoted by Haines at 99-100.

²⁹ In Massachusetts, Lieutenant-Governor Hutchinson wrote in September, 1765, that "the prevailing reason [among "the people in general"] at this time is, that the Act of Parliament is against the Magna Charta and the natural rights of Englishmen, and therefore according to Lord Coke null and void." Quoted in Plucknett 63. Iredell's statement in 1787 likewise reflects acceptance of Coke's doctrine. While noticing the alleged "absolute power" of Parliament, he stated that "any act passed, *not inconsistent with natural justice* (for that curb is avowed by the judges even in England)" would be binding. 2 G. J. McREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 172 (1858). In his Appendix to Josiah Quincy's *Massachusetts Reports*, Horace Gray states that the *Bonham* doctrine "was a favorite in the Colonies before the Revolution" and appends numerous citations. Quin. 527 (1865) (App. I).

eighteenth-century judicial repudiation, but on inferences drawn from Blackstone's principle of "legislative supremacy,"³⁰ which the Founders categorically rejected.³¹

Today criticism of *Bonham's Case* as a "foundation" of judicial review is more apt to be that Coke merely stated "a familiar common law canon of [statutory] construction rather than a constitutional theory."³² Shortly stated by Professor Bailyn, the argument is that "Coke had not meant . . . 'that there were superior principles of right and justice which Acts of Parliament might not contravene'." By "saying that courts might 'void' a legislative provision that violated the constitution he meant only that the courts were to construe statutes so as to bring them into conformity with recognized legal principles."³³

For purposes of the present discussion it suffices to state that Bonham was summoned to appear before the Royal College of Physicians, and after examination was found deficient in medical science, fined 100 shillings and forbidden under pain of imprisonment to practice until he had been admitted to the College. When Bonham continued to practice, he was committed to prison, after further proceedings, by the Censors of the College, and thereupon brought an action for false imprisonment. The issue to be examined is whether the Royal College of Physicians was empowered by statute to fine unlicensed, as distinguished from incompetent, physicians, and more particularly the *Fourth* reason adduced by Coke to deny the power.

³⁰ 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 941 (1953).

³¹ The influence of Blackstone on the Colonies is discussed in chapter 2 of my forthcoming book. Here I shall mention only a few highlights. Gouverneur Morris stated in 1785 before the Pennsylvania Assembly "that the boasted omnipotence of legislative authority is but a jingle of words . . . [F]reemen must feel it to be absurd and unconstitutional." 3 J. SPARKS, *THE LIFE OF GOUVERNEUR MORRIS* 438 (1832). In the North Carolina Ratification Convention, Maclaine noticed Blackstone's view that "the power of Parliament is transcendent and absolute" and then asked, "Has any man said that the legislature can deviate from this Constitution? The legislature . . . cannot travel beyond its bounds." 4 J. ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 63 (2d ed. 1888). Iredell, a leader of the North Carolina convention, and later a Justice of the Supreme Court, stated in a 1786 address respecting the formation of the North Carolina constitution:

It was, of course, to be considered how to impose restrictions on the legislature . . . [to] guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language from Great Britain, of the omnipotent power of the British Parliament, but had severely smarted under its effects. We . . . should have been guilty of . . . grossest folly, if in the same moment when we spurned at the *insolent despotism* of Great Britain, we had established a *despotic* power among ourselves. Theories were nothing to us, opposed to our own severe experience.

2 G. J. McREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 145-46 (1858).

³² Editorial note, 2 J. ADAMS, *LEGAL PAPERS* 118 (L. Wroth & H. Zobel eds. 1965) (footnote omitted). See also GOUGH 35.

³³ BAILYN 177.

Since the College was to receive one half of the fine, said Coke, it was judge in its own cause—a practice contrary to the common law:

[I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void³⁴

Let it be assumed that Coke construed the statute as not conferring power to fine in the premises because that construction would render it void—in modern terms, a construction to avoid “constitutional” doubt. To describe Coke’s statement as a “canon of [statutory] construction” by no means, however, exhausts its implications; there remains his affirmation that a statute which makes a party judge in his own cause is contrary to “common right and reason” and therefore void. That statement is not deprived of constitutional significance because it was uttered in the process of “construction.” We would, of course, be attributing to Coke an as yet undreamed of conceptualization were we to conclude that he deemed himself engaged in fashioning constitutional theory. Nevertheless, attachment of the label “construction” to the germinal concept—an Act of Parliament that makes a party judge in his own cause is against “reason” and void—does not make what we term the “constitutional” problem disappear. Strictly speaking, so far as the *Fourth* reason goes, there was no problem of “construction.” As Professor Thorne justly states, “The words . . . were straightforward”³⁵—they plainly made the College judge in its own cause. But I would not agree that in interpreting these words Coke “was concerned only with the application of a statute.”³⁶ This was not the case of excepting the single, unjust application of words that *generally* were applicable justly.³⁷ Rather this part of the Act was void in the only application it might have.

³⁴ 8 Co. Rep. at 118a, 77 Eng. Rep. at 652.

³⁵ Thorne, *Introduction*, *supra* note 7, at 85.

³⁶ “Coke was concerned only with the application of a statute that led to results ‘encounter common droit & reason,’ not with the theory that ‘an Act of Parliament may be void from its first Creation’ because of a conflict between its provisions and fundamental, natural, or ‘higher’ law.” *Id.* at 89.

³⁷ “St. Germain recognized [certain cases ‘in which statutes had not been applied in particular cases because of the injustice that would ensue’] as . . . ‘. . . an exception of the law of god, or the law of reason, from the general rules of the law of man, when they by reason of their generalty would in any particular case judge against the law of god, or the law of reason’ . . .” *Id.* at 78.

The law of nature and of reason, states Holdsworth, required “abstract justice to be done in each individual case, even at the cost of dispensing (if necessary) with the law of the state.” W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 93 (1938). Even as an “exception” to avoid an unjust “application” the rationale differed little from the general rule which governed laws in conflict with the law of reason. See text accompanying notes 45, 46, 50 *infra*.

Professor Thorne has put the issue into sharper focus: Did Coke mean that the statute was void *ab initio* or merely "ineffective"?

Coke seems to be asserting that there were acts of Parliament void *ab initio* since they conflicted with common right and reason, but if this interpretation of his words is adopted one has difficulty in explaining both the absence of the familiar passages in the *Doctor and Student*, and elsewhere, that might have been usefully cited, and his references in the same sentence to repugnant statutes and acts impossible to be performed. Such acts he likewise considered "void," but clearly that section of an act which is inconsistent with another portion of it need only be considered ineffective, nor need the authority and validity of a statute that it is impossible to apply be impugned.³⁸

Coke, continues Professor Thorne,

must be understood to say that "in many cases the common law will control acts of parliament"—that is, will restrict their words in order to reach sound results; and "sometimes it will adjudge them to be completely void"—that is, will reject them completely if modification cannot serve.³⁹

One who would take issue with Professor Thorne must tread warily, for it is he who has made us aware of the shifting currents in the early centuries and of the need for assaying judicial treatment of statutes in light of the developing and changing authority of Parliament.⁴⁰ Nevertheless, his analysis stirs doubts in my mind, doubts that I set forth with deference, realizing that my suggestions may excite still other doubts. In my view, there is little or no evidence that the distinction drawn between void *ab initio* and "ineffectiveness" played an appreciable role in Coke's time. Our own theorizing to one side, a seventeenth-century lawyer and a later Colonial might well have understood—as, in fact, they did—Coke to mean *simpliciter* that no Act of Parliament could contravene "fundamental" law. But first a closer look at the suggested distinction.

To begin with Coke's omission to cite the "familiar passages" that he "had used . . . in Calvin's Case,"⁴¹ a case decided only two

³⁸ Thorne, *Introduction*, *supra* note 7, at 86-87 (footnotes omitted).

³⁹ *Id.* at 88.

⁴⁰ See Thorne, *Introduction*, *supra* note 7; Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202 (1936). His analysis of *Bonham* in terms of statutory construction rather than constitutional theory has been widely accepted. See, e.g., 2 J. ADAMS, LEGAL PAPERS 118 (L. Wroth & H. Zobel eds. 1965); BAILYN 177. For earlier views to the same effect see GOUGH 35.

⁴¹ Thorne, *Introduction*, *supra* note 7, at 86, 86 n.184. Calvin's Case, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (C.P. 1608).

years before *Bonham*, argued by almost all the notables of the day, and decided by the Lord Chancellor and twelve judges. Coke himself observed that the case was "the longest and weightiest that ever was argued in any Court."⁴² There Coke had said that "the law of nature is part of the law of England"; he cited *Doctor and Student* (a work published in 1518) for the proposition that it is "immutable," and went on to say,

Parliament could not take away that protection which the law of nature giveth unto him; and therefore notwithstanding that statute, the King may protect and pardon him.⁴³

Here was judicial recognition that "notwithstanding statute" a subject could not be deprived of rights protected by the law of nature.

Why didn't Coke cite *Doctor and Student* in *Bonham*? The argument from silence is inconclusive, and against it may be urged that having recently examined the point in a "great case" wherein Coke had said that law on the point "appeareth plainly and plentifully in our books,"⁴⁴ he might well have felt no need to repeat citations for a point so generally accepted and so recently reiterated. From Coke's citation of *Doctor and Student*, it may also be inferred that he employed "reason" as equivalent to the law of nature, for that dialogue stated that "The law of nature . . . is also called the *law of reason*," and that English lawyers were accustomed to say that if anything "be prohibited by the law of nature . . . it is against reason," precisely the words employed by Coke.⁴⁵ Under those circumstances a seventeenth-century lawyer might reasonably assume that Coke's "against reason" was the familiar version of "against the law of nature."⁴⁶ From this important consequences flow.

⁴² Calvin's Case, 7 Co. Rep. 1a, 3b, 77 Eng. Rep. 377, 381 (C.P. 1608); see *id.* at 2a, 77 Eng. Rep. at 379.

⁴³ 7 Co. Rep. at 12b, 13b, 14a, 77 Eng. Rep. at 391, 392-93. Gough states that "we need not read more into Coke's opinion than a willingness . . . to adopt a strict interpretation of the law. We can find support for this in Bacon's speech on Calvin's behalf in the course of the same case." Gough 45. Because, said Bacon, "civil and national laws" "tend to abridge the law of nature, the law favoureth not them, but takes them strictly . . ." Calvin's Case, 2 How. St. Tr. 559, 595 (C.P. 1608). With Bacon's argument in his ears, Coke significantly chose to speak, not in terms of strict construction, but of "protection" "notwithstanding that statute." 7 Co. Rep. at 14a, 77 Eng. Rep. at 393.

⁴⁴ 7 Co. Rep. at 13b, 77 Eng. Rep. at 393, quoted note 63 *infra*.

⁴⁵ ST. GERMAIN, DOCTOR AND STUDENT, ch. 2, at 5, ch. 5, at 12 (W. Muchall ed. 1886). The same identification of the law of nature with reason was made 41 years after *Bonham* by John Milton in his *Defense of the People of England* (1651). The "foundation of all laws," he said, is the "principle, which likewise all our lawyers recognize, that if any law or custom be contrary to the law of God or of nature, or in fine, to reason, it shall not be held a valid law." 7 J. MILTON, WORKS 427 (C. Keyes ed. 1932).

⁴⁶ It has been said that "Coke does not use the concept of 'reason' the way the medievalist did . . . he does not equate 'fundamental law' with the orthodox sense of 'higher' or 'natural' law." Lewis, *Sir Edward Coke (1552-1633): His Theory of*

Medieval law, said Gierke, "declared that every act of the Sovereign which broke the bounds drawn by Natural Law was formally null and void."⁴⁷ It is safe to say that early English lawyers would have agreed.⁴⁸ Gough considers that we must extend "belief in natural law from medieval lawyers to lawyers of the sixteenth and seventeenth centuries,"⁴⁹ as in fact Coke recorded in *Calvin's Case*. Gierke's version of medieval law was that of *Doctor and Student*:

if any law made by [man], bind any person to any thing that is against the said laws [of "reason"], it is no law, but a corruption, and manifest error.⁵⁰

On the justifiable assumption that Coke, who had cited *Doctor and Student* in 1608, meant by his 1610 reference to "against reason" to state the law of nature summarily, we may infer that he meant the Act was void *ab initio*—if the refined distinction we now draw occurred to him at all.

Does his use of "void" to comprehend "repugnant or impossible to perform" compel the inference that he merely meant "ineffective"?

"Artificial Reason" as a Context for Modern Basic Legal Theory, 84 L.Q. REV. 330, 338 (1968). "For Coke . . . law is a work of reason in this sense, that it is the nature of law to be reasonable; and the test of its reasonableness, he thinks, is its ability to withstand the test of time." *Id.* at 339. A Colonial who read his remarks in *Calvin's Case* might justly conclude that Coke believed that a statute had to yield to the law of nature or "reason" in its "orthodox sense."

⁴⁷ Quoted in C. McILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 272 (1910).

⁴⁸ "[N]o human law which was contrary to these universal laws [of "nature or reason"] was valid." 4 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 280 (3d ed. 1945). "The distinction between law natural and law positive . . . was part of the medieval equipment. In fifteenth-century England it was a commonplace of jurisprudence." K. PICKTHORN, *EARLY TUDOR GOVERNMENT: HENRY VII* 164 (1934) [hereinafter cited as PICKTHORN].

"The prevalent mediæval conceptions about law and politics would certainly have led lawyers and statesmen to deny the proposition that there were no limits to the things which could be effected by a statute." 2 W. HOLDSWORTH, *supra*, at 444 (4th ed. 1936). Says Plucknett, "Of course, there is no doubt that the mediæval mind would never think of postulating the absolute sovereignty of Parliament or State." T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 319 (4th ed. 1947).

⁴⁹ GOUGH 45. In 1604 the Speaker of the House of Commons included the law of nature and of reason in the laws "whereby the ark of this government hath ever been steered." Quoted in C. McILWAIN, *supra* note 47, at 63 n.1. John Milton, in his *Defense of the People of England*, adverts to "that fundamental maxim in our law . . . by which nothing that is contrary to the laws of God and to reason can be accounted a law 7 J. MILTON, *WORKS* 445 (C. Keyes ed. 1932). See also note 45 *supra*.

⁵⁰ ST. GERMAIN, *DOCTOR AND STUDENT*, ch. 19, at 53 (W. Muchall ed. 1886). Holdsworth comments, "no human law which was contrary to these universal laws was valid." 4 W. HOLDSWORTH, *supra* note 48, at 280. PICKTHORN 134, states that "Every judge of the later fifteenth century . . . however reluctant to 'annul any act made in parliament,' would have agreed with a legal writer [St. Germain, author of *Doctor and Student*] a generation later that 'against this law (of Reason) prescription, statute, nor custom may not prevail; and if any be brought against it, they be not prescriptions, statutes nor customs, but things void against justice.'" ST. GERMAIN, *DOCTOR AND STUDENT*, *supra*, ch. 2, at 5.

Coke had lumped together Acts that were "against common right and reason, or repugnant, or impossible to be performed," and all three were indifferently cited as examples of Acts that courts would adjudge to be utterly void." The word "impossible" was discussed in 1673 by Chief Justice Vaughan as if it were analogous to a breach of natural law, and so too of "contradictions"⁵¹ which being "impossible to obey" were "no law."⁵² Vaughan was far closer in time and therefore perhaps in sympathetic understanding to Coke than are we; consequently Coke's enumeration of "impossible" and "repugnant" makes it no more difficult to conclude that by "void" he meant null *ab initio* than to arrive at "ineffective." The fact that language suggesting "ineffective" was employed on one occasion,⁵³ whereas reference was made to "void" on another, does not without more indicate that the judges had a firm distinction in mind. There is danger of reading back into Coke's mind a differentiation that is clear enough today but to which a seventeenth-century lawyer may have been oblivious.⁵⁴ To give a meaning to words in the process of "construction" that was "quite contrary to the text" in order to make

⁵¹ Thorne has called attention to early learning explaining "repugnancy" in terms of "contradiction":

But what yf the wordes of an estatute be contraryant or repugnant, what is there then to be saide? And suerelie therin we ought to make our construcion as nyghe as we can in suche sorte that nothinge be repugnant; yet yf yt can not be avoided but that a repugnancie must nedes be, then is the former sayenge good & the thyng repugnant voide . . . and therefore are the former wordes good and the later, because they make a jarre by reason of the repugnancye, shalbe omytted.

A DISCOURSE UPON THE EXPOSITION AND UNDERSTANDINGE OF STATUTES 132-33 (S. Thorne ed. 1942). Probably the *Discourse* was written before 1567. See Professor Thorne's *Introduction*, at 11. See also Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543, 549 (1938).

⁵² After explaining that murder signifies unlawful killing, stealing is unlawful taking, and that a royal "dispensation" (*i.e.*, an authorization to kill as distinguished from a pardon after the fact) would make them "lawful," Chief Justice Vaughan said, "So the same thing, at the same time, would be both lawful and unlawful, which is impossible."

"For the same reason, a law making murder, stealing [etc.] lawful, would be a void law in itself."

"For a law which a man cannot obey, nor act according to it, is void, and no law: and it is impossible to obey contradictions, or act according to them." Thomas v. Sorrell, Vaughan 330, 336-37, 124 Eng. Rep. 1098, 1102 (Ex. 1673). Is it far-fetched to infer that for Vaughan "impossible" and "contradiction" (repugnancy) were synonymous with "against reason" or "against the law of nature"?

⁵³ Thorne, *Introduction*, *supra* note 7, at 87 n.186.

⁵⁴ What McIlwain has said is relevant: "Institutions that are now narrow and definite become as we trace them back indistinguishable from others that we have always considered equally definite. . . . To read the same definiteness into the earlier institutions is not necessarily to put words into men's mouths which they never uttered, but it is to put ideas into their heads that they never dreamed of." McILWAIN, *supra* note 47, at 146-47. Compare Thorne, *Introduction*, *supra*, note 7, 28: "No judge or serjeant had regarded the nonextension of an act to ancient demesne as an 'exception out' of the statute, accomplished through an exercise of judicial discretion, for to say that ancient demesne was bound by an enactment but saved from its operation is a refinement (superfluous in a private-law scheme) for which no contemporary support can be found."

them agree with "reason"⁵⁵ might well have appeared to that lawyer as "nullification" in fact. Would it ultimately matter to him that a crucial portion of a statute was held void from its creation rather than because the contradictory, "repugnant" section must be "omitted"?⁵⁶ The difference matters to us because we attach importance to concepts, such as the separation of powers, which were as yet unborn.⁵⁷ To the mind of the seventeenth-century lawyer, we may conjecture, rejection of a statute as "ineffective"—rejection, to borrow Thorne's phrase, "completely if modification cannot serve"—would as effectively negate it for practical purposes as would a flat declaration that it was "no law" and void, as indeed Chief Justice Vaughan was not much later to say about "impossible" and "contradiction."⁵⁸ And so much may be deduced from the excoriation of Coke by his eminent contemporary, Lord Ellesmere, for "reversing" the Parliament, for "trampling upon" and "blowing away" an Act of Parliament "as vain, and of no value."⁵⁹ If the distinction we draw today between "ineffective" and "void *ab initio*" lurks in Coke's phrase, Ellesmere's diatribes suggest that it was then of no practical consequence.

What Coke failed to state—"the theory that any act of the sovereign that broke the bounds of natural law was formally null and void"—was, in Professor Thorne's view, "soon advanced" by Chief Justice Hobart.⁶⁰ Patently restating *Bonham*, though without mention of it,⁶¹ Hobart said, "even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in it self, for *jura naturae sunt immutabilia*, and they are *leges legum*."⁶² So far as I can discern, Hobart differed from Coke's statement in *Bonham* only in substituting "natural equity" for "common right and reason" and in including the Latin phrase, which Coke had earlier quoted in

We are cited to no use of the words "*ab initio*" in the present context by Coke or his predecessors; they said only that when positive law contravenes natural law it is "no law". Chief Justice Vaughan said the same thing about "impossible" and "contradictions". In 1712, counsel apparently seeking to restrain application of the *Bonham* doctrine to a "very clear case," posited that it meant "void *ab initio*." Plucknett, *supra* note 5, at 58. See text accompanying notes 133-35 *infra*.

⁵⁵ *Fulmerston v. Steward*, 1 Plowden 101, 109, 75 Eng. Rep. 160, 171 (C.P. 1554). See note 67 *infra*.

⁵⁶ See notes 37 & 51 *supra*.

⁵⁷ GOUGH 46, 48.

⁵⁸ See note 51 *supra* and accompanying text.

⁵⁹ ELLESMERE, OBSERVATIONS ON THE REPORTS 21, quoted in footnote to *Bonham's Case*, 77 Eng. Rep. at 652 n.C. See text accompanying note 111 *infra*.

⁶⁰ Thorne, *Introduction*, *supra* note 7, at 91.

⁶¹ Possibly Hobart did not cite *Bonham's Case*, says Plucknett, because his "natural caution warned him against too open a tribute to one whose fortunes had already begun to decline." Plucknett, *supra* note 5, at 50.

⁶² *Day v. Savadge*, Hobart 85, 87, 80 Eng. Rep. 235, 237 (C.P. 1614).

Calvin's Case, citing *Doctor and Student*,⁶³ but which he had omitted in *Bonham*. Coke's "against reason," as explained in *Doctor and Student*, was the familiar reference to the immutable law of nature.

Let us now consider the matter in the perspective of "constitutional theory." Commenting on judicial disregard of statutes in the fourteenth century, Plucknett stated that "constitutional questions" "were not asked." If it was desirable

to neglect some words of a statute, then they were quietly set aside, but in doing so neither counsel nor judges enquired into the nature of statutes and legislation, the sovereignty of Parliament, the supremacy of the common law, the functions of the judicature, and all the other questions which the modern mind finds so absorbingly interesting.⁶⁴

Professor Thorne arrived at the same conclusion.⁶⁵ This "free and easy attitude" begins to disappear in the middle of the fourteenth century, we are told by Plucknett;⁶⁶ yet as we pass through the fifteenth century into the age of Coke, "the power of the courts to construe or misconstrue legislation was unimpaired, and indeed increased. . . . Plowden . . . gloried in the liberty which the courts enjoyed in playing fast and loose with statutes."⁶⁷

All this to be sure was in the domain of "private law," "public law" being still in the womb of the future. But as Professor Thorne observes, "That rights would have been infringed or unjust results would have ensued upon the application of a statute had previously

⁶³ 7 Co. Rep. at 13b, 77 Eng. Rep. at 392-93: "[I]t is certainly true that *jura naturalia sunt immutabilia*. And herewith agreeth Bracton . . . Doctor and Student . . . And this appeareth plainly and plentifully in our books."

⁶⁴ PLUCKNETT, CONCISE HISTORY, *supra* note 48, at 314.

⁶⁵ Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 206-07 (1936). In Thorne, *Introduction*, *supra* note 7, at 71, he refers to "a group of decisions that permitted acts of Parliament phrased in unambiguous terms to be completely disregarded since they led to results that were considered improper. No principle of jurisprudence or political theory that might serve as an explanation was offered." (footnote omitted).

⁶⁶ PLUCKNETT, CONCISE HISTORY, *supra* note 48, at 315.

⁶⁷ *Id.* at 316-17. In *Fulmerston v. Steward*, 1 Plowden 101, 109, 75 Eng. Rep. 160, 171 (C.P. 1554), Justice Bromley stated, "it is most reasonable . . . to expound the words, which seem contrary to reason, according to good reason and equity And so the Judges, who were our predecessors, have sometimes expounded the words quite contrary to the text . . . in order to make them agree with reason and equity," thereby exhibiting a sense of continuity with the past. And in *Partridge v. Strange*, 1 Plowden 77, 88, 75 Eng. Rep. 123, 140 (K.B. 1553), Chief Justice Montague said, "And that, which law and reason allows, shall be taken to be in force against the words of statutes." Holdsworth explains that "the rules of equity are really special applications of the overriding law of God or of reason or nature to the treatment by merely human law of particular cases." 4 W. HOLDSWORTH, *supra* note 45, at 280.

In the 16th century, states Professor Thorne, "statutes were not yet thought to be exact formulas emanating from supreme parliamentary authority." Thorne, *Introduction*, *supra* note 7, at 56. The whereabouts of sovereignty at this point, *i.e.*, the need to have a sovereign power somewhere, was but dimly understood by Parliament itself. See text accompanying note 71 *infra*.

[before the sixteenth century] been sufficient to hold it ineffective."⁶⁸ It is therefore of no moment in weighing *Bonham* and its seventeenth-century successors that they "had nothing to do with the great constitutional questions of the age," and that "[t]hey were entirely private disputes."⁶⁹ For the important thing, the seed from which "constitutional theory" was to germinate, is that when a statute was deemed to unjustly prejudice one of the parties to a "private dispute," Coke, like his predecessors, was ready to shelter private rights from statutory infringement.

By importing our own preoccupations into analysis of *Bonham* we becloud the issue that faced Coke. Coke was not confronted with a dispute with Parliament but with an existing statute that impinged on private rights, and the pivot of his thinking, I hazard, was protection of private rights rather than a challenge to Parliament. To Coke "the question of whether the legislature was sovereign or non-sovereign did not occur, and indeed did not arise."⁷⁰ Parliament itself was "slow to understand" the "whereabouts of the sovereign power of the state"; and Holdsworth remarked that Coke "hardly saw" the necessity "to have a sovereign power somewhere."⁷¹ There was no occasion to fashion a new theory to deal with a statute which invaded private rights; he could meet the case before him by resort to the old. For him "the political theory [supremacy of the law] which he found in his medieval law books," said Holdsworth, "was good enough for the seventeenth century" ⁷² Little or no reason exists to saddle him with our refined analysis, with a belief in the separation of powers and judicial review, concepts that were formulated much later.⁷³

⁶⁸ Thorne, *Introduction*, *supra* note 7, at 41.

⁶⁹ GOUGH 49. Speaking of the later distinction "between the Laws of Property and those of Government," Plucknett observes that "To the middle ages they were all one." Plucknett, *supra* note 5, at 52. As a conscious bearer of the medieval tradition, albeit on the threshold of modern political thought, Coke, one may hazard, found no occasion to draw the distinction. Even in the early 17th century, it would appear, "every litigated issue of constitutional right was primarily a question of private law, was raised by private law procedure, and was settled not as an affair of state but as a matter of general law." Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 559 (1938).

⁷⁰ GOUGH 48.

⁷¹ 6 W. HOLDSWORTH, *supra* note 48, at 83-84 (2d ed. 1937). "Definition of law in terms of sovereign will and the theories of its binding force entailed by them made a relatively late appearance in the history of jurisprudence—certainly long after Coke's time." Lewis, *Sir Edward Coke (1552-1663): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 84 L.Q. REV. 330, 332 (1968).

⁷² 6 W. HOLDSWORTH, *supra* note 48, at 84 (2d ed. 1937). Plucknett, *supra* note 5, at 30-31, considers that Coke had "a presentiment of the coming conflict of Crown and Parliament [and] felt the necessity of curbing the rising arrogance of both," that his "solution" was "a fundamental law which limited Crown and Parliament indifferently," and that he found the means in the old books. The logic of Coke's reasoning cuts both ways, it is true, but whether he had spelled it out in his own mind in the terms that succeeding generations distilled from his action may be doubted.

⁷³ Cf. GOUGH 46-48.

But if our conceptualization of "judicial review" was unknown to him, the notion of "fundamental law" was not. Pickthorn refers to the "medieval idea of the supremacy of the law, an idea of which it is hardly too much to say that before the sixteenth century it was all there was in England in the way of a constitution, [and] that during the seventeenth century it was most of what there was" ⁷⁴ Coke, we have seen, believed in the overriding force of the law of nature, and with Bacon, he believed that Magna Carta was unalterable.⁷⁵ English subjects considered that their rights and liberties were protected against the King's prerogative, and in 1628 Coke himself joined in assertion of the claim.⁷⁶ But, states Gough, "Fundamental laws (and Magna Carta itself) were valued for the protection they afforded against the arbitrary power of kings. There was no suggestion yet that the people's representatives themselves . . . might be tyrannical."⁷⁷ Because fundamental law was invoked against existing tyranny it does not follow that unanticipated parliamentary tyranny would be deemed to rise above fundamental law. To the contrary, both the law of nature and Magna Carta were considered to override *all* conflicting

⁷⁴ PICKTHORN 55; compare Coke's ideas discussed in the text accompanying note 72 *supra*.

⁷⁵ C. MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 64 (1910). Coke spoke of Magna Carta as an "ancient, and fundamentall law" 2 E. COKE, *INSTITUTES* *51. He also stated that "if any statute be made to the contrary of Magna Charta it shall be holden for none. And therefore if [a statute] . . . be contrary thereunto, it is repealed . . ." 3 *id.* *111. See also 2 *id.* *37. If Magna Carta was alterable by subsequent Parliaments, the fact that it was confirmed by later Parliaments upwards of 40 times must have impressed "on later generations the conviction that Magna Carta was no ordinary statute but of special permanence and importance." GOUGH 16.

⁷⁶ GOUGH 61-62. After marshalling a group of instances in which Parliament had spoken for fundamental liberties and rights of Englishmen, William Prynne said "That the Kingdome, and Freemen of England, have some ancient, hereditary Rights, Liberties, Franchises, Priviledges, Customes, properly called *FUNDAMENTALL* . . . no wayes to be altered, undermined, subverted, directly or indirectly, under the guilt and pain of High Treason in those who attempt it . . ." W. PRYNNE, *A SEASONABLE, LEGALL, AND HISTORICALL VINDICATION . . . OF THE GOOD, OLD, FUNDAMENTALL, LIBERTIES, . . . OF ALL ENGLISH FREEMEN* . . . , at 54 (1654). "In a conference between the houses in 1628, the Archbishop of Canterbury, on the part of the House of Lords, promised 'to maintain and support the fundamental laws of the kingdom, and the fundamental Liberties of the Subject.' Sir Dudley Digges in reply expressed the gratification of the Commons at the willingness of the Lords 'to maintain and support the fundamental laws and liberties of England.'" MCILWAIN, *supra* note 75, at 82.

Protection of private rights was also the theme of a Massachusetts judge in 1657, *Giddings v. Browne* (Ipswich, Mass. 1657), 2 HUTCHINSON PAPERS 1 (Prince Soc'y Pub. 1865), discussed in note 118 *infra*. In 1765 Lieutenant-Governor Hutchinson of Massachusetts relayed the claim to protection of "the peculiar rights of Englishmen," see note 25 *supra*. Blackstone himself enumerated the "absolute rights" of Englishmen, stating that the law "will not authorize the least violation of private property." 1 W. BLACKSTONE, *COMMENTARIES* *127, *139. Jefferson identified the British Constitution with "what is called British rights," quoted in E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 31 n.45 (1914), and in 1785 Madison praised English courts for maintaining "private Right against all the corruptions of the two other departments." 2 J. MADISON, *WRITINGS* 170 (G. Hunt ed. 1901).

⁷⁷ GOUGH 65.

laws,⁷⁸ so that an appeal to fundamental law against a statute was entirely logical.⁷⁹ "All through his life," said Holdsworth, Coke "had held firmly to the [idea] that the law must be supreme"⁸⁰ When *Bonham* came down, Parliament was struggling for power and as yet could lay no claim to a greater than royal prerogative. Indeed, the arguments used by the parliamentary opposition against overweening royal claims "encouraged the belief that in the common law there might be found a store of principles which could be used to demonstrate the illegality of particular exercises of arbitrary power."⁸¹ One who, like Coke, could proffer the Petition of Right (1628), which grew out of his bill "for the better securing of every freeman touching the propriety of his goods and liberty of his person,"⁸² in the teeth of arrogant claims to absolute royal power, would hardly shrink from condemning an infringing arbitrary statute. There is no need to assume that Englishmen who were preparing to shed their blood in defense of their rights against royal arbitrariness were ready to suffer arbitrariness at the hands of their own elected Parliament. They turned to Parliament because they trusted it to protect their rights against royal despotism, not to substitute parliamentary tyranny. As Jefferson

⁷⁸ "No human law which was contrary to these universal laws was valid." 4 W. HOLDSWORTH, *supra* note 48, at 280. See also note 75 *supra*.

⁷⁹ GOUGH 49, says of *Bonham's Case* and *Day v. Savadge*, that fundamental law was not mentioned in them. Coke and his colleagues certainly talked of fundamental law (though not in court), and there was indeed a connexion between this idea and their judicial decisions, but it was only a connexion, not an identity. Indeed there could not be an identity, for fundamental law in the seventeenth century was an ill-defined term which covered a wide field, and could not be identified with any one thing.

Nevertheless, Gough states that "Fundamental laws (and Magna Carta itself) were valued for the protection they afforded against the arbitrary power of kings." *Id.* at 65. He also called attention to "other passages in Coke's writings which lend colour to the theory that he believed in the existence of a body of fundamental law." *Id.* at 40. Compare Coke's statement that a statute contrary to the Magna Carta "shall be holden for none." 3 E. COKE, *INSTITUTES* *111. In his Postscript, GOUGH 222, adds that "In the seventeenth century it was constitutional limitations to absolute power—generally to the power of the monarchy, but sometimes also to the power of parliament—which above all were claimed as fundamental." If Coke and his fellows did not attach the label "fundamental" to the law of nature or "reason" or "natural equity," it was certainly so regarded in the particular case. Coke left no doubt that Magna Carta was "fundamental," and presumably he felt no need to separate and ticket the various strands of fundamental law.

⁸⁰ 5 W. HOLDSWORTH, *supra* note 48, at 454 (3d ed. 1945). Said Holdsworth, "According to Coke's view, the common law was the supreme law in the state, and the judges, unfettered and uncontrolled save by the law, were the sole exponents of this supreme law." W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 115 (1938). Coke "preserved the medieval idea of the supremacy of the law, at a time when political speculation was tending to assert the necessity of the supremacy of a sovereign person or body, which was above the law" *Id.* at 126. The "establishment of the rule of law" was "due mainly to Coke's insistence on the supremacy of the common law." *Id.* at 131-32.

⁸¹ 5 W. HOLDSWORTH, *supra* note 48, at 435 (3d ed. 1945).

⁸² *Id.* at 451-52.

was to say many years later, after the battle against Parliament had been won and the issue was arbitrariness of state legislatures, "An *elective despotism* was not the government we fought for."⁸³

Having no reason to suspect that Parliament would be arbitrary, Coke could assume that there was no deliberate arbitrariness in the statute before him, the more so because "Parliament had always contended for the medieval idea of the supremacy of the law."⁸⁴ Untroubled by "parliamentary sovereignty," he could, like his predecessors, decide the "private dispute" without reference to "constitutional questions." If no predecessor had actually declared that an act which contravened natural law is void,⁸⁵ many acts had been "quietly set aside" for the protection of private rights. Coke's advance was to make the tacit explicit, to identify a statute as an Act of Parliament, to articulate judicially what was generally accepted doctrine—a law contrary to "reason" is void—to proceed from "quietly" setting a statute aside "upon the dictate of legal reasonableness"⁸⁶ to explicit recognition that a statute contrary to "reason" is to be *declared* void—a process to which *we* assign the label "nullification."⁸⁷ That Coke believed himself covered by early precedents does not, in my view, militate against an appeal to "any 'fundamental, higher, or natural law.'"⁸⁸ Plucknett states that Coke "added" his "common right and reason" to one of his early citations wherein the court had merely "ignored" the statute,⁸⁹

⁸³ T. JEFFERSON, *Notes on Virginia* *214, in 3 WRITINGS 68, 224 (P. Ford ed. 1892-1899). See also the statement of Iredell, quoted in 2 G. J. McREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL*, 145-46 (1858).

⁸⁴ 6 W. HOLDSWORTH, *supra* note 48, at 243 (2d ed. 1937). Compare note 76 *supra*. Holdsworth remarks on the "old alliance between Parliament and the common law, to which in the past both the common law and the Parliament had owed so much." 5 W. HOLDSWORTH, *supra* note 48, at 444 (3d ed. 1945).

⁸⁵ PLUCKNETT, *CONCISE HISTORY*, *supra* note 48, at 319: "[W]e do not find in mediaeval English cases any decisions which clearly hold that a statute is void because it contravenes some fundamental principle." According to Gough "we shall look in vain for a case where statutes were actually nullified by a judicial decision." GOUGH 145. And compare Gough's reference to "judicial nullification, or judicial review." *Id.* at 48.

⁸⁶ Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 206-07 (1936).

⁸⁷ See GOUGH 34, 145, and the passage quoted note 85 *supra*. If I do not misunderstand him, Professor Thorne considers that Coke could have reached his result on the "theory that any act of the sovereign that broke the bounds of natural law was formally null and void," Thorne, *Introduction*, *supra* note 7, at 91, but that words which might have accomplished this, and which he employed in *Calvin's Case*, are missing from *Bonham*. See text accompanying notes 39, 41-44 *supra*.

⁸⁸ GOUGH 40, quoting Thorne, *supra* note 2, at 552.

⁸⁹ In citing an ancient case wherein the court had merely "ignored" the statute, Coke, in *Bonham's Case*, "added" the phrase "because it would be against common right and reason, the common law adjudges the said act of parliament as to that point void." Plucknett, *supra* note 5, at 36.

In 1320, Hugh le Despenser and his son complained to King Edward II of an award of banishment made by the assembled barons as being made "wrongfully against the laws and usages of the realm, and against common right and reason." Case of Hugh le Despenser (K.B. 1320), 1 How. St. Tr. 23, 33 (1809).

thereby equating a "quiet" setting aside with an application of the law of "reason."⁹⁰ When this is viewed in light of his assertion in *Calvin's Case* that "Parliament could not take away that protection which the law of nature giveth unto" a subject,⁹¹ his later statement in the *Institutes* that if a statute "be made to the contrary of Magna Carta, it shall be holden for none,"⁹² as well as the fact that his phrase, "against common right and reason," may fairly be regarded as shorthand for the law of nature and Magna Carta, it is easier, for me at least, to regard these several expressions as parts of a coherent political-legal theory rather than unrelated, compartmentalized utterances.⁹³

Other arguments have been advanced for the view that Coke was only engaged in statutory construction. It has been maintained that the juxtaposition of the *Fifth* reason—that unless the two clauses of the statute were distinct an unlicensed physician would be liable to a fine under the first clause and also to a fine under the second, an absurdity, for no one should be punished twice for the same offense⁹⁴—with the *Fourth* reason, "against common right and reason," supports this view. Professor Thorne would read Coke's argument thus: "just as it would be absurd to interpret the statute [to permit two punishments for one offense] so it would be absurd to interpret it to permit the college to be party and judge, that is to assess fines in which it shares."⁹⁵ Brownlow's report of *Bonham* does indeed state that if the college shall be "judges and parties also," this is "absurd."⁹⁶ But in his own report Coke was at pains to confine his argument of absurdity to the *Fifth* reason; and we should not be too quick to join what he kept asunder. Moreover, points out Plucknett, Coke had "added" to the report of the ancient *Cessavit* 42, cited in support of the *Fourth* reason, the words "because it would be against common right and reason, the common law adjudges the said Act of Parliament as to that point void,"⁹⁷ when, according to Plucknett, "the statute is

⁹⁰ Under Coke's reasoning, "The newer decisions had not changed the law—they had merely developed or explained the truth to be found concealed in the oldest authorities." 5 W. HOLDSWORTH, *supra* note 48, at 473 (3d ed. 1945).

⁹¹ 7 Co. Rep. at 14a, 77 Eng. Rep. at 393. See text accompanying note 43 *supra*.

⁹² 3 E. COKE, *INSTITUTES* *111.

⁹³ Coke, Holdsworth stated, "preserved the mediaeval idea of the supremacy of the law;" for him "the common law was the supreme law in the state" of which the judges "were the sole exponents;" and he "had demonstrated from the bench that the common law was the greatest safeguard against arbitrary power." W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 126, 115, 116 (1938).

⁹⁴ 8 Co. Rep. at 118b, 77 Eng. Rep. at 654. The argument is more fully spelled out in Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543, 547 (1938).

⁹⁵ Thorne, *Dr. Bonham's Case*, *supra* note 94, at 548.

⁹⁶ 2 Brownlow, 255, 265, 123 Eng. Rep. 928, 933 (C.P. 1610).

⁹⁷ 8 Co. Rep. at 118a, 77 Eng. Rep. at 653.

not held void; it is just ignored.”⁹⁸ Such pains are incompatible with an attempt merely to restate “absurdity” in novel and involved fashion, but breathe rather an intention to furnish an additional reason. With Plucknett I would say that in his *Fourth* reason “Coke has really added an explanation and a theory all his own,”⁹⁹ adding only that it was an explanation rooted in the past.

There remains the other portion of the *Fourth* reason, the phrase “repugnant or impossible to be performed.” Repugnancy, Professor Thorne concluded from an early seventeenth-century treatise on statutory construction, is “a contradiction; it occurs when a statute provides one thing, and then through oversight perhaps, its opposite,”¹⁰⁰ in which case, according to the treatise, “are the former wordes good and the later, because they make a jarre by reason of the repugnancye, shalbe omytted.”¹⁰¹ Faced by contradictory provisions a court would save something from the collision rather than let the statute fail; and Professor Thorne justly infers that there “is no conscious constitutional problem raised here, but only one of statutory construction.”¹⁰² He then suggests that “Though not technically a repugnancy, certainly a statute making a man judge in his own case and a self-contradictory statute might well be regarded as cognate,”¹⁰³ a conclusion to which the precedents might have led Coke. But why dress that result in an additional formula when “impossibility and repugnancy” might have sufficed, particularly since he imposed his “against reason” gloss on *Cessavit* 42, and because his reference to “against reason” suggests a reference to the law of nature which no act could contravene?

Still another comment by Coke needs to be taken into account; in his *Second Institute*, Coke, explaining an old case wherein the statute provided that the assize should not be held except in the counties of the parties concerned, said that a writ was allowed out of the county so that a party in a particular case would not be both judge and party lest “he should have right and no remedy by Law given for the wrong done unto him, which the Law will not suffer, and therefore this case of necessity is by construction excepted out

⁹⁸ Plucknett, *supra* note 5, at 36.

⁹⁹ *Id.* He said it was a “revival” of earlier “law.” *Id.* at 45.

¹⁰⁰ Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543, 549 (1938).

¹⁰¹ DISCOURSE, *supra* note 51, at 133.

¹⁰² Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543, 549 (1938).

¹⁰³ Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543, 549 (1938). Coke, it seems to me, was too fastidious to regard mere “contradiction” as “cognate” with the judge-party situation that was morally “wrong” and *mala in se*. One need only recall that he did not follow Bacon's suggestion of “strict interpretation” in *Calvin's Case* (see note 43 *supra*) that he eschewed the argument of “absurdity” in the *Fourth* reason which he then made in the *Fifth* reason, see text accompanying notes 94-98 *supra*, and that he preferred not to rest on an “exception by construction,” an argument which his fellow Judge Daniel was ready to adopt, see text accompanying notes 106-07 *infra*.

of the Statute.”¹⁰⁴ “More pointed comment on Bonham’s case,” says Gough, “is hardly needed.”¹⁰⁵ Coke, however, plainly avoided putting his decision in *Bonham* on “exception by construction.” Justice Daniel was prepared to rule that a doctor was excepted from the Act,¹⁰⁶ but Coke stated that he did not speak to this point because “he and Warburton and Daniel agreed, that this action was clearly maintainable for two other points.”¹⁰⁷ *Bonham* cannot therefore be explained in terms of a statutory construction doctrine which Coke, by his own statement of the case, felt it unnecessary to consider.

Such doubts about Coke’s meaning as might have been entertained by a Colonial lawyer might well have been dispelled by the strictures of Lord Ellesmere. In his address at the installation of Sir Henry Montague as successor to Coke as Lord Chief Justice, Ellesmere called attention to the demotion of Montague’s predecessor and admonished Sir Henry to follow the practice of his own grandfather “when he sate Chief Justice in the Common Pleas.” *He* did not claim for the judges

power to judge Statutes and Acts of Parliament to be void, if they conceived them to be against common right and reason [a shaft at Coke]; but left the King and the Parliament to judge what was common right and reason. I speak not of impossibilities or direct repugnances.¹⁰⁸

Professor Thorne suggests that the qualifying adjective “direct” seems to indicate that to Ellesmere “Coke’s theory was directed toward interpretation broadened to indirect repugnances, that is, contradictions not on the statute’s face.”¹⁰⁹ Ellesmere, however, “left the King and Parliament to judge what was common right and reason”; from this area judges were excluded, while he carefully preserved for them the right to consider legitimate “repugnancy.” His separation of “repugnancy” from “right and reason” indicates concern with a differentiation of *functions* rather than a sharpening of definition to guide the judges. His qualifying “direct” repugnancy is of a piece with his counsel not to “strain the statute” or to make “an absurd or inept new construction.”¹¹⁰ Judicial exercise of a power “left to King and Parliament” was something else again—this was to overthrow, rather than to misconstrue, a statute.

¹⁰⁴ 2 E. COKE, INSTITUTES *25.

¹⁰⁵ GOUGH, *supra* note 3, at 36.

¹⁰⁶ 8 Co. Rep. at 116b, 77 Eng. Rep. at 650.

¹⁰⁷ *Id.*; Thorne, *Dr. Bonham’s Case*, 54 L.Q. REV. 543, 546 (1938), considers that exception from the statute by construction was not possible for several reasons, and that Coke therefore turned from that path.

¹⁰⁸ Reported in Moore K.B. 826, 828, 72 Eng. Rep. 931, 932 (1613).

¹⁰⁹ Thorne, *Dr. Bonham’s Case*, 54 L.Q. REV. 543, 552 (1938).

¹¹⁰ Moore K.B. at 828, 72 Eng. Rep. at 932.

That it was overthrow, or reversal, of a Parliamentary act which Ellesmere had in mind is suggested in yet another of his critiques of Coke in the *Earl of Oxford's Case*:

It seemeth, by the Lord Coke's report . . . in Dr. Bonham's Case, That Statutes are not so sacred as that the Equity of them may not be examined. For he saith, That in many Cases the Common Law hath such a Prerogative, as that it can controul Acts of Parliament, and adjudge them void; as if they are against Common Right, or Reason, or Repugnant, or impossible to be performed . . . And yet our Books are, That the Acts and Statutes of Parliament ought to be reversed by Parliament (only) and not otherwise.¹¹¹

After thus reproaching Coke for "reversing" Parliament, Ellesmere turned to the "Judges" usurpation of the Chancellor's role, of "making Construction of [statutes] according to Equity . . . and enlarging them *pro bono publico*, against the Letter and Intent of the Makers."¹¹² Again a Colonial lawyer might conclude that Ellesmere had distinguished the "reversal" of Parliament by resort to "common right and reason" from the act of "construction." On still another occasion Ellesmere chided Coke for his decision in *Dr. Bonham's Case* because he "tramples upon the Act of Parliament . . . whereby that patent [to the College] was confirmed, blowing them both away as vain, and of no value,"¹¹³ once more indicating that he was taking aim at Coke's declaration that a statute was void because "against reason."

Let us move from Coke to Hobart, Chief Justice of Common Pleas who, in *Day v. Savadge*, stated that "even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in it self, for *jura naturae sunt immutabilia*, and they are *leges legum*."¹¹⁴ Here the *Bonham* "against reason" stands alone, unaccompanied by "repugnancy"; and Hobart's reference to the immutable law of nature again suggests that Coke employed "reason" in the sense earlier explained by *Doctor and Student*. Plucknett observes, "Clearly, then, in Hobart's opinion, the truth of [the *Bonham*]

¹¹¹ 1 Ch. Rep. 1, 11-13, 21 Eng. Rep. 485, 487-88 (Ex. 1615).

¹¹² *Id.* at 13, 21 Eng. Rep. at 488.

¹¹³ ELLESMERE, OBSERVATIONS ON THE [COKE] REPORTS 21, quoted in a footnote to *Bonham's Case*, 77 Eng. Rep. at 652 n.C. In the same footnote there is quoted from Serjeant Hill's copy of the *Observations* Hill's comment "on the strictures of Lord Ellesmere," the meat of which for present purposes is that Ellesmere condemned Coke's statement "that a statute against reason is void" notwithstanding Coke "is supported by many authorities." Like the Colonists, Hill singled out "against reason," leaving "construction" by the wayside.

¹¹⁴ Hobart 85, 87, 80 Eng. Rep. 235, 237 (C.P. 1614). See also text accompanying note 60 *supra*.

doctrine was beyond dispute.”¹¹⁵ At least a Colonial lawyer might so conclude.

Additional conformation for such a reading is furnished by a treatise published in 1627 by Sir Henry Finch, Serjeant-at-Law, wherein he stated, “[I]t is truly said, & all men must agree, that lawes in deed repugnant to the law of reason are as well void as those that cross the law of nature.”¹¹⁶ This, says Gough, “indicates the atmosphere in which lawyers were educated in the seventeenth century”¹¹⁷ and to a Colonial lawyer who did not bring finely-honed modern scholarship to the exegesis of Finch, the latter might well seem to justify acceptance of Coke’s “against common right and reason” at face value.¹¹⁸ Consider too Bishop Burnett’s summary of the 1676 debate on the exclusion of the Duke of York from the Succession: “All lawyers had great regard to fundamental laws. And it was a great maxim among our lawyers, that even an act of Parliament against Magna Carta was null of itself.”¹¹⁹

Praise of Coke’s statement came in 1702 from no less a figure than Chief Justice Holt:

[W]hat my Lord Coke says in *Dr. Bonham’s case* . . . is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge . . . it would be a void Act of Parliament; for it is impossible that one should be Judge and party . . . and an Act of Parliament can do

¹¹⁵ Plucknett, *supra* note 5, at 49.

¹¹⁶ H. FINCH, *LAW OR A DISCOURSE THEREOF* 76 (1627), quoted in GOUGH, *supra* note 3, at 34.

¹¹⁷ GOUGH, *supra* note 3, at 34.

¹¹⁸ A 1657 Massachusetts case, *Gidding v. Browne* (Ipswich, Mass. 1657), 2 HUTCHINSON PAPERS 1 (Prince Soc’y Pub. 1865) exhibits that understanding. A town meeting had voted 100 pounds for the gift of a house to the minister; some of the minority refused to pay, were distrained and brought suit. Justice Symonds held for them, saying that “fundamental law” included “[t]hat every subject shall and may enjoy what he hath a civell right or title unto, soe as it cannot be taken from him.” *Id.* at 1, 2. Arguing “from the greater to the lesse,” Symonds said that “if noe kinge or parliament can justly enact and cause that one mans estate, in whole or part, may be taken from him and given to another without his owne consent, then surely the major part of a towne or other inferior powers cannot doe it.” *Id.* at 5. He cited the 1627 Finch treatise: “lawes positive doe lose their force and are noe lawes at all, which are directly contrary to . . . fundamentall [law].” *Id.* at 5. Justice Symonds was reversed by the General Court, not because his principles were rejected, but because, the Court found, such a gift to the minister was lawful and customary, the minority were heard at the town meeting, and the vote was carried by a majority and was binding on the minority. *Id.* at 22-23.

Justice Symonds’ view was in part embodied in the MASSACHUSETTS CONSTITUTION of 1780, first part, art. X: “no part of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. . . . And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”

¹¹⁹ Quoted in GOUGH, *supra* note 3, at 148. But see 6 W. HOLDSWORTH, *supra* note 48, at 186 n.2 (2d ed. 1937).

no wrong, though it may do several things that look pretty odd . . . but it cannot make one that lives under a Government Judge and party. An Act of Parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B. . . .¹²⁰

Although Holt is torn between conflicting concepts, between respect for an Act of Parliament and the conviction that it cannot make wrong lawful,¹²¹ he begins and ends with the restatement of the *Bonham* doctrine, paying lip service to the dawning theory of legislative supremacy.¹²² Pre-Revolutionary America seized on that portion of Holt which seemed consonant with what had gone before and which responded to its own needs.

Finally there is the fact that the *Bonham* principle had been repeated in the Viner, Bacon and Comyns *Abridgments*.¹²³ "[A] lot of American law," said Professor Goebel, "came out of Bacon's and Viner's *Abridgments*."¹²⁴ Comyns was Chief Baron of the Court of Exchequer, and as late as 1851 his *Digest* was referred to by Lord Campbell as a book "of the highest authority."¹²⁵

Except for *Streater's Case*,¹²⁶ wherein John Streater sought habeas corpus from a commitment by order of the Long Parliament for publishing seditious pamphlets, no case to my knowledge departed from the Coke doctrine prior to the American Revolution. In *Streater*

¹²⁰ *City of London v. Wood*, 12 Mod. 669, 687-88, 88 Eng. Rep. 1592, 1602 (K.B. 1702).

¹²¹ Plucknett, *supra* note 5, at 55.

¹²² Compare Holt's earlier statement in the *King v. Earl of Banbury*, Skinner 517, 526-27, 90 Eng. Rep. 231, 236 (K.B. 1694): "the Earl of Banbury can not be ousted of his dignity but by attainder, or Act of Parliament . . . yet when this comes incidently in question before them [the judges], they ought to adjudge and intermeddle with it, and they adjudge things of as high a nature every day; for they construe and expound Acts of Parliament, and adjudge them to be void."

GOUGH, *supra* note 3, at 11, asks whether the "true explanation of Holt's remarks [in the *Wood* case] may not be that the older view of the relations between the courts and acts of parliament, which Coke had expounded, had not yet been entirely superseded." See also Pollock, *A Plea for Historical Interpretation*, 39 L.Q. REV. 163, 165 (1923), quoted at note 10 *supra*.

¹²³ 19 C. VINER, ABRIDGEMENT 512-13, tit. "Statutes" (E. 6, p. 15) (1744); 4 J. COMYNS, DIGEST 340, tit. "Parliament" (1766). Compare the citation in 4 M. BACON, ABRIDGEMENT 639, tit. "Statutes" (E) (1759) to the statements of Holt, quoted in the text accompanying note 120 *supra*.

¹²⁴ Goebel, Book Review (*Ex Parte Clio*), 54 COLUM. L. REV. 450, 455 (1954). James Otis cited *Bonham's Case* "from the extract of it in 19 Viner, *Abridgement*," 2 J. ADAMS, LEGAL PAPERS 128 n.73 (L. Wroth & H. Zobel eds. 1965). See also *id.* at 144. A quick search of the Adams volume discloses frequent citations of Viner and Bacon by Otis, Adams and Blower. *Id.* at 163, 228, 269, 284, 341, 348, 350, 424, 427, 428, 430. The *Abridgements* remained respected authority in the English courts, cf. *Martin v. Mackonochie*, [1878] L.R. 3 Q.B.D. 730, 749-50; *Mayor of London v. Cox*, [1867] L.R. 2 E. & I. App. 239, 290 (1867).

¹²⁵ *Wadsworth v. The Queen of Spain* [1851] 17 Q.B. 171, 214, 117 Eng. Rep. 1246, 1262.

¹²⁶ 5 How. St. Tr. 365 (K.B. 1653).

Chief Justice Rolle said, "an inferior court cannot controul what the Parliament does."¹²⁷ Whether this was because of Cromwell's mighty shadow or because the commitment was deemed to resemble Parliament's power to protect itself from insult,¹²⁸ deserves exploration. Plucknett, on the other hand, considers Blackstone's conclusion that no power can control Parliament "typical of the best judicial opinion,"¹²⁹ expressed in such cases as *The Duchess of Hamilton's Case*,¹³⁰ *Great Charte v. Kennington*,¹³¹ and *The Mersey Docks & Harbour Board Trustees v. Gibbs*.¹³² *Mersey*, an 1866 decision, may be regarded as irrelevant to judicial opinion in 1765. In the *Hamilton* case, says Plucknett, counsel for plaintiff *argued* that Hobart stated, "an Act of Parliament may be void from its first Creation, as an Act against Natural Equity But this must be a very clear Case, and Judges will strain hard rather than interpret an Act void *ab initio*."¹³³ The court found it unnecessary to reach the constitutional issue, interpreting the statute to be inapplicable to the defendant. Plucknett concludes that the "application of Coke's principle is now to be decently veiled under the cloak of 'interpretation'."¹³⁴ However, plaintiff's counsel and the court were in fact, primarily concerned with a genuine question of "interpretation," that is, with the meaning of the statute¹³⁵ rather than with an acknowledged meaning (such as words making a party judge in his own cause) that made the statute void. In such a case there can be no doubt that a reading that would lead to a judgment that the statute is void is not lightly to be made.

The *Kennington* case, says Plucknett, was "[a] decisive step in the destruction of [Coke's] theory . . . when it . . . held that although it was a good principle that a man should not be judge and party, yet if a situation arose in which the only competent judge assigned by statute was interested in the dispute, he could, and ought to proceed notwithstanding."¹³⁶ As *Grand Junction Canal Co. v. Dimes* explained, "A failure of justice was . . . considered to be a

¹²⁷ *Id.* at 386; see GOUGH, *supra* note 3, at 130-32. Pickthorn, in another context, observed that "it would be easy to hang too much deduction on the expression of [judicial] timidity" at moments of revolutionary crisis. PICKTHORN, *supra* note 48, at 134.

¹²⁸ Cf. Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602, 611 (1942).

¹²⁹ Plucknett, *supra* note 5, at 60.

¹³⁰ *Thornby v. Fleetwood*, 10 Mod. 114, 88 Eng. Rep. 651 (C.P. 1713).

¹³¹ 2 Strange 1173, 93 Eng. Rep. 1107 (K.B. 1742).

¹³² L.R. 1 E. & I. App. 93 (1866).

¹³³ 10 Mod. at 115, 88 Eng. Rep. at 653, *quoted in* Plucknett, *supra* note 5, at 58.

¹³⁴ Plucknett, *supra* note 5, at 58.

¹³⁵ 10 Mod. at 115, 88 Eng. Rep. at 653.

¹³⁶ Plucknett, *supra* note 5, at 58.

greater evil than a departure from that fundamental rule, that a party interested cannot be a Judge.”¹³⁷ Neither court touched upon the power of the judiciary to set aside Acts of Parliament; and the fact that an exception was grafted upon a particular rule which had furnished the occasion for articulation of the *Bonham* “against reason” nowise diminished the doctrine.

Of course, I would not intimate that one can assign a definitive meaning to words uttered by Coke 360 years ago. The glosses put by present-day scholars upon his words seem to me, however, over-subtle and debatable, and therefore I elect at the risk of being simplistic—the eighth deadly sin—to construe “against reason” as did his immediate predecessor, *Doctor and Student*, that is, as prohibited by the law of nature. It did not require acceptance of such later concepts as separation of powers and the like to declare judicially what was generally accepted: a “positive” law that violated the law of nature was “no law.” Although the words were uttered in deciding a private dispute and presumably carried no implication of challenge to Parliament, they readily lent themselves in later days to direct defiance of Parliamentary arbitrariness. When the Colonists concluded that Parliament was intolerably abusing its power, they not unjustifiably took Coke’s words, which meanwhile had been repeated respectfully by judges and in the *Abridgments* for 150 years, at face value. That they went on to fashion from Coke’s phrase “constitutional theory” that did not enter into his thinking does not deprive it of the meaning that it bears on its face: an Act of Parliament “against common right and reason” is void. And if it is indeed void, what is more logical than that a court may say so?

¹³⁷ 12 Beav. 63, 77, 50 Eng. Rep. 984, 989 (Rolls Ct. 1849).