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The Common Law and the Enlightenment: The Origins of Liberal-Democratic Discourse in the Ancient Constitution

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Abstract

This project intends to show that the impact of the "Ancient Constitutionalists" and their thought upon early modern English jurisprudence was crucial for laying the foundation of "liberal-democratic" ideology in England and the Enlightenment. Although certainly no stalwarts of the common people, the Ancient Constitutionalists, philosophically crystallized by Sir Edward Coke (1552-1634), were a group of English jurists and historians who championed many of the modern political-legal institutions we commonly associate with Enlightenment thinking. Intending to merely limit the monarchical authority of the king for the benefit of either parliament or the courts, Sir Edward and the Ancient Constitutionalists unintentionally led the vanguard of modern political discourse and helped institute legal-political doctrines, such as rule of law, constitutionalism, and representative government, that figure heavily in liberal-democratic theory. Consequently, this maturation in the English common law became a catalyst for legal-political experimentation that eventually spread across Europe in what we now call the Enlightenment. As evidenced through the works and writings of Thomas Hobbes, Viscount Bolingbroke, and John Locke, the Constitutionalists were influential foundational framers to emerging modern English philosophy. Unfortunately, the Constitutionalists became quickly obscured given their inconsistent theorizing and historiography and their opposing objectives to Enlightenment thinkers as the movement outgrew England. Even in the works of Voltaire, Rousseau, and Montesquieu, however, Ancient Constitutionalism is clear in their veneration of rationalism, private property, and the separation of powers in government.

Keywords: Common Lawn, Enlightenment, Ancient Constitution

1. Introduction

With the incomparable aid of extreme hindsight, the modern historian finds it easy and tempting to create a cogent narrative connecting disparate thinking throughout the ages into a linear progression of ideas. This is especially true in the formation of modern political thought. Unfortunately, this oversimplification and tidying of history necessarily distorts the reality of the circumstances. Indeed, it implicitly accepts that there was a process, continual and lasting, in the first place and creates the bias of retrospect – that because we have reached a point of modernity everything preceding must have inexorably, if not always apparently, *led* up to this moment. This makes for abusive history, however salivatingly compelling, and needs to be guarded against when assessing the origins of modern political theory. Intrinsically, liberal-democratic discourse in the European Enlightenment was not articulated out of a void of otherwise absolutist-monarchical rhetoric. That being said, it is perhaps generally safe to assume that most of the thinkers who framed and articulated the language later used by liberal-democratic philosophers were, by and large, conservative in their inclinations and intentions. Even in the case of Locke and other thinkers, "enlightened ideologies were to assume a unique inflection in England: one less concerned to lambast the status quo than to vindicate it against adversaries left and right, high and low."[1]

It needs to be recognized, then, that just because other thinkers would not have agreed with Locke, Montesquieu, etc., does not mean in the slightest that they were not contributory or even critical to providing the framework of discourse and values extrapolated in the Enlightenment. As such, building context for political Enlightenment discourse necessitates looking back further to discover the influences, sometimes unrecognized by the philosophers themselves, that framed their thought and provided a setting within which they could elucidate their distinctly modern ideas. With staggering success, previous work has traced such discourse in medieval and early modern continental ecclesiastical and political thought.[2] That being said, historians have given little recognition to the significant developments made in the foundation of modern Anglo-American jurisprudence. This is a particularly egregious oversight given that "the process of building precedents of liberty and standards of rule-of-law . . . advanced much more rapidly and moved without human intent or any planning in a consistent direction because [the common] lawyers had specific words to quote even while they were charging those words with vastly new meanings."[3]

This lack of recognition is largely understandable when taking into account that, as Roy Porter's work *The Creation of the Modern World: The Untold Story of the English Enlightenment* suggests, the influence of England as an entirety on the Enlightenment has only recently started to be more fully appreciated.[4] Although Locke is hailed as the founder of the Enlightenment, and both Rousseau and Montesquieu admitted to his influence, these are small concessions to the home of the rule of law. It is within England's legalist tradition, especially the common law debates of the early seventeenth century, that historians can retrospectively locate some of the most important Enlightenment concepts articulated in their first modern characterization. This requires another advantage of hindsight however. Namely, branding diverse and sometimes even oppositional thinkers into one overarching label for the sake of historiographical convenience.

In this case, the term "Ancient Constitutionalist" shall signify a group of English historians, politicians, and, most importantly, lawyers, spanning centuries, who mutually accepted the frankly wrong history that England had an ancient constitution. This charter was immemorial and unwritten, secured the subject's liberties from arbitrary authority, and proved one of the most effective foundations for refuting Jacobean absolutism. As mentioned, however, these thinkers were just as often, rhetorically speaking, fighting each other as they were against expanding regal and ecclesiastical power. During their own age, they might have been shocked to find themselves identified together within the same legal-philosophical tradition. This doesn't remotely take away though from the fact that, accepting the doctrine of the ancient constitution, they created a framework of discourse that provided a language of resistance for later parliamentarians in the Glorious Revolution. Furthermore, they also helped craft such concepts as the "rule of law" and "constitutionalism" both of which are central ideas in liberal-democratic ideology upon which many others are built. Ultimately, the ancient constitutionalists' influence were such that historian Wallace Notestein considered that "it was the lawyers . . . who were the essential agents in the development of parliament, and legally educated antiquarians who found the legal precedents that tamed the monarchy."[5]

The ancient constitutionalists thus articulated the first modern rhetorical paradigm for accepting the liberties of the masses and the rule of law in government. Although this was still within a monarch-subject context, the framework of language leading jurist Sir Edward Coke (1556-1634) utilized to assert judicial independence was incidentally, and some would consider surprisingly, crucial to parliamentarians who exploited it to further sometimes-populist objectives. Their adoption of Cokean periphrastic terminology resulted in the Petition, Declaration, and ultimately the English Bill of Rights. Although the dominance of the common law mentalité fluctuated tremendously throughout the seventeenth-century, once its rhetorical currency was reestablished it evolved and became indistinguishable from incipient liberal-democratic discourse found in Locke and other thinkers of the English enlightenment. From there this discourse spread in conjunction with the Enlightenment and provided the foundation for French thinkers in their political conceptions of government, law, and liberty.[6]

2. The Ancient Constitution and the Common Law Language

In contemporary society, modern defenses against legal-political abuse, such as the rule of law, judicial review, and constitutionalism, have become incontrovertibly institutionalized and are now taken for granted in most industrialized nations. It is important to remember these concepts have not always been with us, nor did they have the widespread acceptance they do today. A process involving hundreds of years of refining, we can look back and know that modern Anglo-American jurisprudence is largely the result of seeds planted in early modern Britain by Sir Edward Coke and a disparate group of thinkers that can best be referred to as the "Ancient Constitutionalists." Although certainly by no means united in legal, political, or even historical perspective, the ancient constitutionalists were linked by a shared conception of the origins of law and power in England. They were also connected by a common objective of limiting the potential caprice of authority. It is due to their efforts and influence that the notion of the "divine right of kings"

was seriously contested in favor of what was centuries later defined as "a government of laws and not of men."[7] Unfortunately these men met with only limited success in their lifetimes, and consequently have received a stunted appreciation in history. Nonetheless, the theories of Sir Edward Coke and the ancient constitutionalists have actually been central to the conception of law as it has evolved into its modern understanding.

Before serious inquiry can be made into the impact, both immediate and distant, of Sir Edward Coke and the ancient constitutionalists, an understanding must be formed regarding their collective philosophy and indeed the nature of their association. For the term "Ancient Constitutionalist" is not a static identification defined by one age or by one profession of men. Rather, it is a general category wherein lawyers, politicians, and intellectuals across centuries were united by their shared reading of England's constitutional history and their attempts to curtail arbitrary power wherever it might arise.[8] Even amongst themselves, like most ideological groups, the constitutionalists were often just as fervently combating each other as they were competing governmental theorists. This was due in large part to their often vastly divergent views of just what the ancient constitution meant in England. The group and its principles, however, are most thoroughly illustrated by its equally inconsistent thinker and leader, Sir Edward Coke. Because of the group's diversity, it is nearly impossible to readily define a fully cogent, shared philosophy. As such, their mindset is best seen through Coke's viewpoint, as the single most important embodiment of ancient constitutional thought. They likewise are defined more by an "ad hoc" concern connected by specific principles and precedent rather than creed. In Coke's own words "generalities never bring anything to a conclusion."[9]

Although it is hard to overemphasize Coke's importance, especially in light of his frequently underemphasized role, he was ultimately responsible for the victory of the common law over all other authority in England. In the words of one of Sir Edward's common law disciples, Thomas Hedley (1569-1637), the "parliament hath his power and authority from the common law, and not the common law from parliament."[10] That being said, this triumph did not happen in Coke's lifetime and was the work of hundreds of people over time rather than solely the result of his efforts or the success of a small number of men. According to J.G.A Pocock, the ancient constitution "cannot therefore be regarded as the creation of any single mind, [but] Coke did more than any other man to summarize it and make it authoritative."[11] Thus, for every ancient constitutionalist mentioned here there are a multitude of champions who remain nameless but represented by the culmination of ancient constitutional thought in Sir Edward. By necessity the entirety of the group is defined less by philosophy rather than embodiment through its key thinkers and advocates. Although perhaps too far, it is convenient to think of him as "not [always] Coke the individual but Coke the mouthpiece of many lawyers[12].

What then did these men mean then when they referred to the "Ancient Constitution"? Although, like the rest of their philosophy, the concept is a rather indistinct theoretical term, "the ideology of the Ancient Constitution was an elaborate set of historical arguments by which it was sought to show that the common law, and the constitution as it now stood, had been essentially the same since . . . time immemorial . . ."[13] This must be understood accurately then as a sort of "historical jurisprudence," given that " the law did much to determine the character of sixteenth-century historical thought . . . each nation's thought about its past . . . was deeply affected by the character of its law and the ideas underlying it."[14] Given that context, Coke spent his life looking for certainty in the law, and asserting that it was the sole guarantor of the subject's liberties, which could otherwise be overrun by the abusive authority of the king, parliament, or even the courts themselves. A contemporary of Sir Edward, and the Attorney-General of Ireland, Sir John Davies (1569-1626), considered it in similar terms when holding that neither could any one man ever vaunt, that he was the first Lawgiver to our Nation: for neither did the King make his own Prerogative, nor the Judges make the Rules or Maximes of the Law, nor the common subject prescribe and limit the Liberties which he enjoyeth by the law. But as it is said of every Art or Science which is brought to perfection, *Per varios isis Artein experiential fecit*; so it may properly be said of our Law, *Per varios usus Legem experiential fecit*. Long experience, and many trials of what was best for the common good, did make the Common Law.[15]

For the ancient constitutionalists, the common law was close to being natural law in that it transcended human reason through what Coke referred to as its "Artificial Reason." This was the joint expertise of generations of lawyers and judges, stretching back to unrecorded time, incessantly "fining and refining" the law as handed down by history and precedent.[16] Coke believed that "reason is the life of the law; nay, the common law itself is nothing else but reason – *the law which is perfection of reason*."[17] It is convenient to conceive of Coke's common law as a Heraclitean river then, always the same yet continually in flux while slowly, slowly, changing in its structure and direction. His was the original iteration of that now oft-recited refrain "no man need be wiser than the laws" (in this sense "need" being read as "can" given its subsequently alternate meaning from Coke's original usage).[18] This is significant in the history of jurisprudence and political thought because, for all practical purposes, this was the first time when such now-common concepts as inalienable rights and the rule of law were used in their modern understanding to seriously countermand the king's authority.

Lord Thomas Macaulay has commended Sir Edward Coke for "[standing] up manfully" when he flatly told King James I (1566-1625) that the king was unqualified to adjudicate cases of the common law.[19] Because of his bravery

in the face of such pressure, he became responsible for making "the ancient constitution the cornerstone of the arch supporting the various rules, maxims, and dogmas, that, collectively, can best be summarized as the *jurisprudence of English and American liberty.*"[20]

One distinction must be made clear, however. Coke by no means created or originated these conceptions himself. He was primarily responsible merely as the definer of their role in government and law. His distinguishing achievement was principally his "unparalleled ability to integrate the diverse elements of the English common law into a coherent whole."[21] Predating Coke by over three centuries, the English jurist Henry de Bracton (1210-1268), and one of the first major constitutionalists, articulated that "the King must not be under man but under God and under the law, because law makes the king . . . For there is no rex where will rules rather than lex.[22]" Although this was a far cry from what the rule of law would evolve into, especially when compared to a contemporary definition of the term, it is critical to understand that it was not the conception that the law could limit the king that was novel. Rather, it was the actual implementation of the principle, and conceiving it as a judge's responsibility, which most thoroughly distinguishes Sir Edward Coke from his predecessors and marks the transition from medieval to early modern jurisprudence. Immediately prior to Coke, Tudor judges were notoriously servile to the crown and were in fact their agents who took their cues from the king or queen rather than custom, reason, or any other normative principle.

Although Coke has been heavily criticized for his inconsistency as a jurist and historian, this is only to be expected given that he was working in a transitional context and his was the first serious attempt to fully rationalize, and consequently modernize, the common law of England.[23] This was a necessarily immature attempt, largely created in a void without guiding precedent, which, like the common law itself, would require generations of refining and discourse to reach maturity. As Coke's greatest rival, Sir Francis Bacon, even admitted "had it not been for Sir Edward Coke's Reports . . . the law by this time had been almost like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former time."[24] Largely, the problem of Coke's prevailing portrayal springs from recent historians' tendencies to define his ideology in modern terms. This is particularly confusing given that he predates every major modern legal philosophy and thus, reasonably, does not remotely fit into their paradigms and dichotomies.[25]

Coke and the ancient constitutionalists directed their efforts toward ensuring justice in England's legal system and indeed the idea that "I should prefer twenty men to escape death through mercy than one innocent to be condemned unjustly," widely known incorrectly as Blackstone's formulation, was first advanced by Coke's predecessor and legal model, Sir John Fortescue (1394-1476). [26] Despite such overtly generous remarks, however, Coke and the constitutionalists were neither champions of the populace nor revolutionary reformers. The common lawyers' conception of establishing the centrality of law was, consciously or unconsciously, used almost entirely to expand their own jurisdiction. They sought to diminish such rivals as the church courts and to further the power of whichever institution they happened to be associated with or could launch an effective salvo against arbitrary authority. If one were being cynical, it wouldn't be too much of a stretch to see their efforts as a battle for a rule of lawyers rather than a rule of law. Lord Chief Justice John Popham (1531-1607), for instance, was iconically opportunistic and was known as someone who "could seize any opportunity offered, for his queen or for himself."[27]

Along Coke's own pragmatic vein, when he was Chief Justice of the Court of Common Pleas he laid down the first judgment asserting the principle of judicial review. In *Doctor Bonham's Case* (1610), Coke was unequivocal that "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void . . . when an Act of Parliament is against common right and reason," because it was the fundamental law of the land.[28] Theoretically, this claimed vast oversight for his Court. Simultaneously, it also curtailed the jurisdiction of other courts, both monarchical and ecclesiastical, whenever they conflicted with or threatened his jurisdiction.[29] Once he was reassigned to the King's Bench, however, Coke then swiftly asserted that court's supremacy by declaring its "cognizance of all other Inferior Courts" and its ability to "correct all errors and proceedings in them."[30]

So successful was he that, by 1600, "Sir Thomas Wilson (1560?–1629) was able to note [of]," in slightly inaccurate though still highly revealing terms, "the dominance of common lawyers over other professions, which had occurred 'since the practice of civil law hath been as it were wholly banished and abrogated, and since the clergy hath been trodden down.'"[31] Where Coke was at his most consistent, however, was in his tendency to increasingly place "all grievances on the [king and his counsel] and to regard them as ultimate threats to the liberties of the subject and to the very life of the commonwealth."[32] As he saw it, the common law was the sole reliable defense for protecting the subject from a capricious monarch.

Pragmatism then was a defining trait of the constitutionalists and perhaps was one of the greatest reasons they were as successful and not as controversial as they otherwise might have been. Cautious to assert their liberties while simultaneously not infuriating or overtly challenging the monarchy, the constitutionalists forwarded seemingly contradictory ideas. Hedley, for instance, believed confusingly from a modern perspective that "no man [should] think liberty and [absolute] sovereignty incompatible . . . rather like twins . . . they have such concordance and coalescence,

that the one can hardly long subsist without the other."[33] Coke himself has often been seen as shameless due to the inconsistencies in his practice with his principles. As attorney general to Elizabeth, he "expansively described the crown's prerogatives" and even "drafted commissions giving ample power to the members of the ecclesiastical Court of High Commission."[34] These actions would come to haunt him in later years. However, this was only one facet of the man. "Coke could be counted on to display the same explosive energy in any cause he represented," and "would oppose the crown with the same implacability he had shown in prosecuting its enemies."[35] Indeed, were it not for his faithful zeal, Coke may have never been appointed to the bench in the first place, and, consequently, his arguments and ideas may have never been implemented!

Regardless of Coke's inconsistency, modern notions of popular sovereignty, later used so effectively by Rousseau and other Enlightenment thinkers, can in many ways be easily traced back to the constitutionalists and how they incorporated their notions of the subject's liberty. In the words of Algernon Sidney (1623-1683), who sat in the Long Parliament and was indebted to Cokean rhetoric, "the nations, whose rights we inherit, have ever enjoyed the liberties we claim, and always exercised them in governing themselves popularly, or by such representatives as have been instituted themselves, from the time they were first known in the world."[36]

Extending this notion of popular possession in the prior century, Fortescue saw "the subject's libertie" as "the King's wealth. For nothing can be good for the Kinge that is ill for the subject."[37] Coke would later expand this idea to justify a modern conception of property rights rooted in the subject's justifiable expectation of the rule of law.[38] He considered it a particular injustice to deprive the subject of property that had been his inheritance and was the first to formulate the idea that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose."[39] He added to this argument in his Third Institute when asserting that "there is no law to warrant tortures in this land, nor can they be justified by any prescription" and even that "the Law requireth that a Prisoner should be kept in faith . . . without pain or torment to the Prisoner" because of its intrinsic violation to the fIs undamental respect due to the subject.[40] This was a particularly novel claim at the time and it was partly due to such rulings and his advocacy for jury trials that led to England being one of the first countries to bar the use of torture in 1640.

The rule of law and the liberties of the subject were not wrested only from the monarch, however, nor was Coke the only one to limit ecclesiastical authority with it. John Selden (1584-1654) for instance – one of the primary examples of how varied the ancient constitutionalists could be given his strenuous opposition to Coke's historicism – was denounced by the clergy as "the most pernicious underminer of the Church, and of religion in the Church, that the Prince of darknes hath set on worke to do mischiefe many yeeres."[41] Claiming "absolute property was incompatible with jure divino tithes," Selden established himself as one of the first and most prominent advocates for subjugating the authority of the church to law due to the rights of subjects.[42] "Common law was in principle the sole definer of 'private' right . . ."[43]

In the final analysis of the common lawyers and ancient constitutionalists by historian John H. Baker,

lawyers cannot claim responsibility for the idea of liberty, which as an abstraction is never very precisely defined; but in practice only they were able to invent, improve, and defend the means of securing it . . . it was not built into the common law from the outset, but developed through the cumulative effect of decisions which were not widely known to outsiders and became unknown to posterity . . . Once taken, however, each of these decisions made an irreversible step in favor of liberty.[44]

3. Crossing the Channel: Common Law Discourse in the French Enlightenment

Now, given that it is a great truism of intellectual history that nothing is original and great thinkers are almost never the first to actually express their ideas, the next question to consider is if nothing articulated by Locke or even Coke was all that unprecedented, what can we say was particularly unique and influential in their contribution to the French Enlightenment? Quentin Skinner has already provided a fairly exhaustive analysis of continental influence and has shown that in France's ecclesiastical tradition nearly all of the Enlightenment's most central tenets had already been developed, albeit immaturely.[45] Namely then, the English were critical for the context and centrality of legality and the rule of law in the French Enlightenment that made democratic impulses more palatable and in line with the political formulations of enshrined reason. English constitutional discourse added a final, secular advantage of justice to democratic and republican principles as already thought out in France. The English government itself stood as a paramount model for continental Europe to envy for its liberty, apparent progressiveness, and castrated church – all due to the victory of its constitution over the monarch. Populism had come to be defined in legal terms and the reverence for the rule of law ensured that anything identified with it and justice would likewise be venerated.

Beyond this, the English brought modernized terms to the table unshackled by prior ecclesiastical perceptions in contrast to the antiquated phrasing of continental liberal-democratic founders. Unlike in Catholic dominated France, rights, law, and liberty all existed as independent from and impregnable to God's capricious officials on Earth. The addition of an English perception of property and property rights also proved critical and made prior French democratic rhetoric more individualistic as opposed to its previously communal connotations. Instead of responsibilities imposed to rebel or resist because of God's law or even a violation of communal contract or obligations by a king, the English political-legal tradition had emerged to theoretically facilitate individual determination. It was from the English that the Enlightenment gained its flavoring of individual rights and property under the rule of law.

England's constitution, that great vindicator of Cokean-Common Law discourse, became the archetype governmental institution Enlightenment thinkers turned to. As Roy Porter makes clear, "throughout the eighteenth century Aufklärer of all nations revered English government, society and opinion as the pure crystal of Enlightenment. Anglophiles celebrated the British constitution, law and freedom, the open weave of English society, its religious toleration, and prosperity."[46]

This comes as unsurprising, however, when one contrasts the relative strides England had made in the past century towards constitutional government with the other major powers on the continent. France was the home of Bodiean absolutism and this rhetoric had become the "hegemonic language" of political France, leaving French monarchs comfortable with enforcing strict censorship and arbitrarily incarcerating individuals for the most minor offenses.

Voltaire's life story stands as testament to this abusive government unrestrained by law. It is small wonder that, in his *Lettres Philosophiques,* Voltaire contrasted England with his home country and showed that "[the English] have at last established that wise Government, where the Prince is all powerful to do good, and at the same time is restrained from committing evil . . ."[47] Ironically, when published, this book proved unable to pass censorial muster and put him once more on the run from the law. Nevertheless, Voltaire never gave up on his crusade for justice in France based on the English example. Looking to the home of the rule of law, he realized that "English laws are on the side of humanity; whereas ours are against humanity."[48] The English constitution and constitutional philosophy dominated his premises and suppositions and became the model for liberalization that he wanted to see ingrained in France.

The common law constitutional discourse provided more than just a foundation for the rejection of torture, however, and law became an increasingly prominent feature in French political thought. Rousseau directly states in his *Discourse on the Inequality of Man* that his primary intent was to locate "in the progress of things, the moment at which right took the place of violence and nature became subject to law."[49]

Indeed, Rousseau took England's revitalized manifestation of social-contract theory and its previously, intentionally-weak connection with popular sovereignty and made the two virtually indistinguishable. Utilizing English thinkers' language but going even further beyond their intentions, Rousseau finally fully vested the people, in their conglomerate "general will," with ultimate and undeniable authority in government should they require it. What's most significant is that this also ties into the principle of the rule of law in that "pronouncements of the general will must be in the form of 'general conventions': they must . . . take the form of absolutely general laws; although here, laws which all create as well as obey."[50] Thus, even the general will cannot be arbitrary and law rules over the mass of society just as it rules over a king or legislature.

Rousseau's contemporary, Denis Diderot, thought in very similar terms regarding the rule of law and popular authority, believing that "it is from his subjects themselves that the prince derives the authority he exercises over them. The state does not belong to the prince, but the prince to the state.[51]"

Although the English constitutionalists had articulated early popular possession, this was one of the first modern assertions that the collective, more than being superior to the monarch, in fact owned him as a servant as they did the entire government. Building upon the English, the right to inheritance of the laws and government had transcended into possession of all forces in government, political and legal.

Looking to England, French Enlightenment thinkers turned to its philosophers and their language of values and even Montesquieu, "for all his separation of powers, virtually accepted [the doctrine of the Ancient Constitution]."[52] Discarding skepticism as to its historical veracity, Montesquieu, like Coke, was more concerned about the supreme argument the constitution presented in favor of rights, law, and liberty. In unmistakable terms then, Montesquieu accepted the evolved doctrine of the ancient constitution, if for no other reason than because of its rigorous defense of the individual's rights and for what he saw as its perfect prescription of separated government. It was in England alone that the judiciary had struck off from the control of either of the other branches of government. As such, England's near-perfection as a society and government was not to be tampered with for any reason regardless of its historical legitimacy. For Montesquieu, "virtue . . . was . . . an equality of subjection to the republic's laws . . ." and the Englishman, accurately or inaccurately, was his ideal virtuous citizen and England's common law his ideal system.[53]

4. Conclusion

Although developing a comprehensive analysis of the common law's influence on the Enlightenment is work for another day and for a longer text, what is clear at this point is that England, as it emerged from the early modern era of civil war and power struggles, had a profound effect on the Enlightenment in its unique considerations of law and constitutionalism. Although this merged and indeed becomes indistinguishable from other influences on Enlightenment thinkers in several aspects, the language and discourse of values that the English had made their priority transferred to the continent where it was likewise utilized in increasingly universal terms of liberal-democratic thought. It is for academic speculation to consider what would have occurred had any number of events been different, if certain people had not existed, or if myriad values hadn't been adopted near entirely by all. All that can be said is that, however unlikely or incidental, the paradigm of the ancient constitutionalists defined in modern terms many incipient Enlightenment ideals and became ingrained in English and European thought for at least two centuries after its peak status of supremacy in England. This was *not* an inexorable or even natural consequence of their advocacy and certainly not one of their intentions. Nevertheless, the elitist, shamelessly pragmatic, anti-democratic lawyers of early modern England played a significant role in the formation of modern liberties, government, and the language of some of the world's greatest political thinkers. This hitherto undervalued status in history needs to be recognized with greater appreciation then if for nothing else than their role in the development of the rule of law and constitutionalism as understood today.

Still cited frequently today by lawyers of all stripes for a variety of purposes, Sir Edward Coke fathered modern law and aided in indelibly, despite numerous obstacles, connecting its terms and values to the emergence of modern government. The fine line between law and the political realm is often indistinct and reading Coke or other ancient constitutionalist works makes this obvious. The strangeness that such an unlikely group should be so influential in such an unlikely manner is thus readily explained. However, this fact should not hinder the understanding that this was an extraordinary series of developments that, at the beginning of the seventeenth century and even up to the 1640s, could not have been foreseen by anyone at the time. Regardless of alternative, even more likely, scenarios we today can trace modern values of liberty, the rule of law, and constitutionalism in many aspects to the thoughts, language, and advocacy of the common law mind. With the potential bias of hindsight ever at the forefront of such assertions, one can nevertheless see that, as history actually played out, modern principles of government are indebted in a great degree to England and the evolution of its legal-political values in the seventeenth century

5. Endnotes

1 Roy Porter, *The Creation of the Modern World: The Untold Story of the British Enlightenment,* (New York, NY: W. W. Norton & Company, 2001), 31.

2 Quentin Skinner, *The Foundation of Modern Political Thought*, and J.G.A. Pocock, *The Machiavellian Moment*, are two such examples.

3 John Phillip Reid, *Rule of Law* (DeKalb Il: Northern Illinois University Press, 2005), 15.

4 Porter, *The Creation of the Modern World.*

5 Quoted in Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642*, (Cambridge, UK: CUP, 2009),190.

6 It is important to mention here that there is a caveat to keep in mind. Although this was a crucial theory in the development of liberal-democratic discourse, it was not the only one existent in England, nor the only one that had a hand in European constitutional discourse. I am focusing on one aspect of one subgenre of the Enlightenment. This theory will be the primary focus of my work and there will not be sufficient space to discuss many of the alternatives or competing influences. A multitude of unmentioned philosophical-legal-political paradigms in England and Europe had at least some role in the development of this rhetorical model. Nevertheless the focus of this paper shall be exclusively on the development and influence of constitutionalism stemming from England's legal tradition –this does not preclude nor imply that others were not influential or even that they were of less significance.

7 John Adams, "Novanglus Papers, no. 7." *The Works of John Adams,* ed. Charles Francis Adams (1851), 106.

8 It is crucial to note that even the objects of constitutionalist ire were not uniform across the group. Rather, ecclesiastical, monarchical and even judicial authority were all equally, in their time, faced with opposition from this group due to what was seen as their arbitrary use of authority.

9 Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age* (Stanford, CA: Stanford University Press, 2003), 97.

10 Hedley's speech is given in *Proceedings in Parlaiment 1610:* vol.2, *House of Commons* ed. Elizabeth Foster, (New Haven: Yale University Press, 1966), 174.

11 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge, UK: Cambridge University Press, 1987), 38.

12 Donald O. Wagner, "Coke and the Rise of Economic Liberalism," *Economic History Review* (1936), 31.

13 J.G.A. Pocock, *Virtue, Commerce, History* (Cambridge: Cambridge University Press, 1985), 94.

14 Pocock, *The Ancient Constitution*, 29.

15 Sir John Davies, "Preface to Irish Reports" *Les Reportes des Cases & Matters en Ley, Resolves & Adjudges en les Courts del Roy en Ireland* (London, 1674), Unpaginated.

16 Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary on Littleton* (London, 1628), 97.b.

17 Ibid**.,** *The Seventh* Part, 97.b.

18 *Prohibitions del Roy*, 12 Co. Rep. 63, 65 (1607).

19 Thomas Babington Macaulay, "Lord Bacon," *Critical and Historical Essays* (Adamant Media Corporation, 2000), 172; Roland G. Usher, "James I and Sir Edward Coke," *English Historical Review* (1903) XVIII: 664-675.

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22 Henry de Bracton, *De Legibus et Consuetudinibus Angliae* (1628), 2:33.

23 Robert Bucholz and Newton Key, *Early Modern England 1485-1714*: *A Narrative History* (Oxford: Wiley-Blackwell Publishing LTD, 2004), 221.

24 Sir Francis Bacon, *The Works of Sir Francis Bacon,* (Oxford: Oxford University Press, 1803), 473.

25 J.P. Sommerville, *Royalists and Patriots: Politics and Ideology in England 1603-1640* (New York, NY: Pearson Education Limited, 1986), 85.

26 Sir John Fortescue, *On the Laws and Governance of England* (Cambridge: University of Cambridge Press, 1997), 41; It must be noted here, however, that Coke diverged slightly from this position, holding that "a private person should be punished or damnified by the rigor of the law, than a general rule of the law should be broken to the general trouble and prejudice of the many." Litt. 97B; Coke, "Treatise of Bail and Mainprize" 30.

27 Boyer, 114.

28 8 Co. Report, "Bonham's Case," vol. 41, 365.

29 12 Co. Rep. 41 vol. 6, 250.

30 Penson v Cartwright, 79 Eng. Rep. 295, 296 (K.B. 1615).

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37 Fortescue, 49.

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39 *Semayne's Case*, 5 Co. Rep. 913 a, 190 (K.B. 1604).

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42 John Selden, *Historie of Tithes* (1618), passim.

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