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EDWARD COKE

Edward Coke makes regular appearances in works on English constitutional history and constitutional law.[1] Coke was born in 1552 and by 1572 was a student observing the courts in London.[2] In 1578 he was called to the bar. Over the next five decades, Coke was a private practitioner, an educator in the Inns of Court and Chancery, a crown law officer, author, chief justice, privy councillor, prisoner and a member of parliament. In many respects Coke's career followed the same trajectory as other successful Elizabethan and Jacobean lawyers.

Some aspects of Coke's career and writings have not yet been investigated in detail. There is no scholarly biography of his whole life,[3] no study examining Coke's parliamentary careers,[4] and manuscript material remains relatively unused, at least in the accounts more concerned with the constitution.[5] Recently, historians have been particularly interested in Coke's political thought and the idea of the 'ancient constitution', but these works have

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[1] Samuel R Gardiner, *History of England from the Accession of James I to the Outbreak of the Civil War 1603-1642* vols 1-3 (Longmans, Green, and Co. 1883); James S Hart Jr, *The Rule of Law 1603-1660: Crown, Courts and Judges* (2003, Pearson); Ann Lyon, *Constitutional History of the United Kingdom* (Cavendish, 2003), 199-201; Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A critical introduction* (5th edn, CUP, 2009), 58 and 87; Colin Turpin and Adam Tomkins, *British Government and the Constitution: Texts and Materials* (7th edn, CUP 2011) 86; AW Bradley and KD Ewing, *Constitutional and Administrative Law* (15th edn, Pearson, 2011) 50, 58, 247.

[2] Biographical details are taken from Allen Boyer, 'Coke, Sir Edward' in HCG Matthew and Brian Harrison (eds), *Oxford Dictionary of National Biography*, vol 12 (OUP 2004) 451.

[3] Existing biographical works include the seriously outdated Catherine Drinker Bown, *The Lion and the Throne: the life and times of Sir Edward Coke, 1552-1634* (Hamiltons 1957) and Allen D Boyer, *Sir Edward Coke and the Elizabethan Age* (Stanford UP 2003) which does not cover Coke's life after 1603. Boyer, 'Coke, Sir Edward' (n 2) is very full.

[4] Coke had been a member of the House of Commons on various occasions before he became a judge, serving as speaker in 1593, and was also a member after his dismissal from the bench, including in the parliament of 1628, where he was heavily involved in the proceedings which led to the Petition of Right. Coke features frequently in Conrad Russell, *Parliaments and English Politics 1621-1629* (Clarendon 1979).

[5] Several of Coke's notebooks survive (see JH Baker, 'Coke's Note-Books and the Sources of His Reports' (1972) 30 CLJ 59). Coke appears regularly in manuscript law reports of the period. Scholars have made some use of this material with regard to particular cases of interest, but not in a systematic fashion. See, e.g., CM Gray, 'Bonham's Case Reviewed' (1972) 116 Proceedings of the American Philosophical Society 35 and Jacob I Corré, 'The Argument, Decision, and Reports of *Darcy v. Allen*' (1996) 45 Emory LJ 1261.

tended to focus on Coke's writings and relatively high level theory, placing Coke into a wider intellectual context, rather than his actions and career. On some practical legal issues of the day which touched on constitutional matters (writs of habeas corpus and prohibition), legal historians have shown that Coke was neither the first nor the most active of the judges in those fields, which may raise doubts about Coke's contemporary constitutional importance.[6] No attempt has been made to examine whether Coke genuinely held a coherent view about English constitutional issues or whether his views on constitutional matters changed over time. Recent work examining Coke's historical thinking has shown both how he formed his early views on the history of the common law, and how his thinking developed in his later work. Given that Coke's political thought was related in some way to his view of the past, his constitutional ideas may also have changed.[7] Apparent contradictions in Coke's actions and statements can easily be perceived.[8] Whether these differences should simply be accepted as based upon Coke's changed roles, a genuine change of mind, or possibly even underlying consistency at a deeper level, has not been carefully investigated.

It is the abnormalities of Coke's career which have created the perception of Coke's constitutional importance. Coke's career was abnormal in two ways: first, his disagreements with James I and others and second, his considerable writings. For lawyers and constitutional historians, Coke is probably best known for his seemingly antagonistic relationship with James I and the confrontations and arguments which resulted, disagreements which ultimately led to his dismissal from the bench in 1616. Historians of political thought make considerably more use of Coke's writings, but are less concerned with the relationship between Coke and James. These writings include considerable discussion of the history and quality of the English constitution in terms which were important in political discourse in pre-Civil War England.

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[6] Paul D Halliday, *Habeas Corpus: From England to Empire* (Harvard UP 2010) 30 and Charles M Gray, *The Writ of Prohibition: Jurisdiction in Early-Modern English Law* vol 1 (Oceana Publications 1994) xvii.

[7] Ian Williams, 'The Tudor Genesis of Edward Coke's Immemorial Common Law' (2012) 63 Sixteenth Century Journal 103; Anthony Musson, 'Myth, Mistake, Invention? Excavating the Foundations of the English Legal Tradition' in Andrew Lewis and Michael Lobban (eds), *Law and History* (OUP 2003). On the links between Coke's view of the past and his constitutional thought, see below, nn 34-45 and text.

[8] Russell (n 4) 57-58 and 128 and Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (CUP 2006) 228.

Coke's Career

In many respects, Coke's constitutional significance depends upon his dismissal as chief justice of the King's Bench in 1616, three years after his apparent promotion from the post of chief justice of the Common Pleas to which he had been appointed in 1606. Coke's dismissal was seen by some historians as a defining moment in seventeenth-century history: Samuel Gardiner's *History of England from the Accession of James I to the Outbreak of the Civil War*[9] incorporated a two volume work entitled *History of England from the Accession of James I to the disgrace of Chief Justice Coke*.[10] Compared to previous judicial dismissals, Coke did not seem to have committed any misconduct, instead he was dismissed for disagreeing with the king.

Gardiner's *History of England* was the principal reference for Dicey when writing about the English constitution in the early seventeenth-century. In this way, Gardiner's views on Coke have become part of the standard constitutional history presented in English works on constitutional law.[11] For Gardiner, Coke earned the 'approbation of posterity' in resisting demands from James I for the judges to submit to the Crown.[12] The judges who bowed to James I's demands that they not derogate from his prerogative, or determine cases affecting the Crown without first consulting him, were condemned for 'dereliction of duty'.[13] Such submission to the Crown, and the potential for the Crown to prevent cases being heard which affected its interests, reflected a principle 'equally bad' as that in 'so many French constitutions'.[14] Such a constitutional narrative elevates Coke as an example of the importance of judicial independence, often now linked with the separation of powers.[15] As we shall see below, while some of Coke's actions may look like those considered appropriate under the separation of powers, Coke's motivations and justifications for acting seem to be very different.

According to a contemporary, '[t]he common speech is that fowre Ps have overthrown and put him [Coke] down, that is Pride, Prohibitions, Premunire and

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[9] Longmans, Green, and Co. 1883-4 (10 volumes).
[10] Hurst and Blackett, 1863.
[11] See JWF Allison, *The English History Constitution: Continuity, Change and European Effects* (CUP 2007) 136.
[12] Gardiner, *History of England*, vol 3 (n 1) 24.
[13] Gardiner, *History of England*, vol 3 (n 1) 18.
[14] Gardiner, *History of England*, vol 3 (n 1) 7.
[15] This is not limited to works written by lawyers. Hart (n 1) 102-109 similarly focuses on the idea of judicial independence as underlying the Jacobean disputes, especially at 107.

Prerogative'.[16] Coke's personality was certainly a contributing factor in his dismissal; as Hart puts it, Coke 'may have been the most brilliant and learned jurist of his day, but he was also obstinate, opinionated, argumentative and willful[sic]. In fact he was, to an alarming degree, James's alter ego, and, given their respective positions, collision was almost inevitable'.[17] Opinionated and argumentative lawyers did not suddenly appear around 1600, or disappear later, so it took more than Coke's personality to bring matters to a head. The personalities of other participants in the various legal dramas were also important. Lord Chancellor Ellesmere was at least as proud, obstinate and opinionated as Coke, while James himself had a strong conviction about the place and role of the monarch, convictions which were not always shared with Coke. Unlike Elizabeth, his predecessor, who also held strong views, James sometimes sought to persuade those who disagreed with him, descending from his imperial majesty to debate with his political inferiors.

The references to prohibitions and praemunire encompass the various jurisdictional disputes in which Coke was engaged (especially the jurisdictional conflict with the Chancery just before Coke's dismissal), as well as the particular issues concerning writs of prohibition which were raised in the *Case of Prohibitions*, and the confrontation with James I which resulted. Finally, the mention of prerogative refers to the *Case of Commendams*, where the judges refused to delay a case despite the king claiming that it affected his prerogative. These two latter issues raised questions of political principle and theory, and Coke's dismissal was seen by Gardiner as due to Coke's resistance to James I's views about the powers of the King.

Several of the issues with which Coke was associated were not new. Jurisdictional disputes existed during the reign of Elizabeth, but became more heated during James's reign; Elizabeth was also jealous of her prerogative, but largely avoided discussion of it. Some of the responsibility for this change seems to lie with James I. The Stuart regime made highly successful use of the courts to ascertain the legality of controversial policies. By doing so, James was able to levy extra-parliamentary taxation with judicial approval,[18] and to determine some of the legal consequences of his accession to the English throne when

[16] Norman Egbert McClure (ed), *The Letters of John Chamberlain* vol 2 (American Philosophical Society 1939) 34.
[17] Hart (n 1) 45.
[18] *Bates's Case* (1606) 2 State Trials 371.

Parliament had proved unwilling to reach James's desired conclusions.[19] Such an approach demonstrated respect for the importance of law in England, but risked giving the judges a degree of control or veto over royal policies. The idea of law as important to English political thought was not new, but the spheres into which the common-law intruded did expand in the sixteenth century, and the use of the courts by James reflected and amplified that trend.[20] When disputes could not be resolved in the courts, or at least not resolved to James's satisfaction, James sought to resolve the issues himself through debate. This led to the enunciation of ideas and conclusions on all sides, revealing strong differences in opinion between James and his chief justice.

Coke's Writings

Coke was unusual in producing a large volume of writings. Eleven volumes of reports, each accompanied by a preface, appeared during Coke's lifetime, with two more posthumous volumes. After his enforced retirement from the bench, Coke published the first part of his *Institutes of the Laws of England*, the final three volumes being printed with parliamentary support in the 1640s. Coke's writings, and some of the constitutional ideas expressed there, have become the focus of renewed interest in recent years, especially with the (re)emergence of the idea of 'common law constitutionalism', and in particular in relation to questions concerning parliamentary sovereignty.[21]

There is a disjunction between the events in Coke's career which are considered important by lawyers and constitutional historians and Coke's writings. Though Coke made personal notes of controversial cases concerning constitutional and public law issues, he did not have those cases printed. The cases of *Prohibitions* and *Proclamations*, for example, were only included in the twelfth volume of Coke's *Reports*, printed posthumously. Other cases which are important for Coke's constitutional reputation were never reported by Coke at all, such as *Peacham's Case* and the *Case of Commendams*. For those cases which Coke noted, but

[19] *Calvin's Case* (*The Case of the Post-Nati*) (1608) 2 State Trials 559.

[20] Cromartie has argued that this trend was so pronounced that during the sixteenth century a view developed amongst common lawyers that the common law was omnicompetent and viewed by common lawyers as a complete 'science of the common weal' (Cromartie (n 8)). This goes too far, but Cromartie is correct to observe that more facets of a wider range of activities were in some way encroached upon by the jurisdiction of the common-law courts.

[21] E.g. TRS Allan, 'The rule of law as the rule of reason: consent and constitutionalism' (1999) 115 LQR 221 and Allison (n 11).

did not print, the explanation probably lies in the conventions of early-modern law reporting. Other early-modern printed reports did not include cases on sensitive issues.[22] The omission of *Peacham's Case* and the *Case of Commendams* is more difficult to explain because Coke's notebooks for the relevant period have been lost after being used as a source for the twelfth part of the *Reports*.[23] It is therefore impossible to ascertain whether Coke made notes on these cases but the editor of the twelfth *Reports* did not think the cases sufficiently important to print, or whether Coke did not even report the cases at all. Either of these explanations highlights differing views of matters of importance between the seventeenth century and writers from the nineteenth century onwards.

Coke's *Reports* addressed many areas of development in the law which were not reflected in the earlier law reports. The sixteenth century was a period of rapid change in English law, and Coke's *Reports* provided guidance on new, or developing legal issues. A good example which touched on constitutional matters is *Bagg's Case*, in which Coke made a sweeping statement about the powers of the King's Bench. *Bagg's Case* was the first use of the developed form of *mandamus* writ, and so Coke's *Report* provided a valuable resource to practitioners in demonstrating the existence of the writ and some suggestions about its use.[24] Coke's *Reports* were particularly significant in this regard because they were printed, so capable of wider dissemination than manuscript collections, and Coke sometimes published quite quickly.

However, Coke's *Reports* are difficult texts for historians to use. As Francis Bacon put it when criticising them in 1616, they contain too much '*de proprio*'.[25] Certainly Coke's style of reporting (or perhaps his memory) did not lead to reports which accurately reflected what was said or decided in cases. The *Reports* often treated Coke's own views as those of the

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[22] Baker has observed that both such sensitive matters were omitted from the posthumous reports of Dyer too (JH Baker, 'Introduction' in JH Baker (ed), *Reports from the Lost Notebooks of Sir James Dyer* vol 1 (Selden Society Publications vol 109 1993) xlv).

[23] Baker, 'Coke's Note-Books' (n 5) 66.

[24] (1615) 11 Rep 93b, 77 ER 1271. On the writ of mandamus and its development see Edith G Henderson, *Foundations of English administrative law: certiorari and mandamus in the seventeenth century* (Harvard UP 1963) 46-82. Henderson shows that *Bagg's Case* was not the first mandamus writ to be issued (the first was in 1608), but was the first to lead to a judgment.

[25] Francis Bacon, *A Memorial Touching the Review of Penal Laws and the Amendment of the Common Law* in James Spedding (ed), *The Letters and the Life of Francis Bacon* vol 5 (Longmans, Green, Reader, and Dyer 1869) 86.

court, and did not clearly separate Coke's commentary from the report itself.[26] The *Case of Prohibitions* is particularly problematic in this regard. Ussher showed that the report of the case in Coke's *Reports* is not easily reconciled with the other surviving reports and may misrepresent which issues were considered most important by parties in the debates.[27]

Coke's *Institutes* are used less frequently by historians and lawyers, and have been little studied.[28] As Coke seems to have regarded the English constitution as ideal, the descriptions of constitutional matters in the four volumes of the *Institutes* provide valuable material for understanding Coke's views on constitutions. Coke makes no references to the *Institutes* project during his judicial career, suggesting that he only began work on them after 1616. When the first part, the *Commentary on Littleton*, was printed in 1628, Coke claimed that the second and third parts were also completed, but that he had only begun to gather material for the fourth part.[29] If this is correct, then the *Fourth Part of the Institutes of the Laws of England*, which contains Coke's longest discussion of the legislature, was written only around the time of, or after, the parliament in which Coke was one of the members who complained about Charles I's use of the 'Forced Loan' and ultimately worked to create the Petition of Right.

Although they purport to be descriptions of the contemporary state of English law and legal institutions, there is good evidence that the *Institutes* should be treated with some caution. It appears that Coke used the opportunity provided by his *Institutes* to reiterate his own views. Coke had always reused earlier material in his printed publications,[30] but in the *Institutes* Coke seems to have done this to present his conclusions on disputed points as an accurate statement of the law. For example, in the *Third Part of the Institutes of the Laws of England*, Coke discussed the criminal offence of praemunire.[31] Coke's discussion included consideration of the illegitimacy of the Chancery interfering with judgments in common law

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[26] For various early-modern criticisms in this vein, see John William Wallace, *The Reporters, chronologically arranged: with occasional remarks upon their respective merits* (3rd edn, T & JW Johnson 1855) 119-120 and Thomas Egerton, 'The Lord Chancellor Egertons Observacions upon ye Lord Cookes Reportes' in Louis A Knafla, *Law and Politics in Jacobean England: The tracts of Lord Chancellor Ellesmere* (CUP 1977).

[27] Roland G Usher, 'James I and Sir Edward Coke' (1903) 18 English Historical Review 664.

[28] A notable exception is Musson (n 7), who considers Coke's use of historical sources in the *Institutes*.

[29] Co Litt sig ¶¶2a.

[30] See Williams 'Tudor Genesis' (n 7) 114, where Coke is shown to have reused material from a speech he gave in the Inns of Court in the preface to the third volume of the *Reports*.

[31] 3 Co Inst 119-127.

courts and the possibility of using praemunire to punish those involved in doing so. Praemunire had been used by Coke in a jurisdictional dispute with the Chancery on the issue of Chancery interference after judgment just before his dismissal, and Coke repeated the same arguments and authorities. However, in the *Institutes* Coke then added:

> See a Privy Seal bearing *Teste 18 Julii*, Anno Domini 1616. to the contrary, obtained by the importunity of the then Lord Chancellor being vehemently affraid…And besides, the supposed Presidents (which we have seen) are not authenticall, being most of them in torn papers, and the rest of no credit.[32]

Without an understanding of Coke's earlier arguments, this passage makes little sense: it is a reference to a statement by the king that praemunire was not to be used against the Chancery. Coke never provides the 'supposed Presidents' against the use of praemunire, against which he inveighed here. The reference must be to the precedents which were used in the debates before Coke's dismissal, rather than any text in the *Institutes* themselves. As with the *Reports*, we should therefore consider the *Institutes* as works which while purporting to be descriptive, actually present Coke's own views.[33]

COKE'S POLITICAL THOUGHT

Coke's legal, historical and political thought has been the subject of considerable interest since the publication of Pocock's *The Ancient Constitution and the Feudal Law* in 1957, in which Coke was one of the paradigm examples of the early-modern 'common law mind'.[34]

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[32] 3 Co Inst 125.

[33] Other examples include: the jurisdiction of the court of Common Pleas to issue writs of prohibition in 4 Co Inst 100, which was one of the issues in dispute about prohibitions in the first decade of the seventeenth century (see, eg, Henry E Huntington Library Ellesmere MS 2011, which includes arguments against the Common Pleas' jurisdiction); the discussion of monopolies considered below (nn 90-93 and text) concerned a statute (21 Jac c 3) which Russell observes was Coke's 'pride and joy' as a legislator in the 1620s and for which Coke introduced the initial bill (Russell (n 4) 110, 187 and 190).

[34] The outline here is based on Pocock's retrospect on his book (JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century. A Reissue with a Retrospect* (CUP 1987). It does not attempt to take account of all the nuances of the academic discussions on this topic. See, *inter alia*, Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (Macmillan 1992); Cromartie (n 8) and Christopher

Broadly, Pocock presented Coke as representative of Jacobean common lawyers, lawyers who thought that the common law was a form of customary law which had existed since time immemorial. The common law had survived political upheaval and invasion more or less unchanged because it was the best law for England.[35] Related to this was a belief in the 'ancient constitution', an English constitution which had similarly existed unchanged beyond the memory (and records) of man.

Within the English constitution and the common law, Coke recognised 'fundamental law'. This was often associated with Magna Carta, but Coke made it clear that Magna Carta was only declaratory of the older fundamental law contained within the common law.[36] The ancient constitution therefore linked the constitution and the common law, and early-modern lawyers held a view that the common law could determine constitutional questions. This did not necessarily mean the common law was all encompassing; early-modern common lawyers clearly recognised spheres in which other laws (such as canon law in the ecclesiastical courts) were legitimate and many (perhaps even all, at least until some point in the reign of Charles I) recognised an 'absolute' royal prerogative which, within its sphere, was legally unrestricted.[37]

This outline does seem to reflect Coke's thinking, if not that of all other common lawyers. Aside from one or two isolated comparative remarks, Coke never considered 'constitutions' in his writing, only the English constitution. The English constitution with which Coke was concerned was that which he believed existed in his lifetime (probably, in fact, an idealised Elizabethan constitution)[38] and had always existed.

From the perspective of constitutionalism, the most important aspect of this constitutional model was its focus on law as determining the relationship between government and governed, and between different institutions of government. There is

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W Brooks, *Law, Politics and Society in Early Modern England* (CUP 2008). Many of these works consider a much wider range of sources than Pocock.

[35] The possibility of change does not seem to have been disputed by early-modern lawyers, although the advisability of such change clearly was. See Burgess (n 37) 23, for an explanation of the Aristotelian basis of the idea that changing law was inadvisable and dangerous.

[36] 2 Co Inst proheme (unpaginated).

[37] See Burgess (n 34) 139-178; Halliday (n 6) 65-69; Cromartie (n 8) 208 identifies material by Coke referring to the 'absolute' prerogative.

[38] Brooks has described Coke as a 'long-lived Elizabethan' (Brooks (n 34) 135), while Russell observes that in the parliaments of the 1620s, 'Coke was an old Elizabethan , constantly reminiscing about the days of his youth, when England had been glorious' (Russell (n 4) 169).

nothing especially novel about these particular points. Law had long been an important element in thinking about constitutional matters in western Europe.[39] The novelty in the thinking of Coke and his contemporaries was not in the role of law, but the role of common law. Rather than any form of higher order law, such as divine or natural law, the ancient constitution was determined by a temporal body of law.

For Coke, because the English constitution was an historical artefact, the content of the constitution could be proved. Because the old constitution was the best constitution, there was no clear distinction between the constitution as it was/is and what the constitution ought to be. Such a view had important constitutional effects, notably that the same techniques which were used to 'prove' the law in private law cases could also be used in cases concerned with the constitution.[40] By the time Coke began to write about the English constitution the onset of printing had led to English law being determined principally through textual means, especially through printed texts, rather than the medieval oral/manuscript tradition.[41] Coke's idea that the constitution was based on common law led to an assumption that the constitution could be determined through the examination and interpretation of texts, just as would be done in private-law cases, and this can clearly be seen in the *Institutes*.[42] This could privilege the common lawyers: they were a group who could claim training conducive to finding and interpreting the relevant material and consequently expertise in discerning the constitution from it. Coke never made this point explicitly, but it lay behind several of Coke's views: his warning to law students to avoid chroniclers as not understanding legal matters (thereby excluding a potential source for identifying the historical constitution);[43] his criticism, in the preface to the *Sixth Reports*, that the Jesuit Robert Parsons' attempt to argue with Coke's recently-printed views about

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[39] Eg MP Gilmore, *Argument from Roman Law in Political Thought, 1200-1600* (Harvard UP 1941); Brian Tierney, *Religion, Law and the Growth of Constitutional Thought, 1150-1650* (CUP 1982).

[40] See Ian Williams, 'English Legal Reasoning and Legal Culture, c.1528-c.1642' (PhD thesis, University of Cambridge 2008) on legal argument in this period generally, 44-47 and 105-6 for the idea of the law being 'proved'.

[41] Ian Williams, '"He Creditted More the Printed Booke": Common Lawyers' Receptivity to Print, c.1550-1640' (2010) 28 Law and History Review 39.

[42] Another good example of this trend is the remark of the judge, Richard Hutton, upon the death of Charles I's Attorney General, William Noy, in 1634: 'in his time many novelties pretended to be grounded upon ancient records in olden times were introduced' (WR Prest, *The Diary of Sir Richard Hutton 1614-1639* (Selden Society Supplementary Series vol 9 1991) 98).

[43] Edward Coke, *Le Tierce Part des Reportes* (London 1602) sig Ciii.

English ecclesiastical history was flawed because it did not make reference to matters of record and common law sources;[44] and his denial of James I's capacity to judge because James did not possess the 'artificial reason' of those with 'long study and experience' in the law.[45]

COKE'S VIEW OF THE (IDEAL) ENGLISH CONSTITUTION

According to Coke, England was a monarchy.[46] The relationship between the monarch, the constitution and the law in Coke's thinking was complex. When Coke discussed the institutions of government in his *Fourth Part of the Institutes*, there was no specific discussion of the monarch. The monarch clearly existed, and was in many respects central to the constitution, but was not identified as a participant in government.[47]

One of Coke's views which remained consistent is that the English monarch had two capacities, a natural body and a politic body.[48] Coke was not the first common lawyer to make this point.[49] However, Coke integrated the idea of the king's two bodies into the existing common law and drew conclusions which related to issues beyond property law. The language of body politic was used for both the king and corporations, which were sometimes described as 'bodies politic' in medieval law reports.[50] Coke used material and ideas from the medieval discussions of corporations when considering the Crown. For example, the king's politic body meant that the king 'cannot give or take but by matter of Record for the dignitie of his person'.[51] The same position was taken in the second part of the

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[44] Edward Coke, *La Size Part des Reports* (London 1607) sig ¶v-vi. Ecclesiastical history was an important aspect of debates about the powers of the Crown over the English church.

[45] *Prohibitions del Roy* (1610) 12 Co Rep 63, 65; 77 ER 1342, 1343.

[46] Edward Coke, *Le Quart Part des Reportes* (London 1604) sig Bii.

[47] For example, the king was '*Caput, principium* & *finis*' (the head, the beginning and the end) of parliament, but was not present (4 Co Inst 3). In the King's Bench, the king was always present, but never answered (4 Co Inst 73).

[48] *Calvin's Case* (1608) 7 Co Rep 1a, 10a; 77 ER 377, 388.

[49] See Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton UP 1957) 7-16 for discussion and references to its appearance in the *Commentaries* of Plowden in the 1570s.

[50] David J Seipp, 'Formalism and realism in fifteenth-century English law: Bodies corporate and bodies natural' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (CUP 2012) 39-40.

[51] *Calvin's Case* (1608) 7 Co Rep 1a, 12a; 77 ER 377, 391.

Institutes, '[t]he King being a body politique cannot command but by matter of Record'.[52] In this respect the king was like other corporate bodies, such as towns. The king as a natural person evidently could take property or issue instructions, but as a body politic these actions were not legally effective unless done by record. While Maitland thought that the theory of the king's two bodies 'stubbornly refuses to do any real work in the case of jurisprudence',[53] at the level of constitutional theory this view is misplaced. Coke's approach not only led to concrete conclusions on matters of law, but also suggested a broader idea: that the king was integrated into the legal system, rather than outside it.[54]

Coke's approach inevitably limited the powers of the monarch. As Coke made clear, even in the period when he was Attorney General, unlawful actions by the monarch could not be enforced through the courts. In the preface to the second volume of *Reports* (1602), Coke proclaimed that while in other countries, 'the Lawes seeme to governe', in England the judges actually would not obey an unlawful command from the monarch.[55] Coke seems to have taken the same view in actual cases through his career. In *Darcy v Allen* (the '*Case of Monopolies*'), in which Coke appeared as counsel, Coke conceded that if the king granted a monopoly by letters patent, and the grant was unlawful, then the courts could not enforce it.[56] Coke was Attorney General at the time, but does not seem to have thought his concession would be problematic or controversial. Similarly, Coke explained how the king by charter could not abridge existing common-law rights in subjects, another example of the king not being able to act contrary to law.[57] To some extent, Coke's model of the constitution presupposed the supremacy of law: not even the king could act contrary to law, at least in the sense that unlawful actions would not be enforceable.[58]

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[52] 2 Co Inst 186.

[53] FW Maitland, 'The Crown as Corporation' in HD Hazeltine, G Lapsley and PH Winfield (eds), *Maitland: Selected Essays* (CUP 1936) 111.

[54] It is not clear to me whether Coke reached this view consciously or as a political theory, or it simply reflected his approach to interpreting legal sources, which was to integrate ideas into his existing understanding. For examples of this, which are shown to be linked to contemporary reading techniques, see Williams 'Tudor Genesis' (n 7) 121-122.

[55] Edward Coke, *Le Second Part des Reportes* (London 1602) 'To the learned reader' (unpaginated).

[56] See Corré (n 5) 1297. Tanfield, then the solicitor general, agreed with this concession.

[57] *Case of the Tailors of Ipswich* (1615) 11 Co Rep 53b-54a; 77 ER 1218, 1219-1220.

[58] An important qualification is the 'absolute' prerogative (n 37 and text).

Coke referred to England as 'governed by law'.[59] His *Fourth Institutes* 'was a treatise on structural constitutional law and organs of government. Coke reviewed the powers of the various government bodies existing in England – legislative, administrative, fiscal, mercantile, ecclesiastical, collegiate, metropolitan, and baronial'.[60] However, the subtitle of this book was 'concerning the Jurisdiction of Courts'. For Coke, every governmental body was in some sense a court. Parliament was a court,[61] the King's council was a court, so were the 'Counting House of the King's Household' and 'Commissioners and others for the maintaining and erecting of Beacons, signes of the sea, or Light-houses'.[62] If a body had legal powers, it was a 'court'.

This position made sense in early-modern England. The earliest institution of central government in Anglo-Norman England, the Exchequer, clearly was a court and its judicial jurisdiction was determined by its revenue function;[63] the most important figure in early-modern local government, the Justice of the Peace, was a judge who also exercised important investigatory and administrative functions.[64]

This identification of all sorts of governmental institutions as courts is a salutary reminder that Coke could not have thought in anything like modern terms about government or the separation of powers. Coke did not classify governmental bodies based upon their functions: all governmental bodies were courts and their activity was 'judicial'. Moreover, it was this understanding of other institutions as courts which seems to have justified Coke's ideas about the accountability of these institutions. According to Coke in *Bagg's Case*:

> to this Court of King's Bench belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach

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[59] Coke, *Second Part* (n 55) 'To the learned reader' (unpaginated).
[60] Boyer, 'Coke, Sir Edward' 462.
[61] 4 Co Inst 1. In the preface to 2 Co Inst (unpaginated), Coke even states that parliament acts as a court when legislating, describing statutes as 'enacted by that court'.
[62] 4 Co Inst 131 and 148.
[63] See JH Baker, *An Introduction to English Legal History* (4th edn Butterworths 2002) 48-49. The fictitious writ of *quo minus*, which changed the Exchequer into a common-law court of general jurisdiction was not fully accepted until around 1649, see W Hamilton Bryson, 'The court of Exchequer comes of age' in DJ Guth and JW McKenna (eds), *Tudor Rule and Revolution: essays for G.R. Elton from his American friends* (CUP 1982).
[64] See, eg Henderson (n 24) 9-25.

> of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law.[65]

For Coke, errors were either 'judicial' or 'extra-judicial', an interpretation which presupposes an interpretation of government as itself curial. The jurisdiction of the King's Bench over 'judicial' errors was largely accepted at the time, and criticisms of Coke's remarks in *Bagg's Case* focused on the assertion of jurisdiction over 'extra-judicial' errors.

Halliday has recently drawn attention to a manuscript report which provides evidence as to how Coke justified the King's Bench jurisdiction over 'judicial' errors.[66] The passage suggests that by identifying governmental institutions as courts, Coke necessarily concluded that the King's Bench would have review of them. In 1605, Coke intervened in a habeas corpus application argued in the King's Bench concerning imprisonment on the orders of the Council of the Marches of Wales, despite not being counsel in the case. Coke asked the court's permission to 'plead a little for the prerogative of the king, the jurisdiction of the court, and the benefit of all the king's subjects'. Coke explained that

> [a]ll courts of justice within the dominions of the king are subordinate, this court alone excepted, in which the king is always by law intended to be present, and which is restrained to no place but extends to all his dominions. Thus only this court will have the examination of all other courts of justice, and when the king gives authority by his commissions, or the law by act of parliament, to any man to execute justice, still the examination of them shall be made by such authority that will remain in the absolute and supreme power of the king and in his bench, which is his proper seat of justice.[67]

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[65] *Bagg's Case* (1615) 11 Co Rep 93b, 98a; 77 ER 1271, 1277-1278.

[66] For what follows, see Halliday (n 6) 11-13.

[67] *Whitherby v Wetherley* (1605) Harvard Law School MS 1180, fos 68v-69. The same passage is quoted by Halliday, with a slightly different translation from the law-French. Similar ideas were expressed by Thomas Fleming when Elizabeth's solicitor general (see the material quoted in Halliday (n 6) 64-65).

Coke's remarks show an assumption that the review jurisdiction of the King's Bench, the king's prerogative and the interests of the king's subjects could all be upheld simultaneously, something which is not apparent from many discussions of Coke's constitutional ideas. The jurisdiction of the King's Bench was an emanation of the royal prerogative.[68] Contempt of the King's Bench and its orders was therefore also contempt of the royal prerogative and the king.

From this perspective habeas corpus and all resolutions of jurisdictional disputes could be described as protecting the king's prerogative. Prohibitions to ecclesiastical courts, and praemunire against the Chancery, were not mere assertions of power by the central common-law courts, but attempts to protect the king's judicial prerogative from illegitimate usurpation. Jurisdictional usurpation would also have dangerous effects for subjects seeking justice and the realm as a whole. Coke explained this using the metaphor of the realm as a body politic. He explained that if the hands or feet tried to exercise

> the office of the eie to see, these should assuredly produce disorder, and darknesse, and bring the whole body out of order, and in the end to distruction: So in the Commonwealth (Justice being the main preserver thereof) if one Court should usurp, or incroach upon another, it would introduce incertainty, subvert Justice, and bring all things in the end to confusion.[69]

What Coke's explanation for the King's Bench's jurisdiction does not provide is clarification as to why the King's Bench had jurisdiction over 'extra-judicial' errors. The breadth of Coke's statement was criticised by some of his opponents. Lord Chancellor Ellesmere announced that Coke sought to subordinate the entire government of the realm to the King's Bench.[70] However, the substance of Ellesmere's criticism was more subtle and can only be understood in the context of *Bagg's Case* as a whole. *Bagg's Case* was the first case initiated by a writ of mandamus to proceed to trial. The writ of mandamus emerged in the King's Bench in the early-seventeenth century and, unlike its precursors or writs such as

[68] Coke also made this point in the fourth part of the *Institutes*: the king had delegated his judicial powers to the King's Bench (4 Co Inst 70-1).
[69] 4 Co Inst sig B-B^{v}.
[70] Egerton, 'The Lord Chancellor Egertons Observacions' (n 26) 307.

prohibition or habeas corpus, was not necessarily directed to a 'judicial' body, and was not in *Bagg's Case* itself.[71] Coke's remark in *Bagg's Case* was directed to providing some justification for the writ of mandamus itself, rather than a wide theory of government by judiciary.[72] Ellesmere's criticism of Coke recognised this. The substance of his complaint was not that Coke was trying to run the country through the King's Bench, but that Coke was asserting a jurisdiction for the King's Bench which had previously been exercised by the king, the Privy Council, or the Court of Star Chamber.[73]

In *Bagg's Case* Coke did not explain why the King's Bench had jurisdiction over extra-judicial errors. That explanation is found in the fourth part of the *Institutes*, where Coke expressly linked the King's Bench's jurisdiction to issue writs of mandamus with the jurisdiction to grant writs of habeas corpus or prohibition.[74] If Coke's justification for the jurisdiction of the King's Bench in matters of 'judicial' error was the presence of the king and his judicial prerogative, it seems that this justification was also to explain the jurisdiction over 'extra-judicial' error. In some sense, this jurisdiction had already been recognised as existing in the Star Chamber. All that Coke had done was move the jurisdiction to (or claim shared jurisdiction for) the King's Bench.

Legislature and Law-Making

Because Coke's ideal constitution was the English constitution, his discussion of the legislature was to a great extent descriptive of the English parliament. Most of Coke's writings about Parliament are found in his *Institutes*, especially the *Fourth Part*. This poses an interpretative challenge. According to Coke he had not written the *Fourth Part* by 1628 (when the *First Part* was printed), but had begun to collect material.[75] This means that the views Coke expressed in the *Fourth Part* may reflect Coke's experience in the tumultuous

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[71] Henderson (n 24) 62 makes this clear.

[72] There is no evidence that Coke influenced the development of the mandamus writ before *Bagg's Case*. The key developments in the form of the writ occurred under his two predecessors (Henderson (n 24) 68-69). By the time of *Bagg's Case*, Coke may have felt that he had to find a justification for a writ which was by then established as part of his court's jurisdiction.

[73] Egerton, 'The Lord Chancellor Egertons Observacions' (n 26) 307. Henderson provides some evidence that the type of dispute in *Bagg's Case* itself had previously been addressed by the Privy Council. In fact the dispute in *Bagg's Case* had itself gone to the Council (Henderson (n 24) 72-76).

[74] 4 Co Inst 71.

[75] Co Litt sig ¶¶2a.

Parliament of 1628. Coke never directly refers to this parliament, but it may have coloured some of his views in ways which cannot easily be identified.

Parliament consisted of the king and the three estates of the realm: lords spiritual, lords temporal and the commons. Those elected as members of the commons 'represent all the Commons of the whole Realme, and trusted for them'.[76] According to Coke, statute was consequently 'made by authoritie of the whole Realme', of which the king was a part.[77] Certain remarks by Coke present a view that Parliament had a power greater than that of the monarch. According to Coke, 'the power and jurisdiction of the Parliament, for making of laws in proceeding by Bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds',[78] and that '[t]he highest and most binding Laws are the Statutes which are established by Parliament'.[79]

Coke explained the power of parliament through the metaphor of the body politic:

> as in the naturall body when all the sinews being joyned in the head do join their forces together for the strengthning of the body, there is *ultimum Potentiae* [greatest power]: so in the politique body when the king and the Lords Spirituall and Temporall, knights, Citizens, and Burgesses, are all by the kings command assembled and joyned together under the head in consultation for the common good of the whole realm, there is *ultimum Sapientiae* [greatest wisdom].[80]

Like his justification for judicial independence, Coke's explanation as to Parliament's unique power was based upon Parliament's superior capacity to reach the correct decisions due to its greater wisdom than any other person or institution.

However, while in the *Institutes* Coke stressed Parliament's preeminent wisdom and power, Coke is well-known for remarks which present a very different view. Coke not only doubted Parliament's wisdom, but may have propounded limitations on its power. For

[76] 4 Co Inst 1.
[77] Co Litt 19b. Despite stating that statutes made by the whole realm, Coke accepted that many were bound by statutes who were not parties to elections (4 Co Inst 4).
[78] 4 Co Inst 36.
[79] 2 Co Inst proheme (unpaginated).
[80] 4 Co Inst 3.

example, in the preface to his third volume of *Reports*, Coke described how Parliament sometimes changed the common law, which was not a wise thing to do. For example:

> the wisedome of the Common Law, was that all estates of inheritance should bee Fee simple, so as one man might safely alien, demise, and contract, to and with an other: But the Statute of Westminster the second cap.1. created an estate taile, and made a Perpetuitie by Act of Parliament, restraining Tenant in taile from aliening or demising…which in process of time brought in such troubles and inconveniences, that after two hundred yeeres, necessitie found out a way by Law for a Tenant in taile to alien.[81]

Coke's changing views may reflect changing circumstances. In the 1628 parliament, Coke and others were trying to resolve the problems caused by the *Five Knights' Case*. That case seemed to show that the judges could not be relied upon to protect the liberties of the subject. If so, Coke needed to justify Parliament having the final say. While Coke had earlier stressed the excellence, wisdom and reasoning of the judges,[82] in the fourth part of his *Institutes*, Coke instead stressed the wisdom of Parliament. By doing so, Coke provided a justification for parliamentary intervention which did not upset his theory: if parliament was more wise than the judges, it was appropriate for parliament to be the final arbiter.

One of the statements for which Coke is most famous was made in *Dr Bonham's Case*, where Coke suggested that Parliament's power was limited and that the courts had a role in controlling Parliament's power. In his report of *Dr Bonham's Case*, Coke stated that:

> it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.[83]

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[81] Coke, *Tierce Part* (n 43) sig Div[r].
[82] See below, nn 101-103 and text.
[83] *Dr Bonham's Case* (1610) 8 Co Rep 107a, 118a; 77 ER 646, 652.

The meaning of this passage, and quite what Coke meant by 'common right and reason' has been much discussed. No consensus has been reached, although recent work has been more sceptical about the idea that Coke was claiming a genuine power in the courts to review legislation.[84] It may be significant that the early-seventeenth century Parliament acknowledged that it was not sovereign in all respects and had itself recently complained about the practice of 'letting out of penalties to subjects', which was the issue in *Bonham's Case*.[85] Unless significant new evidence is identified, it seems unlikely that agreement is possible over such an ambiguous passage. Coke may have been referring to ideas of higher order law, common-law norms, or maybe mere contradiction in the statute itself, and there are questions about whether the language of 'void' refers to declaratory judgments or mere non-application in particular cases.

A further complication in Coke's view of the power of the legislature related to dispensations, an aspect of the royal prerogative which enabled the king to dispense a particular person from the rules imposed by legislation. In the *Case of Non Obstante*, Coke clearly stated that the king had just such a dispensing power, even if parliament included a provision in its legislation denying the possibility of such a dispensation with regard to the statute.[86] In this respect, Coke seems to have regarded parliament's 'transcendent and absolute' legislative power as weaker than the royal prerogative.

Related to the legislature was Coke's view of non-parliamentary legislative powers. Notoriously, James I thought that the king had power to make law by issuing proclamations under the royal prerogative. Coke apparently rejected this position in the *Case of Proclamations*, proclaiming 'that the king cannot change any part of the Common Law, nor create any Offence by his Proclamation, which was not an Offence before, without Parliament'.[87] Modern readers tend to take the interpretation that Coke here established that the monarch could not alter the law.[88] As with many of Coke's quotes, the interpretation

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[84] The most recent contributions offering competing views are Ian S Williams, '*Dr Bonham's Case* and "void" statutes' (2006) 27 Journal of Legal History 111, RH Helmholz, 'Bonham's Case, Judicial Review, and the Law of Nature' (2009) 1 Journal of Legal Analysis 325 and Philip Hamburger, *Law and Judicial Duty* (Harvard UP) 622-30. See Allison (n 11) 136-9 for further references.

[85] Conrad Russell, *King James VI & I and his English Parliaments* (OUP 2011) 31 and 60.

[86] *Case of Non Obstante* 12 Co Rep 18; 77 ER 1300. See also *Penall Statutes* (1605) 7 Co Rep 36, where the dispensing power was affirmed.

[87] *Case of Proclamations* (1611) 12 Co Rep 74, 75; 77 ER 1352, 1353.

[88] Bradley and Ewing (n 1) 50.

may not be as simple as it first appears, in this instance because of the early-modern jurisprudential context. It is clear that some other common lawyers considered that a practice could be prohibited or regulated by proclamation if the practice was not punished by the common law or statute but was nonetheless 'unlawful'. For example, in the *Case of Monopolies*, Altham argued precisely this position with regard to the monarch having power to regulate monopolies through the prerogative.[89] In this context, unlawfulness must mean something other than contrary to common or statute law. Whether Coke agreed with this position is not entirely clear.

The views about monopolies expressed by Coke in the third part of his *Institutes* demonstrate the difficulty in understanding Coke's views on identifying what was an offence. According to Coke, '[t]hat offence which is contrary to the ancient and fundamentall laws is malum in se'.[90] To explain the characterisation of monopolies as contrary to the ancient laws of the realm, Coke argued that 'the law of the Realm in this point is grounded upon the law of God, which saith…Thou shalt not take the nether or upper milstone to pledge, for he taketh a mans life to pledge: Whereby it appeareth that a mans trade is accounted his life, because it maintaineth his life and therefore the Monopolist that taketh away a mans trade, taketh away his life'.[91] However, Coke does not provide any evidence of the ancient law relating to monopolies, other than parliamentary materials from the reign of Edward III onwards. Coke's view would therefore seem to be that prohibition by divine law would also mean prohibition by the 'ancient and fundamentall laws'.[92] If that is correct, anything which could be identified as contrary to divine law,[93] could be punished by proclamation, because in theory at least it was already contrary to existing law. While

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[89] Corré (n 5) 1298. Coke was counsel in *Darcy* v *Allen*, and there is no evidence of him taking a contrary position.

[90] 3 Co Inst 181. In the *Case of Proclamations*, Coke said 'that which is against common law *malum in se*' ((1611) 12 Co Rep 74, 76; 77 ER 1352, 1354).

[91] 3 Co Inst 181. It would be interesting to identify if the arguments from the law of God which Coke advances at various points had wider support among divines or other writers. For example, the bishop Lancelot Andrewes condemned unjust monopolies in his catechism, regarding them as contrary to the eighth commandment against theft (see Naomi Tadmor, *The Social Universe of the English Bible: scripture, society, and culture in early modern England* (CUP, 2010), 157-8).

[92] Exactly the same position is taken with regard to brothel-keeping, for example (4 Co Inst 205).

[93] For modern readers it is important to observe the capacity of 'divine law' to be stretched. Coke considered monopolies to be addressed by divine law because monopolies deprived people of livelihoods and then life; Lancelot Andewes extended the prohibition on theft to monopolies, which does not seem an obvious point to all modern readers.

Coke's position stated a clear theoretical limitation on the monarch's power, one which modern authors can identify as related to a modern doctrine, in the early-modern context this limitation may have been of much more limited effect.[94] What Coke's position would have achieved is the resolution he reported later in the *Case of Proclamations*: 'that the King hath no Prerogative, but that which the Law of the Land allows him.'[95] By stating that proclamations would not be enforced unless the offence was already recognised as an offence by the existing law, Coke effectively denied the king's potential to determine the scope of his own prerogative power to issue proclamations, a power which Coke described as a 'grand prerogative of the king'.[96]

Judicial Independence

Coke is usually identified by writers on the constitution as an early champion for the idea of judicial independence from the Crown. Medieval and early-modern judges were not obviously independent of the Crown. Even Coke described the judges as part of the 'King's Council'.[97] Nevertheless, *Peacham's Case* and the cases of *Prohibitions* and *Commendams* are taken as specific examples of the ideas of the separation of powers and judicial independence, while Coke's willingness to resist royal pressure itself demonstrated judicial independence.[98] The *Case of Prohibitions*, in particular, became well-known following its inclusion in Coke's twelfth volume of *Reports*. This case is an excellent example of the difficulty in reconstructing Coke's views, while *Peacham's Case* is more problematic in its significance.

The *Case of Prohibitions* concerned a jurisdictional dispute between the common-law and ecclesiastical courts, centred on the use by the common-law courts of writs of prohibition which ordered ecclesiastical courts to cease hearing a case. Such jurisdictional disputes were not first encountered in Jacobean England, but what was new was James I's decision to attempt to resolve the dispute personally. Prohibitions issued to the ecclesiastical

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[94] In addition to the potential breadth of offences which might be identified as part of the law, there is the fact that conciliar courts such as the Star Chamber clearly did punish either for breaches of proclamation in themselves or for contempt of the king in breaching his proclamation. See Frederic A Youngs, *The Proclamations of the Tudor Queens* (CUP 1976) 70, 117-119, 153 and 237-240.

[95] *Case of Proclamations* (1611) 12 Co Rep 74, 76; 77 ER 1352, 1354.

[96] (1611) 12 Co Rep 74, 75; 77 ER 1352, 1353.

[97] Co Litt 110.

[98] Lyon (n 1) 199-200; Loveland (n 1) 58 and 87; Bradley and Ewing (n 1) 247.

courts related to important matters of public interest. Such prohibitions undermined the capacity of the church courts to enforce religious discipline, and made it more difficult for the church to raise revenue (especially in cases concerning tithes) and thereby fund its ministry.

Quite what happened on the two days of debate over which James presided is unclear; there are several reports, none of which entirely match. The only report of the debate which was printed was Coke's (printed in the Interregnum), which also happens to be the report which is most different to the others.[99] From the perspective of later influence, it was Coke's report which became well-known and to which reference is still made in works on the English constitution. In comparison to the other reports, Coke's report focuses on an issue which seems to have been of less importance in the debates themselves: whether the king was permitted to resolve such a jurisdictional dispute.[100]

According to Coke, he explained to James that the king could not act as a judge because he lacked the 'artificial reason' of those trained in the law.[101] Coke's claim to a particular constitutional role and power, that of judging, was grounded upon a claim to expertise and particular skill.[102] Coke's argument denied the king any judicial role. The argument was unsuccessful, at least in the short term: James appeared as a judge in the court of Star Chamber in 1616, pronounced a resolution to another jurisdictional dispute and explained that he was entitled to act in a judicial capacity. In the longer term, Coke effectively reiterated his conclusion in the *Second Institutes*, but in terms which would, perhaps, have been more palatable to James. There, Coke accepted that kings had a judicial

[99] Usher 'James I and Sir Edward Coke' (n 27).

[100] See above n 27.

[101] On 'artificial reason' see Allen Dillard Boyer '"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review' (1998) 39 Boston College Law Review 43 and Allen D Boyer, 'Sir Edward Coke, Ciceronianus: Classical rhetoric and the common law tradition' (1997) 10 International Journal for the Semiotics of Law 3, n 12 which includes references to earlier discussions. Coke accepted the monarch being concerned about jurisdictional disputes and being involved in their resolution; he reports Elizabeth ordering just such a resolution (3 Co Inst 124), but Elizabeth referred the dispute to the judges and did not involve herself in the substance of the resolution.

[102] The same reliance upon expertise was made by James Morice in his reading in the Middle Temple in 1578. According to Morice, if the king appointed someone as a judge 'who never studyed the lawes of the Realme althouh otherwise he be profoundly learned, Authorising him thereby to be a Justice of the one Bench or thother, this man is no sufficient Judg lawfully ordeyned by the kings Prerogative' (British Library Egerton MS 3376 fo 30^{v}).

power from their status as God's lieutenant. However, the king had delegated his judicial power to the judges of the various courts.[103]

Peacham's Case arose in rather different circumstances. After discovering a draft treatise by Peacham which hinted at rebellion and regicide, the Crown asked the judges for their views about whether Peacham could be regarded as having committed treason.[104] Unusually, the judges were consulted individually.[105] Three of the four justices of the King's Bench accepted this, but Coke initially refused to be party to the consultation, on the basis that individual consultation was 'new and dangerous'.[106] Eventually Coke did agree to be consulted alone, but the initial refusal can be interpreted as a demonstration of judicial independence. However, this view should not be taken too far. Coke did not object to the practice of consultation in itself,[107] merely the practice of consulting the judges as individuals. The basis for this rejection seems to have been based upon the quality of the advice that would be given as a result. Assessments of the authority of cases in early-modern legal argument placed considerable weight on two factors: unanimity amongst the judges and the existence of argument and discussion. Cases which lacked either (or both) of these features were considered to be less authoritative because they were more likely to be mistaken.[108] Individual consultation of the judges did lack both of these features. From Coke's perspective, such individual consultations may therefore have been more likely to generate incorrect conclusions. If this is correct, then Coke's objection was not to providing

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[103] 2 Co Inst 103, the same point is also made 4 Co Inst 70-3.

[104] On the facts, see Gardiner, *History of England*, vol 2 (n 1) 272-283.

[105] The usual practice when asking the judges questions was to consult them as a group (see Bacon's letter to the king in Spedding (n 25) 101). In the dispute over prohibitions, judges were consulted in small groups, but Usher observes that the judges seemed to have 'intended to disagree in private and invariably present a united front to their enemies' (Roland G Usher, *The Rise and Fall of the High Commission* (OUP 1913) 218), perhaps explaining James's desire for individual consultations.

[106] Bacon's letter to the king in Spedding (n 25) 107.

[107] Unlike Hussey CJKB in (1486) YB Trin 1 Hen VII, fo 25a, pl 1 at 26a. Hussey's objection (which arose in the content of the possibility of judges giving advice in a case of treason and then having to try the case too) was generalised by Brooke in his *Graunde Abridgement*, a standard Elizabethan reference work (Brooke Abr, tit Judgement, pl 157). James Morice, in his 1578 reading in the Middle Temple, disagreed with Brooke's conclusion, stressing that 'it is not small part of the Justices allegiance expressed in their oath faithfully and lawfully to Councell and advise the king in his affaires', concluding that if any judge did refuse to advise the king, dismissal of the judge would be justified (Morice (n 101) fo 36^{v}-37).

[108] Williams, 'English Legal Reasoning' (n 41) 72-73 and 101.

advice, but that James's request for individual consultation risked providing the king with bad advice.

Interpreted in this way, *Peacham's Case* is a useful corrective to the view of Gardiner that 'Coke was clearly in the right in instinctively feeling that the true place for a judge was on the Bench, not in the council chamber of the King'.[109] Coke did not object to judges being in the king's council chamber, rather Coke objected to the judges not being able to exercise their role as councillors as well as they could. It was only in his *Institutes* that Coke expressed the view that consultation itself should not occur, even then limiting this solely to criminal cases.[110]

It is only in the *Case of Commendams* that we see something which looks like genuine judicial independence. The king as head of the church in England granted a bishop an additional living in the church. The plaintiffs in the case sued the bishop, claiming that they held the right to appoint to the living in question. Such rights of appointments were recognised as property rights, advowsons, by the common law. The case raised difficult questions about the king's prerogatives as head of the church in England, especially in relation to private property rights. Once James learned of the case, he sent the judges an order by letter, instructing them not to hear final arguments, or give judgment, before consultation with him. The judges refused. The judges justified their refusal in a letter to James, and again in a conference with him in June 1616,[111] claiming that to obey the king's command would be unlawful and expressly forbidden by the judicial oath.[112] According to James Morice in 1578, the judicial oath required judges to swear that 'yee deny no man common Right by the kings Lettres nor non other meanes nor for none other cause, and in case any Lettres come to you Contrary to the Law that you doe noething by such Lettres but

[109] Gardiner, *History of England*, vol 3 (n 1) 24.

[110] 3 Co Inst 29. Coke relied upon Hussey's objection in 1486 (n 106), but the restriction to criminal cases meant his position was narrower than that of Brooke.

[111] See *Acts of the Privy Council of England 1615-1616* (HMSO 1925) 595-609 for the letters and debates.

[112] This reliance upon the judicial oath was not new. In 1591 the judges delivered an opinion to the Lord Chancellor and Lord Treasurer which condemned certain aspects of imprisonment without cause. As such imprisonment was an aspect of the royal prerogative, there was the potential to cause offence to Elizabeth, and so the judges stressed that they were 'bound by office and oath to relieve and help' people who had been so imprisoned (see the two versions of the opinion in WS Holdsworth, *A History of English* Law vol 5 (Methuen & Co 1924) 495 and 497).

certifie the king thereof and goe forth to do the law'.[113] This is precisely what the judges did in the *Case of Commendams*.

The *Case of Commendams* therefore does not seem to reflect any new developments in either Coke's thought, or wider constitutional thinking. Morice described the terms of the judicial oath as arising from statute in the reign of Edward III.[114] What is significant is that the *Case of Commendams* was the practical application of constitutional ideas, unlike earlier remarks by Coke or the terms of the oath itself. The *Case of Commendams* was the first occasion where the judges expressly stated that the instruction they had received was unlawful, and as Coke had said in the preface to his *Second Reports* in 1602, they refused to act on such an instruction.[115]

CONCLUDING REMARKS

In some respects the *Case of Commendams* is a useful point at which to end consideration of Coke and constitutionalism. The fact that the concern is with a particular case is itself significant. Coke's constitutional thought (such as it was) was never expressed in a single document, or even a collection of documents, which purports to be a coherent or complete collection. Despite the importance of the *Case of Commendams* for Coke's reputation, Coke himself never reported it.

The events of the *Case of Commendams* were also closely linked to Coke's dismissal, a dismissal which some time later made Coke a martyr to the idea of judicial independence. For writers on English constitutional law, much of Coke's significance is linked to events in which Coke was involved, rather than Coke's actual ideas. In that sense, Coke provides a historical example of contemporary ideas, a useful figure in the narrative of the English

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[113] Morice (n 101) fo 29[v].

[114] Morice bases this oath on a statute of 18 Edward III. This must be a reference to 20 Edw III c 1. The oath of a judge in *The Book of Oaths, and The severall forms thereof, both Antient and Modern* (1649) p 10 is in the same terms as Morice, but the relevant passage is printed simply as 'notwithstanding the Kings Lees [Lettres?], &c'

[115] In an earlier case where a writ *non procedendo rege inconsulto* was brought on behalf of the Crown, the judges declined to obey the writ but the case was settled (see Hart (n 1) 104-5). This writ was a regular feature of medieval legal procedure (Theodore FT Plucknett, *A Concise History of the Common Law* (5th edn, Little, Brown & Co 1956) 196). However, in the *Case of Commendams* the delay was instructed by a royal letter, not a recognised (if rarely used) writ. The instruction to delay could therefore be seen as unlawful in part because such a letter was not a regular form of legal process.

constitution identified as important because of the importance of certain ideas to modern writers.

Coke was more than that. In the 1620s he was described as the 'father of the law'[116]. In 1631, when ordering that Coke's books and papers be seized, Coke was described as 'too great an oracle amongst the people, and they may be misled by anything that carries such an authority as all things do that he either speaks or writes'.[117] Some of Coke's remarks and actions are as delphic as those from the original oracle. As Maitland observed over a century ago, '[i]t is always difficult to pin Coke to a theory', a difficulty which has not been solved despite considerable discussion in some contexts.[118] In the *Case of Commendams*, we have no real explanation of Coke's theory. There is a letter from all the judges to the king, which sets out their reasons for refusing to delay the case, but there is no explanation as to why the instruction given was considered unlawful. Much modern writing on Coke has been attempting to understand and explicate Coke's legal and political theory based around such isolated remarks and actions.

Despite his publications, Coke is silent on many of the issues which modern constitutionalists consider to be important. In some respects, this may explain Coke's appearance in later discussions of the constitution. Coke provides an example which can be interpreted to suit later theories, without expressing any theory which demonstrates quite how different his underlying ideas were or might have been. Where Coke does express theory, he rarely explains his underlying assumptions and the resulting expression is often ambiguous, providing plenty of scope for interpretation.[119] The various attempts to understand, and sometimes to rely upon, Coke's report of *Bonham's Case* are a good example of this. In the early eighteenth century, Coke's language of controlling statutes contrary to 'common right and reason' in *Bonham's Case* could be interpreted through the prism of social

[116] Robert Zaller, *The Parliament of 1621: A study in constitutional conflict* (University of California Press, 1971) 69 and Cromartie (n 8) 232.
[117] John Bruce (ed), *Calendar of State Papers, Domestic Series, of the Reign of Charles I. 1629-1631* (Longman, Green, Longman and Roberts 1860) 490.
[118] FW Maitland, *The Constitutional History of England* (HAL Fisher ed, CUP 1961) 300.
[119] Cromartie regards some of Coke's expressions as 'craftily ambiguous' (Cromartie (n 8) 214). Russell describes Coke as a 'great rambler' (Russell (n 4) xix) whose parliamentary speeches lacked structure, which might suggest ambiguity was not deliberate.

contract theory.[120] In Blackstone's *Commentaries* in the second half of the eighteenth century the same language is interpreted as a rule of construction.[121] In the late-twentieth century the words could be interpreted as related to the principle of legality and rule of law.[122]

Nevertheless, Coke clearly did think that theory was important as a justification for action. Coke's remarks about the jurisdiction of the King's Bench in relation to habeas corpus and other courts discussed above[123] were made when Coke thought it was worthwhile for him to raise such points for the benefit of the court, despite not being counsel in the case and simply present in court. In this case Coke did present a theory about ideas of legality and royal power. Unlike Coke's usual posthumous reputation, the theory was a prerogative theory, one which does not fit neatly with the view of Coke presented in works which stress Coke as an opponent of the prerogative.[124]

A recurring element in this chapter has been Coke's stress on the importance of expertise, which in his view justified power and allotted constitutional roles. Judges were to judge, not the king, because judges had greater skill. The same assumption can be seen in the refusal to consult with the king as an individual judge, rather than as the judicial collective: it was in a group, through a process of discussion and debate, that judges were able to exercise their expertise. To consult individually, before such discussions had occurred, would be to prevent the judges exercising their skill. Parliament was to legislate because of its greater wisdom; where the common law was already wise and parliament unwisely intervened, the law would ultimately correct the situation. In a very broad sense, this aspect of Coke's constitutional thought was aristocratic:[125] certain people or institutions

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[120] See Philip A Hamburger, 'Revolution and Judicial Review: Chief Justice Holt's Opinion in *City of London v. Wood*' (1994) 94 Columbia Law Review 2091.

[121] John V Orth, 'Blackstone's Rules on the Construction of Statutes' in Prest (ed), *Blackstone and his* Commentaries*: Biography, law, history* (Hart 2009). Orth suggests that Blackstone was trying to interpret Coke's words in *Bonham's Case* so that they continued to have some validity in the eighteenth century context, observing that Blackstone's interpretation seems to be 'wrung from him against his will' and that he 'salvaged what he could' from Coke's remarks (85 and 89).

[122] Allan (n 21).

[123] Above nn 65-68 and text.

[124] In this regard, Coke demonstrates in microcosm, the argument of Halliday concerning the writ of habeas corpus: that the writ was initially an emanation of prerogative power, which parliament in fact tended to restrict, rather than to expand in the cause of 'liberty' (see generally, Halliday (n 6)).

[125] Goldsworthy has raised the idea of common law constitutionalism as introducing an 'aristocratic' element into democratic constitutions (Jeffrey Goldsworthy, *Parliamentary Sovereignty, Contemporary Debates* (CUP 2010) 10-11), but in a very different sense to that raised here.

were the best at certain functions and so were to perform them. Power and legitimacy were both premised on expertise. This perspective, however, was only taken so far: although the king could neither judge, nor create law of the same status as statute because of his want of expertise, the question of expertise to be king was, unsurprisingly, never raised.