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RETROSPECT

THE ANCIENT CONSTITUTION AND THE LANGUAGES OF POLITICAL THOUGHT*

Catherine Behrens, 'The Whig theory of the constitution in the reign of Charles II', [*Cambridge Historical Journal*], 7 (1941), pp. 42–71.

J. G. A. Pocock, 'Robert Brady, 1627–1700: a Cambridge historian of the Restoration', [*Cambridge Historical Journal*], 10 (1951), pp. 186–204.

J. G. A. Pocock, 'Burke and the ancient constitution: a problem in the history of ideas', 3 (1960), pp. 125–43.

Quentin Skinner, 'History and ideology in the English Revolution', 8 (1965), pp. 151–78.

Corinne Comstock Weston, 'Legal sovereignty in the Brady controversy', 15 (1972), pp. 409–31.

H. S. Pawlisch, 'Sir John Davies, the ancient constitution and the Civil Law', 23 (1980), pp. 689–702.

R. B. Seaberg, 'The Norman Conquest and the common law: the Levellers and the argument from continuity', 24 (1981), pp. 791–806.

Robert Willman, 'Blackstone and the "theoretical perfection" of English law in the reign of Charles II', 26 (1983), pp. 39–70.

Martyn Thompson, 'Significant silences in Locke's *Two treatises of government*', 31 (1987), pp. 275–94.

Jim Smyth, '"Like amphibious animals": Irish Protestants, ancient Britons, 1691–1707', 36 (1993), pp. 785–97.

Rachel Foxley, 'John Lilburne and the citizenship of "free-born Englishmen"', 47 (2004), pp. 849–74.

Philip Connell, 'British identities and the politics of ancient poetry in late eighteenth-century England', 49 (2006), pp. 161–92.

Ian Campbell, 'Aristotelian ancient constitution and anti-Aristotelian sovereignty in Stuart Ireland', 53 (2010), pp. 573–91.

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George Owers, 'Common law jurisprudence and ancient constitutionalism in the radical thought of John Cartwright, Granville Sharp, and Capel Lofft', 58 (2015), pp. 51–73.

ABSTRACT. *Historians of political thought speak of 'languages' of politics. A language provides a lexicon, an available resource for legitimating positions. It is looser than a 'theory', because protean, and not predictive of particular doctrines. Some languages attract considerable scholarly attention, while others languish, for all that they were ambient in past cultures. In recent scholarship on early modern European thought, natural law and civic humanism have dominated. Yet prescriptive appeals to national historiographies were equally pervasive. Many European cultures appealed to Tacitean mythologies of a Gothic ur-constitution. The Anglophone variant dwelt on putative Saxon freedoms, the status of the Norman 'Conquest', whether feudalism ruptured the Gothic inheritance, and how common law related to 'reason', natural law, and divine law. Whigs rooted parliaments in the Saxon* witenagemot*; though, by the eighteenth century, 'modern' Whigs discerned liberty as the fruit of recent socio-economic change. Levellers and Chartists alike talked of liberation from the 'Norman Yoke'. These themes were explored from the 1940s onwards under the stimulus of Herbert Butterfield; one result was J. G. A. Pocock's classic* Ancient constitution and the feudal law *(1957).*

I

A political language denotes something looser than a theory or ideology. It is an intellectual toolkit, a discursive field, an available resource for the work of legitimation. It is protean, malleable, and not prescriptive of particular doctrinal, still less policy, outcomes. In use, it might lead to quite contrary positions, but ones which will be legible and plausible to their audiences, because operating within a common frame of reference and shared sources of value. Such resources lend authority to positions, if persuasively configured, but more fundamentally they make political conversation possible, by providing a common parlance.[1] A political language is not indefinitely flexible, for it sets boundaries, outer perimeters, to what may plausibly be proposed. Step outside, or shatter, the discursive arena and all the prescriptions offered within its terms lose their force. Political languages tend to be more enduring through time and space than doctrines, which are more contingent and temporary. Intellectual revolutions which shatter a language of political thought are more drastic than changes of doctrine. Sometimes, historians have spoken of a paradigm shift when such a caesura occurs. Diverse doctrines were once deduced from

[1] The opening section of this essay is indebted to J. G. A. Pocock, *Politics, language, and time* (London, 1972), and idem, *Political thought and history* (Cambridge, 2009). Also Quentin Skinner, *Visions of politics* (3 vols., Cambridge, 2002), I.

the writings of the Greeks and the Romans, but such a way of generating political prescriptions declined rapidly with the demise of the teaching of the classics to European elites and with the acceptance of the view that modern polities are irretrievably different from ancient states.

A political language is not the same as a *mentalité*, for the latter implies scarcely articulated assumptions or presuppositions which are too instinctual to find formal articulation. A language denotes texts, printed or scribal, written by people thinking about politics, albeit that a certain vocabulary may be practically second nature. The 'furniture' of their minds may predispose them to conceptualize their world in certain ways, in which case the scholar needs to know the characteristic pedagogy of an era, and the professional formation of, say, lawyers or clergy. Here, the history of political thought elides with the history of scholarship, which is concerned with institutions which educate, with changing definitions of disciplinary boundaries, and with systems of textual production and transmission.

Political thinkers are caught in a web of words. Languages are distinct and it can be hard to translate from one to another. The temptation is therefore to see them as hermetic, as pervasive and ambient within one community of speakers, but a closed book to another. We might slip into assuming that those who justified norms from Scripture and those who did so from the pagan Stoics simply talked past each other. But this example immediately warns us against the fallacy of incommunicability, since we know that, while *some* people insisted on *sola scriptura*, and *some* debunked Scripture, many were eclectic, and appealed to both Scripture and the Stoics. This warning is far from jejune, for, paradoxically, contemporary academic communities are in danger of being more hermetic than those in the past whom they study. It is arguably the case that current scholarship has become overly fixated upon just two political languages, notwithstanding that the language-users they investigate were far more polyglot and syncretic than they imagine.

Current scholarship on early modern European political thought tends to be transfixed by the languages of natural jurisprudence, that is to say theories of natural law and natural rights, and classical republicanism, which is to say theories of citizen virtue and agency within free commonwealths. It is easy to offer a series of binaries which tend to confirm that these two languages encompassed the universe of logical possibilities for political thinking. The former refers to something possessed by individuals – rights – and the latter to something done by them – civic action; the former refers to the juridical status of citizens, the latter to their moral character or prowess; the former points to what the citizen may justly defend against the ruler, the latter to the nature of self-rule in the ordinary or high offices of a citizen; the former suggests the delegation of the protection of the citizen's interests to a sovereign or a representative, but the latter recoils from arrangements in which the citizen is not directly a participant. The former tends to be indifferent to forms of polity, so long as rights are protected; the latter tends to test all regimes by their approximation to a

republic. The former is scholastic in its intellectual inheritance; the latter humanist. The former works within the paradigm of the medieval fusion of Aristotle with Roman Law, seeking to interweave nature, *nomos*, and *lex*, so that nature is held to be normative for the human order; the latter prefers the exemplary teachings of the Roman and Greek historians and philosophers concerning the best regimes and the best moral character. And so on. There is perhaps good reason why Thomas Hobbes tends to be the Clapham Junction of the history of political thought. He marks the transition from natural law to natural right, and hence embodies the maturation of the 'modern natural law' school, at the point at which it ceased to be scholastic; and he was the conscious and vehement enemy of the classicizing republicanism, or civic humanism, which exploded around him during the English Revolution.

Arguably, the scholarly weight accorded to natural law and civic humanism has elbowed aside other languages, which are too little studied, given their equally adamantine presence in the mental universe of early modern political argument. One such is what may be called sacred history, or civil religion: the deployment of Biblical archetypes as prescriptive for Christian commonwealths, and the construal of the secular polity as the vehicle of divine providence and spiritual reformation. To say of King Edward VI that he was a 'Josiah' carried with it a panoply of assumptions about the duty of a 'godly prince' to act as the instigator and guardian of reform. It has taken some effort in recent decades to reinstate in scholarship the debt of political thought to Scripture, to the eschatological, and the ecclesiological.[2] Another language is political economy: the construal of the polity in terms of commercial imperatives, the fiscal state, the relationship between wealth, virtue, and corruption, and the tension between landed and mobile capital, all of which began with the extrapolation to the commonwealth of ancient discourse about the prudent conduct of the *oikos* or household.[3]

II

It is not, however, these which the present essay is intended to recuperate, but Gothic history. Throughout early modern Europe, political theorists appealed to a common past, to an institutional and legal inheritance which they took to be prescriptive by virtue of its antiquity. It was an appeal to history and experience, but to neither classical nor sacred history. Nor, in this idiom, was nature

[2] The writings of William Lamont, especially *Godly rule* (London, 1969), were premonitory, as was Pocock's 'Time, history, and eschatology', in *Politics, language, and time*. See Alister Chapman, John Coffey, and Brad Gregory, eds., *Seeing things their way: intellectual history and the return of religion* (Notre Dame, IN, 2009); Eric Nelson, *The Hebrew republic: Jewish sources and the transformation of political thought* (Cambridge, MA, 2011); and John Robertson, *The sacred and the social: history and political thought, 1650–1800* (forthcoming).

[3] For example, Donald Winch, *Adam Smith's politics* (Cambridge, 1978); Istvan Hont, *Jealousy of trade* (Cambridge, MA, 2005).

held to be normative for jurisprudence, but custom, although custom was readily construed as second nature. If this language was less populated by authoritative ancient texts, it is because its appeal was to the record of a whole community, sedimented in its inherited practices. It looked not to prophets, philosopher-kings, hero lawgivers, or great moralists, but rather to parchment, charters, and law books. Custom lacks a creator or moment of creation. In principle, this was a paradoxical appeal to a history with no *point de départ*, for what mattered was continuity, immemoriality, timeless time. But in practice, it did rely on a singular canonical point of reference, the Saxon polity; and because the English was also a European experience, it was also called Gothic. This habit of mind was neither universalist nor cosmopolitan, for it dwelt less on what was true for human nature than what was particular to nations, albeit that the experience of, say, the English nation was understood to be a variant of a pan-European pattern. The present essay dwells on the English variant, although the insularity of this tradition will be in question. It was a language of political thought governed by partisan historiography, and to study it is to investigate the history of historical thought. The critics of this way of thinking could challenge the premise of ancientness either by a denial of continuity, and insistence instead upon rupture; or by asserting a thesis about evolutionary change, which stressed that the nation's institutions were essentially modern and owed little to ancient models. But, in each instance, historical scholarship, polemically driven, was needed to attest a case.

Of the exportability of English ancient constitutionalism to the wider Anglophone world, and its persistence until the nineteenth century (there are echoes still today), there can be no doubt. When the text of the American Declaration of Independence was first included in a printed book, that book was entitled *The genuine principles of the ancient Saxon or English constitution* (1776). And when late Victorians sought to know their island story, they habitually turned to John Richard Green's *Short history of the English people* (1874), which opens with an idyll of Saxon community, harmony, and liberty.

It is sixty years since J. G. A. Pocock published the cardinal exposition of this language of thought in his *Ancient constitution and the feudal law*.[4] It is ironic that

[4] J. G. A. Pocock, *The ancient constitution and the feudal law* (Cambridge, 1957; 2nd edn, with lengthy Retrospect, 1987). See also idem, *Virtue, commerce, and history* (Cambridge, 1985). Themes in the present essay are rehearsed in Quentin Skinner, 'History and ideology in the English Revolution', *Historical Journal*, 8 (1965), pp. 151–78; repr. in *Visions of politics*, III; and J. P. Sommerville, 'The ancient constitution reassessed: the common law, the court, and the languages of politics in early modern England', in R. Malcolm Smuts, ed., *The Stuart court and Europe* (Cambridge, 1996). For key studies, prior and subsequent to Pocock, see Samuel Kliger, *The Goths in England* (New York, NY, 1952); H. A. MacDougall, *Racial myth in English history: Trojans, Teutons, and Anglo-Saxons* (Montreal, QC, 1982); Gerald Postema, *Bentham and the common law tradition* (Oxford, 1986, 2004); J. P. Sommerville, *Politics and ideology in England, 1603–1640* (Harlow, 1986); Glenn Burgess, *The politics of the ancient constitution* (Basingstoke, 1992); Colin Kidd, *British identities before nationalism* (Cambridge, 1999); and, with a broader brush, Nick Groom, *The Gothic: a very short introduction* (Oxford, 2012).

he himself is largely responsible for the subsequent comparative occlusion of scholarship on this subject, or at least for its lack of *éclat*, because his *Machiavellian moment* (1975) had far greater impact, and turned a generation of scholars toward civic republicanism and the humanist reworking of the Greco-Roman tradition. Pocock's first book was based on a Cambridge doctoral thesis of 1952 supervised by Herbert Butterfield. The *fons et origo* of modern scholarship in this area is Butterfield's *The Englishman and his history* (1944), a book readily dismissed as slight in scholarship, as wartime propaganda for the Englishness of liberty, and as reneging on his famous diatribe, *The Whig interpretation of history* (1931).[5] Yet it was not whiggish to make the Whig conception of history an object of study, and the book offered a programme for research. Butterfield's influence endured, in the work of Duncan Forbes and John Burrow, who showed how the Victorians refought the historical battles which Pocock explored in the seventeenth century.[6]

There is a rich subsequent scholarship on these matters, but it somehow lacks the glamour of natural law, or civic humanism, or political economy, in the current scholarly firmament. It is not clear why this is so. Perhaps it arises from an academic division of labour. English legal history and the history of historiography involve a high level of technical arcana and empirical contingency, and their substance is farther removed from analytical political philosophy than those other languages of political thought. It may also arise from a misleading, if not wholly false, belief that ancient constitutionalism was ethnocentrically Anglophone. Possibly the neglect is politically tinged in a more precise way, insofar as the liberal intelligentsia reacts against the veneration for ancient constitutionalism still found among a certain sort of American conservatives. Finally, the marginalization has to do with the ease with which the Gothic model can today be dismissed as historically bogus, despite the fact that the first duty of the intellectual historian is to suspend judgement in excavating the thought worlds of the past. At any rate, in order to reconstruct the pattern of modern scholarship the best place to start is with Pocock.

For him, ancient constitutionalism had two components. The first lay in the idealization of that peculiarly English institution, the common law. This was law without a law-maker, except insofar as it was articulated by judges and lawyers. It was not law *made* but *discovered*. Putatively, it was immanent in the community, the distillation of the customs of the people. It could be found in the proceedings of the courts, which adjudicated disputes by reference to communal and local knowledge of *meum* and *tuum*, judgements which passed into public transmissible knowledge through scribal and printed law reports. Common law was ancient, it grew incrementally and through practice, and was not embodied

[5] Michael Bentley, *The life and thought of Herbert Butterfield* (Cambridge, 2011), pp. 168–70; C. T. McIntire, *Herbert Butterfield: historian as dissenter* (New Haven, CT, 2004), pp. 115–26.

[6] Duncan Forbes, *The liberal Anglican idea of history* (Cambridge, 1952); John Burrow, *A liberal descent: Victorian historians and the English past* (Cambridge, 1981).

in formal codes. Its origins were 'lost in the mists of time'. Pocock regarded the 'common law mind' as a pervasive characteristic of lawyers and gentlemen, inculcated through the Inns of Court (the 'third university') and through the practice of judicial commentary on cases. The most limpid expression of what he held to be the core concept occurs in the dedicatory preface to Sir John Davies's *Irish reports* of 1612:

> For the common law of England is nothing else but the common custom of the realm: and a custom which hath obtained the force of a law is always said to be *jus non scriptum*: for it cannot be made or created either by charter, or by parliament, …but…consisting in use and practice, it can be recorded and registered nowhere but in the memory of the people…When a reasonable act once done is found to be good and beneficial to the people…then do they use it and practice it…and so by often iteration…it becometh a custom; and being continued without interruption time out of mind, it obtaineth the force of a law. And this customary law is the most perfect and most excellent, and without comparison the best, to make and preserve a commonwealth. For the written laws which are made either by the edicts of princes, or by councils of estates, are imposed upon the subject before any trial or probation made, whether the same be fit and agreeable to the nature and disposition of the people.[7]

During the seventeenth century, the idealization of the common law was mobilized as a means of challenging over-mighty monarchs. But such idealization did not by itself constitute a political ideology, for it was evident that in the history of English law the crown's prerogatives were as manifest as the people's liberties. Even so, the habit of construing political questions as matters of common law was inherently susceptible of a populist reading. The crux was the lack of a legislator. For, to the contrary, defenders of the Stuart crown began to appeal to the strictures of Jean Bodin, in his mightily influential *Six books of the commonwealth* (1576), whose doctrine of sovereignty entailed that all law, properly so called, must be the positive will of a legislator.[8] There began to be absolutists who said that in England the true legislator was the monarch. On this view, the rights and liberties found in common law were only laws if construed as grants or concessions, the implied will, of the sovereign lawgiver. The corollary was that they were revocable, for sovereigns cannot be bound. To hold that a sovereign could be bound was either a seditious mistake, or a muddled claim that some other person or body is sovereign instead. To this, the obvious retort was that there was indeed an alternative sovereign: it was parliament, or the people. But that was not the claim made before the Civil War by exponents of the common law who resisted the crown. Indeed, they asserted that

[7] Quoted in Pocock, *Ancient constitution*, pp. 32–3.

[8] Interest in Bodin is currently resurgent, and complicates the conventional picture of Bodin as a theorist of royal absolutism. See Daniel Lee, *Popular sovereignty in early modern constitutional thought* (Oxford, 2016); H. A. Lloyd, ed., *The reception of Bodin* (Leiden, 2013); H. A. Lloyd, *Jean Bodin: 'this pre-eminent man of France': an intellectual biography* (Oxford, 2017).

'sovereign power is no parliamentary word', that the laws of England 'are not acquainted with sovereign power', and that Magna Carta, the supposed embodiment of common law liberties, is 'such a fellow that he will have no sovereign'.[9]

The supreme figure in weaponizing the common law was Sir Edward Coke, through his prodigious erudition, for it was his *Reports* and *Institutes* which became textbooks for later generations. The posthumous volumes of the *Institutes*, confiscated by King Charles I, were ordered to be printed by the Long Parliament during the Civil War. In the eighteenth century, an edition of the *Second institutes* was published under the title *The corner stone of the British constitution* (1789). Coke was a politician of profound rhetorical inventiveness, for it was he who, virtually single-handedly, 'invented' Magna Carta, in the Petition of Right debates of 1628, a document to which the Tudor age had paid minimal attention.[10] Magna Carta became a cardinal historical text of the ancient constitution, and it remains testimony (as the anniversary celebrations in 2015 testify) to the enduring attraction of an Anglo-American mythology about the seat of liberty. If, in Coke's towering presence (and surely he remains *the* pre-eminent English common lawyer), we begin to suspect that 'the common law mind' was a Cokean fabrication, an invention of tradition, we need to recall that he and his successors constantly appealed to medieval forebears. They constructed a canon. Its central figure was Henry de Bracton, whose *Laws and customs of England* (c. 1235–60) gave currency to the idea of *lex non scripta*, unwritten law rooted in usage. It included Sir John Fortescue, who harnessed the common law to a Polybian account of the English polity as a 'mixed' and not a 'pure' monarchy.[11] And it included twinned texts which were partial fabrications, insofar as they were medieval but purported to be Saxon: the *Mirror of justices* and the *Modus tenendi parliamentum*.[12]

We have now arrived at the second basic element of ancient constitutionalism. Alongside the common law stood the Gothic polity, understood as something belonging to the Saxon era. Coke had more to say about immemorialism than about the Saxons, and the Gothic element came to the fore in the hands of Civil War radicals and Whig legal historians later in the seventeenth

[9] Sir Edward Coke and Thomas Wentworth, quoted in Lee, *Popular sovereignty*, p. 64 (and see ch. 9 passim); J. W. Gough, *Fundamental law in English constitutional history* (Oxford, 1955), p. 64.

[10] J. H. Baker, *The reinvention of Magna Carta, 1216–1616* (Cambridge, 2017).

[11] Sir John Fortescue, *Of the laws and government of England*, ed. Shelley Lockwood (Cambridge, 1997).

[12] For Coke, see S. D. White, *Sir Edward Coke and the grievances of the commonwealth* (Manchester, 1979); David Smith, *Sir Edward Coke and the reformation of the laws* (Cambridge, 2014). For the *Mirror* and the *Modus*, see V. H. Galbraith, 'The *Modus tendendi parliamentum*', *Journal of the Warburg and Courtauld Institute*, 16 (1953), pp. 81–99; Nicholas Pronay and John Taylor, eds., *Parliamentary texts of the later middle ages* (Oxford, 1980); D. J. Seipp, 'The Mirror of Justices', in J. A. Bush and A. Wijffels, eds., *Learning the law* (London, 1999); Janelle Greenberg, *The radical face of the ancient constitution* (Cambridge, 2001). The Cokeans overlooked Bracton's deference to the kingly source of law.

century.[13] The emergence of the idealization of the Saxons is harder to document, for there is no commanding figure like Coke. The earliest articulations lie in William Lambarde's *Archaionomia* (1568) and *Archeion* (c. 1591), where the German origins of English society were used to push against Roman imperial accounts of political origins: 'the law or policy of this realm of England, as it is a peculiar government, [is] not borrowed from the imperial or Roman law'.[14] Other early exponents were Richard Verstegen, in his *Restitution* (1605), and Michael Drayton's chorographic poem *Poly-Olbion* (1612–22). The Society of Antiquaries, active from about 1586 until suppressed by James I in 1614, played its part, not least through attention to the Saxon etymological rootedness of much that was English, and, more broadly, through the promotion of 'chorography': local and regional studies of ancient institutions and practices.[15] The ecclesiastical historians of the Reformation (Matthew Parker, John Bale, John Leland, and their popularizer, John Foxe) provided another impetus, for they wished to demonstrate the vitality and autonomy of Saxon Christianity, before the rise of the papal *imperium*, and, in particular, before the pope sent Augustine to 'convert' the English. Finally, Saxonism gained ground because of the collapse of the credibility of older Trojan and Arthurian legends, still to the fore in 1600 but shattered well before 1700. This allowed for a vigorous seventeenth-century archaeological and ethnographic approach to the Gothic past, in the work of such antiquaries as John Aubrey, which ran alongside, and occasionally intersected with, legal-constitutional discourse.[16]

With one vital exception, ancient constitutionalists eschewed the classical sources beloved of the humanists. While their primary resource was the accumulated evidence of English legal practice, they relied for their myth of origins upon a textual source that was Roman and, in a manner, anthropological. The tradition was thereby immensely reinforced by a few potent phrases in Tacitus's *Germania* (c. 98), which lauded the virtues and self-rule of the German tribes beyond the northern frontiers of the Roman Empire, an account which Tacitus deployed to deprecate the corruption and tyranny of the Caesarian principate. The Teutons, according to Tacitus, approved their laws and chose their princes collectively, in meetings of elders gathered in

[13] Cokean common law was apparently not Pocock's starting point. In 1948, Butterfield reported that he was about to acquire a graduate student who will be 'studying the history of the idea of primitive Teutonic freedom – the idea of Anglo-Saxon democracy – in English historiography': Bentley, *Butterfield*, p. 299. For Pocock's tendency to see Coke as premonitory of the Whigs, see William Klein, 'The ancient constitution revisited', in Nicholas Philippson and Quentin Skinner, eds., *Political discourse in early modern Britain* (Cambridge, 1993).

[14] Rebecca Brackmann, *The Elizabethan invention of Anglo-Saxon England* (Cambridge, 2012), ch. 7, quotation at p. 201.

[15] F.J. Levy, *Tudor historical thought* (San Marino, CA, 1967); A.B. Ferguson, *Clio unbound* (Durham, NC, 1979); Kevin Sharpe, *Sir Robert Cotton, 1586–1631: history and politics in early modern England* (Oxford, 1979); Richard Helgerson, *Forms of nationhood: the Elizabethan writing of England* (Chicago, IL, 1992), ch. 3.

[16] Kelsey J. Williams, *The antiquary: John Aubrey's historical scholarship* (Oxford, 2016).

the forests. It is this text which Montesquieu had in mind when, in a famous passage in *The spirit of the laws* (1748), he remarked that the English system of liberty was found 'in the forests' and was 'taken from the Germans'.[17] Tacitus provided the ur-text which pitted the customs of communities against the concept of *imperium* (the ancestor of Bodin's 'sovereignty') and which established a pervasive historical-juridical binary which set 'Germanism' against 'Romanism'.

Few texts have been so influential in Western culture, not least because, in the nineteenth and twentieth centuries, *Germania* was used to racialize the idea of Teutonic superiority.[18] The Tacitean idyll of the German forest was resonant enough to produce, inter alia, the cult of the oak tree, of secluded clearings in the woods, as the locale of liberty, solidarity, and virtuous habitude, undisturbed by urban and courtly corruption. In the legend of Robin Hood in Sherwood Forest, in Friedrich Schiller's rendition of the William Tell story (1804), and in Charles Kingsley's *Hereward the Wake* (1866), political thought spilt over into folkloric mythography.[19] In the 1860s, Bishop Stubbs was still lecturing at Oxford on 'Constitutional History from Tacitus to Henry II', while Edward Freeman found in the German chieftain Arminius the Teutonic ancestor of George Washington.[20] From the sixteenth to the nineteenth centuries, Tacitean Gothicism was one of the fundamental languages of European political and historical thought.

III

The union of the 'common law mind' with the Saxon-Gothic *mythos* completes the marriage of ancient constitutionalism. But it was an unhappy marriage. No sooner than stated, ancient constitutionalism was beset with empirical, conceptual, and jurisprudential obstacles and dilemmas, which afflicted its early modern practitioners, and set limits to the plausibility of Pocock's magisterial rendition of it. Let us begin with history and then move to jurisprudence.

In the seventeenth century, the greatest empirical obstacle to Saxonism was the brute fact of the Norman Conquest and the distinctive medieval socio-economic order we call feudalism. If William was a conqueror, he ruled by

[17] Bk 2, ch. 6.

[18] The book mattered enough to the Nazis that, in the midst of the Second World War, they tried to seize a manuscript. See Simon Schama, *Landscape and memory* (London, 1995), ch. 2; Christopher Krebs, *A most dangerous book: Tacitus's* Germania *from the Roman Empire to the Third Reich* (New York, NY, 2011). For surveys, see T. J. Luce and A. J. Woodman, eds., *Tacitus and the Tacitean tradition* (Princeton, NJ, 1993); Colin Kidd, 'Northern antiquity: the ethnology of liberty in eighteenth-century Europe', in Knud Haakonssen and Henrik Horstbøll, eds., *Northern antiquities and national identities* (Copenhagen, 2008).

[19] Schama, *Landscape*, ch. 3: 'The liberties of the greenwood'. For a recent (Brexiteer?) deployment, see Paul Kingsnorth's novel, *The wake* (2014). For another survival, explore online the rituals surrounding the Isle of Man's Tynwald, the 'oldest parliament in the world'.

[20] Burrow, *Liberal descent*, p. 189.

right of the sword, and the Saxon polity had been erased. Early in the seventeenth century, antiquaries with few axes to grind, particularly Henry Spelman and William Dugdale, or whose axes eventually became Parliamentarian, notably John Selden, began to show that a conquest had indeed occurred, that it had led to a wholesale transformation of English landholding and its attendant rights and duties, and that Norman laws had superseded Saxon.[21] Furthermore, parliament did not exist before the mid-thirteenth century, when it emerged as an outgrowth of the king's council, and was always subordinate to royal summons and dismissal. It had no connection with the *witenagemot*, the much vaunted 'parliament' of the Saxons. Thus, to the fraught nature of 1066 was added the vexed significance of 1265 (or '49 H 3' as it was known, by its regnal year). By the late seventeenth century, royal absolutists were flinging '49 H 3' in the faces of the Whigs. (One reason, it must be said, for the smaller *éclat* today of this language of thought is the technical demand of making sense of antiquarian scholarship, much of which was philological and glossarial, and which depended inter alia on the parsing of Latin formulae in medieval writs and charters, determining which statuses of person were encompassed by the term '*proceres*', and explicating tenurial law and the rise and fall of 'allodial' title.)

It remains unclear when defenders of the Stuart crown first made ideological capital out of these findings, in order to assert that contemporary monarchs held absolute power by virtue of conquest. Some scholars were puzzled by its apparent absence until late in the seventeenth century, though it now appears to have been deployed quite early.[22] The claim was made by Sir Robert Filmer in his Civil War tract *The freeholder's grand inquest* (1648), and it was reinforced in the weighty scholarship of the Restoration Tory historian Robert Brady. The result was a mighty battle of books during the 1680s and 1690s, which formed, with Coke, a centrepiece of Pocock's study.[23] Brady's historiography was so partisan, so committed to demonstrating the crown's absolute supremacy, that it proved imperative for Whigs, for the next two centuries, to reject his theses, to deny both the Conquest and the medieval ('late') origins of parliament. Saxonism triumphed because, politically, it had to, if Stuart tyranny was to be defeated. In Victorian times, the aptly surnamed

[21] On Selden: Richard Tuck, '"The ancient law of freedom": John Selden and the Civil War', in John Morrill, ed., *Reactions to the English Civil War, 1642–1649* (London, 1982); Paul Christianson, 'Young John Selden and the ancient constitution, 1610–1618', *Proceedings of the American Philosophical Society*, 128 (1984), 271–315; idem, *Discourse on history, law, and governance in the public career of John Selden, 1610–1635* (Toronto, ON, 1996); G. J. Toomer, *John Selden: a life in scholarship* (2 vols., Oxford, 2009).

[22] Skinner, 'History and ideology'; J. P. Sommerville, 'History and theory: the Norman Conquest in early Stuart political thought', *Political Studies*, 34 (1986), pp. 249–61.

[23] J. G. A. Pocock, 'Robert Brady, 1627–1700: a Cambridge historian of the Restoration', *Cambridge Historical Journal*, 10 (1951), pp. 186–204; idem, *Ancient constitution*, ch. 8.

Freeman still devoted the six volumes of his *History of the Norman Conquest* (1867–79) to denying the Conquest.

In 1679, Filmer's *Works* were posthumously published as the ideological flagship of the emerging Tory party. Some Whigs challenged his patriarchalist claim that political rule is grounded in natural hierarchy, paternal authority, and primogeniture. John Locke did so in his *Two treatises of government* (1689), by reworking the neo-scholastic case for the natural equality and liberty of humankind. The *Second treatise* was written in the (cosmopolitan) idiom of reason and nature, not of (English) antiquity. Pocock's great achievement was to show how consequential was the other half of the debate. For Whigs also challenged the historical case for the Conquest and the late and derivative appearance of parliament.[24] This was the work of William Petyt, William Atwood, and the author of *Argumentum anti-Normanicum* (1683). It is usually said that Algernon Sidney's *Discourses concerning government* (published 1698) took the first tack, with Locke, or that it was a 'classical republican' work, yet it was an eclectic book, also much preoccupied with the Gothic polity.[25] James Tyrrell's *Patriarcha non monarcha* (1681) stood close to the *Two treatises*, yet Tyrrell devoted his later years to the Goths, his 1,000-page *Bibliotheca politica* (1692–4) and 3,000-page *History of England* (1696–1704) being encyclopaedic representatives of Gothic Whiggism, written as ideological coping stones to the Glorious Revolution.[26] The Whigs expended inordinate casuistical energy upon obliterating the Conquest. King William I had conquered only King Harold; he had changed the names but not the substance of Saxon institutions; he had upheld King Edward the Confessor's laws; at Swanscombe in Kent he had made a formal agreement with the people. The Whigs softened the transition from allodial to feudal tenures. Their theme is captured in the frontispiece of *Argumentum anti-Normanicum*, which shows William receiving Edward's laws from Britannia.

It was, however, quite possible for those appealing for greater popular liberties to *accept* the fact of the Conquest, to argue that we do indeed live under the 'Norman Yoke' – and that it is to be resisted. This was a claim made by the Levellers in the 1640s, the Wilkites in the 1760s, and the Chartists in the 1840s. But such a thesis still depended upon idealizing the Saxon polity that preceded the Norman.[27] William had indeed conquered, and had suppressed Saxon liberty; it is accordingly our cause and duty to recover what was lost; and the intervening centuries have seen, at best, a cycle of recoveries and losses. The *mythos* of the 'Norman Yoke' became extremely ideologically

[24] Pocock remarked that the Filmer debate taught him the 'plurality of [political] languages': *Political thought and history*, p. xi.

[25] Jonathan Scott, *Algernon Sidney and the Restoration crisis, 1677–1683* (Cambridge, 1991).

[26] Julia Rudolph, *Revolution by degrees: James Tyrrell and Whig political thought* (Basingstoke, 2002).

[27] The classic account is Christopher Hill, 'The Norman Yoke', in *Puritanism and revolution* (London, 1958).

adaptable, a name for whatever was thought to be the incubus poisoning society. In the late eighteenth century, John Wilkes lambasted the Frenchified and oppressive Norman foreignness of the landed aristocracy, and in the nineteenth the same trope was inherited by the Romantic Tory Benjamin Disraeli in his Young England novels, as a device to attack the Whig oligarchy.[28]

Locke's silence concerning the ancient constitution has been too readily construed as a repudiation of the historical mode of political argument.[29] In turn, his stance has been read as a marker of the Enlightenment's turn to a Promethean vision of reason unencumbered by antiquity. But this is to misread both Locke and the Enlightenment. It is not clear that Locke intended more than an academic division of labour. He distinguished between the analytic understanding of political power and the 'art of governing', the latter 'best to be learned by experience and history'; and whereas his own book contributed to the former, he keenly recommended the usual authorities for the latter, from Bracton to Tyrrell, by way of Coke, the *Mirror*, and the *Modus*. 'It would be strange to suppose an English gentleman' should not study 'the ancient books of the common law'.[30]

Locke's silence has also been construed as denoting his recognition that Whig history was bad history, and best avoided. An undoubted difficulty about taking ancient constitutionalism seriously today is that modern historiography tells us that Brady was 'right' and the Whigs 'wrong'. In the late nineteenth century, it proved necessary for historians to update Brady in order to refute Henry Hallam, Stubbs, Freeman, and Green. Hence, the anti-Whig historical truths of the twentieth century: the Normans did conquer; feudalism happened; Magna Carta was a baronial power grab; and parliament began in 1265. The Revolution of 1688, which saw Brady's *political* defeat, was hence good for the ancient constitution but bad for good history. On this account, ancient constitutionalism limped on, intellectually enfeebled but ideologically useful. Yet there is an oddity about telling the story this way. It is a case of trouncing (upper case) Whig history with a piece of (lower case) whig teleology, namely the notion of the inexorable rise of modern critical historical science. It is scarcely good history to berate seventeenth-century Whigs for 'failing to grasp' the findings of twentieth-century historiography.

The water, in any case, is muddier than it seems. Brady was himself thoroughly anachronistic. His medieval monarchs were Bodinian sovereigns. He was less interested in showing that feudalism was a socio-economic system alien to the moderns than in showing that Norman rulers were as supreme as the Stuarts were, or ought to be. And he played fast and loose with the chaos

[28] *Coningsby* (1844), *Sybil* (1845), *Tancred* (1847).

[29] See Martyn Thompson, 'Significant silences in Locke's *Two treatises of government*', *Historical Journal*, 31 (1987), pp. 275–94; J. Coniff, 'Reason and history in early Whig thought', *Journal of the History of Ideas*, 43 (1982), pp. 397–416.

[30] John Locke, *Political essays*, ed. Mark Goldie (Cambridge, 1997), pp. 351–2; idem, *Some thoughts concerning education*, ed. John and Jean Yolton (Oxford, 1989), pp. 239–40.

of medieval monarchical succession in order to extract the Stuart doctrine of primogenital hereditary right. He was just as committed as were his enemies to the view that the past was prescriptive for the present, and he was as liable to impose his ideology upon the past.[31]

Furthermore, some strange *bouleversements* occurred after 1688, which ensured that ancient constitutionalism avoided Whig atrophy.[32] Tories themselves began to deploy the Gothic constitution against the overweening executive power exercised by the Whig state. In the 1720s and 1730s, the erstwhile Jacobite Viscount Bolingbroke denounced Prime Minister Robert Walpole. He argued that, unlike the contemporary British who were enslaved under Walpolean oligarchy, 'the principles of the Saxon commonwealth were very democratical'.[33] This was an exemplary instance of a political language proving to be available for contrasting ideological positions: what had been wrought by Civil War Parliamentarians and 'Old' Whigs was now serviceable against the ruling 'New' Whigs. Such inversions had already occurred in the 1690s, in ecclesiastical argument. In the Convocation Controversy, concerning the right of the Church of England's assembly to convene and legislate for the religious life of the nation, High Church Tories like Francis Atterbury constructed a Saxon ecclesiology, an ancient prescriptive authority lying in the church to receive a writ of summons and choose its own representatives alongside the secular parliament. They were heirs to the Reformation Saxonizing of the English church. On this view, the Saxon church was free, whereas Normanism had brought papalism in its wake; and the modern Whig Erastians were the new caesaro-papists, seeking to suppress the freedoms of the church.[34]

During the eighteenth century, Gothicism proved an elastic cultural resource, especially once the domination of imaginative literature by classical idioms receded. 'Augustan' classicism – the upholding of Roman models as the perfection of eloquence – gave way to the celebration of domestic, if often confected, traditions: the chivalric, epic, and bardic. James Thomson's poem *Liberty* (1745–6) is a pre-eminent text of versified Gothicism. It is tempting to call these manifestations 'proto-Romantic'. Visions of antiquity became fragmented, and Saxonism began to find competition from rival Gaelic pasts. One political context, in the 1760s, was English loathing for Lord Bute's prime ministerial despotism, the 'Scotch Yoke'. The Scots offered the 'discovery' of the 'ancient' poems of Ossian, the great literary sensation of that decade. Concocted by James Macpherson, half of Europe fell for Ossian's

[31] Corinne Comstock Weston, 'Legal sovereignty in the Brady controversy', *Historical Journal*, 15 (1972), pp. 409–31.

[32] R. J. Smith, *The Gothic bequest: medieval institutions in British thought, 1688–1863* (Cambridge, 1987); D. W. Earl, 'Procrustean feudalism: an interpretative dilemma in English historical narration, 1700–1725', *Historical Journal*, 19 (1976), pp. 33–51.

[33] Lord Bolingbroke, *Historical writings*, ed. Isaac Kramnick (Chicago, IL, 1972), p. 178.

[34] Smith, *Gothic Bequest*, pp. 28–38.

portrayal of primitive perfection.[35] Thomas Percy's *Reliques of ancient English poetry* (1765) patriotically pushed back by offering a resolutely English tradition. The character of the ur-patriot was now personified by the ancient bard. After all, King Alfred had infiltrated the Danish army's camp disguised as a minstrel. (The choice of heroes had moved on: the seventeenth-century adulation of Edward the Confessor had given way to worship of Alfred.)[36] In sum, regardless of the historical truth or otherwise of Brady's Tory historiography, after 1700 Gothicism remained ambient and became rampantly protean in its ideological and cultural possibilities.[37]

IV

And yet, the eighteenth century's historical investigation of liberty also produced a wholly contrasting and anti-Gothic strand. There emerged an evolutionary history of liberty which debunked ancient constitutionalism, charging it with anachronistic sentimentalism, and which held instead that liberty was a modern achievement. It began to be said that free institutions were not bequeathed by the 'rude' and 'barbarous' peoples of the dark ages, but by latter-day 'polite' ages. Civil liberty was peculiar to modern conditions, made possible by the growth of civility, a gentry and merchant class, the sophistication of commercial and contractual relations, and the growing fiscal clout of parliaments and centralized states. In particular, the Revolution of 1688 was not a renovation of the Saxons, but rather the beginning of permanent parliaments, accountable administrations, and reliable protection of property. This analysis was sometimes accompanied by a socio-economic thesis, derived from James Harrington's *Oceana* (1656), to the effect that liberty had only developed with the demise of the medieval monarchic, baronial, and ecclesiastical monopoly over land, and its accompanying servitude. This account came to be augmented by a 'stadial' theory, in which primitive societies were seen to have had simple, even nugatory, political arrangements (their chieftains were either naively trusted or brutally slaughtered); while modern commercial societies, having greater economic complexity and a necessary inequality, develop highly regulated systems of law and government, in which liberty arises alongside the economic division of labour. Modern people have liberty without

[35] Howard Gaskill, ed., *The reception of Ossian in Europe* (London, 2004).

[36] Simon Keynes, 'The cult of King Alfred the Great', *Anglo-Saxon England*, 28 (1999), pp. 225–356; Kathleen Wilson, *The island race: Englishness, empire, and gender in the eighteenth century* (London, 2003), ch. 2 and Epilogue.

[37] Philip Connell, 'British identities and the politics of ancient poetry in late eighteenth-century England', *Historical Journal*, 49 (2006), pp. 161–92. For Irish dimensions, see Clare O'Halloran, *Golden ages and barbarous nations: antiquarian debate and cultural politics in Ireland, 1750–1800* (Cork, 2004); Jim Smyth, '"Like amphibious animals": Irish Protestants, ancient Britons, 1691–1707', *Historical Journal*, 36 (1993), pp. 785–97; Kidd, *British identities*, ch. 7. For the Romantics, see Clare Simmons, *Reversing the Conquest: history and myth in nineteenth-century British literature* (New Brunswick, NB, 1990).

precedent, for they may choose a multitude of pursuits, free from the coerced communalism, status ascription, and compulsory public (especially military) service that had characterized ancient polities. There are elements of all these strands in David Hume who, in writing his 'sceptical Whig' *History of England* (1754–61), wanted to trounce the 'vulgar Whig' Gothic shibboleths of Paul Rapin's *History of England* (1726–31), a textbook which carried on where Petyt and Tyrrell had left off.[38]

As Hume knew, he was extrapolating positions efficiently set out by Sir Robert Walpole's journalists, adept at teaching 'modern' liberty to the sentimentally antique Country Party followers of Viscount Bolingbroke. Those of the Country persuasion (a melange of Tories, Jacobites, and Old Whigs), who were angry about the 'corruptions' that had been wrought by ministerial autocracy since 1688, correctly perceived that there was now afoot a 'pernicious' novel doctrine, 'that liberty is not an ancient inheritance, but only an acquisition since the Revolution'.[39] The best defence of the Court Whigs, and of 1689 as liberty's Year One, was set out in Lord Hervey's *Ancient and modern liberty stated and compared* (1734): ancient history is a dismal saga of despotic kings, barons, and bishops in oscillating contention with each other, occasionally interrupted by violent popular insurrections. Walpole's *Daily Gazette* epitomized the case with blunt simplicity: 'the modern constitution is infinitely better than the ancient constitution'.[40] Modernism of the Humean sort, embedded within a comprehensive socio-economic history of the evolution of civility, was further developed in Lord Kames's *Historical law tracts* (1758) and John Millar's *Historical view of the English government* (1787).[41]

Eighteenth-century historical modernism found a juridical counterpart in the growing acceptance of the doctrine of parliamentary sovereignty – a parliament against which the crown's powers were now decisively curtailed by regular elections and the desuetude of the royal veto. The power of a sovereign to legislate unconstrained had been the Stuarts' Bodinian gift to English jurisprudence. That the 'modern' Whigs stole the Stuarts' Bodinian clothes, by transferring the attributes of sovereignty from the crown to parliament, is perhaps the central truth about 1688, for it still defines the British polity. Parliament is 'absolute' and 'uncontrollable' and can do 'everything that is not naturally impossible', Sir William Blackstone famously averred in 1765.[42] The conceptual transference had begun in the 1640s and accelerated after the Glorious

[38] Duncan Forbes, *Hume's philosophical politics* (Cambridge, 1975), ch. 8; James Harris, *Hume: an intellectual biography* (Cambridge, 2015), chs. 7–8; Jai Wei, *Commerce and politics in Hume's* History of England (Woodbridge, 2017).

[39] *The Craftsman*, 8 (1737), Dedication.

[40] *Daily Gazette*, 23 Aug. 1736. See I. Kramnick, 'Augustan politics and English historiography: the debate on the English past, 1730–1735', *History and Theory*, 6 (1967), pp. 33–56.

[41] Peter Stein, *Legal evolution: the story of an idea* (Cambridge, 1980).

[42] Sir William Blackstone, *Commentaries on the laws of England* (4 vols., Oxford, 2016), I, pp. 160–2.

Revolution. The crisis of the Civil War had put pressure on the Cokean sovereign-less conception of customary law, because it was ill-equipped to determine who was supreme when crown and parliament fell into open conflict. William Prynne, in his comprehensive defence of the Long Parliament, devoted hundreds of pages to the common law and the ancient constitution, but he called his book *The sovereign power of parliaments* (1643). The thesis implied by his title was one which he and fellow Parliamentarians were reluctant to accept. The dilemma of sovereignty just as tortuously afflicted the Whigs at the point of their emergence under that name in the Exclusion Crisis around 1680. Their desire to cleave to the ancient mixed polity, as a check upon the crown, was vulnerable to the unavoidable fact that the crown historically had extensive prerogatives, over the appointment of ministers, the summoning of parliament, and the vetoing of legislation. Accordingly, they were forced towards theses that were not historical, but were drastic assertions of the sovereign right of parliament to curtail prerogative.[43]

A standing alternative to parliamentary sovereignty was the concept of a 'fundamental constitution', which, like a modern written constitution, could trump both royal prerogative and the whims of parliamentary majorities. Such a notion, as some modern Americans are overly keen to remind us, was commonplace in early modern England.[44] Saxonism might look historical, but it was always at risk of being a disguised form of foundationalism, an antique name for a covenant of 'fundamental' laws and liberties, to which the Whigs readily applied the designation 'original contract'. No longer denoting the river of time, the 'ancient constitution' becomes an Archimedean point, by which to judge the present and find it wanting. In the same way, Magna Carta sat oddly with the 'common law mind', because it is a formal document, apt to seem foundational and code-like; a fixed text wrought at a specific moment, deemed constitutive of the constitution, and super-eminent in relation to ordinary law. This is why Cokeans and Whigs, when deferring to immemorialism, tended to insist that Magna Carta was purely reiterative, a re-publication of pre-existing (inevitably Saxon) liberties. It was, wrote Coke, 'for the most part declaratory'.[45] But this only relocated to the Saxon era the tension between

[43] This case was put by Catherine Behrens: 'The Whig theory of the constitution in the reign of Charles II', *Cambridge Historical Journal*, 7 (1941), pp. 42–71. Behrens belonged to a remarkable cohort of interwar Cambridge women historians. Her correspondence with Butterfield is among her papers in the Churchill Archives Centre.

[44] Charles McIlwain argued that the common lawyers held that constitutional 'fundamental law' could trump ordinary law: *The high court of parliament* (New Haven, CT, 1910). But, while 'fundamental law' was a common phrase, it is doubtful any common lawyer denied the supremacy of statute.

[45] Faith Thompson, *Magna Carta* (Minneapolis, MN, 1948); J. C. Holt, *Magna Carta* (Cambridge, 1965, 2015) (quoting Coke, p. 3).

foundationalism and continuity, between text and custom. 'King Edward's laws' became foundational too.[46]

Raised to the level of abstract jurisprudence, a fundamental objection to the 'common law mind' lay in a strict theory of legal positivism. On this view, custom is not law; law is the work of sovereign command, wherever sovereignty happens to lie. Custom denotes habitual practice, it cannot constitute a binding rule: it is *ethos* not *nomos*. Bodinian strictures became fully domesticated in Hobbes's *Dialogue of the common laws* (posthumous, 1681). Although Royalist by preference, Hobbes decisively decoupled sovereignty from Stuart absolutism ('sovereign power in whomsoever it resides'), and made it available as a general thesis about formal legislative supremacy (neither 'customs' nor 'Saxon kings' but 'the sovereign legislator').[47] His line of thought would find restatement in the late eighteenth and nineteenth centuries in the works of Jeremy Bentham and John Austin, sworn enemies of common law shibboleths, not least because the 'liberty' offered by the common law was, it seemed to them, monopolized and obfuscated by that sinister clerisy, the lawyers.[48]

On the other side, the classic initial defences of Cokean common law against Hobbes's attempted demolition were Mathew Hale's fragmentary 'Reflections' (c. 1672) and his *History of the common law* (posthumous, 1713). For Hale, Hobbesian sovereignty was both dangerous and uselessly metaphysical in its obsession with authorization. Identifying the law's obligatoriness tells us little about its substance and operation. No 'refined…speculation [will] find out how lands descend in England'; 'the best invention of the most pregnant wits not aided by…experience' will not give us good laws; and the formal capacity of institutions to *make* law is not disturbed by the rich benefit derived from '*lex non scripta*, or unwritten laws and customs' which have 'obtained their force by immemorial usage'. As for the law's obligation, Hale suggested it arises from its 'admission and reception' by a community, which pointed toward Hume's grounding of authority in collective habits of obedience.[49]

[46] Ironically, Lord Ellesmere complained that Coke's zealous printing of reports froze the law in time and text, and gave fixity and personal authority to what ought to be a protean, anonymous flow of a collectively generated understanding of the law. See R. Ross, 'The commoning of the common law: the Renaissance debate over the printing of English law', *University of Pennsylvania Law Review*, 146 (1998), p. 437.

[47] Hobbes, *A dialogue of the common laws*, ed. Quentin Skinner and Alan Cromartie (Oxford, 2005), pp. 22, 116. See also John Vaughan's strictures ('the common law cannot be conceived to be law otherwise than by acts of parliament'): Richard Tuck, *Natural rights theories* (Cambridge, 1979), p. 135.

[48] Bentham, *A fragment on government* (1776); Austin, *The province of jurisprudence determined* (1832). See Postema, *Bentham*; Michael Lobban, *The common law and English jurisprudence, 1760–1850* (Oxford, 1991).

[49] Curiously, Hale's 'Reflections' is still only available as an appendix in William Holdsworth, *History of English law* (17 vols., London, 1922–65), v, pp. 499–513. See D. E. C. Yale, 'Hale and Hobbes on law, legislation, and the sovereign', *Cambridge Law Journal*, 3 (1972), pp. 121–56; Alan Cromartie, *Sir Matthew Hale, 1609–1676* (Cambridge, 1995), ch. 7 (quotation at pp. 102–6); Postema, *Bentham*, ch. 1.

Arguably, however, Coke's supposed indifference to the sovereign supremacy of parliamentary statute is overstated. The common lawyers knew well enough that statute trumped customary law, but they also knew that, in their era, statute occupied only a tiny fraction of the great ocean of law, and they also, until the Civil War, tended to speak of the 'high court' of parliament, softening the categorical distinction between common and statute law – for even statute could still be construed as declaratory or adjudicative.[50] Parliament, before 1689, was only an occasional institution, and sometimes statutorily barren; only after that did it become vastly more statutorily activist. The law reports – records of cases – were far more profuse producers of the daily fabric of law than were occasional discrete moments of creative legislative will. In any case, statutes themselves became incorporated into common law, for they were remoulded through judicial interpretation, and were sometimes inoperable until enabled through case law.

In the wake of parliamentary triumph in 1689, the jurists of the eighteenth century, notably Blackstone, sought to square what threatened to be an impossible circle, by celebrating in equal measure the 'omnipotence' of parliamentary sovereignty, the glories of the common law and its immemoriality, and also the rational foundations of common in natural law. In Blackstone, we find 'great Alfred's' ancient constitution; but also the slow, evolutionary achievement of 'the modern perfection of the constitution'.[51] Characteristic of his gnomic pronouncements was that the constitution was 'an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant'.[52] Scholarship on his *Commentaries on the laws of England* (1765–9) is forced to grapple with the (in)coherence of this riddle.[53] Bentham would find fatuity in Blackstone.

There is a deeper sense in which it is a mistake to see 'the common law mind' as committed to a static reverence for antiquity. Throughout the seventeenth century, and more especially in the eighteenth, jurists stressed the common law's capacity for adaptation and development in the face of social and economic change. It was held that the courts of the common law were better equipped than statute-makers to serve an evolving society, because they were flexibly attuned to the contingencies of everyday life which litigation presents to judges for adjudication. Statute could be a crude instrument, and over time redundant, because of its moment, whereas judges mould the law, incrementally, circumstantially. Jurists thus resisted the charge that the common law, because ancient, was ossified and unfitted to the exigencies of commercial

[50] McIlwain, *The high court of parliament*. His reading has, however, long been resisted, from Holdsworth to Geoffrey Elton.

[51] Robert Willman, 'Blackstone and the "theoretical perfection" of English law in the reign of Charles II', *Historical Journal*, 26 (1983), pp. 39–70.

[52] Blackstone, *Commentaries*, III, pp. 267–8.

[53] David Lieberman, *The province of jurisprudence determined: legal theory in eighteenth-century England* (Cambridge, 1989), chs. 1–2; Lobban, *Common law and English jurisprudence*, ch. 2; Wilfrid Prest, *Blackstone and his Commentaries: biography, law, history* (Oxford, 2009).

society. Selden melded ancient constitutionalism with an acute sense of the law's adaptability through time. Hale stressed legal development. In lawyers such as Sir Robert Atkyns, reverence for the Saxon antique was no bar to developing commercial law. Above all, Lord Mansfield's adjudications deftly mobilized ancient maxims to create new frameworks for novel economic practices. Thus did he construct law for negotiable financial instruments, intellectual property, and the power of a wife to make contracts. 'As the usages of society alter, the law must adapt itself.'[54] This, it has been suggested, makes of the eighteenth-century 'common law mind' a mode of Enlightenment: it was not necessary to shed historicism in order to embrace modernity.[55]

V

If we set aside the antiquity/sovereignty impasse, there remains a more fundamental contradiction, both juridical and philosophical, at the heart of ancient constitutionalism. If the common law was 'immemorial' and 'lost in the mists of time', then identifying a Saxon polity in specific time was superfluous and contradictory. The 'common law mind' ought not, in the end, to appeal to any particular past, and Whig antiquaries had foisted history upon jurisprudence. The twin foundations of the Pocockian 'standard model' were thus discordant.

One way out of the predicament was to discard *empirical* history, any claim for a putatively actual past. On this view, the thesis is atemporal, or, rather, involves 'timeless time'. It is committed to temporality, pastness, as a governing principle, but not to a demonstrable origin. It is iterative: a theory of infinite regress and indefinite repetition, the past as an echo chamber. It is, as Pocock put it, 'the assumption, rather than the factual information, of previous performance, that is operative'.[56] One version of this is the lawyer's formalist response, that forensic time is not historical time. Technically, in English law, it remains the case that 'immemorial' means anything that has been the case since 1189. Historical facts pertaining to things antecedent to that date are not pertinent. Further, for lawyers, the notion of 'legal fiction' has traction in a way that is inconceivable for the discipline of history. And since advocacy is of the essence in legal practice, the search for precedents, though ostensibly historical, is always instrumental and present-minded. Coke's emphasis on the arcane, 'artificial', erudition of the legal mind, in effect judge-made law, and his privileging of law reports over other documents, was designed to set legal

[54] Lieberman, *Province of jurisprudence*, passim, quotation at p. 127.

[55] Julia Rudolph, *Common law and Enlightenment in England, 1689–1750* (Woodbridge, 2013).

[56] Pocock, *Politics, language, and time*, p. 237. See J. W. Tubbs, *The common law mind* (Baltimore, MD, 2000), chs. 6–8; George Garnett, 'Why good lawyers are such bad historians: the case of Sir Edward Coke', Lecture, Inner Temple, 2015: www.innertemple.org.uk/downloads/education/lectures/2015/lecture_garnett.pdf.

discourse apart from historical method and lay scrutiny.[57] While ostensibly intent on embedding law in the woof and weft of the community's history, Cokean law kept slipping into archetypes known only to the legal mind. The practice of law is categorically distinct from that of an antiquary; and the supposed populism of the appeal to custom narrows into that which is customary among lawyers. Law was the work neither of legislators nor historians, nor yet of the people, but of courts and judges.

If lawyers draw the common law away from history *as a discipline*, so also do philosophers. We have reached a point at which ancient constitutionalism moves beyond both empirical history and jurisprudence, and becomes an expression of a political philosophy. It is a view of society in which the past prescribes to the present, in which a *sense* of history is held to be vital for the reliable conduct of public life. The sceptic might object that the cult of the common law entails the tyranny of the past over the present, of tradition over reason, of obfuscation over transparency, which inhibits the present generation from asking of a practice simply whether it has utility or serves the common good. The conservative is apt to respond that the traditional is not irrational; on the contrary, the customs of a community are the best source of reason, because, as Aristotle and the Scholastics argued, it repairs 'the defect of the single intellect', the inadequacy of an individual's natural reason, and of *this generation's* reason. The decisions of a legislature are but 'a temporary aggregate of arbitrary wills'.[58] The present generation's appeal to reason is hubristic, whereas tradition embodies the maximal accumulated endowment of reason. A tradition may be reasonable in ways we cannot see; it is ineffable, and we should modestly accept our myopia, for we inhabit a lonely island in the ocean of time.

Note here the ambivalent construal of 'reason'. It is either something to be repudiated, on grounds of scepticism about its capacities, its apriorism; or it is something misunderstood, because reason, properly, is experiential, cumulative, inductive. Suspicion of reason, or at least of any version of it that does not equate with tradition, has had several provocations. In the seventeenth and eighteenth centuries, the view that claims to 'reason' were often deluded was reinforced by a sense that those who said they were acting on behalf of divine reason, present in their illuminated minds, were 'enthusiasts'. In the nineteenth century, a similar view stemmed from revulsion against the savagery unleashed by the Reason which the French Revolutionaries claimed for themselves. In recent times, the Aristotelian idea of the wisdom of collective, inherited reason can be elided with epistemologies, such as those of Gadamar or

[57] See Alan Cromartie, 'The idea of common law as custom', in Amanda Perreau-Saussine and James Murphy, eds., *The nature of customary law* (Cambridge, 2007).

[58] The phrase is Postema's: *Bentham*, p. 15.

Wittgenstein, which posit the social construction of reason and knowledge: custom is all we have, because reason is but the articulation of convention.[59]

Raised to the level of a philosophical disposition, the 'common law mind' begins to meld with a profound tradition in conservative political philosophy, which holds that collective experience through time should be our guide. Deductive reason, and utilitarian calculus are, by contrast, disastrous. While the latter may be appropriate methods for metaphysics or mathematics, they do not belong to praxis – as Aristotle had said against Plato. Adequate moral and political conduct requires not analysis or apriorism but judgement and habituation. It is a position hostile to 'rationalism' in politics, in a certain meaning of 'rationalism'. Politics as a vocation is here regarded as a *habitus*, the art and practice of those acculturated to it, and it cannot be taught from first principles.

Edmund Burke was the foremost ancient constitutionalist by virtue of philosophical commitment rather than Saxonist pretention. He followed Hume in acknowledging the evolution of law and civility, and his respect for pastness had little to do with historical beginnings.[60] In his onslaught, *Reflections on the Revolution in France* (1790), his contrast between the English and French Revolutions depended upon the distinction between politics as the art of the experienced and as a crassly unstable deduction from the axioms of *philosophes*. The Glorious Revolution had been no revolutionary moment of liberation from history in which the people chose *de novo* to erect a form of government they saw fit. Rather, it was a renewal of the compact with the ages. Rendered as political philosophy, ancient constitutionalism here becomes something that connects Coke and Hale with Burke.[61] Because it is Burke who captures most perfectly its core conception, he is worth quoting at length.

> [A]n idea of continuity, which extends in time as well as in number and in space… [A] choice not of one day, or one set of people, not a tumultuary and giddy choice;… [but] a deliberate election of ages and of generations;…a constitution made by what is ten thousand times better than choice, it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time…Nor is prescription of government formed upon blind unmeaning prejudices – for man is a most unwise, and a most wise, being. The individual is foolish. The multitude, for the moment, is foolish, when they act without deliberation; but the species is wise, and when time is given it, as a species, it almost always acts right.[62]

[59] For philosophical accounts of custom see Perreau-Saussine and Murphy, eds., *The nature of customary law*; James Murphy, *The philosophy of customary law* (Oxford, 2014).

[60] Richard Bourke, *Empire and revolution: the political life of Edmund Burke* (Princeton, NJ, 2015), pp. 85–92.

[61] J. G. A. Pocock, 'Burke and the ancient constitution: a problem in the history of ideas', *Historical Journal*, 3 (1960), pp. 125–43; repr. in *Politics, language, and time*.

[62] Speech to the House of Commons, 7 May 1782.

A certain type of Cokean–Burkean ancient constitutionalism has its advocates today, especially in the United States, where reverence for the Founding can be underpinned by a certain vision of the legal past. Those who are suspicious of contemporary liberal activism, whether by Supreme Court judges or legislatures, are apt to critique fashionable pretensions to modern 'reasonableness' as 'arbitrary, rootless, and impulsive',[63] and prefer the accumulated historical reason present in the minds of the Founders. If revering the Constitution is apt to look like simple foundationalism (compare the Magna Carta problem), so the American ancient constitutionalist will wish to insist that the Constitution was recuperative and declaratory of earlier wisdom. The Constitution is thus a kind of *nunc stans* in which eternal truth is present in the moment of its creation. One exponent of this view contrives to align, as twin demons, American judicial activism and British parliamentary sovereignty, and sees Robert Brady as an ancestor of both, since, albeit Brady was a Tory, he was a closet Jacobin who handed plenary law-making powers to the whims of those who live only in the moment. On this view, Brady had failed to grasp that our compact, as Burke famously put it, is with the dead as well as the living. It is no accident that a good deal of scholarship on ancient constitutionalism, especially that which emphasizes its resilience in the eighteenth century, is the work of conservative Americans who have a powerful preference for common law jurisprudence over other forms of political reasoning.[64]

VI

Historians from the 1950s to the 1970s tended to overdraw the contrast between ancient constitutionalism and 'rationalist', ahistorical political philosophy.[65] They might reject Burke's politics, but they accept his binary. The theory of natural rights, and the ahistoricity of rational agents consenting to create states, writing upon the blank slate of a state of nature, seemed wholly inimical to the rival preference for legal antiquity and a mythologized reverence for pastness. This binary tended to bring with it a presumption that 'rationalism' was necessarily radical, even revolutionary, whereas historicism was inherently conservative. Leveller or Lockean 'rationalism', on this view, was a release from the antiquarian deadweight. This attitude had something to do with the enduring

[63] Colin Kidd, 'The grail of original meaning: uses of the past in American constitutional theory', *Transactions of the Royal Historical Society*, 26 (2016), pp. 175–96 (quotation at p. 175).

[64] John Phillip Reid, *The ancient constitution and the origins of Anglo-American liberty* (De Kalb, IL, 2005). More soberly: Trevor Colbourn, *The lamp of experience: Whig history and the intellectual origins of the American Revolution* (Chapel Hill, NC, 1965; reissued Indianapolis, IN, 1998); A. E. Dick Howard, *The road from Runnymede: Magna Carta and constitutionalism in America* (Charlottesville, VA, 1968); Ellis Sandoz, ed., *The roots of liberty: Magna Carta, ancient constitution, and the Anglo-American tradition of rule of law* (Columbia, MO, 1993). For an exploration of the Founders' pervasive respect for Coke and Blackstone, see Laura K. Donohue, 'The Original Fourth Amendment', *Chicago Law Review*, 83 (2016), pp. 1181–328.

[65] See especially Skinner, 'History and ideology'.

presence of Burke, who remained the presiding genius of English Conservatism, before his eclipse in the age of market neo-liberalism. But it had much more to do with the high reputation, post-war, of the brilliant figure of Michael Oakeshott. Oakeshott's classic essays, 'Rationalism in politics' and 'Political education' (1947–51) had, with exquisite Olympianism, skewered all, but especially the British Left's, aspirations to reform society according to a rational plan, and appealed instead to the sacrosanctity of experience, custom, and habitude. For Oakeshott, modern political reason was a momentary enthusiasm pretentiously masquerading as universal truth, and it presaged either anarchy or totalitarianism. Anyone who reads, now, the intellectual historians of the 1950s–70s will be struck by the looming incubus of Oakeshott.[66]

It is, then, significant that a powerful trend in recent historiography has been the theme of the 'radical face' of the ancient constitution.[67] It breaks with the assumption that historicism was, as Pocock insisted, a 'doctrine of profound conservatism'.[68] Scholars now show us that seventeenth-century ancient constitutionalism, from the 1640s onwards, served the causes of rebellion, deposition, and regicide. Two highly influential treatises construed the Saxon constitution in a manner that pointed to the execution of tyrants: Nathaniel Bacon's *Historical discourse* (1647) and John Sadler's *Rights of the kingdom* (1649). These books were deployed in John Milton's official defences of the execution of Charles I – Milton was the Saxon republican *par excellence*[69] – and then in the Whigs' attack on the later Stuarts, who sought and then justified the expulsion of James II. A century later, when Whig radicalism awoke from its Hanoverian torpor in the 1760s, a new generation of 'true Whigs' and 'commonwealthmen' demanded annual parliaments and an extended franchise, and they – notably John Cartwright and Catherine Macaulay – were rampant Saxonists.[70] This grand tradition of radical ancient constitutionalism includes innumerable exemplars, such as William Penn's *England's present interest* (1675): 'the Saxons…were a free people,…there was no law made without the consent of

[66] There is a striking contrast between two historians often classed together: Pocock's writings cleave to Oakeshott, Skinner's do not. Pocock's essays in *Politics, language, and time* are arguably shadowed by the student revolt and its search for unconditioned freedom. For a recent Oakeshottian reading of Burke, see Jesse Norman, MP, *Edmund Burke* (London, 2013).

[67] Janelle Greenberg, 'The Confessor's laws and the radical face of the ancient constitution', *English Historical Review*, 104 (1989), pp. 611–37; idem, *The radical face of the ancient constitution: St Edward's laws in early modern political thought* (Cambridge, 2001).

[68] Pocock, *Political thought and history*, p. 171. See especially his essay 'Time, institutions, and action'.

[69] Nicholas von Maltzahn, *Milton's History of Britain: republican historiography in the English Revolution* (Oxford, 1991); Martin Dzelzainis, 'The ideological context of John Milton's *History of Britain*' (Ph.D. thesis, Cambridge, 1984).

[70] George Owers, 'Common law jurisprudence and ancient constitutionalism in the radical thought of John Cartwright, Granville Sharp, and Capel Lofft', *Historical Journal*, 58 (2015), pp. 51–73; idem, 'The political thought of Major John Cartwright, 1774–1824' (Ph.D. thesis, Cambridge, 2015); Bridget Hill, *Republican virago: Catherine Macaulay, historian* (Oxford, 1992).

the people, *de majoribus omnes*, as Tacitus observeth'.[71] The appeal to the past never inoculated against drastic programmes of political reconstruction. It is tempting to read the reason/history binary of the 1960s as a version of 'high modernism', while the recent 'radical face' thesis is by contrast a postmodern recognition that historicism is not inimical to modernity.[72]

The radical Saxonists had in common three claims which they incessantly urged: that England's monarchy was essentially elective; that the coronation oath set binding contractual conditions on monarchs; and that there inhered in the political community a right to depose monarchs for 'maladministration'. Saxon kings, they contended, were little more than chieftains, *primus inter pares*, warriors made into princes; valour, prowess, and honour, and not bloodline, were the criteria for their election; and their ejection, expulsion, or killing, for oppression, was routine. Hereditary right and primogeniture were late and partial developments; and even when they arose, the community *elected* to permit the crown to pass by inheritance. The true accession of a king occurred only at the coronation oath, and an interregnum ensued at the predecessor's death. Radical Saxonists recited *ad nauseam* instances of deposition and breaches of blood inheritance. They stripped the crown of its vetoes, and held that parliaments had always been the plenary embodiment of the whole community, and so must be regular, and not dissolved until grievances were heard.

Whether this tradition was 'republican' is a matter of nomenclature. Royalists and Tories denounced it as such. In Milton's hands, it was fully so: the Saxon chieftains' office was so minimal that it was scarcely monarchical at all. The accent on valour, not bloodline, involved the humanist respect for virtue and true nobility. The veneration of Alfred and Edward the Confessor made of them classical lawgivers in the mould of Solon, Numa, and Lycurgus. Yet practically all the practitioners of radical Gothicism, outside the Cromwellian era, took for granted that England was and should be a monarchical polity, in which the highest servant of the people remained at least ornamentally royal.

Where to place the Levellers? During several decades of scholarly scrutiny, they have been something of a Rorschach ink blot. It is possible to hold that they outflanked the Long Parliament's own authoritarianism by appealing to the supremacy of the people by way of natural law, which makes them proponents of one kind of 'political rationalism'. It can be held, instead, that they were classical republicans, autodidacts steeped in Roman history.[73] Or that they were deeply historically minded, albeit torn between appeals to the

[71] Andrew R. Murphy, ed., *The political writings of William Penn* (Indianapolis, IN, 2002), p. 28.

[72] In Rudolph, *Common law and Enlightenment*, we learn that Saxons are 'subalterns' demonized by 'the modernizing narrative' (p. 266).

[73] S. D. Glover, 'The Putney debates: popular versus elite republicanism', *Past and Present*, 164 (1999), pp. 47–80; idem, 'The classical plebeians: radical republicanism and the origins of Leveller thought' (Ph.D. thesis, Cambridge, 1994).

Confessor and acceptance that the Normans had crushed Saxon liberties, so that now the people are slaves in want of liberation. John Lilburne radicalized Coke. Though he might sometimes speak of reason and nature, his predominant vocabulary was of 'franchises', 'immunities', 'privileges', the language of the common law. Our 'birthrights' are our heritage. Here, 'liberties' are plural and particular, specific legal rights entrenched over time. But those rights, the Levellers argued, have become democratized, because today's yeomanry and artisanate inherit the rights of that once smaller class of the non-villein *liber homo*, the free man – or, rather (in the single word), 'freeman'. Lilburne's slogan, the 'freeborn Englishman', extolled the particularities of *English* liberties.[74] In Lilburne, the ancient constitution was scarcely an instrument for conservatism, and it is a misleading to suppose that his radicalism was unleashed by the abandonment of historical for rational-natural modes of political reflection. In the 1760s, the Gothic democrats of the age of Wilkes took up where he left off.

VII

Ancient constitutionalism was unavoidably Anglocentric insofar as it was axiomatic that prudent politics were best grounded in the life of a particular nation. Yet, more than is often allowed, its practitioners were aware that they spoke about an English variant of a transnational phenomenon. The European context can be expressed in either a Roman or Gothic vein.

There is a question as to how closed the seventeenth-century common law mind was to the traditions of the Roman or Civil Law. The Englishness of common law and foreignness of Roman is one fact about the law which modern Britons think they know. In the early modern period, Civil Law was practised in the ecclesiastical and admiralty courts, and had its own college, Doctors Commons, distinct from the Inns of Court. (Anti-clerical hostility to canon law played its part in the burgeoning of the common law ethos.) The early Stuart turn toward absolutism was partly informed by the application of Roman Law norms to political thinking. Justinian's Code offered dicta which became the common parlance of European theorists of royal sovereignty: '*princeps legibus solutus est*' (the prince is the sole source of law); '*quod principe placuit legis habet vigorem*' (what pleases the prince has the force of law). Monarchs encouraged Civilian learning. The Italian Civilian Albericus Gentili was appointed regius professor of law at Oxford in 1587. When the Civilian John Cowell published his textbook *Interpreter* (1607), it offended the common

[74] R. B. Seaberg, 'The Norman Conquest and the common law: the Levellers and the argument from continuity', *Historical Journal*, 24 (1981), pp. 791–806; Rachel Foxley, 'John Lilburne and the citizenship of "free-born Englishmen"', *Historical Journal*, 47 (2004), pp. 849–74; idem, *The Levellers: radical political thought in the English Revolution* (Manchester, 2013); Ashley Walsh, 'John Streater and the Saxon republic', *History of Political Thought*, 39 (2018), pp. 57–82.

lawyers: it was condemned in parliament and James I felt compelled to suppress it. The 'common law mind', it has been argued, was a Jacobean reaction to the intrusion of alien Civil Law. To paraphrase Frederic Maitland, 'a Roman reception in sixteenth-century England lead to a Gothic revival in the seventeenth'.[75]

Yet this is to construe the common law as inimical to Civil Law, a juridical hermeticism which Pocock assumed, but which later scholars have disputed.[76] Intellectually, the common lawyers were habituated, not least through their scholastic Aristotelian university training, to eliding common law with the *jus naturae* and *jus gentium*, and were aware of the conceptual resources of Civil Law as a tool for systematizing legal thought. Pedagogically at least, the fissiparous and fragmentary particularities of common law could be given architectonic form by using Civil Law categories. This was an ambition of Francis Bacon, John Dodderidge, and John Selden. (Conversely, there was recognition that continental nations all had local laws and only a partial reception of Roman Law. 'Every Christian state hath its own common law', as Selden put it.[77]) It may also be noted that common law thinking habitually subtended upon Aristotelian moral philosophy. Disquisitions on natural law characteristically asked what the source was of knowledge of this law, and one answer was that it was known from communal experience over time. The common lawyers were simultaneously natural lawyers, predisposed to hold that the common law was the local and historic embodiment of universal laws of reason.[78]

Ideologically, furthermore, the lawyers were ready to resort to Civil Law when they faced conflicts of jurisdiction. Pocock's key exemplar, besides Coke, was Sir

[75] Daniel Coquillette, 'Legal ideology and incorporation', *Boston University Law Review*, 61 (1981), pp. 1–89, 315–71; 67 (1987), pp. 289–364; Peter Stein, *The character and influence of the Roman Civil Law* (London, 1988); J. P. Sommerville, 'James I and the divine right of kings: English political thought and continental theory', in Linda Levy Peck, ed., *The mental world of the Jacobean court* (Cambridge, 1991); Christopher Brooks, *Lawyers, litigation, and English society since 1450* (London, 1998), esp. pp. 224–7. For a common lawyer who leaned towards Cowell's politics, see L. A. Knafla, *Law and politics in Jacobean England: the tracts of Lord Chancellor Ellesmere* (Cambridge, 1977).

[76] The point was debated in Christopher Brooks, Kevin Sharpe, and D. R. Kelley, 'History, English law, and the Renaissance', *Past and Present*, 65 (1974), pp. 24–51; and 72 (1976), pp. 133–46. See also Helgerson, *Forms of nationhood*, ch. 2.

[77] John Selden, *The history of tithes* (1618), p. 478.

[78] Ian Campbell, 'Aristotelian ancient constitution and anti-Aristotelian sovereignty in Stuart Ireland', *Historical Journal*, 53 (2010), pp. 573–91; Sommerville, 'The ancient constitution reassessed'; Alan Cromartie, *The constitutionalist revolution: an essay on the history of England, 1450–1642* (Cambridge, 2006), ch. 7; Tubbs, *Common law mind*, chs. 6–9; Christopher Brooks, *Law, politics, and society in early modern England* (Cambridge, 2008), ch. 4. The pre-eminent historian of English law, J. H. Baker, has judiciously examined the insularity/cosmopolitanism of the lawyers. He argues for a shift between c. 1500 and c. 1600 from 'doctrine' to 'jurisprudence', from Sir Thomas Littleton's analytic treatment, largely free of citation of cases, to Cokean reliance on cases: 'English law in the Renaissance', in *The legal profession and the common law* (London, 1986). He connects this with the impact of print, because the printing of reports restricted the canon of legal citation and promoted a shift from appeals to reason to appeals to case law. See also Ross, 'Commoning of the common law'.

John Davies, quoted above. But when Davies sought to impose English institutions on conquered Ireland, and to suppress Brehon law, he appealed to Civil Law and the *ius gentium*, with which his *Irish reports* are replete. He resorted to the standard tags of the medieval glossators: the *princeps* is '*imperator in regno suo*' (the prince is sovereign in his realm) and was armed with '*plenitudo potestatis*' (plenary power).[79] Likewise, in his tract concerning customs impositions, defending royal fiscal prerogative, he cleaved to the *jus gentium:* 'neither the customary law, now statute law of England, but the general law of nations did first give these duties unto the crown'.[80] Much like Davies, in the late seventeenth century the ardent Whig William Atwood combined devout ancient constitutionalism, for home consumption, with aggressive assertions of the *imperium* of the metropolitan parliament, when dealing with Scottish and Irish claims to independence.[81]

The notion that common law was the local expression of universal natural law became especially strong in the eighteenth century, largely because of the academic prestige of the modern school of natural jurisprudence: Grotius, Pufendorf, Locke, Barbeyrac, and Vatel. The Whig commonwealthmen wreathed their vision of the Saxons in the dress of nature's laws: universal reason in its English incarnation. Its practical value lay in equipping the ancient constitution with an overriding authority capable of trumping unwanted parliamentary legislation. If mere common law could not challenge statute, then common law imbued with the law of nature might. Thus Coke's claim, in the *Second institutes*, that 'the common law…is the perfection of reason' came into its own. A classic instance is the demand of parliamentary reformers for more regular elections. Long parliaments were held to be inimical to liberty, and the Septennial Act of 1716, which extended the interval between elections, for all that it was statutory, was held to be 'null and void', because natural reason endowed citizens with a right of regular representation. Saxon history was held to exemplify this principle through its alleged commitment to annual parliaments.[82] Such natural-historical reasoning was the means by which putatively ancient principles could be entrenched as inviolable 'fundamental law', in the face of oppressive systems of royal or parliamentary sovereignty. Once again, ancient constitutionalism slipped into foundationalism. It is a tendency of thought which is apt to find in Coke premonitions of

[79] H. S. Pawlisch, 'Sir John Davies, the ancient constitution, and the Civil Law', *Historical Journal*, 23 (1980), pp. 689–702; Tubbs, *Common law mind*, ch. 6.

[80] Sir John Davies, *Jus imponendi vectigana* (London, 1659), p. 6.

[81] C. C. Ludington, 'From ancient constitution to British empire: William Atwood and the imperial crown of England', in J. H. Ohlmeyer, ed., *Political thought in seventeenth-century Ireland* (Cambridge, 2000). For the export of Cokeanism, see D. J. Hulsebosch, 'The ancient constitution and the expanding empire: Sir Edward Coke's jurisprudence', *Law and History Review*, 21 (2003), pp. 439–82; Kidd, *British identities*, ch. 10.

[82] Mark Goldie, 'Annual parliaments and aristocratic Whiggism', in John Spurr, ed., *Anthony Ashley Cooper, first earl of Shaftesbury* (Farnham, 2013).

such American constitutional arrangements as the capacity of judges to nullify statutes which breach deeper principles. Coke's famous remark in Bonham's Case (1610) – 'in many cases, the common law will control acts of parliament'[83] – has been taken to amount to a doctrine of judicial review of legislation, though few legal historians would now claim that Coke meant any such thing; rather, he was exploring the role of judicial discretion in giving effect to statute.

The Pocockian proposition that the Cokean 'common law mind' was pervasive but hermetic seems, at present, to be attracting criticism and re-affirmation in equal measure. For some, as just implied, Pocock misleadingly extrapolated *some* of Coke's multi-faceted utterances and a single passage in Davies into a common culture, whereas the seventeenth-century legal profession is better characterized as eclectic and cosmopolitan in its resources and mentality. Reading Bacon, Selden, Finch, Dodderidge, or Ellesmere conveys a different impression: theoretical, Civilian, royal. For others, however, Coke's mindset has come to seem yet more embedded in the culture of his contemporaries, both in entrenched Tudor legal assumptions about English legal antiquity (and which hence were not simply attributable to the exigencies to Jacobean politics);[84] and in the ethos of the Inns of Court, where shared practices, rituals, and dramatic and poetic self-representations reinforced insular and oppositional ideologies.[85]

VIII

The supposition that ancient constitutionalism was a prime instance of Anglocentric pretensions to national exceptionalism can be challenged in another way, through noting not only the ancient constitutionalists' recognition of juridical universalism, via natural and Civil Law, but also an historical counterpart, their acceptance that the Saxon polity belonged to the universal Gothic order of European peoples. Arguably the *fons et origo* of English ancient constitutionalism was a French text, François Hotman's *Francogallia* (1573). This was one of a trio of treatises provoked by the Massacre of St Bartholomew – the attempt by the French crown to annihilate the Huguenots – and against which Bodin had articulated his doctrine of sovereignty. The trio exemplify the deployment of contrasting political languages to assert a common ideological position, that there is a right of armed resistance against tyranny. Theodore Beza's *Right of magistrates* (1574) was chiefly Scriptural in approach; the *Vindicae contra tyrannos* (1579) drew upon natural law; while Hotman appealed to French history. Hotman constructed a 'Germanist' account of

[83] Quoted in David Pollard et al., *Constitutional and administrative law* (Oxford, 2007), p. 51.

[84] I. Williams, 'The Tudor genesis of Edward Coke's immemorial common law', *Sixteenth-Century Journal*, 43 (2012), pp. 103–23.

[85] Paul Raffield, *Images and cultures of law in early modern England: justice and political power, 1558–1660* (Cambridge, 2004).

the origins of limited monarchy, as an inheritance from the Goths, in contrast to the false 'Romanist' account, which identified the crown with the *imperator* of the Roman Empire. 'That the German kings were created by the suffrages of the people, Cornelius Tacitus, in his book *De moribus Germanorum*, proves plainly; and we have shown, that our Franks were a German people.' Thus, the practice of electing kings was an institution continued 'to this very day' by the 'Germans, Danes, Swedes, and Polanders'.[86]

These conflicting ancestries, Germanist and Romanist, would continue to be played out in French historiography until the eighteenth century. Hotman was remodelled by Henri de Boulainvilliers, in his *Essais sur la noblesse de France* (1732), while the Romanist thesis was restated in Jean-Baptiste Dubos's *Histoire critique de l'établissement de la monarchie français dans les Gaules* (1734). Montesquieu's *Spirit of the laws* sought to adjudicate between the two schools.[87] The stakes were high: in 1714, Nicolas Fréret was sent to the Bastille when his Frankish thesis was held to libel the monarchy.

Hotman's *Francogallia* was absorbed and deployed in England from an early stage. John Selden's *Analecta* (1607) and *Jani Anglorum* (1610) drew upon it, and his *Titles of honour* (1614) exhibits a profound grasp of the European character of English institutions.[88] Among the Levellers, the arch-Goth was John Hare, but his perspective was emphatically transnational: 'We are a member of the Teutonic nation, and descended out of Germany…Scarcely was there any worth or manhood left in the occidental nations, after their so long servitude under the Roman yoke, until these new supplies of freeborn men reinfused…the then servile body of the West.'[89] Elias Ashmole's *The institution… of the garter* (1672), respectful of restored monarchic institutions, followed earlier Goths in providing a trans-European context, in this case for the history of English nobility, drawing upon French and Spanish antiquaries, such as Ambrosio Morales's *De las antiquedades de las cuidades de Espana*.[90] Algernon Sidney searched all Europe to find parallels; thus the 'gemotes, parliaments, diets, cortes, assemblies of estates' to be found from Spain to Poland, all of them deferring to the Tacitean model of law-making by *omnium consensus*.[91] Likewise, Thomas Rymer's *General draught and prospect of government in Europe* (1681) offered a remarkably pan-European perspective. An English translation of Hotman's *Francogallia* appeared in 1711 – a book that was on Benjamin

[86] Julian Franklin, ed., *Constitutionalism and resistance in the sixteenth century* (New York, NY, 1969), p. 239.

[87] See Robert Shackleton, *Montesquieu* (Oxford, 1951), pp. 328–36. On the importance of Hotman, see Pocock, *Ancient constitution*, ch. 1; Donald R. Kelley, *Foundations of modern historical scholarship* (New York, NY, 1970).

[88] Christianson, *Public career of John Selden*, passim.

[89] John Hare, *St Edward's Ghost* (London, 1647), p. 3.

[90] Vittoria Feola, *Elias Ashmole and the uses of antiquity* (Paris, 2012), ch. 5.

[91] Algernon Sidney, *Discourses concerning government*, ed. Thomas West (Indianapolis, IN, 1990), p. 105; Hotman is cited at pp. 291–3.

Franklin's shopping list when in London in the 1770s.[92] Robert Molesworth's preface to this translation is a model statement of Gothic universalism, and later reappeared as *The principles of a real Whig* (1775). He claimed that Hotman's book 'gives an account of the ancient free state of above three parts in four of Europe', and that the foundations of the English constitution are shared by all 'the Goths and the Franks'.[93] Not least of the advantages of deploying European-wide scholarship was its utility for outmanoeuvring Brady's apparently narrow, antiquarian reading of English post-Conquest history, with its descent into the minutiae of parliamentary writs of summons, and allowing instead the emergence of something like a sweeping 'philosophical' history of the common European polity, one indeed that could match the universalist pretensions of the Civil Law. We still lack a full account of Hotman's English reception and of the non-insular, trans-European, perspective of the Gothic Whigs.[94] Such an account would need to engage with other continental variants, such as the myth of Batavian origins, crafted for the Dutch Republic in Grotius's *Liber de antiquitate reipublicae Batavicae* (1610), which appeared in English translation in 1649 as *A treatise of the antiquity of the commonwealth of the Battavers*.[95]

In the nineteenth century, pan-European Taciteanism acquired an anthropological and socio-economic character.[96] In reaction against the dire impact of industrial capitalism – the reaction could be conservative and Romantic as well as socialist and revolutionary – theorists recovered what they believed had been a continent-wide system of primitive communalism. It was argued that the ancient village community had been characterized by private property only in the products of labour, while land and natural resources had been shared in common. This was what German scholars called the *Mark* community. It was a line of thought promoted by Justus Moser in his *History of Osnabruck* (1768), which connected modern survivals of the practice of shared use rights in 'the commons' (usufruct) with the earliest known evidence about free German farmers, as described by Caesar and Tacitus, a system of property consonant with communal norms of self-government. This notion was

[92] Colbourn, *Lamp of experience*, p. 155.

[93] Robert Molesworth, *An account of Denmark, with Frangollia*, ed. Justin Champion (Indianapolis, IN, 2011), pp. 171–2. See also the Preface to Molesworth's *Account of Denmark* (1694).

[94] But see Pocock, *Ancient constitution*, ch. 1; Campbell, 'Aristotelian ancient constitution'; Kidd, *British identities*, ch. 9. For Anglo-Swedish interaction, see William Poole and Kelsey Jackson Williams, 'A Swede in Restoration Oxford: Gothic patriots, Swedish books, English scholars', *Lias*, 39 (2012), pp. 1–67.

[95] Ivo Schöffer, 'The Batavian myth during the sixteenth and seventeenth centuries', in J. S. Bromley and E. H. Kossmann, eds., *Britain and the Netherlands*, v (The Hague, 1975).

[96] For the following, see John Burrow, 'The village community and the uses of history', in Neil McKendrick, ed., *Historical perspectives* (London, 1974).

elaborated by Karl Friedrich Eichhorn, Jacob Grimm, and Georg von Maurer,[97] and in England by John Kemble in *The Saxons in England* (1849). Green's *Short history of the English people* opens with a lyrical account, citing Tacitus of course, of the 'jealous independence' of 'each little farmer commonwealth'. He wrote of 'the holdings of the freemen clustered round a moot-hill or sacred tree where the community met from time to time to order its own industry and to frame its own laws'.[98]

In *Ancient law* (1861) and *Village communities* (1871), Henry Maine, while largely accepting the evidence for the *Mark* community, performed what Whig modernism had attempted a century before, by contrasting modern freedom with the ancient despotism of patriarchy, custom, and status ascription. Yet, skilfully, he also insisted on respect for historically distinctive stages of social development, and, holding that, as a society, British India was distinct and *sui generis*, he sought to challenge the dangerous naivite of Benthamite legal positivists who aimed to impose 'rational' codes. Here, Indian agrarian communalism was being examined with a Tacitean lens. Idealizations of the *Mark* proved tenacious, not least because, albeit modified, they appealed to the burgeoning theorists of pluralism, of *gemeinschaft*, of 'organic' community, who rejected what they saw as the distinctive and pernicious tendency of modern politics: the erosion of everything that lay between 'Man and State', as Maitland put it.[99]

One recidivist, a keen student of Maurer, and attached still to the idea of the *Mark*, was Karl Marx, who wrote in 1881 of the Teutonic 'archaic prototype' wherein control over the economic life of the commune was part of its character of 'popular liberty'. Late in life, Marx began to wonder whether revolution might preserve what was left in Europe of the ancient Gothic commune *before* industrial capitalism obliterated it.[100]

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[97] Georg von Maurer, *Geschichte der Mark-, Hof-, Dorf-, und Stadverfassung und der öffentlichen Gewalt* (*History of the constitution of the mark, farmstead, village, and town, and of the public power*) (Munich, 1854).

[98] John Richard Green, *A short history of the English people* (London, 1924 [1874]), pp. 3–4.

[99] Quoted in Burrow, *Liberal descent*, p. 141.

[100] Gareth Stedman Jones, *Karl Marx: greatness and illusion* (London, 2016), pp. 568–86. The currently flourishing school of English social history sponsored by E. P. Thompson's classic essays on the 'moral economy', with its accent on the early modern capitalist erosion of ancient common rights of usufruct, is arguably a latter-day rehearsal of ancient constitutionalism.