COLUMBIA LAW REVIEW

VOL. 94

NOVEMBER 1994

NO. 7

REVOLUTION AND JUDICIAL REVIEW: CHIEF JUSTICE HOLT'S OPINION IN *CITY OF LONDON* v. *WOOD*

*Philip A. Hamburger**

In 1702, in an opinion touching upon parliamentary power, Chief Justice Sir John Holt discussed limitations on government in language that has long seemed more intriguing than clear. Undoubtedly, the Chief Justice was suggesting limitations on government—limitations that subsequently have become quite prominent, particularly in America. Yet even the best report of his opinion concerning these constraints has left historians in some doubt as to just what he was saying and why it was significant.¹

The case in which Chief Justice Holt was so obscure about matters of such importance, *City of London v. Wood*,² revived the old maxim that a person could not be judge in his own case. The defendant, Thomas Wood, had declined to serve as a sheriff for the City of London. In response, the City brought an action of debt to recover the penalty in the Mayor's Court, formally composed of the Mayor and Aldermen. As was customary, the City brought this action in the name of the Mayor, commonalty, and citizens of London. Although Wood was held liable by the Mayor's Court, he eventually had the judgment overturned by three royal judges sitting at Guildhall, who argued, among other things, that the Mayor could not be judge in his own case.

According to the most substantial printed report, Chief Justice Holt discussed the parliamentary implications of the prohibition against being both judge and party:

* Professor of Law and Legal History, The National Law Center, The George Washington University; J.D. 1982, Yale; B.A. 1979, Princeton. The author very gratefully acknowledges the generous financial support of the Lynde and Harry Bradley Foundation and the thoughtful, learned comments of Richard Ashcraft, Jacob I. Corre, Richard S. Kay, Jacqueline Newell, Lois G. Schwoerer, Patricia Springborg, Robert W. Tuttle, and the participants in the Legal Theory Workshop, Chicago-Kent College of Law. Permission to publish excerpts from manuscripts in the custody of the City of London Record Office and the Trustees of the British Library is also acknowledged with gratitude.

1. See Carleton K. Allen, *Law in the Making* 433–34 (1958); John W. Gough, *Fundamental Law in English Constitutional History* 9–11 (reprint 1985) (1955); Charles H. McIlwain, *The High Court of Parliament and Its Supremacy* 307 (1910); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 *Harv. L. Rev.* 149, 376 (1928); Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 *Harv. L. Rev.* 30 (1926); Frederick Pollock, *A Plea for Historical Interpretation*, 39 *L.Q. Rev.* 163, 165 (1923).

2. 12 *Mod.* 669, 88 *Eng. Rep.* 1592 (1702).

[I]t is against all laws that the same person should be party and Judge in the same cause, for it is manifest contradiction And what my Lord Coke says in *Dr. Bonham's case* in his 8 Co[ke's Reports] is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a Government Judge and party.³

In his report of *Bonham's Case*,⁴ Coke had asserted that a statute making a person judge in his own case would be void if not interpreted to avert the contradiction,⁵ and almost a century later, in *City of London v. Wood*, Holt appears to have followed Coke's example. Yet if Holt was attempting to say something about limitations on government, he might have been less enigmatic than to say that Parliament could restore a person "to the state of nature" or that an act of Parliament "can do no wrong" but, nonetheless, might be "void."

Fortunately, it is not necessary to rely upon these cryptic allusions in the printed reports. Holt's own manuscript report of his opinion has survived, and this new evidence reveals that he discussed two types of limitation on government. First, Holt argued that government—including even a representative institution such as Parliament—was subject to natural law. According to Holt, if Parliament violated the limitations implied

3. *Wood*, 12 Mod. 669, at 687–88, 88 Eng. Rep. at 1602; see also Holt, K.B. 396, 396, 90 Eng. Rep. 1118, 1118, 1 Salk. 397, 397–98, 91 Eng. Rep. 344, 344–45. According to the report in Holt, K.B., the judges gave their opinions at Guildhall on "March 2, 1701"—i.e., 1702 new style.

4. 8 Co. Rep. 107a, 77 Eng. Rep. 638 (K.B. 1610).

5. According to Coke's report:

The censors cannot be judges, ministers, and parties; judges to give sentence or judgment . . . And 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

8 Co. Rep. 114, 118a, 77 Eng. Rep. 646, 652 (C.P. 1610). Professor Samuel Thorne has suggested that Coke took a relatively modest position that focused on a problem of statutory interpretation. See S.E. Thorne, *Dr. Bonham's Case*, in *Essays in English Legal History* 269, 275–76 (1985). In contrast, Professor Charles Gray has argued that Coke at least reported his position in a way that attributed to the judges a more ambitious role. See Charles M. Gray, *Bonham's Case Reviewed*, 116 *Proc. Am. Phil. Soc'y* 35, 35–36 (1972). Professor D.E.C. Yale has noted that Coke applied to Parliament a doctrine that had earlier been applied to the king. See D.E.C. Yale, *Judex in Propria Causa: An Historical Excursus*, 33 *Cambridge L.J.* 80, 92 (1974).

by natural law, it would be dissolved, and individuals living under it would be returned to the state of nature. In this way, the Chief Justice suggested extrajudicial, even revolutionary restraints on government. Second, Holt acknowledged that the judiciary could not employ judicial review to void acts of Parliament. On the basis of ideas of sovereign power related to his understanding of natural law, Holt treated judicial review as a mechanism that enforced and deferred to the acts of a body with sovereign power. Under England's parliamentary system of government, Holt's version of judicial review could not void acts of legislation, but it at least required the government to exercise its power by means of such acts and so by means of law. Thus, whether with respect to natural law and extrajudicial restraints or with respect to sovereign power and judicial review, Holt strove to establish that government, even representative government, was subject to law. Almost three hundred years later, his opinion remains a profound exploration of the lawfulness of government and of the capacity of law to restrain government.

Beyond its significance as an examination of law and limited government, Holt's opinion can illuminate some important historical developments and controversies. First, Holt's account of natural law and the possibility of a dissolution of government marks a crucial transition in Anglo-American constitutional developments. Following a century of turmoil in which two revolutions established Parliament's supremacy over the Crown, Holt recognized that the most vital constitutional questions would no longer concern limitations on monarchical power. Instead, as Holt clearly understood, constitutional controversies would now increasingly involve limitations on the power of Parliament—a representative institution. On this account, the notion of the power of the people acquired a prominence that remains with us and that has changed the very nature of our constitutional law.

More broadly, Holt's opinion suggests the need to reconsider the early eighteenth-century reception of natural-law ideas. Many notable historians have depreciated the historical importance of modern natural-law ideas, particularly the Lockean versions of such ideas, which justified limitations on government, including, ultimately, revolution. These scholars have argued—indeed, have established as historical orthodoxy—that modern natural-law theories, especially the ideas of John Locke, had a relatively insignificant role in eighteenth-century political debates and that, even when mentioned, such ideas were employed in an unsophisticated, “unthinking” way. John G.A. Pocock, for example, has written about the “myth” of Locke and has emphasized that a large part of eighteenth-century political discourse does “not necessitate reference to Locke at all.”⁶ Even a well-known critic of this approach, Isaac Kramnick, has

6. J.G.A. Pocock, *Politics, Language and Time: Essays on Political Thought and History* 144 (1971); see J.G.A. Pocock, *The Myth of John Locke and the Obsession with Liberalism*, in John Locke 3, 6–8 (J.G.A. Pocock & Richard Ashcraft eds., 1980). The literature that adopts this perspective is too vast to be enumerated here. See, e.g., J.P.

written that it "is on solid ground" to the extent it "de-emphasizes the role of Lockean ideas in the early eighteenth century."⁷ Other historians, however, have begun to question whether Lockean ideas were, in fact, so insignificant prior to mid-century, and Holt's opinion confirms their doubts.⁸ In his analysis of natural-law limitations on government, Holt appears to have drawn upon the ideas of Locke and other contemporary philosophers, and therefore his opinion corroborates the need for a broad re-evaluation of the reception of such ideas and of their role in the development of modern constitutional analysis.

Indeed, Holt's discussion of natural law suggests much about the relationship between the dissemination of political ideas and the diffusion of political authority. It provides an opportunity to observe the transmission of ideas from Locke and other philosophers to judges such as Holt,

Kenyon, *Revolution Principles: The Politics of Party, 1689–1720*, at 17–20 (1977); J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* 237, 335 (1987); Donald Winch, *Adam Smith's Politics: An Essay in Historiographic Revision* 28–29, 36, 41, 180 (1978); Martyn P. Thompson, *The Reception of Locke's Two Treatises of Government 1690–1705*, 24 *Pol. Stud.* 184 (1976). In particular, Pocock and others have suggested that analysis based on notions of the law of nature and the state of nature played only a small role in the Revolution of 1688 or the subsequent constitutional settlement. In defense of this position, they seem to assume that "liberal" and "republican" ideas tended to be quite distinct in eighteenth-century political discussion, as if they were not intimately interconnected. Although this issue cannot be pursued in detail here, it should suffice for purposes of this essay to note the combination of "liberal" and "republican" ideas in the works of Sidney, Toland and vast numbers of other "republican" writers during the following century. In this context, to tease apart purely "republican" and purely "liberal" strands and then dramatically say that the republican threads constituted a "discourse" that can be understood without reference to the Lockean or "liberal" threads is rather troubling.

More generally, it has been suggested by numerous historians that the elaborate arguments of Locke and other natural-law writers typically were reduced to mere catch-phrases and rarely were employed in a more sophisticated way. See, e.g., J.G.A. Pocock, *Politics, Language and Time: Essays on Political Thought and History* 5–6, 25–27 (1971) (citing Dunn); John Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in *John Locke: Problems and Perspectives* 45 (John W. Yolton ed., 1969). For other examples, see the extensive literature critiqued by Ralph Lerner, *The Thinking Revolutionary* 1–16 (1987).

7. Isaac Kramnick, *Republican Revisionism Revisited*, 87 *Am. Hist. Rev.* 629, 630 (1982).

8. A number of distinguished authors have suggested more complex accounts that acknowledge the substantial role of John Locke and other natural-law writers. See, e.g., Alan C. Houston, *Algernon Sidney and the Republican Heritage in England and America* 3–8, *passim* (1991); Richard Ashcraft & M.M. Goldsmith, *Locke, Revolution Principles, and the Formation of Whig Ideology*, 26 *Hist. J.* 773 (1983); Mark Goldie, *The Revolution of 1689 and the Structure of Political Argument*, 83 *Bull. Res. Human.* 473, 486–87, 490, 508–09 (1980); Jeffrey M. Nelson, *Unlocking Locke's Legacy*, 26 *Pol. Stud.* 101 (1978); Lois G. Schwoerer, *The Right to Resist: Whig Resistance Theory 1688 to 1694*, in *Political Discourse in Early Modern Britain* 232, 233 (Nicholas Phillipson & Quentin Skinner eds., 1993); Lois G. Schwoerer, *Locke, Lockean Ideas, and the Glorious Revolution*, 51 *J. Hist. Ideas* 531 (1990). As will be seen, Holt's opinion in *City of London v. Wood* similarly suggests that such ideas were far from dormant and that at least some lawyers and judges could make relatively sophisticated use of political theory.

to journalists such as Daniel Defoe, and through at least the journalists, to a much wider reading public. As Defoe and even the more judicious Holt seem to have understood, their ideas about limitations on government could be effective only if transmitted and made persuasive to the people who might have to implement such limitations.

Holt's examination of the second type of limitation on government—judicial review—also has important historical implications, for it suggests the clarity with which judicial review could be linked to ideas of sovereignty already in 1702. Thus far, historians have tended to conclude that Holt adopted Coke's position in *Bonham's Case*—that judges could declare statutes "void"—but that Holt inconsistently combined this "judicial review" with a recognition of parliamentary sovereignty. Assuming that the origins of judicial review were to be found in *Bonham's Case*, historians on both sides of the Atlantic have taken for granted that the late-seventeenth century triumph of parliamentary power put an end to the possibility of judicial review in England. Yet, if the Revolution of 1688 and the Revolutionary Settlement finally resolved the contest between Crown and Parliament by leaving Parliament sovereign, how, these historians have asked, could Holt have seriously suggested judicial review?

Failing to consider the possibility that Holt was discussing a limitation on government different from that in which they were interested, historians have assumed that either the Chief Justice or, more generously, the reporter was confused. Professor Theodore F.T. Plucknett wrote that "[t]he judgment of Lord Chief Justice Holt shows clearly how perplexed he was."⁹ Plucknett concluded his extensive quotations from the printed report by observing: "Such is the sad state of wreckage to which Lord Coke's stately theory had been reduced after the successive hurricanes of the Great Rebellion and the Glorious Revolution."¹⁰ In mercifully less windy prose, Professor Edward S. Corwin similarly asserted that the opinion took an inconsistent position somewhere between the ideas of Coke and modern conceptions of parliamentary sovereignty. Corwin asked:

What precisely does Holt mean by the word "impossible" here? In the one case the restraint on the act of Parliament is still the higher law, in other it is not. The question cannot be resolved further than to say that Holt, like Blackstone later, seems to be attempting to bridge the gap between two conflicting theories of law.¹¹

Without dissenting from his predecessors' disparagement of the opinion, Sir Carleton Allen attempted to shift responsibility to the reporter, arguing with lawyerly logic that "[t]he whole judgement, as reported, is so confused that it is impossible to believe that it represents what a great judge really said."¹² To this, John W. Gough retorted sharply that the reporter

9. Plucknett, *supra* note 1, at 54.

10. *Id.* at 56.

11. Corwin, *supra* note 1, at 376.

12. Allen, *supra* note 1, at 434 n.1.

may have been muddled but no more so than Holt, who, Gough insisted, "was perplexed by the questions involved, and wavered in his judgement between the older and the more modern view."¹³ According to these historians, either Holt or, perhaps, the reporter inconsistently combined judicial review with parliamentary sovereignty—a confusion that reflected a transition in ideas of judicial review at this period.

In fact, Holt was far from confused, and he articulated an account of judicial review clearly based on modern notions of sovereignty rather than on Coke's suggestion in *Bonham's Case* that courts could declare statutes "void." Working from a notion of sovereignty connected to his modern ideas of natural law, Holt reasoned that courts were obliged to enforce the acts of a body with sovereign power. Although Holt's version of judicial review therefore could not be used to void acts of Parliament, it implied that Parliament had to exercise its sovereign power by means of such acts. This penetrating account of judicial review as involving the recognition and enforcement of the acts of a body with sovereign power had little connection to Coke's voiding of statutes. Far from reflecting confusion about the supremacy of Parliament, Holt's opinion acknowledged the power of Parliament but did so in a way that required Parliament to exert its power lawfully.

To summarize, in a judicial opinion, one of the greatest of English judges rejected judicial review of acts of Parliament and justified extrajudicial limitations on Parliament. He enunciated a version of judicial review that required the judiciary to enforce rather than challenge the acts of a body with sovereign power—his only caveat being the suggestion that power had to be exercised through such acts. Looking beyond the judiciary, he recognized that the only effective limitation on Parliament would have to come from the source of its power. In this regard, he employed the reasoning of contemporary natural-law theory to explain how abuses of legislative as well as monarchical power could lead to a dissolution of government and a return to the state of nature.

Before examining Holt's ideas—whether concerning extrajudicial restraints, in Part II, or concerning judicial review, in Part III—this article must, in Part I, trace the political and constitutional context of Holt's decision. As will be seen, it was a context rich with possibilities for the application of modern political theory.

I. THE POLITICAL AND CONSTITUTIONAL CONTEXT

Holt's dicta on parliamentary power have long been treated as if they were just passing observations on political theory, casually or fortuitously cast up in an opinion concerning the appointment of London's sheriffs. The political context of Holt's opinion, however, reveals that his dicta were part of a vigorous debate about limitations on parliamentary power. The debate was prompted in 1701 when the Tory House of Commons

13. Gough, *supra* note 1, at 11 (citing Plucknett, *supra* note 1, at 54, 55).

imprisoned five petitioners from the county of Kent. In response, Daniel Defoe and the Whigs condemned not only this arbitrary imprisonment but also, more generally, parliamentary assertions of unlimited power. Drawing upon John Locke and other modern theorists, they expounded dramatic natural-law ideas about limitations on government, including its representative institutions. It was toward the close of this debate, after Defoe and the Whigs had used the modern natural-law theory to censure the House of Commons, that the Chief Justice, in the course of his opinion against the City of London, used the theory to admonish Parliament.

A. *The Imprisonment of the Kentish Petitioners*

The imprisonment of the Kentish Petitioners and the debate it provoked came after a century of tumultuous attempts to establish parliamentary limits on monarchical power. During their two seventeenth-century revolutions, large numbers of Englishmen had struggled to cure England of absolutism—what Locke had called the “French disease”—by establishing parliamentary and other legal restraints on the Crown. Although the Revolution of 1688 and '89 (in which Parliament settled the Crown upon William and Mary) is typically assumed to have established almost unlimited parliamentary power and, indeed, parliamentary sovereignty, this solution remained controversial. Already at mid-century, during the experiment with parliamentary government, even some erstwhile supporters of the Parliament (such as the Levellers and, later, William Prynne) began to worry that the parliamentary cure for monarchical absolutism could be as dangerous as the disease, and in the decades after 1688, Englishmen again had opportunities to make this observation.¹⁴ Although a Parliament responsive to the people might be preferable to an absolute, hereditary monarch, the danger of an arbitrary exercise of power was not eliminated simply by subjecting the monarch to Parliament.

The dispute about the Kentish Petitioners developed amid indications that Parliament, particularly the House of Commons, was increasingly taking advantage of its new-found strength. The Revolution of 1688 had indicated clearly enough the preeminence of Parliament, but the Tory victory in the election of 1701 led to remarkable attempts to exercise that power. Already in April 1700 it was observed “that the House of Commons had . . . begun to act ‘comme un souveraine’.”¹⁵ By early 1701, Tories in the House of Commons began to formulate plans for an Act of Settlement that not only would have settled the succession but also would have seriously limited the power of the Crown.¹⁶ Although the more sub-

14. *Foundations of Freedom; Or An Agreement of the People* (London 1648); William M. Lamont, *Marginal Prynne 1600–1669*, at 175–204 (1963).

15. 6 Poems on Affairs of State 324 n.60 (Frank H. Ellis ed., 1970) (quoting British Library, Additional Ms. 17677UU, at fol. 203).

16. See *Limitations For the Next Foreign Successor, or New Saxon Race* 3–23 (London 1701). Among other sources, see comments of Andre Bonnet—the London

stantial limitations were not included in the bill sent to the Lords in the middle of May, even the final version of the Act of Settlement revealed the assertiveness of the Tory House of Commons.

It was in this context that the Commons initiated the most dramatic post-Revolutionary discussion of parliamentary power by imprisoning five gentlemen from the county of Kent—an imprisonment that became a *cause célèbre* and set the stage for Holt's opinion. As so often, William III was deeply engaged in his ambitious attempt to halt French advances in Europe. To his annoyance, however, the largely Tory House of Commons was more concerned about him and the taxes he needed to pay for his troops than about the French threat. The Commons feared dangers at home rather than abroad and declined to fund what William and much of the country perceived as the essential defense of Europe and Protestantism. Disturbed by the Commons' failure to support the King's efforts against the French, the Quarter-Sessions for the County of Kent, meeting at Maidstone, petitioned the Commons "to have Regard to the *Voice of the People*," in particular to supply money so that "Our *Religion* and *Safety* may be Effectually Provided for."¹⁷

When the Chairman and four other gentlemen from the sessions attempted to present the petition to the House of Commons, the Tories who controlled the House responded harshly.¹⁸ Although the petitioners reminded the Commons "that it is our Right to Petition this Honorable House," the latter voted that the petition was "Scandalous, Insolent, and Seditious" and ordered the Petitioners to be taken into custody.¹⁹ This imprisonment of gentlemen who had simply exercised their right to petition—and had done so on behalf of Protestantism and resistance to French aggression—excited "Horror and Amazement."²⁰ The Petitioners were the focus of widespread sympathy and received prominent visitors in their places of confinement; as Swift put it, they were "openly carress'd by

resident of the King of Prussia—quoted in 6 Poems on Affairs of State, *supra* note 15, at 327 n.99.

17. [Daniel Defoe], *The History of the Kentish Petition* 2 (London 1701) [hereinafter [Defoe], *History*]. Note that there were different editions of this pamphlet, and the page references here are based on the 14-page edition. The petition was recorded among the papers of the House of Commons in the eighteenth century (Bundle 103, Press 5, in the Office of Journals and Papers) but presumably was burned in the fire of 1834. See Schedule of Parliamentary Papers 501 (1733 Ms. shelf list of the Commons' Office of Journals and Papers, on file with author); for another copy, see British Library, Lansdowne Ms. 553.

According to Defoe, the petition was signed by all 21 members of the grand jury, then by the Chairman and 23 of the justices, and then by many freeholders of the county, who "crouded in so fast, that the Parchment was filled up in less than 5 Hours time." [Defoe], *History*, *supra*, at 1.

18. See *id.* at 3–4.

19. *Id.* at 6; see also 13 H.C. Jour. 518 (May 8, 1701).

20. [John Somers], *Jura Populi Anglicani: or the Subject's Right of Petitioning Set Forth* 18 (London 1701) [hereinafter [Somers], *Jura Populi*].

the People.”²¹ Yet not until the prorogation of Parliament, seven weeks after their imprisonment began, were the Petitioners released.²²

The Kentish Petition (like the subsequent attack on the House of Commons) appears to have been largely the work of Daniel Defoe, acting on behalf of the King. Recognizing the talents and sympathies of the brilliant, multi-voiced journalist, William III had “Employ’d” and “Rewarded” Defoe, who, not merely on this account, attempted to advance the cause of the King—the cause of resisting intolerance and foreign aggression.²³ Accordingly, as part of a scheme to undermine the intransigent Tory House of Commons, which refused to support William’s foreign policy, Defoe seems to have orchestrated the drafting and delivery of the Petition.²⁴ Although Defoe’s initial goal was to persuade the Tories in the House of Commons to abandon their studied inattention to the

21. [Jonathan Swift], *A Discourse of the Contests and Dissensions between the Nobles and the Commons in Athens and Rome* 58 (London, John Nutt 1701) [hereinafter [Swift], *Contests and Dissensions*].

22. For the visitors, see *id.* at 10; 2 Bishop Burnet’s *History of His Own Time* 275 (London, Joseph Downing & Henry Woodfall 1734); 6 *Poems on Affairs of State*, *supra* note 15, at 334.

23. See 6 *Poems on Affairs of State*, *supra* note 15, at 264, 318. Of course these were also the policies of many Whigs. William, however, sought to avoid dependence upon either party. Hence, the usefulness of the Tories, if they could be made pliant. As a result of Defoe’s efforts, the Tories became quite accommodating.

24. Although Defoe attributed authorship of the petition to one of the petitioners, William Colepeper, Professors Ellis and Bastian attribute it to Defoe. See 6 *Poems on Affairs of State*, *supra* note 15, at 319; Frank Bastian, *Defoe’s Early Life* 250–51 (1981). Their suggestions are not improbable, for Defoe and Colepeper may already have been acquainted, and the petition spoke of “the *Voice of the People*”—a phrase that fits with Defoe’s known writings. See [Defoe], *History*, *supra* note 17, at 2. Along similar lines, note that Colepeper and his fellow Kentishmen delivered their petition to the Commons on the same day that the King sent the House a Dutch request for troops. See 13 *H.C. Jour.* 518 (May 18, 1701). Jack Howe, M.P., protested that “the King, the Dutch and the Kentishmen were all in a plot against the House of Commons.” Bastian, *supra*, at 251. According to Defoe’s history of the petition, William Colepeper “withdrew to Compose it.” [Defoe], *History*, *supra* note 17, at 1. According to a Tory, however, Colepeper left the sessions as part of an elaborate charade: “‘He very gravely retires to Word *A Petition that had been sent down from London* in his [sic] *Verbis, five Days before the Sessions at Maidstone.*’” Bastian, *supra*, at 250 (quoting *The History of the Kentish Petition Answer’d*, Paragraph by Paragraph 11 (1701)).

In 1701, when discussing the *Legion Memorial*, Defoe said that it was something “*which I could give a better History of, if it were needful.*” [Daniel Defoe], *The Original Power of the Collective Body of the People of England* 24 (London 1702) (date in Narcissus Luttrell’s hand, Dec. 23, [1701], on Folger Library Copy) [hereinafter [Defoe], *Original Power*]. As noted by an early biographer, Defoe prudently did not reprint this passage in his collected works of 1703. See George Chalmers, *The Life of Daniel De Foe* 14 & n.* (London 1790).

Espousing varied positions, sometimes simultaneously, Defoe was a master of political disguise. In 1718, an anonymous pamphlet, apparently written by Defoe, concluded by advising authors “that a Person writing a great deal on various Subjects, should be as cautious in owning all his Performances, as in revealing the Secrets of his most intimate Friend.” [Daniel Defoe?], *A Vindication of the Press* 36 (29 Augustan Reprint Soc’y Publications 1951) (1718).

French threat, he inadvertently provoked them into demonstrating an indifference to liberty much closer to home.

B. *The Debate About Parliamentary Power*

Outraged by the arbitrary behavior of the Tory House of Commons, Defoe and others accused that body in terms that would be reflected in Holt's analysis. Among other things, they warned the Commons that if Parliament violated the law of nature or reason, government would be dissolved.²⁵

In a hastily printed *Memorial* purporting to be signed by "Legion," Defoe promptly denounced the "Illegal Custody."²⁶ According to this *Memorial*, the imprisonment of the Petitioners, although without a remedy at law, was contrary to the law of reason and therefore was remediable by the people:

And tho' there are no stated proceedings to bring you to your Duty, yet the great Law of Reason says, and all Nations allow, that whatever Power is above Law, is Burthensome, and Tyrannical; and may be Reduced by *Extrajudicial* Methods: You are not above the Peoples Resentments, they that made you Members, may reduce you to the same Rank from whence they chose you; and may give you a Taste of their abused kindness, in Terms you may not be pleas'd with.²⁷

In this blunt language that made the claims of "Legion" notorious, Defoe recognized that Parliament was not limited by "stated proceedings" but, nonetheless, was subject to "the great Law of Reason," according to which "whatever Power is above Law, is . . . Tyrannical; and may be Reduced by *Extrajudicial* Methods."²⁸

Recalling the revolutionary events of 1688 and '89, the *Memorial* asserted that just as the Declaration of Rights had enumerated limitations

25. Defoe's contribution to the debate about the Kentish Petitioners has not received as much attention as might be expected. For an attempt to reconcile Defoe's statements about politics in varied publications and contexts, including the dispute about the Petitioners, see James V. Elliot, *The Political and Social Thought of Daniel Defoe: A Study in the Rise of Liberalism as an Ideology* (1954) (unpublished Ph.D. dissertation, Harvard University).

26. [Daniel Defoe], Mr. S—R., *The Enclosed Memorial* 4 & 1 (n.p. [1701]) [hereinafter [Defoe], *Memorial*].

27. *Id.* at 1.

28. Contemporaries recognized the radical character of Defoe's analysis. For example, a Tory wrote:

In the foregoing Paragraph, they set the People above the *Parliament*, and now above the *Law*, investing them with a power to punish by *Extrajudicial Methods*, a trick they have been so long accusom'd to, that they think they can pass it upon the World under the Title of the *Law of Reason*, which is a profess'd Enemy to their Principles, and abhors all power above Law as a violation of common Right, and a wound given to the very heart of Justice

England's Enemies Exposed 35 (n.p. 1701).

on the monarch, so, in 1701, the *Memorial* could list limitations on Parliament:

When the People of *England* Assembl'd in Convention, Presented the Crown to His Present Majesty, they annexed a Declaration of the Rights of the People, in which was Express'd what was Illegal and Arbitrary in the former Reign, and was claim'd as of Right to be done by Succeeding Kings. . . . In like manner, here follows . . . a short abridgement of the Nations Grievances, and of your Illegal and Unwarrantable Practices; and a Claim of Right which we make in the Name of our Selves. . . .²⁹

In its list of the Commons' "Illegal and Unwarrantable Practices," the *Memorial* asserted that "[t]o imprison Men who are not your own Members, by no Proceedings but a Vote of the House . . . is Illegal . . ."³⁰ In its Declaration of Rights, it made the corresponding claim: "That the *House of Commons* have no Legal power to imprison any Person, or commit them to Custody of Serjants, or otherwise (their own Members except[ed]) . . ."³¹ This limitation on the "Legal Power" of the Commons was, as already noted, without a remedy by "stated proceedings," but it did have an "extrajudicial" remedy:

That if the *House of Commons*, in Breach of the Laws and Liberties of the People, do betray the Trust repos'd in them, and act Negligent[ly] or Arbitrarily and Illegally, it is the undoubted Right of the People of *England* to call them to an Account for the same, and by Convention, Assembly or Force may proceed against them as Traitors and Betraiars of their Country.³²

The *Memorial* concluded:

Thus *Gentlemen*. You have your Duty laid before you, . . . but if you continue to neglect it, you may expect to be treated according to the Resentment of an *injur'd Nation*; for *Englishmen* are no more to be Slaves to *Parliament*, than to a King.³³

To this, Defoe subscribed, "Our Name is Legion, and we are Many."³⁴ Not merely the King but even Parliament was accountable to the people, if not by the ballot, then "by Convention, Assembly or Force."

29. [Defoe], *Memorial*, supra note 26, at 1.

30. *Id.* at 2.

31. *Id.* at 3.

32. *Id.* at 4. Compare John Locke, *Two Treatises of Government* 366–67, 412 (II.xiii.149, II.xix.221) (Peter Laslett ed., 1963) [hereinafter Locke, *Two Treatises*].

33. [Defoe], *Memorial*, supra note 26, at 6.

34. *Id.* at 4. Defoe borrowed this line from Milton's *Animadversions upon the Remonstrants Defence, Against Smectymnuus* (London 1641). See Paula R. Backscheider, *Daniel Defoe His Life* 82 (1989).

In a curious twist of events, Defoe and Colepeper soon found themselves exchanging roles, for in 1703, when Defoe was imprisoned for writing his famous parody of religious intolerance, *The Shortest Way with Dissenters*, Colepeper provided legal counsel and eloquently petitioned the Privy Council for Defoe's release. Soon, however, it was Colepeper who was in trouble again. While waiting to deliver his petition on behalf of Defoe to the Privy Council, Colepeper tactlessly conversed about the fact that Admiral

A more temperate attack on the Commons came from the great Whig lawyer, John Somers—a friend of John Locke's and recently Lord Chancellor—who argued that the Commons had violated the people's right of petitioning. Drawing on Locke's theory that people entered civil society to preserve their rights or "property," and that a person's property could not be taken without his consent, Somers explained that petitioning was a right the people could not have relinquished.³⁵ Alas, he made this interesting point in the prose of one who excelled in his profession:

'Tis certain that nothing can be more agreeable to Nature, and a plainer Dictate of Reason, than that those who apprehend themselves aggrev'd be allow'd a liberty to approach those by Petition who know their Grievances, or perhaps are the Authors of them, and consequently able to redress them. When Men enter'd first into Society, and gave up that Right which they had to secure themselves in the State of Nature, 'tis manifest that they did it for the preservation of Property, which is the end of Government. This necessarily supposes, and indeed requires, that People should have Property, without which they must be suppos'd to lose that by ent[e]ring into Society, which was the end for which they enter'd into it. If men enter'd into Society to preserve it, and therefore are so entitled to it, that (as a very Learned and Ingenious Author [John Locke] tells us*) *The supreme Power cannot take from any man any part of his Property without his own consent*; Can any Absurdity be so gross, as to imagine, that men gave up their Right to pray for Redress, if they thought themselves injur'd in their Properties? Or that the supreme Power may hinder them to pray for that which they have not a right to deprive them of? Wherever therefore any Government is established, there the natural Right which People had to secure what was their own, must be so far at least continued, as to allow them a liberty to petition for what they think their Right, because this is a Privilege which they could not give up, when they enter'd into Society.³⁶

From Locke's ideas about the preservation of property, Somers concluded that the "natural Right" of the people "to secure what was their own" had to "be so far at least continued, as to allow them a liberty to petition for what they think their Right." This was a freedom "they could

Rooke (a fellow Kentishman and a political opponent) was at Bath rather than in more dangerous waters. For this, Colepeper became the object of an attempted assassination, resulting in a trial before Chief Justice Holt. Of course, the whole affair was written up by Defoe. See William Chadwick, *The Life and Times of Daniel De Foe* 186–96 (London, John Russell Smith 1859).

35. Locke wrote that men united in society "for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*." Locke, *Two Treatises*, supra note 32, at 395 (II.ix.123).

36. [Somers], *Jura Populi*, supra note 20, at 30–31. According to Somers's footnote (marked by the asterisk), the person who said that property could only be taken with consent was the "The Author of two Treatises of Government." *Id.* at 30 n.*; see also J.W. Gough, *John Locke's Political Philosophy* 184 (1973).

not give up, when they enter'd into Society" and thus could not have submitted to the discretion of Parliament.³⁷

In enunciating limitations on the power of Parliament, both Somers and Defoe drew attention to the power of the people.³⁸ After quoting the Whig martyr, Algernon Sydney, on the accountability of members of Parliament to their electors, Somers justified petitioning by arguing that "the Freemen of *England*" had not "delegated their whole Power" to their

37. Among the other critics of the Commons was Jonathan Swift. In a dispassionate tone suggestive of his disdain for party politics, Swift compared the House of Commons to popular bodies in ancient times and drew attention to the danger of a representative body inadequately restrained by a balance of power. Although he focused on the question of impeachments, he also addressed himself to the more general problem of the power of the Commons.

From his historical examples, Swift concluded that it was an "Error" to assert "that Power is safer lodged in many Hands than in one. . . . [T]hey are as capable of Enslaving the Nation, and of acting all Manner of Tyranny and Oppression as it is possible for a single Person to be." [Swift], *Contests and Dissensions*, supra note 21, at 10. Swift even suggested that there was a need "of fixing the due Limits of *Power* and *Privilege*." *Id.* at 12. Like Defoe, he hinted at a written limitation on the power of the House of Commons:

It were to be wish'd, that the most August Assembly of the Commons would please to form a *Pandect* of their own Power and Privileges, to be confirmed by the entire Legislative Authority, and that in as solemn a manner (if they please) as the *Magna Charta*. But to fix one Foot of their Compass wherever they think fit, and extend the other to such terrible Lengths, without describing any Circumference at all, is to leave us and ourselves in a very uncertain State.

Id. at 52. Without a written *Magna Charta* limiting the Commons, their power would be uncircumscribed.

Swift also wrote that there was an "unlimited Power placed fundamentally in the Body of a People." *Id.* at 3. This power "is what the Legislators of all Ages have endeavour'd . . . to deposite in such Hands as would preserve the People." *Id.* at 3–4. Yet most such legislators "seem to agree in this, that it was a Trust too great to be committed to any one Man or Assembly, and therefore they left the Right still in the whole Body." *Id.* at 4. Of course, this statement was not as radical as it may sound, for it appeared in the context of Swift's discussion of a balance of power. Swift very carefully did not go so far as to say that a breach of trust justified revolution, and he explained that his argument was compatible with either the contractual or the familial model of government. *Id.* at 4.

38. Defoe claimed that "[w]e have for some time past observ'd, that it has been possible even for so great an Assembly to Err," although whether he was referring to the Levellers or, perhaps, William Prynne or anyone in particular is by no means clear. [Daniel Defoe], *Legion's Second Memorial*, quoted in *Legion's Second Memorial to the Late House of Commons, Answer'd Paragraph by Paragraph* 32 (London 1702) [hereinafter *Legion's Second Memorial Answer'd*]. Of course, Defoe's position differed from that of his predecessors in various ways.

Incidentally, on the assumption that sovereignty was indivisible and that justice was not possible where "every particular man may be Judge in his own case," Edmund Bohun had argued that, "no man can assure himself of more Justice from a Senate, or a Multitude, than from a Prince, or single Person." [Edmund Bohun], *A Defence of Sir Robert Filmer, Against the Mistakes and Misrepresentations of Algernon Sidney*, Esq. 8–9 (London 1684).

representatives.³⁹ More generally, Somers noted that the power retained by the people included a right of self-preservation:

The Knights, Citizens, and Burgesses, sent by the People of *England* to serve in Parliament, have a Trust reposed in them, which if they should manifestly betray, the People, in whom the Power is more perfectly and fully than in their Delegates, must have a Right to help and preserve themselves.⁴⁰

Not burdened with Somers's sense of restraint, Defoe broke into verse on the necessity of limiting parliamentary as well as monarchical power and thereby hinted at a rather forceful remedy:

Nature [h]as left this Tincture in the Blood,
That all Men wou'd be Tyrants if they cou'd.
Not Kings alone, not Ecclesiastick pride,
But *Parliaments*, and all Mankind beside. . . .

Posterity will be asham'd to own
The Actions we their Ancestors have done, . . .
To see one Tyrant banish'd from his Home,
*To set Five Hundred Traytors in his Room*⁴¹

As if to leave no doubt that he had greater concern for liberty than literature, Defoe suggested the means of restraining the "Five Hundred Traytors" in a not-quite poetic address to the Commons:

It was our Freedom to defend,
That *We the People* chose you,
And *We the People* do pretend
Our power of Choosing may extend
To punish and depose you.⁴²

Whereas in the seventeenth century the Crown was often said to be responsible to Parliament and only indirectly to the people, Defoe and the Whigs, in their attempt to find limitations on Parliament, now empha-

39. [Somers], *Jura Populi*, supra note 20, at 51. A more complete quotation is: "They who tell us that the Representatives of the Freemen of England . . . are to act without controul, cannot sure mean that they have delegated their whole power to them . . ." *Id.*

40. *Id.* at 51.

41. [Defoe], *History*, supra note 17, at [14] (Addenda). Also:

They'l be amazed to see there was *but Five*,
Whose Courage could their Liberty survive,
While we that durst Illegal Power dethrone,
Should basely be Enslav[']d by Tyrants of our own.

Id.

42. [Daniel Defoe], *A New Satyr on the Parliament (1701)*, reprinted in 6 *Poems on Affairs of State*, supra note 15, at 330. He also wrote:

Did we for this depose our Prince,
And Liberty assume,
That you should with our Laws dispense,
Commit Mankind without Offence,
And Govern in his Room?

Id. at 327.

sized direct accountability to the people.⁴³ Among the precedents for this accountability was Locke's "*Doctrine of a Power in the People of providing for their safety a-new by a new Legislative, when their Legislators have acted contrary to their trust.*"⁴⁴ Although developed in response to monarchical power, Locke's ideas were significant for the criticism of the Tory House of Commons—as they would be later for Holt's opinion about parliamentary power in *City of London v. Wood*.

By means of a pamphlet, *The Original Power of the Collective Body of the People of England*, Defoe elaborated his position that the people of England retained some power. "There must," he reasoned, "be some Power *Prior* to the Power of King, Lords and Commons," and this power lay in the "*People of England.*"⁴⁵ They "were a People before there was such a thing as a Constitution," and from this it was apparent that "*the People were the only Original*" of the power of government.⁴⁶ "[F]rom the mutual Consent of these people[,] the Powers and Authorities of this Constitution are derived."⁴⁷ The people, moreover, retained some power to replace their constitution and government:

There must always remain a Supream Power in the Original to supply, in Case of the Dissolution of Delegated Power.

The People of *England* have delegated all the Executive Power *in the King*, the Legislative in the *King, Lords and Commons*, the Sovereign Judicature *in the Lords*, the Remainder is

43. For another example, note that Defoe's Second Memorial told the Commons that they had "forgot that the Original of all Right is derived from, and vested in the People." [Daniel Defoe], *Legion's Second Memorial*, quoted in *Legion's Second Memorial Answer'd*, supra note 38, at 23. Similarly, it said that "the Freeholders of *England* are your Superiors." *Id.* at 10. To this, an anonymous pamphleteer responded: "If the Freeholders of *England* (viz. their Electors) are their Representatives Superiors; it may as well be said, that the Gentlemen of the Convention that made Choice of his Present Majesty, and the following Parliament that Recogniz'd the Lawfulness of his Title, are Superior to his Majesty, which is Arrogant as well as Absurd." *Id.* Quoting one of his own poems, Defoe said of monarchical power:

That Kings when they descend to Tyranny,
Dissolve the Bond, and leave the Subject free.

Then he added in prose: "If the People are Justifiable in this Procedure against the King, I hope I shall not be Censur'd if I say, *That if any one should ask me, whether they have not the same Right, in the same Cases, against any of the Three Heads of the Constitution, I dare not answer in the Negative.*" [Defoe], *Original Power*, supra note 24, at 6. In his history of this period, a contemporary, Alexander Cunningham, wrote that the critics of the Commons "proceeded even so far as to affirm that the house of commons might be controlled by the people, whose representatives they are." 1 Alexander Cunningham, *The History of Great Britain from the Revolution in 1688 to the Accession of George the First* 208 (London, Thomas Hollingbery 1787).

44. Locke, *Two Treatises*, supra note 32, at 464 (II.xix.226). Of course, Locke defined the legislative in a way that included the king, Lords, and Commons in their legislative capacities.

45. [Defoe], *Original Power*, supra note 24, at 8.

46. *Id.* at 9.

47. *Id.*

reserv'd in themselves, and not committed, no not to their Representatives⁴⁸

Of the representatives or Members of Parliament, Defoe added that "[w]hat Power they have they receive from the People they represent; and, That some Powers do still remain with the People, which they never neither divested themselves of, nor committed to them."⁴⁹ On these grounds, "when Parliaments . . . betray the People they Represent, the People themselves, who are the Original of all Delegated Power, have an undoubted Right to defend their Lives, Liberties, Properties, Religion and Laws"—"the Constitution is dissolv'd," and, in accord with "the Laws of Nature and Reason," the people have a right to defend themselves and create a new constitution.⁵⁰ In prose rich with cadences and metaphors almost poetic, Defoe brought his essay to a conclusion by contrasting the mortality of representative government to the eternity of the people:

The *House of Commons* . . . are Mortal, as a House; a King may Dissolve them, they may die and be extinct; but the Power of the People has a kind of Eternity with Respect to Politick Duration: Parliaments may cease, but the People remain; for them they were originally made, by them they are continued and renewed, from them they receive their Power, and to them in reason they ought to be accountable.⁵¹

Rarely in verse did Defoe reach such heights as when he wrote that the House of Commons could "die and be extinct; but the Power of the People has a kind of Eternity."

Apparently after reading Defoe's pamphlet, the noted Deist, John Toland, similarly waxed lyrical about the people and their relation to their representatives:

Ever since I knew what it was to be a Member of civil Society, or to concern my self about the Nature of Government, I have bin wholly devoted to the self-evident Principle of *Liberty*, and a profest Enemy to *Slavery* and *arbitrary Power*. I have always bin, now am, and ever shall be persuaded that all Sorts of Magistrats are made for and by the People, and not the People for or by the Magistrats: that the Power of all Governors is originally conferr'd by the Society, and limited to their Safety, Wealth, and Glory, which makes those Governors accountable for their Trust: and consequently that it is lawful to resist and punish Ty-

48. Id. Compare this and the other passages quoted in the text to Locke, *Two Treatises*, supra note 32, at 413 (II. xiii.149).

49. [Defoe], *Original Power*, supra note 24, at 14.

50. Id. at 16.

51. Id. at 23; see also id. (The Dedication to the Lords and Commons.) For Locke's discussion of the perpetual power of the community and of the "Power of the People," see Locke, *Two Treatises*, supra note 32, at 413 (II.xiii.149). Circa 1697, in the margin of his copy of Tyrrell's *Patriarcha non Monarcha*, one Francis Gibbon commented "tis the power of ye people w[hi]ch is perpetuall; for king[s] sometimes dye without heirs, or abdicate, & then the people must Settle the Government." James Tyrrell, *Patriarcha non Monarcha* 257 (sig. S1) (London 1681) (Folger Library copy) (abbreviation marks omitted).

rants of all Kinds, be it a single Person or greater Number of Men; for the Case was just alike to the People of *Denmark* (for Example) whether their *House of Commons* had assum'd an unlimited Authority to themselves, or conferr'd such a Power (as they did) on their King.⁵²

Not merely kings but "all Sorts of Magistrats," including the House of Commons, were "made for and by the People" and were "accountable for their Trust."

Of course, Tories responded to Defoe and Somers rather differently than did Toland: Tories claimed that Whigs wanted to subject Parliament to the mob. Members of Parliament were said to have "sat in fear of their Persons from popular Rage."⁵³ According to one Tory, the "Legion" were "threatening" the Commons "with bringing down the *Mob* upon them" and "were forming a Rebellion."⁵⁴ Later, a "Mr. Whiglove" was represented as telling a "Mr. Double"—a duplicitous Whig—that "a

52. John Toland, *Vindicius Liberius: Or, M. Toland's Defence of Himself* 125–26 (London 1702). Toland was an acquaintance of Locke and Tyrrell and the editor of Harrington, Ludlow, Milton and Sidney. Upon returning from a diplomatic mission to Hanover and Berlin, the undiplomatic Toland eagerly read the pamphlets he had missed while abroad, including attacks upon his deism and probably Defoe's *Original Power*. See id. at 1. In response to the religious criticism, he professed in print to be an Anglican and added to this the rather more resolute political testament printed above. Although proud of his knowledge of ten languages, Toland's spelling suggests that his return from Germany occurred none too soon.

Toland is frequently treated by modern scholars as a "republican," yet this passage, among others, suggests that his republicanism was hardly incompatible with modern natural-law ideas. Cf. Houston, *supra* note 8, at 3–8, *passim*; Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (1988).

53. [Swift], *Contests and Dissensions*, *supra* note 21, at 58. In the fall of 1701, Lord Sunderland advised William III to rely upon the Whigs, asking the King:

Can he forget how the Tories agreed to the ten thousand men, and the address to enter into alliances with the emperor? Was it not because it would have been done without them, and that they were frighted out of their wits, and to oblige him to thank them at last, that they might go into the country with safety?

Letter from Lord Sunderland to William III (Sept. 11, 1701), in 2 *Miscellaneous State Papers from 1501 to 1726*, at 445 (Philip Yorke ed., London 1778). Defoe flattered himself that his Legion Memorial "frighted" various Tories "into the Country," and Tories were all too happy to attribute extreme measures to their opponents, as observed in the text here. 6 *Poems on Affairs of State*, *supra* note 15, at 328–29 n.135. Nonetheless, it should be noted that these claims were at least as convenient as sincere. As Frank H. Ellis has pointed out, "[t]he diplomatic correspondents . . . reported that it was the Kentish petition that had caused the fears." Id.

54. *England's Enemies Exposed*, *supra* note 28, at 31. A Tory poet wrote:

While fearful of Invasions from a far,
At home they meditate a Civil War,
And hatch Rebellion underneath a Zeal,
To save, and to promote the Common-Weal,
As they for Mutinies *most humbly* sue,
And would revive the Crimes of *Forty Two*.

The Kentish Men. A Satyr 2 (London 1701) [hereinafter *Kentish Men*].

competent Number of the People were ripe for any Mischief, and you had got a good Share of the Mob of your Side, even against a House of Commons, which hardly ever happen'd before in *England*.”⁵⁵ Addressing Lord Somers—the most prominent Whig defender of the Petitioners—a Tory poet said of Englishmen with “Estates or sense” that:

They well foresee your ruin and confusion,
Who thus expos'd our boasted Constitution;
Strove to subvert all Pow'r, and Rights, and Laws;
For your wild Maxims ruin every Cause.
If the Trustees of all Mankind be false,
Welcome *Hobbs's* state of Nature!⁵⁶

From the Whigs could be expected Hobbesian anarchy.

In response to these accusations that the Whigs were inviting mob rule, Defoe transformed the criticism implied by the word “mob” into a justification. He told the Commons that they were “[t]he abstract of our Mob.”⁵⁷ Although he explained at length that “[w]hen . . . I am speaking of the Right of the People, I would be understood of the Freeholders,” he appears to have added this to reassure freeholders rather than the Commons.⁵⁸ Certainly, his qualification seemed rather weak following, as it did, his discussion of the right of the people or “mob”:

[W]hen Parliaments, . . . should . . . betray the People they Represent, the People themselves, who are the Original of all Delegated Power, have an undoubted Right to defend their

55. [Charles Davenant], *The True Picture of a Modern Whig, Set forth in a Dialogue Between Mr. Whiglove & Mr. Double* 8 (London 1701). Swift wrote that the Whigs “have been Authors of a new and wonderful Thing in *England*, which is, for a House of Commons to lose the universal Favour of the Numbers they represent . . . [T]hose whom they thought fit to persecute for Righteousness sake, have been openly caress'd by the People.” [Swift], *Contests and Dissensions*, *supra* note 21, at 58. An anonymous Tory pamphleteer wrote that the supporters of the Petitioners were “favoured with the good Opinion of the *Gaderene* Mob.” *The Legionites Plot: Or an Account of Some Late Designs to Create a Misunderstanding Betwixt the King and His People* 8 (London 1702).

56. *The Triumph of the Great L[or]d S[omers]* 11 (London 1701). Incidentally, compare Dryden's account of the possibility that:

. . . government itself at length must fall
To nature's state, where all have right to all.

John Dryden, *Absalom and Achitophel*, in *English Poetry of the Restoration and Early Eighteenth Century* 90, 115 ll.793–94 (H.T. Swedenberg, Jr. ed., 1968). He complained of a situation in which

the crowd be judge of fit and just,
And kings are only officers in trust.

Id. at 114 ll.765–66.

Add that the pow'r, for property allow'd,
Is mischievously seated in the crowd;
For who can be secure of private right,
If sovereign sway may be dissolv'd by might?

Id. at 114 ll.777–80.

57. [Daniel Defoe], *Legion's New Paper* 4 (London 1702); Daniel Defoe, *A New Satyr on the Parliament* (1701), in *6 Poems on Affairs of State*, *supra* note 15, at 318, 325.

58. [Defoe], *Original Power*, *supra* note 24, at 19.

Lives, Liberties, Properties, Religion and Laws, . . . the Constitution is dissolv'd, and the Laws of Nature and Reason act of Course according to the following System of Government.

The Government's ungirt when Justice dies,
And Constitutions are *non Entities*:
The Nation's all a Mob; there's no such thing
As Lords and Commons, Parliament or King.
A great promiscuous Croud the *Hydra* lies,
Till Laws revive, and mutual Contract ties.
A *Chaos* free to chuse for their own Share,
What Case of Government they please to wear.⁵⁹

He added that upon "a general Dissolution of Government," the people, "assembled in a Universal Mob to take the Right of Government upon themselves," could act through a "Convention"—an obvious reference to the events of 1688 and '89.⁶⁰

The danger that required popular restraints even on the House of Commons and Parliament was not merely the risk of arbitrary imprisonment but, more generally, the undefined extent of parliamentary power. As one writer—possibly Lord Somers—noted shortly before the imprisonment of the Kentish Petitioners, "'Tis hard to say what Parliaments cannot do: The Boundaries of their Power not being fix'd, 'tis difficult to determine when 'tis carry'd beyond the utmost extent of its Tether."⁶¹ Similarly, Defoe told Members of Parliament that "*possibly the Extent of your Legal Authority was never fully understood, nor have you ever thought fit to Ex-*

59. Id. at 16; cf. Locke, Two Treatises, *supra* note 32, at 459–60 (II.xix.219–20). The words "according to the following System of Government" are taken from a 1703 revision by Defoe in which these words were substituted for the 1702 edition's phrase: "according to the late Author, quoted before." Daniel Defoe, *The Original Power of the Collective Body of the People of England*, in *A True Collection of the Writings of the Author of the True-Born Englishman* 133, 155 (London 1703) [hereinafter [Defoe], *True Collection*]. I have followed the revised text in this respect simply to avoid a phrase that is rather awkward—as Defoe himself appears to have recognized.

The verse is quoted from his *True-Born Englishman* of early 1701 and is but one indication that in the Kentish Petition debate Defoe was applying ideas he had already espoused in other controversies.

60. [Defoe], *Original Power*, *supra* note 24, at 17. Elsewhere, in response to a ballad by Defoe, an anonymous author (perhaps Defoe himself) purported to give the Commons' justification of their treatment of the Petitioners:

And since such falsehoods were giv'n out,
by those who wish'd 'em Evil,
Twas time for them to look about,
And to prevent the Rabble Rout;
Since Mob's a very Devil.

[Daniel Defoe?], *The Ballad, or: Some Scurrilous Reflections in Verse* 19 (London, D. Edwards [1701]) (response to stanza 27).

61. [John Somers], *Jus Regium: Or, the King's Right to Grant Forfeitures* 44 (London 1701). He continued, however: "But that there is a Tether to their Power is most certain, since besides divine Revelation, the Law of Nature or Reason tells us, that there are rules and measures of Right and Wrong which no positive Law of Man can exceed." Id.

plain it."⁶² This uncertainty was hardly made less worrisome when Tories pronounced that the King, Lords, and Commons, when acting together, "have an *Absolute Supreme Power*, to do whatever they shall think necessary or convenient for the Publick Good, *of which they are the only Judges*, there being no Legal Power on Earth to Controul them."⁶³ In response, Whigs attributed to Tories the opinion "that as soon as ever the Members were chosen, they were then left to the absolute Freedom of their own Wills, to act without Controul; and though they are abusively called the People's Servants, yet really and in truth, they . . . become their Masters."⁶⁴

Of particular concern to Defoe was the suggestion that Parliament and even merely the Commons could authorize someone to do whatever he pleased, without restraint by law. In his *History of the Kentish Petition*, Defoe recounted with relish the claims supposedly made by the Commons' Serjeant to the Petitioners:

On *Friday* in the Evening, Mr. Serjeant began to treat with them and representing his absolute Power, letting them know, *That he had an Unbounded liberty of using them at Discretion, that [he] could confine them at pleasure, put them in Dungeons, lay them under Ground, keep them apart, remove them daily[,] and keep all people from them, by making them close Prisoners.*⁶⁵

Later, Defoe warned that "[t]he Commons may extend their Power to an exorbitant Degree, in Imprisoning the Subjects" and in "giving unlimited Power to their Serjeant to Oppress the People in his Custody."⁶⁶ The possibility that Parliament might give someone "an Unbounded liberty" of "using" other persons "at Discretion" was a danger to which Holt would soon address himself.

For purposes of understanding Holt's opinion in *City of London v. Wood*, an important feature of the debate about the Kentish Petitioners is the seeming paradox created by Defoe and others who complained both that the House of Commons had unlimited power and that it had acted unlawfully. For example, in a *Second Memorial* to the Commons, Defoe said that "[c]ommitting to Custody those Gentlemen . . . is Illegal and Injurious; Destructive of the Subjects Liberty of Petitioning for Redress of Grievances."⁶⁷ Yet shortly after denouncing the imprisonment of the

62. [Defoe], *Original Power*, *supra* note 24, Dedication. He continued: "*But this I may be bold to advance, That whatever Powers you have, or may have, you cannot Exercise but in the Name of the Commons of England, and you enjoy them as their Representative, and for their Use.*" *Id.*

63. [Humphrey Mackworth], *A Vindication of the Rights of the Commons of England* 3 (London, J. Nutt 1701) [hereinafter [Mackworth], *Vindication*] (date in Narcissus Luttrell's hand, Aug. 22, on Folger Library copy).

64. *The Electors Right Asserted with the Advices and Charges of Several Counties, Cities and Boroughs in England to Their Respective Members of Parliament Who are to Meet at Westminster on the 30th of December, 1701*, at 1 (London 1701).

65. [Defoe], *History*, *supra* note 17, at 7.

66. [Defoe], *Original Power*, *supra* note 24, at 4.

67. [Daniel Defoe], *Legion's Second Memorial*, quoted in *Legion's Second Memorial Answer'd*, *supra* note 38, at 9–10.

Petitioners as "Illegal," he also observed that the power of the Commons was unlimited: "You are the Men, who . . . having the Liberties and Estates of your native Country put into your Hands, mis-improv'd that unlimited Power, to oppress the very People who chose you to defend them."⁶⁸ This apparent contradiction did not go unnoticed by Tories, one of whom responded by arguing that "if [the Commons'] *Power was unlimited*, that is, uncircumscrib'd by any Law, how could they act contrary to *Magna Charta*, which is the Law of Laws?"⁶⁹

Yet, in arguing that parliamentary power was unlimited and that Parliament or, at least, the Commons had acted unlawfully, Defoe and the Whigs were not necessarily being inconsistent. Defoe's first *Memorial* had argued that Parliament had violated the "law of reason" or "of nature" and that therefore an "extrajudicial" remedy lay with the people.⁷⁰ His *Second Memorial* similarly took the position that the Commons' exercise of power was unlawful, even if it was not remediable at law, because it was a contradiction: "Voting a Petition from the Gentlemen of *Kent* Insolent . . . is a Contradiction in it self, and a Contempt of the *English* Freedom, and contrary to the Nature of Parliamentary Power."⁷¹ As Holt later argued in *City of London v. Wood* on the basis of the law of nature, the action was unlawful because it was "a Contradiction in it self."⁷²

C. *Parliamentary Usurpation of the Role of the Courts*

The Commons' imprisonment of the Kentish Petitioners could be viewed not only as a contradiction and a violation of natural law but also, more specifically, as one of several attempts by the Commons to usurp the judicial role of the courts.

Somers argued vigorously that by punishing individuals who had not violated any law, and by assuming the role of judge, the House of Commons was treating the people of England as slaves. "[T]hey who assume a Power to punish a People who live under the direction of the Laws, without a Rule or Law, destroy the Rights and Liberties of the Peo-

68. *Id.* at 16.

69. *Id.* at 17. This Tory also argued that "[i]f they [the Petitioners] have been wrongfully us'd, the Law has been open to 'em, and the Judges would have determin'd in their Favour in the Cause between the Serjeant and them, which they have not thought fit to do as yet." *Id.* at 9.

70. See, e.g., supra text accompanying notes 27 & 50. As so often, he took more than one position. He purported to make fun of "Book learn'd Fools" such as himself by rhyming that:

Knowledg[e] of things would teach them every Hour,
That Law is but an Heathen Word for Power.

[Defoe], *History*, supra note 17, at [14] (Addenda).

71. [Daniel Defoe], *Legion's Second Memorial*, quoted in *Legion's Second Memorial Answer'd*, supra note 38, at 10.

72. Defoe also wrote that "[t]he Vindication of the Original Right of all Men to the Government of themselves, is so far from a Derogation from, that it is a Confirmation of your legal Authority." [Defoe], *Original Power*, supra note 24, Dedication.

ple, take away their Freedom, and reduce them to a perfect State of Slavery."⁷³ Later, with a rhetorical flourish, he asked:

Tyrannick Slavery did I say? Some may call it so, when in a Free State, where the whole Legislative only has a Power to set down what Punishment shall be inflicted on the several Transgressions that are committed, a Part of it assumes a Power to inflict one of the severest Punishments⁷⁴

The Commons did not have the power by themselves to enact a penalty, yet they had assumed the power to inflict one. Even if petitioning were illegal, the Commons did not have the power to judge and punish it:

From what I have here delivered concerning the Power of imprisoning in the Lower House, 'tis evident, I think, that if Petitioning, as the *Kentish* Gentlemen did, had been an illegal Act, and the Punishment enjoin'd by the Law, had been Imprisonment, yet it belonged not to them to inflict that Punishment, but to make application (as they have always done heretofore) to have the Law executed against them.⁷⁵

The House of Commons could participate in making law but could not execute it.

Defoe also argued that in acting against the Petitioners, the Commons should have limited itself to regular legal proceedings. The Commons "ought to Address the King, to cause any Person, on good Grounds, to be apprehended, which Person so apprehended, ought to have the Benefit of the *Habeas Corpus* Act, and be fairly brought to Tryal by due Course of Law."⁷⁶ According to Defoe, "if any Expression be offensive to the House, . . . they are at Liberty to proceed as the Law directs; but no otherwise."⁷⁷ Defoe even referred to the "Interruption of Com-

73. [Somers], *Jura Populi*, supra note 20, at 25.

74. *Id.* at 29. He continued:

When a few who are chosen to be Trustees and Guardians of the People's Liberties, bring the People under their absolute Power, and compel them to that which is against the Right of their Freedom. To be free from such Force is the only Security men have of their Preservation, and Reason bids them to look on those as Enemies to their Preservation, who would take away that Freedom which is the Fence to it; and so conclude that they have a Will and Design to take away every thing else, since that Freedom is the Foundation of all the rest.

Id. at 29–30. Another Whig wrote: "[T]here's nothing more to be dreaded, than a popular Assembly taking upon itself an Executive as well as a Legislative Power, by punishing whom they please, and for what they please." A Short Defence of the Last Parliament, Answer'd Article by Article to Which is Added a Paper, Called the Candidates Try'd 21 (London 1702).

75. *Id.* at 30.

76. [Defoe], *Memorial*, supra note 26, at 4.

77. [Defoe], *Original Power*, supra note 24, at 5. He also wrote: "The Commons may extend their Power to an exorbitant Degree, in Imprisoning the Subjects, Dispensing with the *Habeas Corpus* Act, giving unlimited Power to their Sergeant to Oppress the People in his Custody, withholding Writs of Election from Burroughs and Towns, and several other ways" *Id.* at 4. A Tory responded to such arguments against the Commons by saying that "[i]f they are capable of judging what Laws are fit to punish Criminals, I hope they are

mon Justice" as a basis for considering the government to be dissolved and power to be in the hands of the people.⁷⁸ Indeed, unlike Locke, who suggested that only a substantial breach of trust justified revolution,⁷⁹ Defoe insisted that:

[T]he first Invasion made upon Justice either by the tacit or actual Assent of the three Heads of our Constitution, is an actual Dissolution of the Constitution; and, for ought I can see, the People have a Right to dispossess the Incumbent, and commit the Trust of Government, *de novo*, upon that first Act.⁸⁰

Thus, the "first Invasion made upon Justice" could have extraordinary consequences.

Defoe's suggestion that the Commons could bring a complaint but could not substitute their proceedings for a "Tryal by due Course of Law" was echoed when the Lords rejected an attempt by the Commons to interfere in the trial of impeachments. As the debate about the imprisonment of the Petitioners began, the Tory House of Commons was asserting itself by impeaching some of the King's recent ministers, including Lord Somers. After voting these impeachments, the Commons attempted to dictate the dates and voting procedures for the trials. The House of Lords, however, refused to consult with the Commons about the dates and procedures, particularly for the trial of Somers, and thereby a dispute developed, as a result of which the Commons declined to proceed against him. When the Lords promptly acquitted Somers, the lower house accused the Lords of having "refused Justice to the Commons . . . by denying them a Committee of both Houses, which was desired . . . as the proper and only Method of settling the necessary Preliminaries."⁸¹ The Commons even protested that the "Proceedings of the Lords" were "repugnant to the Rules of Justice; and therefore null and void."⁸² The Lords viewed this position as an infringement of their right to conduct trials of impeachments and therefore answered that the resolutions of the Commons "do manifestly tend to the Destruction of the Judicature of the Lords."⁸³ In defense of the Commons, a prominent Tory Member of

capable of knowing when a Person has broken such Laws." *The Legionites Plot: Or an Account of Some Late Designs To Create a Misunderstanding Betwixt the King and his People* 13 (London 1702).

78. [Defoe], *Original Power*, supra note 24, at 12.

79. See Locke, *Two Treatises*, supra note 32, at 463–64 (II.xix.225).

80. [Defoe], *Original Power*, supra note 24, at 12. Incidentally, this was not a new doctrine for Defoe. In his *True-Born Englishman*, he wrote:

When Kings the Sword of Justice first lay down,
They are no Kings, though they possess the Crown.

[Daniel Defoe], *The True-Born Englishman*, in [Defoe], *True Collection*, supra note 59, at 25.

81. 13 H.C. Jour. 639 (June 20, 1701).

82. *Id.*

83. 16 H.L. Jour. 766 (June 23, 1701). Earlier, the Lords had accused the Commons of "a direct Invading of their Judicature." 13 H.C. Jour. 637 (June 20, 1701). A Whig wrote: "And therefore for the Lords to take in a Committee of the Commons . . . was to let

Parliament, Sir Humphrey Mackworth argued that “[t]he Right of Judicature in the *Lords* must not be extended so far, as to enable the *Lords* to make the Right of Impeachments in the *Commons* Impracticable.”⁸⁴ In response, an anonymous writer, perhaps Lord Somers, pointed out that whereas the Commons were the complainants and could impeach, the Lords had the “Decisive Power” and this “cannot be in the *Complainants*, for that would make them *Judges* in their own Cause.”⁸⁵ In addition, Jonathan Swift criticized the House of Commons for justifying itself with a declaration of its rights: “To pretend to a declarative Right upon any occasion whatsoever, is little less than to make use of the whole Power: That is, to declare an opinion to be Law.”⁸⁶ When interfering with the judicial role of the Lords, the Commons came close to usurping the legislative power of Parliament as a whole.

Thus, in imprisoning the Kentish Petitioners and impeaching Lord Somers, the House of Commons revealed the danger of unlimited representative government, and it did so in a way that led Defoe, Somers, and many of their contemporaries to fear that the House was claiming something like judicial power—typically in disputes to which it was a party. The House of Commons even prompted some commentators to worry that in support of its claims of judicial authority, it was expanding its legislative power. Among those who shared these fears was Chief Justice Holt.

D. *The Denouement in the House of Commons and the Participation of John Locke*

Toward its conclusion, the dispute about parliamentary power shifted from the pages of pamphlets back to the floor of the House of Commons, where the controversy had begun with the imprisonment of the Kentish Petitioners. Having suffered in the press at the hands of Defoe and others who accused them of abusing their power, the Tories attempted to prevail in the arena they controlled.

the Commons participate of their Judicature.” A Letter from Some Electors to One of their Representatives in Parliament 17 (London 1701).

84. [Mackworth], *Vindication*, supra note 63, at 18. With respect to the powers of the Commons and the Lords in connection with impeachments, he also said that “both the Powers must admit of such a Limitation and Construction in the Nature and Exercise thereof, as that they may consist together for the Common Good.” *Id.* at 18. “[I]t must be acknowledged, that a *right of Judicature*, does necessarily imply a *power of Judging and Determining*, whether an Offender that is brought to Tryal for any Offence, be *Guilty or not Guilty*, for that is inseparably annexed thereunto. . . . But the *appointing* a time for bringing in the Articles of Impeachment, and of *Time and Place for Tryal*, is not necessarily implied in the power of Judicature, or inseparably annexed to it.” *Id.* at 19–20. For his views on the Kentish Petitioners, see *id.* at 39–40.

85. [John Somers?], *A Vindication of the Rights and Prerogatives of the Right Honorable The House of Lords* 6 (London 1701) (date in Narcissus Luttrell’s hand, Sept. 9, on Folger Library copy).

86. [Swift], *Contests and Dissensions*, supra note 21, at 11.

In the first months of 1702, the small Tory majority in the newly-elected House of Commons began the session by reviewing the results of contested elections and finding against the Whig candidates. Among these was Thomas Colepeper, who before challenging the Tory incumbent for Maidstone, had been one of the Kentish Petitioners and, indeed, had achieved special acclaim for making "his bold Escape to kiss his Wife."⁸⁷ In the course of resolving the disputed election against Colepeper, the Commons voted that he had bribed electors, that he had promoted a scandalous reflection upon the House (by criticizing it in print), that he should be committed, and that the Attorney General should prosecute him "for the said Crimes."⁸⁸

Having chastised this unrepentant Petitioner, the Tories in the weeks that followed, attempted to pass resolutions vindicating themselves with respect to the Kentish Petition fiasco and the failed impeachments. The Whigs resisted, but eventually, on February 26, in a bitterly contested division, the Tories obtained some of their resolutions. One, aimed at the Whiggish House of Lords, stated that it was a violation of privilege and the English constitution "to assert, That the House of Commons is not the only Representative of the Commons of *England*"; a second said that "to assert, the House of Commons have no Power of Commitment, but of their own Members" tended to subvert the constitution of the House of Commons; a third insisted that to print or publish any reflection on the proceedings of the House was a violation of privilege.⁸⁹

Although unable to prevent these Tory victories, the Whigs fought back. In a close vote of 235 to 221, they defeated a resolution "[t]hat the Commons of England have not had right done them in the prosecution of the Impeachments . . . in the last parliament."⁹⁰ Moreover, they limited the broad implications of the Tory resolutions by means of two of their own—one affirming the people's right to petition, the other, their right to have a speedy trial.⁹¹ This tense political crisis suggested to many Englishmen, particularly Whigs, that the House of Commons had hardly abandoned its broad claims of power.

87. Kentish Men, *supra* note 54, at 10. This quotation, however, is from a detractor: A Man of Honour, ventrous of his Life, Witness his bold Escape to kiss his Wife, When he drawn home by her attractive Tail, S—'d, and came back again *to go to Jayl*.

Id. A rather different account is given in [Defoe], *History*, *supra* note 17, at 7.

88. 13 H.C. Jour. 735 (Feb. 7, 1702); 5 Narcissus Luttrell, *A Brief Historical Relation of State Affairs* 139 (1857). I have been unable to trace the piece allegedly written by Colepeper, *A Letter to the Freeholders & Freemen of England*.

89. See 13 H.C. Jour. 767 (Feb. 26, 1702).

90. Letter from Peter King to John Locke (Feb. 26, 1702), in 7 *The Correspondence of John Locke* 577 (E.S. de Beer ed., 1982).

91. The resolutions were:

4. . . . That it is the undoubted Right of the People of England to petition or address to the King, for the Calling, Sitting, or Dissolving, of Parliaments; and for the redressing of Grievances.

Among those who followed the debate about the Kentish Petitioners and took an interest in the subsequent resolutions of the House of Commons was the philosopher whose analysis of unlimited government appears to have contributed so much to the criticism of the Commons. It has long been observed that Defoe seems to have drawn some of his arguments from Locke's *Two Treatises of Government*.⁹² However, not only was Defoe almost certainly reading Locke, but also Locke was almost certainly reading Defoe. In his study at Oates—the manor house of Francis and Demaris Masham, who shared their home with the philosopher—John Locke accumulated and surely read some of the most prominent pam-

5. . . . That it is the undoubted Right of every Subject of England, under any Accusation, either by Impeachment, or otherwise, to be brought to a speedy Tryal

.....

13 H.C. Jour. 767 (Feb. 26, 1702). The fourth resolution was a response to a resolution on this subject proposed by Tories on the 17th. Letter from Peter King to John Locke (Feb. 17, 1702), in 7 *The Correspondence of John Locke*, supra note 90, at 568.

92. Such observations have focused on both Defoe's prose works and his poems—not only those relating to the Kentish Petitioners but also others, earlier and later. For example, see his *True-Born Englishman* of 1701 and his *Jure Divino* of 1706. See Chalmers, supra note 24, at 15 (comparing Defoe with Locke rather than suggesting the derivation of Defoe's arguments); 2 Walter Wilson, *Memoirs of the Life and Times of Daniel DeFoe* 418, 429 (London, Hurst, Chance, & Co. 1830) (quoting Chalmers); 1 William Lee, *Daniel Defoe: His Life and Recently Discovered Writings* 55 (London, John Camden Hotten 1869) (quoting Chalmers's comparison of Defoe and Locke); Paula R. Backscheider, *Daniel Defoe His Life 162–63, 169, 171* (1989); Richard Ashcraft, *Locke's Two Treatises of Government* 269 (1987); Richard Ashcraft & M.M. Goldsmith, *Locke, Revolution Principles and the Formation of Whig Ideology*, 26 *Hist. J.* 773, 798 (1983).

In order to show that Defoe was not a "radical," Manuel Schonhorn argues that Defoe's pamphlet, *The Original Power of the Collective Body of the People of England*, "reveals little direct indebtedness to the *Two Treatises of Government*," and that many of the tenets in the pamphlet "antedate Lockean principles or are in some opposition to Lockean thought." Manuel Schonhorn, *Defoe's Politics* 79–80 (1991). Schonhorn's comments, however, suggest that even he concedes some borrowing from Locke. Schonhorn's reasons for finding "some opposition" between *The Original Power* and the *Two Treatises* include arguments that ignore the circumstances in which Defoe was writing. For example, Schonhorn points out that Defoe developed arguments against abuses of legislative power, whereas Locke was responding to exaggerated claims of executive power. See *id.* at 77–78. In contrast to Schonhorn, Ashcraft views *The Original Power* as "one of the most radical pamphlets [Defoe] ever wrote." Richard Ashcraft, *Revolutionary Politics & Locke's Two Treatises of Government* 565 (1986).

Of course, an understanding of Defoe's use of the ideas of John Locke requires consideration of all of Defoe's works from this period. It is undisputed that Defoe was familiar with Locke's *Two Treatises*, and it seems fairly clear that in prose and poetry Defoe drew upon some of the philosopher's basic ideas about the accountability of government to the people and even upon some of his details, including phrases. See, e.g., supra notes 48 & 51. Indeed, Defoe cited Locke by name in his *Jure Divino*. See Daniel Defoe, *Jure Divino*, 10 (Book II) (London 1706) (written and even printed, in part, as early as 1704) [hereinafter Defoe, *Jure Divino*]. In this connection, it is odd that, to counter any impression that Defoe was "radical," Schonhorn examines *The Original Power* but does not discuss the Lockean suggestions in Defoe's other works, including his *Legion Memorial* and his *History of the Kentish Petition*, which Schonhorn seems to acknowledge were rather less temperate than *The Original Power*. See Schonhorn, supra, at 81.

phlets relating to the Kentish Petitioners, including Defoe's *Legion Memorial*.⁹³

Yet Locke did more than just read. His cousin, Peter King, was a lawyer and Member of Parliament who regularly corresponded with Locke about his handling of the philosopher's finances.⁹⁴ In February, anticipating a momentous struggle in the Commons, Locke repeatedly importuned King to stay in London rather than go on circuit in search of business.⁹⁵ On February 17, King reported to his cousin with evident pleasure that a deft procedural maneuver had defeated the Tories' attempt to pass their resolutions.⁹⁶ But the ever-cautious Locke was hardly put at ease. He urged King:

Be not over confident because the 17th . . . went off . . . soe well.
[W]hat will not goe at one time may be tried an other when
number and strength appears on that side by the absence of
people away.⁹⁷

As Locke feared, the Tories soon tried again and brought the parliamentary conflict to a climax. Writing late in the evening of the 26th, after the Commons had passed their dramatic resolutions, King hastily reported

93. See John Harrison & Peter Laslett, *The Library of John Locke* (2d ed. 1971). Locke acquired, inter alia, the following: Charles Davenant, *The True Picture of a Modern Whig* (#3141); Daniel Defoe, *Legion Memorial* (#1962a); Daniel Defoe, *Ye True-Born Englishmen Proceed* (#2993b) (cited here under one of its varied titles, *A New Satyr On the Parliament*); Humphrey Mackworth, *Vindication of the Rights of the Commons of England* (#1861); John Somers, *Jura Populi Anglicani* (#2272); Jonathan Swift, *Discourse of the Contests and Dissensions Between the Nobles and the Commons in Athens and Rome* (#1299); John Toland, *Vindicius Liberi* (#2940). Of course, some of these had only brief, though not unimportant, references to the dispute about the Petitioners. For the difficulty of ascertaining which books Locke read, see Harrison & Laslett, *supra*, at 39. Undoubtedly, Locke purchased other relevant pamphlets not recorded in his library lists. See *id.* at 53–54; see also Receipts from A. Churchhill to John Locke for 1701 and 1702, Bodleian Library, Locke Ms., b.1, at fols. 251, 257–58.

94. Incidentally, King was appointed Chief Justice of Common Pleas in 1714 and Lord Chancellor in 1725—a position he held until 1733. See 11 *Dictionary of National Biography* 144–47 (1900).

95. See Letter from John Locke to Peter King (Feb. 16, 1702), in 7 *The Correspondence of John Locke*, *supra* note 90, at 567; Letter from John Locke to Peter King (Feb. 23, 1702), in 7 *The Correspondence of John Locke*, *supra* note 90, at 573–74; Letter from John Locke to Peter King (Feb. 26, 1702), in 7 *The Correspondence of John Locke*, *supra* note 90, at 576; Letter from John Locke to Peter King (Feb. 27, 1702), in 7 *The Correspondence of John Locke*, *supra* note 90, at 578.

96. Letter from Peter King to John Locke (Feb. 17, 1702), in 7 *The Correspondence of John Locke*, *supra* note 90, at 567–68. King wrote: "This day was expected to be the greatest day of this parliament, the busyness thereof being to consider the rights and libertys of the house of Commons . . ." *Id.* King closed his letter by explaining that the matter was discussed in a committee of the whole house, where it died on procedural grounds,

which is a very great mortification to some people, tho, not to

Your most affectionate Cosin and Servant. P. KING.

Id. at 568.

97. Letter from John Locke to Peter King (Feb. 23, 1702), in 7 *The Correspondence of John Locke*, *supra* note 90, at 573.

the outcome of the debate and how he had voted, commenting, "I hope the Crisis of this parliament is this day over, which hath been the greatest day of this Session, and the greatest division that ever was."⁹⁸ Locke applauded his relative's public service:

Dear Cosin

I am more pleased with what you did for the publick the day of your last letter, than for any thing you have done for me in my private affairs, though I am very much beholding to you for that too.⁹⁹

Locke then offered to compensate King for his loss of business on the circuit, if he would stay in London to help meet any "new Crisis" that might be stirred up by the Tories.¹⁰⁰ Of course, this letter reveals more about the strength than about the precise character of Locke's sentiments.¹⁰¹ Nonetheless, in an essay that dwells upon some reverberations of Locke's published ideas, his letter to his cousin may serve to remind us that the broad claims of power made by the House of Commons—pugnaciously reiterated in its resolutions of February 26—were taken quite seriously, and not only by the philosopher whose arguments against unlimited power had been employed so prominently against that House.

In the context of this parliamentary struggle, Holt could hardly have been unaware of the implications of his language about parliamentary power. Already in May 1701—while the Kentish Petitioners remained in prison, while the impeached lords awaited their trials, and while Defoe's *Legion Memorial* provoked deep passions—Holt wrote to his "very good [F]riend" William Penn:

98. Letter from Peter King to John Locke (Feb. 26, 1702), in 7 *The Correspondence of John Locke*, supra note 90, at 577.

99. Letter from John Locke to Peter King (Feb. 27, 1702), in 7 *The Correspondence of John Locke*, supra note 90, at 577–78.

100. *Id.* at 578. Note that since the 1690s, Locke had also influenced members of Parliament through a "College" or political club that met at the Hen and Chickens in Red Lion Street. See Maurice Cranston, *John Locke: A Biography* 393, 415 & n.5 (1957), in Lord Somers was its patron. See John Locke, *Two Treatises*, supra note 32, at 40.

Locke's personal connections reached in many directions. For example, consider Locke's friend, Lord Somers, who was Lord Chancellor from 1697 to 1700 and therefore knew Chief Justice Holt—although it was not always a friendly relationship or to Somers' advantage. See *Life of Lord Chief Justice Holt*, in 11 *Law Mag. or Q. Rev. of Jurisprudence* 24, 57 (1834). Somers also seems to have had unusual knowledge about Daniel Defoe's plans. See Letter from Lord Somers to Lord Sunderland (Sept. 20, 1701), in 2 *Miscellaneous State Papers from 1501 to 1726*, supra note 53, at 448 (mentioning an unnamed author who probably was Defoe). Such connections permit intriguing speculation but in the absence of further information are not pursued here.

101. Locke surely was pleased on account of the vindication of Lord Somers and the Whigs, on account of the prospects for their policy of toleration at home and resistance to aggression abroad, and, perhaps, on account of the rebuke to legislative assertions of judicial power—or for a combination of these reasons and others. In this connection, note that in the middle of February, when Locke was beginning to urge King to stay in London, King was writing to Locke about the Tory resolutions, but he wrote nothing about Somers.

Our affaires in this Kingdom, have been under some, tho noe great, difficultys, ariseing from misapprehensions. But I beleive we may reasonably expect a better understanding among us if it please God, to blesse the King, w[i]th life and health, w[hi]ch is the Interest, and therefore ought to be the desire, of all Protestant Englishmen, to continue.¹⁰²

Eventually, Defoe and the Commons elevated the "difficultys" into a dramatic debate about the power of the Commons, culminating in the February 26 resolutions. Less than a week later, on March 2, 1702, Holt and his colleagues delivered their opinions in *City of London v. Wood*. As will be seen, Holt applied to the City of London arguments that had already been employed against Parliament, especially the House of Commons. Rather than make unfocused comments on speculative questions of constitutional law, Holt reflected upon problems already widely familiar as a result of recent political events, and he addressed these problems in terms of a theoretical analysis already applied to Parliament by Defoe and other pamphleteers.

II. HOLT ON NATURAL LAW AND THE DISSOLUTION OF GOVERNMENT

Like Defoe and other champions of the Kentish Petitioners, Holt in *City of London v. Wood* suggested that there were extrajudicial limitations on parliamentary power. Thus, even while citing *Bonham's Case*, Holt gave judicial recognition to a more substantial restraint on Parliament than any that could be exerted by an English court. In so doing, he was responding to the political crisis and constitutional problems publicized by Somers and Defoe, and he employed the type of natural-law analysis that, through their efforts, had already become closely linked to questions of parliamentary power. Yet Holt did not simply follow Somers or Defoe. Drawing directly upon the writings of John Locke and, perhaps, Samuel Pufendorf, Holt synthesized his own version of the natural-law theory and its limitations on government.

Although Holt's ideas about natural law were vaguely suggested in the reports of the opinion he delivered from the bench, they were far more clearly stated in his own manuscript of his opinion.¹⁰³ His manu-

102. Letter from John Holt to William Penn (May 23, 1701), in *The Papers of William Penn*, microformed on Reel 9, frames 237-38 (Historical Society of Pennsylvania 1978). Holt apparently recognized the full range of issues at stake in the crisis. The language quoted above is suggestive of the problems that would be addressed in the Act of Settlement, and Holt continued by alluding to the European context: "I shall be exceedingly glad, of seeing you againe in England and to discourse w[i]th you, of ye famous Enterprises, the folls as well as Polycys of ye Grand Monarch." *Id.*

103. Holt's account of his opinion in *City of London v. Wood* survives in at least two manuscripts. First, British Library, Additional Ms. 34,125 (formerly in the possession of Chief Justice Lee) contains draft accounts in Holt's hand of his opinions in eleven cases, one of which was *City of London v. Wood*. Second, British Library, Additional Ms. 35,979-81 (Hardwicke Collection) are three volumes in the hand of a professional copyist that collect many of Holt's accounts of his own opinions, including *City of London v. Wood* (in

script may have been prepared in part after he delivered his opinion from the bench and therefore may reflect the benefit of some leisure and hind-

Additional Ms. 35,980). Several of Holt's reports of his own opinions, however, including some in Additional Ms. 34,125, are not represented in Additional Ms. 35,979-81. The latter's report of *City of London v. Wood* appears to be a relatively careful copy of that in Additional Ms. 34,125. The cases in 35,979-81 that also appear in Additional Ms. 34,125 appear to have been copied from the latter or, conceivably, from another copy of it. From this, it may be surmised that the text in Additional Ms. 35,979-81 was compiled from Holt's drafts, including what is now Additional Ms. 34,125.

In at least some respects, however, Additional Ms. 35,979-81 is the better text. For example, Holt's opinion in *Lane v. Cotton & Frankland* (K.B. c.1701-02) appears in both manuscripts, and the text in Additional Ms. 35,981, at fol. 89v, seems to be a copy of that in Additional Ms. 34,125, at fol. 3r, except that, at the end of the opinion in Additional Ms. 35,981 there appears, still in the hand of the copyist: "N.B. What follows was omitted in the delivery of the argument as superabundant to avoid prolixity and not because it was improper." Additional Ms. 35,981, at fol. 106r. Cf. Additional Ms. 34,125, at fol. 25r. Indeed, additional arguments ensue.

With respect to *City of London v. Wood*, Holt does not appear to have altered the text that appears in Additional Ms. 34,125. For purposes of this inquiry, the only substantial differences between the two manuscripts are passages in Additional Ms. 34,125 crossed out by Holt while drafting this manuscript and a few words inadvertently dropped by the copyist in Additional Ms. 35,980. Therefore, the draft in Holt's hand, Additional Ms. 34,125, is the basis for the text here. Of course, all of the Holt manuscripts need further study.

Holt's literary efforts created a new genre in legal literature, the opinions of a single judge prepared by him to be published as such and collected together for posterity. Ironically, however, Holt's opinions remain largely unpublished. Holt printed three of his prepared opinions at the end of his edition of Kelying's Reports. See John Kelying, *A Report of Divers Cases*, ([John Holt] ed., 1708). The anonymous editor of two of Holt's opinions published in 1837 hoped that their publication would "bring to light other original judgements of the same Chief Justice, prepared and corrected by himself." The Judgements Delivered by the Lord Chief Justice Holt in the Case of *Ashby v. White* and Others, and in the Case of *John Paty* and Others Printed from Original Mss. xviii (1837) [hereinafter *Judgements*]. Holt's are among the most important of English reports, yet almost three hundred years since he prepared them for publication, they are still largely unknown. I hope this article will prompt someone at last to undertake their publication.

Among the Chief Justice's motives for writing his reports appear to have been a passion for the rule of law and a desire to have the last word. Both can be illustrated by Holt's report of *Rex v. Graep* (K.B. 1697)—a case of perjury. Holt wrote:

I am sorry it so happens that so much pains and time should be spent in prosecuting this man who was convicted upon a full and clear evidence of so horrid a crime as perjury and that it should have no better success. We must keep to the rules of law, and if we should make a precedent in an ill mans case, at another time it may be the case of one that is innocent, which we ought to be as careful to protect as zealous to punish the guilty. And the verdict in this case was very good, yet we cannot give judgment for the king, because the information is bad.

Additional Ms. 35,981, at fol. 30r. At the end of his opinion, however, Holt added the short, caustic paragraph: "Reversed by the arbitrary power of the Lords especially by the influence of the Earl of Rochester notwithstanding any statute law or usage to the contrary." *Id.* at fol. 36v.

Holt's opinion from the bench in *City of London v. Wood* may be gauged by the printed version in *Modern Reports* and another, manuscript report preserved and probably even taken by the City's lawyers. 12 Mod. 699, 88 Eng. Rep. 1592 (1702); *City of London Record Office*, Guildhall, *City Extracts*, Vol. I, item 33 (*Collectiones Ex Libris Et Recordis Civitatis London*—a collection of precedents and other materials apparently compiled c.1713-17).

sight, but it at least permits us to examine Holt's matured position on the case—the position he sought to preserve for posterity—without fear that a reporter has reduced detailed arguments to crude abbreviations. Holt's manuscript shows that he had assimilated modern and particularly post-Hobbesian natural-law theory and could use it with considerable sophistication to expound popular limitations on parliamentary power.

A. *Judge in One's Own Case*

Questions about natural law and about limitations on government arose in *City of London v. Wood* because they had become closely associated with the maxim that a person could not be both judge and party—that he could not be judge in his own case. In the early seventeenth century, the idea that it was a violation of natural law for a person to be judge in his own case was known to Englishmen from scattered English precedents and other sources, including Justinian's Code and Jean Bodin's *République*.¹⁰⁴ Against this background, Coke argued in *Bonham's Case* that it was a contradiction or repugnancy for a person to be both judge and party. Yet by the time of *City of London v. Wood* in the early eighteenth century, and even already by the mid-seventeenth century, the notion that a person could not be both judge and party was familiar not only from *Bonham's Case* and the older sources but also from another, rather different context: modern and particularly post-Hobbesian natural-law theory. Largely through Hobbesian arguments, natural law increasingly came to be discussed, not as traditional right reason, but rather as a mode of reasoning about the liberty of individuals in the state of nature.¹⁰⁵ In the course of arguing from assumptions about individuals in the state of nature, Thomas Hobbes and others had reasoned that individuals should seek to form a government under which, among other

According to the manuscript report, Hatsell noted the objection that “ye Mai[o]r is Judge & p[ar]ty” and asked “how can ye Mai[o]r come before ye Mai[o]r. Tho ye Mai[o]r be n[o]t ye sole pl[ain]t[iff] or sole Judge yet being a necessary & Essential p[ar]ty & Judge.” *Id.* at fols. 1r–2v. Lord Chief Baron Ward is reported to have said, “it might be brought in ye Sheriffs court but as to ye Mai[o]rs court it is a doubt.” *Id.* at fol. 2v. Holt is reported to have argued:

But the main thing is yt this case is held before ye Mai[o]r & Ald[er]men[.] [T]his cannot be by ye rules of any law[.] [I]n no c[as]e w[ha]tsoever can a man be Judge & p[ar]ty too[.] [A]n act of parliamen[t] would be void saith my L[or]d Cook[.] [Y]e would make a man so: an[d] it would be [to] alter the nature of things.

Id. at fol. 4r. (periods and other indications of abbreviation or contraction omitted).

104. See Code J. 3.5.; Code Th. 2.2.1.; Jean Bodin, *The Six Bookes of a Commonweale* 514 (Kenneth D. McRae ed., 1962) (reprinting 1606 translation). Incidentally, note that Holt was familiar with Bodin, for in *City of London v. Wood*, he cited “Bodin de Republica. Lib 3 ca[p] 7.” British Library, Additional Ms. 34,125, at fol. 84r; see also *infra* notes 107 & 160.

105. Of course, some of Hobbes's predecessors and contemporaries made similar arguments, but not as dramatically or influentially as Hobbes. For an account that emphasizes the similarities, see Richard Tuck, *Natural Rights Theories: Their Origin and Development* 119–32 (1993).

things, no one was judge in his own case.¹⁰⁶ On this basis, numerous writers, most notably Locke, reasoned further that if a dispute arose between a people and their government, the latter could not decide between them, for it could not be judge in its own case.¹⁰⁷ Thus, the idea that one could not be both judge and party came to play a profoundly important role in the modern natural-law theory, particularly in its analysis of limited government.

In *City of London v. Wood* it was the Mayor of London who was judge in his own case. The City had sued Wood to recover the penalty he owed for refusing to accept his nomination as sheriff. Under City by-laws, the fine for refusing such a nomination was 400 pounds, and many wealthy individuals preferred to pay this amount than to undergo the expense and trouble of serving. Therefore, in the seventeenth and eighteenth centuries, the City often used the nomination of sheriffs to raise substantial amounts of money from wealthy citizens. It was a means of "Fishing for Sheriffs or for Money"—the point being that "they shou'd get Money by him"—and many a candidate for sheriff was "pitcht upon . . . not as a Man they desir'd should serve, but as a Rich Man who would fine rather than hold."¹⁰⁸ One such was a tallowchandler named Thomas Woods (truncated to "Wood" in the printed reports and also here), who was nominated in the summer of 1698 and did not appear before the Court of Aldermen to accept.¹⁰⁹ As in other cases of nominees both unwilling

106. See Thomas Hobbes, *De Cive* 70 (iii.21) (Howard Warrender ed., Oxford Univ. Press 1983) (1651) [hereinafter Hobbes, *De Cive*]. Although something like this position had been suggested by pre-Hobbesian writers, it was given particular clarity and prominence by Hobbes and subsequent theorists. For a notable late sixteenth-century suggestion of this type of argument, see 1 Richard Hooker, *Of the Laws of Ecclesiastical Polity* 190–91 (I.x.4) (J.M. Dent & Sons Ltd. 1954) (1907).

107. See *infra* text accompanying notes 139–144. Locke had been preceded by others who made related albeit less developed arguments. For example, Bodin briefly observed that, "if it bee contrarie unto the law of nature, that the partie should be judge also; & That the king is a partie in all causes which concern either the publicke or his own proper patrimonie in particular, in which case he cannot be a judge." Bodin, *supra* note 104, at 514. See also, e.g., [Philip Hunton], *A Treatise of Monarchy* (I.ii.7), in 9 *Harleian Miscellany* 321, 332 (London 1810) (1689 reprint; first published 1643); Samuel Rutherford, *Lex, Rex: The Law and the Prince* 210–12 (London 1644) [hereinafter Rutherford, *Lex, Rex*].

108. [Daniel Defoe], *The Livery Man's Reasons, Why he did not give His Vote for a Certain Gentleman, either to be Lord Mayor; or, Parliament Man for the City of London* 5 (London 1701). The typical attitudes of victims of the system are easy enough to imagine. In the 1670s, the threat of being nominated as sheriff was sufficient to lead "severall considerable persons within the City" to inform the City that they were "willing to be admitted into the freedome [i.e., to become citizens] if they might be privileged from undergoing the Offices of Alderman and Sheriffe by the Space of seven years." Memorandum dated March 24, 1673, City of London Record Office, Misc. Ms. 164.20. Other individuals complained that they were nominated more than once. See Petition dated Nov. 20, 1676, City of London Record Office, Misc. Ms. 164.20.

109. See *Mayor v. Woods*, City of London Record Office, Large Suits, Box 9, No. 2; *City of London [actually, Mayor] v. Long*, Brief (Mayor's Ct., Oct. 15, [1700]), City of London Record Office, Small Suits Box 1, No. 38 (reciting details of prior nominations in

to serve and unwilling to pay the penalty, the City of London brought an action of debt for its 400 pounds in the name of the Mayor, commonalty, and citizens, and it brought this action in the Mayor's court, which nominally consisted of the Mayor and Aldermen of the City, although the Court's judicial functions had long been in the hands of the Recorder.¹¹⁰

summer of 1698, including Wood's); Brief of City, endorsed, "The City of London's Case. Upon a Writ of Error in parliament . . ."; *Mayor v. Markwick* (H.L. 1708) (action against a clockmaker, Markwick, who had posted bond that Wood would prosecute his writ of error with effect, reciting details of Wood's nomination). Note that Wood may have been unable rather than unwilling to serve as sheriff. See *Marwick v. Mayor*, 2 Brown 409, 1 Eng. Rep. 1030 (H.L. 1708).

For Wood's guild affiliation, see *id.* and *The Lists of the Liveries of the Fifty six Companies In the City of London . . . With an Account Who Poll'd, and who did not at the Late Election of Members of Parliament for the said City of London list no. LI ([1700?])*. For a wealthy merchant called Thomas Woods, see J.M.B. Alexander, *Economic and Social Structures of the City of London c. 1700* (unpublished Ph.D. dissertation, Univ. of London 1989) (copy on file at City of London Record Office); *London Inhabitants Within the Walls 1695* (D.V. Glass ed., 1966).

Other nominees in the summer of 1698 included John and Nicholas Vanacre (or Vanacker), both of whom resisted and one of whom eventually brought his case to the royal courts. See *City of London v. Vanacre*, 12 Mod. 269, 88 Eng. Rep. 1314 (K.B. 1699); *Holt*, K.B. 431, 90 Eng. Rep. 1137; British Library, Additional Ms. 35,981, at fol. 61r (K.B. 1701) (holding for the city).

110. As Chief Baron Ward noted in his opinion, the court was not, in fact, held before the Mayor and Aldermen:

Objection. Though the stile of the Court be before the mayor and alder men, yet they never are there, but all is done before the recorder, who may or may not be free of the city. . . . Answer. This were to take an averment against the record, where by it appears that the Court is held before the mayor and alder men.

City of London v. Wood, 12 Mod. 669, 674, 88 Eng. Rep. 1592, 1595 (1702).

Incidentally, in the summer of 1701, less than a year prior to the judgment in *City of London v. Wood*, the Kentish Petitioners may have been the beneficiaries of the shrieval nominations that had given rise to Wood's difficulties. Upon their release in late June 1701, the Kentish Petitioners were honored by Whigs at a dinner at Mercers Hall, where, according to a hostile contemporary, Daniel Defoe was seated next to them. See *The Legionites Plot: or An Account of Some Late Designs To Create a Misunderstanding betwixt the King and his People 17-18* (London 1702). To pay for the dinner, the City or at least some unscrupulous Whigs may have misused the appointment of sheriffs. More precisely, individuals in the City may have threatened to nominate persons who did not contribute relatively small sums for the cost of the supper. According to a very hostile and therefore not altogether reliable Tory pamphleteer, as soon as Parliament was prorogued on June 23 and the five Petitioners were set at liberty, the "Legionites" resolved:

that Money be collected to make a noble Treat for the said worthy Members, . . . and accordingly some of the Sheriff-makers of London were ordered to collect the said Money, which I am told they did to the value of 200 l. tho some they importun'd to join with them had more Wit than to do it.

Id. at 17. As the nomination of sheriffs was a common method of raising money, this may, perhaps, have been a suggestion that Whigs in the City used the shrieval nominations to extort money from many of "the Guinea-droppers" who attended the Petitioners' dinner. Regardless of whether Holt knew of these dining arrangements, he could not have been unaware that by condemning the City and the Whigs, he could, with unimpeachable impartiality, censure the Tories' use of the House of Commons.

Holt disposed of the case in a way that allowed him to discuss the Mayor's dual role and its parliamentary implications in the relative safety of dicta. Upon the defendant's writ of error, Holt examined, first, whether the defendant should have been allowed to wage his law¹¹¹ and, second, whether the record could be amended to correct what "doth appear to be a discontinuance."¹¹² According to Holt, the defendant had no right to wage his law, but the record's suggestion of a discontinuance was fatal and could not be amended. Having held for the defendant on the second question, Holt might have stopped. He went on, however, to address what he considered to be the major issue in the case, whether the Mayor could be both a party and a judge:

The third point is now to be considered, which though by what hath been said may appear unnecessary to be spoke to at this time, but if omitted the judgment in this case will be the same, yet forasmuch as the discussing and settling of it will be of great consequence, therefore out of a just respect to the City, I think it ought to receive a determination to the intent that there may never be the like occasion to bring it into question any more.

The question is whether this action be well commenced and brought in the court held before the Lord Mayor and Aldermen.¹¹³

It was in dicta on this question about the proceeding before the Mayor and Aldermen that Holt explained the possibility of limits on Parliament's power.

111. That is, to defend himself with compurgators.

112. British Library, Additional Ms. 34,125, at fol. 67r. According to Holt:

The first (which was the principle and was indeed the cause of this writ of error) is whether, in an action of debt brought by the Mayor and commonalty and citizens of London for the penalty of this act of Common Council, the defendant might wage his law.

The second did arise upon the record certified to us in which there doth appear to be a discontinuance, which if it cannot be amended, must be fatal to the judgment. Therefore considering the circumstances of the case, the question is, whether it can be amended.

Id.

As I hope that Holt's opinions will eventually be published in their entirety, I have taken the liberty of quoting them here in a way that will make my excerpts easily readable while also faithful to the original. Orthography, spelling, punctuation and capitalization are silently modernized. Most contractions or abbreviations are completed silently, and ampersands are spelled out. For the sake of the reader, I have altered or deleted much of Holt's punctuation and have silently added new punctuation that roughly reduces Holt's paragraphs to plausible modern sentences. In transcribing Additional Ms. 34,125, I have often deferred to the interpretation of the early eighteenth-century copyist who prepared Additional Ms. 35,980.

113. British Library, Additional Ms. 34,125, at fol. 83r. As Holt observed at the beginning of his report, one of the three questions before the court was "[w]hether the Mayor and commonalty and citizens can bring an action of debt for the recovery of this penalty in the court held before the Mayor and Aldermen." Id. at fol. 67r.

In objecting to the City's pursuit of its action in the Mayor's Court, Wood had made two exceptions. The first was that the suit was brought to obtain a forfeiture for the Corporation of London, of which the Mayor and Aldermen were members. This was not quite a claim that the complainant was also the judge, and Holt did not consider it a sufficient objection.¹¹⁴ In contrast, the second exception did allege an identity of judge and party:

But the second exception that hath been taken is that the suit, being by the Mayor, Aldermen and citizens, can't be before the Mayor and Aldermen, which was a question never stirred in Westminster Hall, but did arise upon the debate of the case in this place [i.e., Guildhall]. I am of opinion that the Mayor and commonalty and citizens cannot sue in a court held before the Mayor and Aldermen, because no man can be judge and party. In this case, as the Lord Mayor is judge so he is a party too.¹¹⁵ On this second exception, Holt agreed with the defendant.

B. *Counter-Examples*

Holt began his argument that the Mayor could not be judge in his own case by stating some counter-examples and responding to them. In so doing, he drew upon the ideas of John Locke and hinted at the illegality of the imprisonment of the Kentish Petitioners.

According to Holt, some persons had rejected the proposition that no man can be both judge and party:

That no man can be judge and party I thought had been a proposition so plain and so universally true, that as it could not admit of any contradiction, so it was not capable of any qualification. But . . . in another place it hath been said that in some cases a man might be judge and party, especially by the laws of England where a man is only to judge of the law and not of the fact, though I confess I know not any.¹¹⁶

Among the places in which there were suggestions that a person could be both judge and party were various legal cases, and several of these were listed in the section on "Judges" in Henry Rolle's *Abridgment* of 1668, which Holt cited later in his opinion.¹¹⁷ The issue was also suggested, although not directly mentioned, in Sir Robert Filmer's *Patriarcha*, published in 1680. In this notorious defense of absolute monarchy, Filmer

114. See British Library, Additional Ms. 34,125, at fols. 83r–86r. The printed report, in contrast, says that the first exception to the by-law was "that it inflicts a penalty for the benefit of those that make the law." *City of London v. Wood*, 12 Mod. 669, 686, 88 Eng. Rep. 1592, 1601 (1702).

115. British Library, Additional Ms. 34,125, at fols. 86v–87r. Holt also said that this exception was that "the Mayor who is a judge is the head of the Corporation and is a party as well as a judge." *Id.* at fol. 83r.

116. *Id.* at fol. 87r.

117. 2 Henry Rolle, *Un Abridgment des Plusieurs Cases* 92–93 (London 1668); see citation by Holt in British Library, Additional Ms. 34,125, at fol. 90r.

argued that monarchs had an unlimited paternal power over their subjects, including a right of judgment.¹¹⁸

When Holt proceeded to list some counter-examples—instances in which it might be thought that a person was, in fact, judge in his own case—he began with a situation strikingly reminiscent of Filmer's position on paternal authority. If a parent could correct his children, he might seem to be judge in his own case:

Some instances to prove it not to be against the law of nature for a man to be judge and party are that of a parent over his children by giving them correction for offending him. Response: that is not so, for the parent corrects his child not for an offence against him, but because he [i.e., the child] hath done amiss, and that is for the child's good, for the parent gets nothing by it but the child's reformation.¹¹⁹

Holt's response was that parents corrected their children for the benefit and reformation of the children and consequently did not do so as parties, let alone judges. Both Holt's initial counter-example and this response were taken directly from Locke's reply to Filmer in the philosopher's *Two Treatises of Government*.

Although Holt's counter-example—his suggestion that a parent might be judge and party—generally reflected Filmer's arguments, it was derived, not directly from Filmer, but rather from Locke's characterization of Filmer. Filmer had asserted that patriarchal authority was unlimited, but he had not specifically stated that a parent was, in relation to his children, judge in his own case. On the contrary, it was Locke who attributed this position to Filmer.

118. See Robert Filmer, Patriarcha at iii.10, in John Locke, *Two Treatises of Government* 292–94 (Thomas I. Cook ed., 1956). Filmer wrote that “the lawmaker should be trusted with the application or interpretation of the laws.” Id. at 292.

Elsewhere, Filmer wrote that the judgments of kings “are supreme in all courts.” Robert Filmer, *The Free-holders Grand Inquest in Patriarcha and Other Writings* 114 (Johann P. Sommerville ed., 1991). He also wrote: “Not only the law-maker, but also the ‘sole judge of the people is the king,’ in the judgment of Bracton.” Id. at 118. Also: “Now if you ask the author [Hunton] who shall be judge whether the monarch transcend his bounds, and of the excesses of the sovereign power, his answer is: ‘there is an impossibility of constituting a judge to determine this last controversy.’” Robert Filmer, *The Anarchy, in Patriarcha and Other Writings*, supra, at 150 (citations omitted). Filmer eventually provided his own analysis:

Who must judge? If the monarch himself judge, then you destroy the frame of the state and make it absolute, saith our author; and he gives his reason: for, to define a monarch to a law, and then to make him judge of his own deviations from that law, is to absolve him from all law. . . . [I]f the king be judge, then he is no limited monarch; if the people be judge, then he is not monarch at all. So farewell limited monarchy. Nay, farewell all government if there be no judge.

Id. at 151.

For a much more moderate patriarchal theory, see William Temple, *An Essay Upon the Original and Nature of Government*, in *Miscellanea* 45 (London 1680) (written in 1672).

119. British Library, Additional Ms. 34,125, at fol. 87r.

Locke argued that an absolute sovereign, such as one with the paternal authority described by Filmer, was a particularly dangerous example of a person who was judge in his own case. Locke summarized Filmer's position by observing:

This *Fatherly Authority* then, or *Right of Fatherhood*, in our A[uthor]'s sence is a Divine unalterable Right of Sovereignty, whereby a Father or a Prince hath an Absolute, Arbitrary, Unlimited, and Unlimitable Power, over the Lives, Liberties, and Estates of his Children and Subjects; so that he may take or alienate their Estates, sell, castrate, or use their Persons as he pleases, they being all his Slaves, and he Lord or Proprietor of every Thing, and his unbounded Will their Law.¹²⁰

Having described Filmer's version of parental power as an absolute power, Locke later explained the perils of absolute power by arguing that an absolute monarch was an especially undesirable type of judge in his own case:

Absolute Monarchs are but men, and if Government is to be the Remedy of those Evils, which necessarily follow from Mens being Judges in their own Cases, and the State of Nature is therefore not be endured, I desire to know what kind of Government that is, and how much better it is than the State of Nature, where one Man commanding a multitude, has the Liberty to be Judge in his own Case, and may do to all his Subjects whatever he pleases . . . ? Much better it is in the State of Nature wherein Men are not bound to submit to the unjust will of another: And if he that judges, judges amiss in his own, or any other Case, he is answerable for it to the rest of Mankind.¹²¹

In other words, in the state of nature everyone was judge in his own case. If people formed government to avoid the "evils" of such a condition, they would be foolish to adopt an absolute monarchy, for under such a government, the monarch would be judge in his own case and, indeed, would have a monopoly of that arbitrary power. In this way, Locke attributed to Filmer the position that the patriarchal authority of an absolute monarch made him judge in his own case. Apparently drawing on Locke's characterization of Filmer, Holt treated parental power as a counter-example to the proposition that a party could not be his own judge.

In defending the maxim that a person could not be both judge and party, Holt drew not only his initial counter-example but also his response from Locke. Having noted the possibility that a parent might be

120. Locke, *Two Treatises*, supra note 32, at 182 (I.ii.9). Professor James Tully notes of this passage: "When Locke sets up Filmer's right as a target he emphasizes the absolutist and wholly irresponsible concept of individual proprietorship it necessarily embodies." James Tully, *A Discourse on Property: John Locke and his Adversaries* 57 (1980). It should be noted, however, that Filmer himself was not unaware of some of the implications of his theory. See supra note 118.

121. Locke, *Two Treatises*, supra note 32, at 317 (II.ii.13).

considered a judge in his own case, Holt insisted this was "not so, for the parent corrects his child not for an offence against him, but because he [i.e., the child] hath done amiss, and that is for the child's good for the parent gets nothing by it but the child's reformation." The continental philosophers Grotius and Pufendorf, among others, had said that parents corrected their children for the benefit of the children and to reform them. But it had been John Locke—provoked by Filmer—who had used this argument about parental power to demolish the suggestion that parents were judges in their own case.¹²² Thus, Holt appears to have drawn

122. For suggestions of the positions taken by Locke and Holt, see Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* 231–33 (II.v.1–6) (James B. Scott ed. & Francis W. Kelsey trans., 1925); Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* 910–33 (VI.ii), particularly at 913–15 (VI.ii.4) (James B. Scott ed., C.H. Oldfather & W.A. Oldfather trans., 1934); Samuel Pufendorf, *De Officio Homini et Civis Juxta Legem Naturalem Libri Duo* 97 (III.ii.108) (James B. Scott ed. & Frank G. Moore trans., 1927); Samuel Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* 281–83 (II.v.8–10) (James B. Scott ed. & W.A. Oldfather trans., 1931).

Locke wrote:

But what reason can . . . advance this Care of the *Parents* due to their Off-spring into an *Absolute Arbitrary Dominion* of the Father, whose power reaches no farther, than by such a Discipline as he finds most effectual to give such strength and health to their Bodies, such vigour and rectitude to their Minds, as may best fit his Childern to be most useful to themselves and others Nay, this *power* so little belongs to the *Father* by any peculiar right of Nature, but only as he is Guardian of his Children, that when he quits his Care of them, he loses his power over them, which goes along with their Nourishment and Education

Locke, *Two Treatises*, supra note 32, at 352–53 (II.6.64–65); see also id. at 347 (II.vi.56), 348 (II.vi.58) & notes.

Locke's friend, James Tyrrell, who sometimes adopted arguments from Locke, made similar assumptions about parental power. In general, he followed Grotius's division of a child's life into three periods but emphasized the reformatory purposes of parental correction. Some details, however, suggest a relationship to Locke. In the second period, when the child had the use of reason, "the Father hath power to correct his Son, if he prove negligent, or disobedient; since this Correction is for his advantage, to make him more careful and diligent another time, and to subdue the stubbornness of his Will: . . . [T]his Duty is not by force of any absolute Subjection." James Tyrrell, *Patriarcha Non Monarcha*, supra note 51, at 19. According to Tyrrell:

[T]he highest Right of Parents in their Children, doth arise merely from their discharge of [their] great Duty of Education. . . . [T]he highest Right which Parents can have in their Children is not merely natural, from generation; but acquir'd by their performance of that nobler part of their Duty. And so the highest Obedience which Children owe their Parents, proceeds from that Gratitude and Sense they ought to have of the great obligation they owe their Parents, for the trouble and care they put them to in their Education. . . . [T]his right in the Child, or power over it, extends no farther than as it conduces to this end, that is, the good and preservation thereof: and when this Rule is transgressed, the Right ceases.

Id. at 16–17. Unlike Locke, Tyrrell did not directly treat the argument against unlimited parental authority as an argument against the possibility that a person could be judge in his own case. Incidentally, note that Holt, like Tyrrell and especially Locke, was content (when not specifically responding to Filmer's patriarchal formula) to discuss the authority of the parents without distinguishing between the father and the mother.

his first counter-example and his response to it from Locke's characterization of, and reply to, Filmer.

Holt continued by proposing and responding to other counter-examples, including the examples of an officer executing military justice and a court inflicting punishment for contempt. In the course of showing that such an officer and such a court were not judges in their own cases, Holt suggested that the privileges of the House of Commons were not so extensive as to justify the imprisonment of the Kentish Petitioners.

Another instance is of an officer of an army. If a soldier assaults him he may proceed against him and take away his life. Response: That is not for offending him but for breaking the laws and rules of military discipline. And if that officer consider his own passion and revenge he is less fit to be a judge. But none will say that by the court marshal held before that officer he can sue for satisfaction of the injury.

The like for an affront or contempt to a court of justice: The court may commit and punish the offender.

1. That is an offence to the government and the fine goes to the government.

2. And though the offence be against the court punishing they are not parties. Suppose in the Common Pleas it should be that the justices of the Common Pleas complain to or before the justices of the Common Pleas or the barons of the Exchequer. Therefore they are not parties but judges only.

3. No more are the two houses of Parliament judges in their own cases, do they complain to themselves, but one of them [i.e., an individual member] that is injured complains to the rest. Besides no satisfaction is there sued for.¹²³

In considering whether a court was judge in its own case when it punished a contempt, Holt examined the parliamentary adjudication of cases of parliamentary privilege, but he concluded that the Houses of Parliament were not judges in their own case. The Lords or Commons proceeded only when an individual member "that is injured complains to the rest"—a description of proceedings for breach of privilege that would have precluded the imprisonment of the Kentish Petitioners for their injury to the House of Commons as a whole. Moreover, "no satisfaction is there sued for"—a point that Holt would later make in *Ashby v. White*¹²⁴ and a reminder that the Commons could not act as judges. Holt's narrow treatment of parliamentary privilege—as involving complaints of injury

See also the writing of Thomas Hunt, discussed by Gordon J. Schochet, *Patriarchalism in Political Thought* 198 (1975).

123. British Library, Additional Ms. 34,125, at fols. 87r–88r. He continued:

It hath been said that in case of wager of law a man is judge. That sure is a very hard assertion. When he is put to wage his law or when he puts himself to it he discharges himself by his own oath, but it was never thought that he was his own judge, but the compurgators that he produces may be reasonably thought so.

Id. at fol. 88r.

124. For *Ashby*, see *infra* text accompanying notes 168–170.

by individual members of a House rather than by the House itself and as providing no satisfaction for an injury—not only allowed him to maintain that a person could not be judge in his own case but also conveniently avoided any suggestion that Holt approved of the recent abuses of claims of privilege. Thus, already in responding to these counter-examples—whether parental authority, military justice, or contempt of court—Holt made use of the ideas of John Locke and suggested his concern about abuses of parliamentary privilege.

B. *Natural Law Limitations on Parliament*

After replying to these very specific counter-examples, Holt presented a more general argument that a person could not be judge in his own case. Drawing upon the modern natural-law theory, Holt argued that it was a contradiction for a person to be judge and party, and he thereby hinted at extrajudicial limitations on Parliament.

It will be recalled that by the time Holt wrote his opinion in *City of London v. Wood*, the idea that one could not be judge in one's own case had become an important part of modern natural-law theory. In the last half of the seventeenth century, largely through the influence of Hobbes, natural law was frequently understood as a mode of reasoning about the use of natural liberty—natural liberty being the freedom of individuals in the state of nature. According to this modern theory, the state of nature was the condition in which there was no civil government, in which individuals were equally free from subjugation to each other and in which, therefore, each person was judge in his own case. In this state, as described by Hobbes, Locke, and others, individuals depended upon themselves to punish or seek reparation for injuries, and they were restrained only by their reasoning about how to use their freedom, this reasoning being the law of nature. As Locke put it, "Men living together according to reason, without a common Superior on Earth, with Authority to judge between them, is *properly the State of Nature*."¹²⁵

With this modern natural-law theory, Holt explained why it was contradictory for a person to be judge in his own case, and Holt began by distinguishing between a statute that made a man judge in his own case and a statute that allowed a man to do as he pleased:

Since then it hath [by] some been laboured to maintain that proposition, that in some cases a man may be a judge in his own cause, it belongs to me to show by reason and authority, that no man in any civil state can be judge and party too.

It is true that saying [in] 8 [Coke's] Rep[orts] 118 Bonhams Case may seem to be carried too far, that an act of Parliament can't make a man to be judge in his own cause, yet it is not so harsh a saying as some may imagine, but it is a true and ortho-

125. Locke, *Two Treatises*, supra note 32, at 321 (II.iii.19); see also id. at 346 (II.vi.54).

dox proposition, for a judge and a party are in their nature and institution different and distinct, for the being of the one doth necessarily exclude the other. Therefore an act of Parliament that should make a man to be a judge in his own case would be an absolute contradiction. But an act of Parliament may be [made] to leave a man at liberty to do what he will and to exempt him from any judicature and return him to a state of nature. For by the law of nature before the foundation of states and erection of tribunals every man that was injured by another might seek his own satisfaction, but it was still with that caution that he kept himself within the bounds of reason, otherwise he made himself obnoxious to others for his excess. But that was not as a judge that he did it [*i.e.*, sought his own satisfaction], but for want of a judge.¹²⁶

Not only *Bonham's Case* but also the very nature of judges and parties implied that a statute making a man judge in his own case was "an absolute contradiction." A statute, however, could allow a man "to do what he will" and thus "return him to a state of nature."¹²⁷

Of course, a statute that made a person judge in his own case was not substantively different from a statute that allowed the person to do as he pleased, and therefore both statutes could be understood to return him to the state of nature. Yet Holt, perhaps following Pufendorf, carefully took the traditional position that a person in the state of nature was not judge in his own case, and on this basis, Holt attributed different consequences to the two types of statute.¹²⁸ Possibly to accommodate Coke's opinion in *Bonham's Case*, Holt found it convenient to insist upon a contrast between a statute that made a man judge in his own case (which, at least according to Coke, was void) and a statute that allowed a man to do

126. British Library, Additional Ms. 34,125, at fols. 87v–88r. Incidentally, a few years earlier in an anonymous case before Holt, it is reported that: "The Mayor of Hereford was laid by the heels, for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by the charter was sole Judge of the Court." 1 Salk. 396, 91 Eng. Rep. 343 (K.B. 1698).

127. For Defoe's account of how the Commons' Serjeant claimed to have authority to do, in his discretion, what he wished to the Petitioners, see *supra* text accompanying notes 65–66.

128. Pufendorf had written:

Now among those who live in natural liberty there is no judge who may by his authority settle and dispose of the disputes that arise. . . . Indeed, Hobbes, *De Cive*, chap. i, § 9, makes each man in a natural state the judge of his own affairs. But that statement only allows this meaning: whoever does not have a superior by whom he is controlled, conducts his affairs at his own discretion, and decides by his own judgement upon the means that concern his own preservation. For even though another man may try to decide them, yet since he has no authority to force his opinion upon me, whether and how far I am willing to accept his counsel will depend upon my own judgement and decision, and thus I will ultimately be responsible for the ordering of my own actions, which must, of course, be properly governed according to natural law.

Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, *supra* note 122, at 826 (V.xiii.2).

as he pleased (which, according to Holt, returned him to the state of nature). It was in support of this distinction that Holt had to deny that a person in the state of nature was judge in his own case—a traditional position that was slightly awkward for Holt because it could be viewed as a deviation from the more modern, Hobbesian and Lockean ideas upon which he would rely in his next paragraph.

Having suggested a distinction more subtle than substantive between a statute that made a man judge in his own case and a statute that allowed him “to do what he will,” Holt explained why a man could not be judge in his own case. According to Hobbes, natural law was the basis of the reasoning that led men to form civil government, and it was contrary to this reasoning for a man to be judge in his own case. As already noted, Locke further reasoned that an absolute monarch was a particularly undesirable type of judge in his own case and that therefore absolute monarchy was inconsistent with the end of civil society:

Absolute Monarchy, which by some Men is counted the only Government in the World, is indeed *inconsistent with Civil Society*, and so can be no Form of Civil Government at all. For the *end of Civil Society*, being to avoid, and remedy those inconveniences of the State of Nature, which necessarily follow from every Man’s being Judge in his own Case, by setting up a known Authority, to which every one of that Society may Appeal upon any Injury received, or Controversie that may arise, and which every one of the Society ought to obey; where-ever any persons are, who have not such an Authority to Appeal to, for the decision of any difference between them, there those persons are still *in the state of Nature*. And so is every *Absolute Prince* in respect of those who are under his *Dominion*.¹²⁹

Although facing parliamentary rather than monarchical power, Holt similarly argued that it was inconsistent with the end of civil societies for a Parliament to make a man judge in his own case:

But it is contrary to the principles and the end of all commonwealths and civil societies for a man to be allowed to be a judge in his own cause. To prevent the great inconveniences that ensued from the mere state of nature, men formed themselves into civil societies and did resign up themselves to a state of subjection. And though it is not supposed that a Parliament will ever make a man judge in his own cause, yet if it should do so, it is repugnant to law, and if a man should be allowed by act of Parliament to do what should seem good in his own eyes, the government [would be] dissolved and the man or those who have that liberty are returned to a state of nature. It would be such a law that should entitle one man to invade the life or property of another.

The making therefore [of] a judge to determine between the parties is necessarily meant another person than the parties

129. Locke, *Two Treatises*, supra note 32, at 369 (II.vii.90).

themselves. The laws of the kingdom or community are that there should be one or more judges; otherwise the government [would] be dissolved.¹³⁰

While reluctant to follow Locke in saying that a person in the state of nature was judge in his own case, Holt argued in accord with the philosopher that it was "contrary" to the "end" of "civil societies" for a man to be judge in his own case and that men "formed themselves into civil societies" in order to "prevent the great inconveniences" of the "state of nature."¹³¹ If Parliament were to make a man judge in his own case, it would be "repugnant to law"—at least, that is, to the reasoning that constituted the law of nature. Therefore, Parliament's designation of a person as a judge "is necessarily meant another person than the parties." The only alternative interpretation would be that there was no judge between the parties—that the putative judge was a person left free to do "what should seem good in his own eyes"—and this would return him to the state of nature. As Locke had said, "if any Man may do, what he thinks fit, and there be no Appeal on Earth, for Redress or Security against any harm he shall do; I ask, Whether he be not perfectly still in the State of Nature."¹³² Although it could not be supposed that a

130. British Library, Additional Ms. 34,125, at fol. 89r. (The words "would be" and "would" added in brackets are supplied from Additional Ms. 35,980, at fols. 16r & 16v.) Holt followed this with a detailed refutation of some of the instances in which it had been suggested that person could be both judge and party, including some of the cases listed in Rolle's Abridgment: "And though a judge of a court where there be other judges of the court besides himself sues or be sued in that court, he as to that cause ceases to be a judge. And the court as to his cause is not held before him . . ." British Library, Additional Ms. 34,125, at fol. 89r.

131. In addition to the passage from Locke quoted in the text accompanying note 129, see Thomas Hobbes, *Leviathan* 109 (i.15) (Richard Tuck ed., 1991); Locke, *Two Treatises*, supra note 32, at 316 (II.ii.13). Pufendorf is considerably less succinct. See Samuel Pufendorf, *De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo*, supra note 122, at 102 (II.i.10); Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, supra note 122, at 959 (VII.i.6).

132. Locke, *Two Treatises*, supra note 32, at 374 (II.vii.94). This passage was preceded by:

[T]he People . . . could never be safe nor at rest, *nor think themselves in Civil Society*, till the Legislature was placed in collective Bodies of Men, call them Senate, Parliament, or what you please. By which means every single person became subject, equally with other the meanest Men, to those Laws, which he himself, as part of the Legislative had established: nor could any one, by his own Authority, avoid the force of the Law, when once made, nor by any pretence of Superiority, plead exemption, thereby to License his own, or the Miscarriages of any of his Dependants. *No man in Civil Society can be exempted from the Laws of it.* For . . .

Id. at 373–74 (II.vii.94). The passage in the text was followed by: "and so can be *no part or Member of that Civil Society*: unless any one will say, the State of Nature and Civil Society are one and the same thing, which I have never yet found any one so great a Patron of Anarchy as to affirm." Id. at 374 (II.vii.94). Locke also wrote that the people's authorization of the legislative to make laws "*puts Men out of a State of Nature into that of a Commonwealth*, by setting up a Judge on Earth, with Authority to determine all the Controversies, and redress the Injuries, that may happen to any Member of the Commonwealth; which Judge is the Legislative, or Magistrates appointed by it. And where-ever there are any number of Men,

Parliament would ever make a person judge in his own case and therefore statutes were not to be so construed, if Parliament were to allow a man "to do what seem good in his own eyes," he would be "returned to the state of nature."

In making this argument, Holt was unambiguous about the consequences of a statute that allowed a man to do what seemed good in his own eyes: "[G]overnment [would] be dissolved." According to Locke, "*Civil Government* is the proper Remedy for the Inconveniences of the State of Nature, which must certainly be Great, where Men may be Judges in their own Case."¹³³ This absence of "a known and indifferent Judge" was one of three characteristics of the state of nature that impeded achievement of "the ends of political society and government."¹³⁴ It was an obstacle to the preservation of "Lives, Liberties and Estates, which I call by the general Name, *Property*."¹³⁵ When describing how "[g]overnment may be dissolved," Locke briefly returned to the subject of judges: "Where there is no longer the administration of Justice, for the securing of Mens Rights, . . . there certainly is *no Government left*. . . . In these and the like Cases, *when the Government is dissolved*, the People are at liberty to provide for themselves, by erecting a new Legislative"¹³⁶ Similarly, Holt argued that without a judiciary—if there were not "one or more judges"—government would be "dissolved." Even if only one man were "allowed by act of Parliament to do what should seem good in his own eyes, the government would be dissolved, and the man or those who have that liberty are returned to a state of nature." Of course, Holt disposed of the case on other grounds and even in his dicta avoided direct discussion of revolution or resistance. Yet educated Englishmen at the close of the seventeenth century were not apt to hear or say that "the government would be dissolved" without recognizing the possibilities to which these words might refer.

D. *The Prohibition Against Being Judge in One's Own Case and the Development of Modern Natural-Law Theory*

In both *Bonham's Case* and *City of London v. Wood*, a party had attempted to be its own judge. Yet whereas in the 1610 decision, Coke

however associated, that have no such decisive power to appeal to, there they are still *in the state of Nature*." Id. at 369 (I.vii.89).

133. Id. at 316 (II.ii.13).

134. Id. at 396 (II.ix.125). Locke wrote:

In the State of Nature there wants a *known and indifferent Judge*, with Authority to determine all differences according to the established Law. For every one in that state being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases; as well as negligence, and unconcernedness, to make them too remiss, in other Mens.

Id.

135. Id. at 395 (II.ix.123).

136. Id. at 459 (II.xix.219–20).

concluded that a contradictory statute could be declared void, in the 1702 decision, Holt alluded to a far more effective limitation on government. This difference between the Chief Justices' opinions reflected the seventeenth-century development of modern ideas of natural law.

For Holt, the law according to which a man could not be judge in his own case and according to which "government would be dissolved" was the modern version of natural law, the law of human nature. It was the law of self-preservation that existed "before the foundation of statutes and erection of tribunals," according to which "every man that was injured by another might seek his own satisfaction, but . . . with that caution that he kept himself within the bounds of reason." This law, concerned with the reasoned pursuit of self-preservation, was what permitted human beings to protect themselves from and punish anyone who would "invade" their "life or property." This was the law that led to the formation and, on occasion, the dissolution of government. Thus, for Holt, the law that limited Parliament was hardly the traditional notion of right reason but rather was the reasoning about the liberty of individuals in the state of nature and about the preservation of that liberty through the creation of civil government. Although Holt employed this newer version of natural law to show that a statute could be a "contradiction," he also explained that this natural law could be the basis for the dissolution of government and the return of individuals to the state of nature.

It may be thought ironic that Holt cited *Bonham's Case* in an opinion that suggested extrajudicial limitations on government, but it is not altogether surprising, for by the late seventeenth century the notion that a man could not be judge in his own case had been elevated from an observation about a particular abuse of power in a court to a central metaphor of English political theory. Whereas Coke had applied the maxim to an actual judicial body, seventeenth-century philosophers developed the maxim as a description of a broader problem of political power.¹³⁷ Hobbes had described absolute sovereignty as a means of avoiding a condition in which individuals were judges in their own cases—as a means of providing an arbiter among individuals who, in the state of nature, were all judges in their disputes with one another.¹³⁸ Locke and others responded that even the monarch could not be judge in his own case; they applied the principle not only to subjects but also to government and thereby made it the central explanation of the right of revolution.¹³⁹ In controversies between subjects and their government, there seemed to be

137. Some earlier writers suggested this broader use of the maxim but did not develop it or give it the prominence it achieved in the mid-seventeenth century. For one such earlier source, see Bodin, *supra* note 104.

138. See Hobbes, *De Cive*, *supra* note 106, at 94 (vi.8); Hobbes, *Leviathan*, *supra* note 131, at 109 (i.15), 168 (ii.23). For recent discussion of Hobbes's views on this issue, see James R. Stoner, Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* 109–11 (1992).

139. See Locke, *Two Treatises*, *supra* note 32, at 316–17 (II.ii.13). Tyrrell struggled with the problem but was not as bold as Locke:

no judge who was not a party, and therefore Locke concluded his *Two Treatises* by asking "the common Question . . . *Who shall be Judge* whether the Prince or Legislative act contrary to their Trust?"¹⁴⁰ To this, Locke first gave a practical answer: "I reply, *The People shall be Judge*; for who shall be *Judge* whether his Trustee or Deputy acts well, and according to the Trust reposed in him, but he who deposes him. . . ."¹⁴¹ Then Locke refined his response: "But farther, this Question, (*Who shall be Judge?*) cannot mean, that there is no Judge at all. For where there is no Judicature on Earth, to decide Controversies amongst Men, *God in Heaven is Judge*: He alone, 'tis true, is Judge of the Right."¹⁴² Nonetheless, continued Locke, "*every Man is Judge* for himself . . . whether another hath put himself into a State of War with him, and whether he should appeal to the Supreme Judge, as *Jephtha* did."¹⁴³ Because no one could be judge in his own case, "the Appeal lies only to Heaven," and "the *injured Party must judge* for himself, when he will think fit to make use of that Appeal."¹⁴⁴ Thus, by the late seventeenth century, to be judge in one's own case was an idea associated not only with judges but also more generally with all persons in a polity, whether subjects or sovereigns, and on this basis, it had become an essential means of analyzing arbitrary power and a justification for revolution. Hence, the ease with which Holt could turn from Coke's report of *Bonham's Case* to a theoretical discussion of arbitrary power and "the dissolution of government."

Even more revolutionary than the political philosophy Holt had assimilated was the use to which he put it. He had participated in the Revolution of 1688 as a legal advisor to the Lords, as a member of the Convention of 1689, and, indeed, as a manager on behalf of the

Neither would I be thought to encourage Princes to stretch their Power to the utmost limits, nor yet to stir up Subjects to take Arms as soon as ever they think themselves injured, since the Populace is but too apt, where they are left to be their own Judges, to pronounce Sentence in the[i]r own favour.

James Tyrrell, *Patriarcha non Monarcha*, supra note 51, at 123 (sig. I6). With an even greater caution he wrote: "Our Author [Filmer] will have no particular man to be Judge in his own Cause. I grant it, if by *Judg* he means *Execution[er]* too, by publick resistance." Id. at 218 (sig. P5). In criticizing Filmer, Sydney wrote that:

[H]e might have remembered, that having affirmed the people could not judge of the disputes that might happen between them and kings, because they must not be judges in their own case, 'tis absurd to make a king judge of a case so nearly concerning himself, in the decision of which his own passions and interests may probably lead him into errors.

Algernon Sidney, *Discourses Concerning Government* 395 (iii.14) (Thomas G. West ed., 1990). Of course, these positions were debated even before Hobbes wrote on the subject. Hunton devoted a section of his *Treatise* to the question: "Who shall be the Judge of the Excesses of the Monarch?" [Philip Hunton], *A Treatise of Monarchy* 23 (I.ii.7), in 9 *Harleian Miscellany*, supra note 107, at 332.

140. Locke, *Two Treatises*, supra note 32, at 476 (II.xix.240).

141. Id.

142. Id. at 476 (II.xix.241).

143. Id.

144. Id. at 477 (II.xix.242).

Commons in their conference with the Lords about James II's "abdication."¹⁴⁵ In 1702, still having an attachment to the principles of the Revolution, Holt recognized that these principles could have general application—that many of the objections to unlimited monarchical power could, if stated generally, also apply to unlimited parliamentary power. Accordingly, the theory that Locke in the seventeenth century had developed in response to claims on behalf of the Crown, Holt in the eighteenth century employed against the legislature. Like Defoe, who reminded the Commons of "We the People," and, perhaps, like Locke himself, who commended his "cosin" for what he "did for the publick," Holt recognized that the most prominent threat to liberty lay elsewhere than it had in the past and that the most efficacious response would come from beyond the courts and other governmental institutions.

III. HOLT ON SOVEREIGN POWER AND JUDICIAL REVIEW

In arguing that the Mayor of London could not be both judge and party, Holt cited *Bonham's Case*,¹⁴⁶ and he therefore has often been assumed to have revived the judicial voiding of statutes envisioned by Coke's report of that earlier decision.¹⁴⁷ In his own manuscript of his opinion, however, Holt took a rather narrow view of *Bonham's Case*. Far from having illusions about the power of the courts, he understood and accepted their very limited role, and he thereby reached conclusions about judicial review consistent with the ideas of sovereignty implied by his modern account of natural law.

A. *Enforcing the Acts of a Body with Sovereign Power*

The modern natural-law theory seemed to require deference to acts of a body with sovereign power. Already at the end of the sixteenth century, Jean Bodin had given an account of sovereignty, with which Holt was familiar,¹⁴⁸ and in the seventeenth century, the more modern, natural-law theorists also explained sovereignty or, at least, a closely related notion of supremacy.¹⁴⁹ For example, Locke justified revolution with a theory that ordinarily required obedience. In some circumstances, according to Locke, the natural law of preservation permitted resistance to government: "[t]he *Community* perpetually retains a *Supream Power* of sav-

145. In his capacity as manager for the Commons, Holt—not yet a judge—defended the use of the word "abdication" on the ground that "the Government and Magistracy is under a Trust, and any Acting contrary to that Trust is a *Renouncing* of the Trust." The Debate At Large, Between the Lords and Commons . . . Relating to the Word, Abdicated, and the Vacancy of the Throne 12 (London, John Morphew 1710) [hereinafter Debate at Large] (Feb. 5, 1689).

146. 8 Co. Rep. 107a, 77 Eng. Rep. 638 (K.B. 1610).

147. See *supra* text accompanying notes 9–13.

148. See *supra* note 104.

149. In contrast to the word "sovereignty," the term "supreme power" had the advantage of not suggesting that such power was located exclusively in the monarch.

ing themselves from the attempts and designs of any Body, even of their Legislators"¹⁵⁰ Yet even though the natural law of preservation sometimes justified revolution, it otherwise implied that "there can be but *one Supream Power*, which is *the Legislative*, to which all the rest are and must be subordinate."¹⁵¹ Having been established to preserve liberty, the legislative was "*the Supream Power*," and therefore until the legislative breached its trust or government was otherwise dissolved, the enactments of the legislative had to be obeyed:

In all Cases, whilst the Government subsists, the *Legislative is the Supream Power*. For what can give Laws to another, must needs be superiour to him: and since the Legislative is no otherwise Legislative of the Society, but by the right it has to make Laws for all the parts and for every Member of the Society, prescribing Rules to their actions, and giving power of Execution, where they are transgressed, the *Legislative* must needs be the *Supream*, and all other Powers in any Members or parts of the Society, derived from and subordinate to it.¹⁵²

In the absence of a dissolution of government, natural law required conformity to the laws made by the "Legislative," which in England was comprised of the King, Lords, and Commons acting together. Its laws were binding on "all other Powers in any Members or parts of the Society." Although probably known to Holt through Locke's *Two Treatises*, this understanding of the legislative and its supremacy was commonplace in late seventeenth-century England.¹⁵³

In accord with such a perspective, Holt clearly stated that an act of Parliament was not subject to judicial review. One of his colleagues, Baron Hatsell, is reported to have said not only that the Mayor's being judge and party was "against natural justice" but also that "an Act of Parliament against natural equity, [such] as to make one a Judge in his own cause, would be merely void."¹⁵⁴ Holt, however, appears to have disagreed with Hatsell's comments about "natural equity." Independent of the question whether the Mayor could be judge in his own case, Wood's lawyers argued that the particular act of Common Council under which Wood had been sued was "contrary to the law of England and right reason."¹⁵⁵ Holt responded by reminding Wood and his lawyers that this objection had already been put to rest in a recent case involving another

150. Locke, *Two Treatises*, supra note 32, at 413 (II.xiii.149).

151. *Id.* at 412-13 (II.xiii.149).

152. *Id.* at 413-14 (II.xiii.150).

153. See *id.* at 412 (editor's note).

154. *City of London v. Wood*, 12 Mod. 669, 672, 88 Eng. Rep. 1592, 1593-94 (1702).

155. 12 Mod. at 673, 88 Eng. Rep. at 1594; Ms. Report of *City of London v. Wood*, City of London Record Office, City Extracts Vol. I, item 33 at fol. 2v. In both the oral and the written versions of his opinion, Holt discussed this issue in connection with the question whether Wood should have been allowed to wage his law.

victim of London's shrieval nominations.¹⁵⁶ In the course of asserting that the act of Common Council had already been adjudged to be equitable and in accord with right reason, Holt distinguished it from an act of Parliament:

This then being a just act enacted by a legal authority is as obligatory to the party as if it had the sanction of an act of Parliament. I do not say it is of as high nature as an act of Parliament, for that binds absolutely without any dispute to be made of its justice or equity, but this binds sub modo if just and reasonable, but when it appears to be so, the obligation then is absolute, and the party hath no way to avoid it, but is bound as much to submit to it as if imposed by the legislative authority of the kingdom.¹⁵⁷

Whereas an act of Common Council or other by-law could be avoided if unjust or unreasonable, an act of Parliament "binds absolutely without any dispute to be made of its justice or equity."

Later in his opinion, Holt explained this distinction in terms of sovereignty. The first exception to the proceedings in the Mayor's Court was: "That the Mayor and Aldermen as being members of the corporation to which the forfeiture is given, are incapable of being judges."¹⁵⁸ In responding to this objection, Holt argued that corporations such as the City of London established their own laws and enforced these in their own courts to facilitate the governance of the kingdom, and in making this argument, Holt described the standards for judicial review of the acts of such corporations. Unlike acts of bodies with sovereign power, acts of bodies without this power, such as the City of London, were subject to judicial review by King's Bench:

But I am of opinion that their being members of the City is no impediment to their being judges in this case. Which will be very evident if the corporations of cities and populous towns be considered in their nature and end. In their nature they are communities politic and civil societies invested with a legislative authority that shall bind all the members and all others inhabiting or maintaining any commerce within the limits of their city or town. For a corporation as such may make by-laws. Hob[bart's Reports]. 21[0]. *Norris v. Staps*. But indeed they have

156. See *City of London v. Wood*, 12 Mod. at 676, 88 Eng. Rep. at 1596; British Library, Additional Ms. 34,125, at fol. 68r.

157. British Library, Additional Ms. 34,125, at fol. 68r. According to a printed report, Holt said:

[E]very by-law is a law, and as obligatory to all persons bound by it, that is, within its jurisdiction, as any Act of Parliament, only with this difference, that a by-law is liable to have its validity brought in question, but an Act of Parliament is not; but when a by-law is once adjudged to be a good and reasonable by-law, it is to all intents as binding to those that it extends to as an Act of Parliament can be.

12 Mod. at 678, 88 Eng. Rep. at 1597.

158. British Library, Additional Ms. 34,125, at fol. 83r; see *supra* text accompanying note 114.

not a sovereign power. Therefore all their acts of Common Council or by-laws are subject to the review of the kings courts, which [acts] are so far valid as they are agreeable to law and right reason, and if contrary to either they are ipso facto void.¹⁵⁹

Acts of the City of London and other corporations—bodies that “have not a sovereign power”—were “subject to the review of the kings courts” according to the standards of “law and right reason, and if contrary to either they are ipso facto void.”

Nonetheless, as to some matters, the City of London and other corporations exercised power on behalf of the state:

But as to those matters that they are to perform with that subordination to the government of the kingdom or state of which they are member[s], they act as a state or commonwealth. [Volume] 4 [of Coke's] Institutes [at page] 249, speaking of the Common Council of London saith, this court hath some resemblance to the High Court of Parliament. It consisteth of two houses (I suppose of two states of men) the one Mayor and Aldermen, the other of such as be of the Common Assembly resembling the whole commonalty of London. In this court they have power to make constitutions and laws for advancement of trade and traffick, for the better execution of the laws and statutes of the realm, so as these laws be not contrary thereunto.¹⁶⁰

159. British Library, Additional Ms. 34,125, at fol. 84r. (There is a blank space in the manuscript following the first sentence, which may signify either a paragraph or, more probably, a missing citation. Following the word, “communities,” the copyist who prepared Additional Ms. 35,980 added a comma, which assumes one of two interpretations. See British Library, Additional Ms. 35,980, at fol. 12v. I follow this copyist, however, in rendering as “they” in the last sentence what Holt mistakenly wrote as “that.”) In *Norris v. Staps*, it was said:

For, as reason is given to the natural body for the governing of it, so the body corporate must have laws as a politick reason to govern it, but those laws must ever be subject to the general law of the realm as subordinate to it. And therefore though there be no proviso for that purpose, the law supplies it. And if the King in his letters patents of incorporation do make ordinances himself, as here it was (as aforesaid) yet they are also subject to the same rule of law.

Hob. 210, 211, 80 Eng. Rep. 357, 358 (C.P. 1616). According to Coke, in *The Chamberlain of London's Case* it was said:

It appears by many precedents, that it hath been used within the City of London time out of mind, for those of London to make ordinances and constitutions for the good order and government of the citizens, &c. consonant to law and reason, which they call Acts of Common Council. Also all their customs are confirmed by divers Acts of Parliament, and all such ordinances, constitutions, or by-laws are allowed by the law, which are made for the true and due execution of the laws or statutes of the realm, or for the well government and order of the body incorporate. And all others which are contrary or repugnant to the laws or statutes of the realm are void and of no effect . . .

5 Coke 626–63a, 77 Eng. Rep. 150, 151 (K.B. 1590). Note that in these respects, Holt's account of judicial review followed precedent.

160. British Library, Additional Ms. 34,125, at fols. 83v–84r. The next paragraph began:

As to these matters that they perform "with that subordination to the government of the kingdom or state" and in which they act "for the better execution of the laws and statutes of the realm," a corporation was subject only to the limitation that its regulations "be not contrary thereunto." Clearly, Holt understood the idea of judicial review, whether measured by "right reason" or by the "laws and statutes of the realm," but he did not consider it applicable to an act of Parliament—an act of a body with sovereign power—"for that binds absolutely without any dispute to be made of its justice or equity."

Thus, it was no coincidence that when Holt came to discuss *Bonham's Case*, he did not mention standards of "right reason," "equity," or "justice," or the possibility that a statute might be "void" or subject to judicial "review." Instead, he cited *Bonham's Case* merely for the proposition that Parliament could not make a man judge in his own case:

It is true that saying [in] 8 [Coke's] Rep[orts] 118 Bonhams Case may seem to be carried too far, that an act of Parliament can't make a man to be judge in his own cause, yet it is not so harsh a saying as some may imagine, but it is a true and orthodox proposition, for a judge and a party are in their nature and institution different and distinct, for the being of the one doth necessarily exclude the other. Therefore an act of Parliament that should make a man to be a judge in his own case would be an absolute contradiction¹⁶¹

Although the printed reports of this passage indicate that Holt went on to say that such acts of Parliament would be void, his own account said nothing of this and instead suggested that either the statute would have to be construed to avoid the contradiction or else "government would be dissolved."¹⁶²

The end of this institution is the good government of the city or town, and for which these corporations have time immemorial in all governments been found to be very necessary. Bodin [in his] *de Republica*. Lib 3 ca[p] 7. saith they are so essential to all good governments whether monarchical, aristocratical or democratical that they cannot subsist without them, but they are utterly repugnant to all tyrannical or oppressive administrations. In a large dominion territory it is impossible for the government or the legislative authority thereof to attend [to] the affairs of the cities and great and considerable towns in the kingdom so as to make provision for all emergencies. Therefore for the peace and tranquility of these places and for their support upon which the welfare of the kingdom doth much depend it is indispensibly necessary that this should be under a more nice inspection.

Id.

161. See *supra* text accompanying note 127.

162. For his opinion delivered from the bench, see *supra* text accompanying note 3 and *supra* note 103. Three months before Holt's opinion in *City of London v. Wood*, Defoe wrote: "That Reason is the Test and Touch-stone of Laws, and that all Law or Power that is contradictory to Reason, is *ipso Facto* void in itself, and ought not to be obeyed." [Defoe], *Original Power*, *supra* note 24, at 3. In the mid-1690s, when defending the jurisdiction of King's Bench from the Lords' claim of privilege, Holt is reported to have said that the judges "adjudge things of as high a nature every day; for they construe and expound Acts

Holt's narrow treatment of *Bonham's Case*—as requiring interpretation to avoid the contradiction—reflected not only a realistic appraisal of the extensive power of Parliament but also a clear understanding of the modern natural-law theory and its implications for sovereignty. Familiar with the works of both Bodin and Locke, Holt argued that, “[t]o prevent the great inconveniences that ensued from the mere state of nature, men formed themselves into civil societies and did resign up themselves to a state of subjection.”¹⁶³ Accordingly, Holt recognized that acts of Parliament were the acts of a body with “sovereign power.”¹⁶⁴ Judicial review—“the review of the kings courts”—was what courts did to enforce such acts and other law, plus, in some circumstances, right reason, but judicial review could not defeat acts of Parliament. The only power to defeat an act of a body with “sovereign power” lay, not in the judiciary, but presumably in those who had originally given that sovereign power.

B. *The Implications for the Acts of Bodies Without Sovereign Power*

If, according to Holt in *City of London v. Wood*, the acts of a body with sovereign power bound the judges “absolutely,” then, perhaps, the acts of other bodies might not bind the judges. For example, an act of one House of Parliament—whether the Lords or the Commons—was not, by itself, an act of a body with sovereign power and therefore might not be considered law. This possibility is confirmed by Holt’s other opinions, for *City of London v. Wood* was decided amid a series of cases in which the Lords and then the Commons used claims of privilege to interfere with the role of the courts. In these cases, Holt simultaneously rejected the parliamentary usurpation of the judicial function of the courts and developed the idea that judges had to adjudicate—that they had to apply the law and distinguish it from such things as were not law.

Holt first challenged the abuse of parliamentary privilege in the 1690s, following the indictment of “Charles Knollys” for the murder of his brother-in-law. Knollys claimed in abatement that he was the Earl of Banbury, that the indictment should have identified him by his title rather than his name, and that therefore the indictment contained a misnomer. He also petitioned the Lords that he was a peer and that therefore they alone could try him. Although the Lords resolved that his earldom was spurious, in 1694 King’s Bench quashed the indictment. Holt explained this refusal to defer to the Lords by pointing out that King’s Bench had to consider the claim of a peerage in order to decide the plea of a misnomer, and that the Lords had not decided Knollys’s claim of a peerage in either their judicial or their legislative capacity. More generally, Holt ob-

of Parliament, and adjudge them to be void.” *Rex v. Knollys, a.k.a. the Earl of Banbury*, Skin. 517, 526–27, 90 Eng. Rep. 231, 236 (K.B. 1694). Curiously, this opinion is missing from those of Holt’s manuscript opinions known by me to be extant.

163. See *supra* text accompanying note 130.

164. For his knowledge of Bodin, see *supra* note 160; for his knowledge of Locke, see *supra* text accompanying notes 116–122 & 129–136.

served that "every law which binds the subjects of this realm, ought to be either the common law and usage of the realm, or Act of Parliament," and a mere resolution of the Lords was neither.¹⁶⁵ "[T]hough he had all respect and deference for that honourable body, yet he sat there to administer justice according to the law of the land."¹⁶⁶

In 1702, in *City of London v. Wood*, Holt again, in effect, condemned the abuse of parliamentary privilege. While acknowledging that judges had to enforce acts of Parliament, Holt suggested that Parliament could not make a person judge in his own case or allow a person to do what seemed fit in his own eyes. He thereby seemed to question the Commons' imprisonment of the Kentish Petitioners for breach of privilege—what could be viewed as the Commons' attempt to prohibit by a claim of privilege what was not prohibited by law and to exercise a judicial power without the sanction of law, indeed, to do this in their own case.

Shortly after deciding *City of London v. Wood*, Holt dissented in a pair of related cases—among the most famous of his career—and in so doing, he forcefully rejected two attempts by the Commons to usurp the role of the judges and to exert power without law. In *Ashby v. White*,¹⁶⁷ Matthew Ashby sought damages from the Mayor and constables of Aylesbury, who had prevented him from exercising his right to vote in a parliamentary election. Following a verdict for Ashby, the defendants moved in arrest of judgment that it was a privilege of the House of Commons to resolve disputed elections and that an elector could not bring an action for the denial of his right to vote unless the House of Commons first decided that he had such a right.¹⁶⁸ In 1703, Holt's colleagues were swayed by such arguments, but Holt dissented "long and learnedly . . . with some Vehemence."¹⁶⁹ Holt argued, among other things, that existing law did not permit the House of Commons to exercise judicial power over individuals' complaints: "The House of Commons cannot take cognisance of particular men's complaints; . . . in regard the law hath provided for it [i.e., Ashby's cause of action], it is to be pursued in the ordinary and common methods of justice . . ." ¹⁷⁰ Nor, indeed, could Ashby's cause of action be barred by parliamentary privilege: "That certainly can never be esteemed a privilege of Parliament which is incompatible with the rights of the people, which is to have reparations for the injuries that are done

165. *Rex v. Knollys*, Skin. at 526, 90 Eng. Rep. at 236.

166. *Id.* Later, the Lords called Holt before them for an explanation. Holt bluntly responded that the judgment could be properly questioned by means of a writ of error, but that he was not to be questioned in an extrajudicial manner. See 1 Ld. Raym. at 18, 91 Eng. Rep. at 909.

167. 2 Ld. Raym. 938, 92 Eng. Rep. 126 (1703).

168. 2 Ld. Raym. at 941, 92 Eng. Rep. at 128.

169. 2 Bishop Burnet's History of His Own Time 367 (London 1734); see also 14 A Complete Collection of State Trials 695 (T.B. Howell ed., London, T.C. Hansard 1812) [hereinafter State Trials].

170. Judgements, *supra* note 103, at 26.

to their rights and franchise, in the ordinary and common method of justice”¹⁷¹ If Ashby’s case was to be relegated to a decision by the House of Commons on a question of privilege, this method of proceeding would have to be compatible with “the rights of the people.” As Holt emphasized in the last sentence of his opinion, it would have to be justified “either by statute law or common law.”¹⁷² Perhaps encouraged by Holt’s dissent, Ashby sought a writ of error and eventually, in January 1704, was vindicated by the House of Lords.¹⁷³ In response, the Commons declared Ashby guilty of a breach of privilege and declared that anyone who made a claim similar to Ashby’s or who provided legal assistance for such a claim would also be guilty of a breach of privilege.¹⁷⁴

The related case occurred when John Paty and four other Aylesbury electors interpreted Ashby’s victory in the Lords as a precedent and pressed similar actions.¹⁷⁵ As it had threatened, the House of Commons promptly imprisoned the plaintiffs and attempted to imprison their legal advisors.¹⁷⁶ In 1705, upon a writ of habeas corpus, only Holt, of all the judges, urged that the Commons could not keep the Aylesbury electors in prison for breach of privilege. Among other things, he argued that by bringing an action in one court, King’s Bench, the electors could not have violated the privileges of another court, Parliament, and that if the Commons wished to make something a privilege that was not previously a privilege, they, together with the Lords and the king, would have to pass a statute to this effect:

For if this commitment in the case of these men shall be determined to be warranted by the laws and customs of this realm, it will be a rule in all other cases within the same reason, which is in truth when either House of Parliament shall make a menacing declaration that whoever shall presume to do such or such acts, (though in themselves never so legal or justifiable,) shall be judged and esteemed to be an infringer or transgressor of the privilege of that House, and so to be subject to the censure thereof:—which proceeding is not according to the Constitution of the Kingdom, which admits no such power or authority

171. *Id.* at 35.

172. *Id.* at 36.

173. 17 H.L. Jour. 369 (Jan. 14, 1704) and 527–34 (Mar. 27, 1704); 14 State Trials, supra note 169, at 799 (Jan. 14, 1704). Note that Holt was asked by the Lords to help draft their Report. See 17 H.L. Jour. 386 (Jan. 27, 1704). In their famous resolutions, adopted after receiving the Report, the Lords said, *inter alia*, that the votes of the Commons were “in effect to subject the law of England to the Votes of the House of Commons.” 14 State Trials, supra note 169, at 799 (Mar. 27, 1704).

174. See 14 State Trials, supra note 169, at 775–78 (Jan. 26, 1704). Among the members of the Commons who argued that Ashby had not violated the privileges of the House was Peter King. See *id.* at 769–71.

175. See *Queen v. Paty*, Holt, K.B. 526, 90 Eng. Rep. 1189.

176. See 14 H.C. Jour. 444 (Dec. 5, 1704); 14 State Trials, supra note 169, at 800. One of the plaintiffs’ lawyers, Nicholas Lechmere, escaped capture through a back window with quick use of his bedsheets and a rope. See *id.* at 810.

to be exercised and administered but by the whole Legislature.¹⁷⁷

In other words, the commitment of the five Aylesbury electors was justified neither by custom nor by an act of a body with sovereign power, and therefore it was not authorized by law. Only an act of the whole legislature—an act of Parliament—could diminish a subject's liberty or property:

Neither House of Parliament hath power, no, not both together, to dispose, limit, or diminish the liberty or property of the subject, because by law (which is superior to the actions or determinations of either House,) that liberty and property is established, and cannot be diminished or infringed by a less[er] authority than the Legislature of the kingdom, which is the Queen, the Lords and Commons assembled in Parliament.¹⁷⁸

Like Holt's enforcement of acts of Parliament, his refusal to enforce the act of a lesser authority if it would "diminish the liberty or property of the subject" reflected his understanding of sovereign power. Although hardly a restraint on acts of Parliament, this deliberate disregard of acts of a lesser authority at least avoided judicial enforcement of arbitrary power.¹⁷⁹

Perhaps recalling the scenes of legislative intimidation of the judiciary he had witnessed so often, Holt began his dissenting opinion in *Paty's Case* by noting that he was at a "disadvantage" in "seeming to encounter any act of the House of Commons."¹⁸⁰ Holt said that "every Englishman must be very fearful of giving any offence to so great and venerable a

177. Judgements, *supra* note 103, at 43. For a similar report of Holt's oral opinion, see 14 State Trials, *supra* note 169, at 857. Holt also made arguments about the right of the House of Commons to judge its own privileges. According to a rather condensed report, Holt said that "to make them, or any Court, the final judges of them, exclusive of everybody else, is to introduce a state of confusion, by making every man judge in his own cause, and subverting the measures of all jurisdictions." *Regina v. Paty*, 2 Salk. 503, 504, 91 Eng. Rep. 431 (K.B. 1705).

178. Judgements, *supra* note 103, at 43.

179. Locke had written: "When any one, or more, shall take upon them to make Laws, whom the People have not appointed so to do, they make Laws without Authority, which the People are not therefore bound to obey" Locke, *Two Treatises*, *supra* note 32, at 456 (II.xix.212); see also *id.* at 400 (II.xi.134). Indeed, according to Locke, the law making power could not be delegated.

The *Legislative cannot transfer the Power of Making Laws* to any other hands The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands.

Id. at 408–09 (II.xi.141).

180. Judgements, *supra* note 103, at 42; see also 14 State Trials, *supra* note 169, at 857. Even before he became a judge, during the 1679 impeachment of the Earl of Danby, Holt's conduct as counsel to the Earl made him the object of legislative displeasure. See Chief Justice Holt, *The Law*, May 1875, at 3–4.

body, and must think himself very unfortunate to fall under such circumstances as might in anywise contribute thereunto." Yet "there is one thing that doth overrule me, which I do fear more than all the evils and calamities that can befall me in this world, which is my own conscience, the dictates whereof I ought always to obey."¹⁸¹ In this, Holt said much about parliamentary power—as did his brothers, who refused to release the prisoners.

CONCLUSION

For the litigants in *City of London v. Wood*, the decision of Holt and his colleagues was hardly the last word on the dispute. Shortly after Wood's victory before the royal judges, the City again brought an action against him in the name of the Mayor, commonalty, and citizens—but this time in the Sheriffs' Court. Following what could not have been an inexpensive struggle, Wood eventually failed to prosecute a writ of error with effect, and he thereby not only lost his case but also left an unfortunate clockmaker who had posted bond for him to face years of convoluted litigation.¹⁸²

For the City of London, the decision against it in 1702 was no obstacle to its collection of penalties, whether from Wood or others. Although the City promptly sued Wood in the Sheriffs' Court in the name of the Mayor, commonalty, and citizens, in 1703 it legalized proceedings in the Mayor's Court by enacting that fines for refusing shrieval nominations

181. Judgements, *supra* note 103, at 42–43.

These election cases are suggestive of Holt's understanding of the relationship of the people to their representatives. Another case of Holt's involving the right to vote was *Regina v. Soley*, in which Holt, on a motion for arrest of judgment, held that defendants seeking to vote for a bailiff were not guilty of a riot. See British Library, Additional Ms. 35,980, at fol. 95v; also reported at 2 Salk. 594, 91 Eng. Rep. 503 (K.B. 1707).

182. See the printed brief of the City before the House of Lords, *Marwick v. Mayor of London* (H.L. 1708), copy available in City of London Record Office, P.D. 49.13; *Markwick v. Mayor*, 2 Brown 409, 409–11, 1 Eng. Rep. 1030, 1030–31 (H.L. 1708). James Markwick, Jr., posted bond that Wood would prosecute his writ of error with effect. See *id.* If the Thomas Woods was the wealthy merchant mentioned above in note 109, then he had other troubles, as is suggested by an action against him by the notorious Charles Knollys, Earl of Banbury, for taking and detaining the Earl's wife, Mary, Countess of Banbury. See *Banbury v. Woods*, 2 Salk. 705, 91 Eng. Rep. 595, 6 Mod. 84, 87 Eng. Rep. 841, 2 Ld. Raym. 987, 92 Eng. Rep. 157 (K.B. 1703–04). The Countess was Wood's daughter, who apparently was seeking refuge from Knollys. See Peter King's shorthand notes, Bodleian Library, Oxford, Locke Ms. fol. 36, at 81. Ironically, this was the same Charles Knollys whose indictment for murder (after a successful duel with his brother-in-law) prompted Holt to assert the jurisdiction of King's Bench to "adjudge" privileges of the House of Lords. See *Rex v. Knollys, a.k.a. the Earl of Bambury*, Skin. 517, 526, 90 Eng. Rep. 231, 236 (K.B. 1694). It may be doubted whether Woods appreciated the honor of either connection to Holt's constitutional opinions.

Incidentally, Peter King was present at the discussions of *Banbury v. Woods*, and apparently argued before Holt. See 2 Ld. Raym. at 988, 92 Eng. Rep. at 158. The case was tried by Holt at Guildhall, where Woods and his wife were acquitted. See Locke Ms. fol. 36, at 220.

were to be collected “in the Name of the Chamberlain of the . . . City.”¹⁸³ Indeed, Holt recommended this solution and even ended his opinion by emphasizing that his arguments in favor of Wood posed no impediment to the City’s collection of penalties. After observing that “many acts of Common Council” had appointed actions “to be brought by the Chamberlain” precisely in order “to avoid splitting upon this rock,” Holt concluded:

There will therefore be no harm done to the government of the City, but it will put the City in mind of making use of their own ancient officer. Appoint him by their acts of Common Council to sue in the behalf of the City in the City courts and to have recognizance acknowledged to him. . . . This particular case miscarrying, the act of Common Council may be fit to be reviewed and made more practicable, but as it now stands the judgment given ought to be reversed.¹⁸⁴

Hardly for the first time in his career, Holt attempted to persuade the losing party that “this particular case miscarrying” was a small sacrifice for the long-term benefits of the rule of law.¹⁸⁵

Following the example of Holt, we too must conclude by turning from the litigants to the larger issues at stake in *City of London v. Wood*. Holt’s opinion reflected the seventeenth-century philosophical development of the maxim against a person being judge in his own case. The notion that Coke had applied to a party that had attempted to be its own judge Holt also applied to such a party, and yet he went beyond this narrow, legalistic application and suggested the idea’s broad, philosophical implications for limits on government. Just as seventeenth-century philosophers had borrowed the idea—recently made prominent by a Chief Justice—and had given it profound philosophical significance, so, now, another Chief Justice took it back with its expanded implications and gave it profound constitutional significance.

Nonetheless, the notion that one cannot be judge in one’s own case had little future in widely discussed constitutional analysis—and not just because Holt’s written opinion remained unpublished. As a metaphor for political power, the notion of one who was judge in his own case was awkwardly technical. It had played a crucial role in the development of theories of limited government, but it was a legalistic conception of a

183. *The Privileges of the Lord Mayor and Aldermen of the City* 119 (London 1708). Incidentally, for numerous lists of persons who had not paid their fines and other materials relating to the City’s collection attempts, see City of London Record Office, Sheriffs & Sheriffs’ Court, Box 2.

184. British Library, Additional Ms. 34,125, at fols. 92v–93r. Earlier in his opinion, he wrote that “the reason why it [i.e., prosecution on behalf of the City] is given to the Chamberlain is because the chief court of the City is before the Mayor and Aldermen, and therefore it is incongruous for him to sue as head of a corporation where he is judge.” *Id.* at fol. 85v.

185. See, e.g., *Regina v. Graep* (K.B. 1697), British Library, Additional Ms. 35,981, at fol. 30r, quoted *supra* note 103.

problem that could, after the development of such theories, be addressed in their more direct and political terms.¹⁸⁶ Accordingly, rather than discuss the implications of the government's being judge in its own case, Defoe and other eighteenth-century writers tended to emphasize the power of the people, the breach of contract or trust, and the dissolution of government.

This contrast between the fate of the natural-law ideas accentuated by Holt and the fate of those emphasized by Defoe suggests much about the relationship between the dissemination of political ideas and the diffusion of political authority. Writing a judicial opinion in a case involving a mayor who was judge in his own case, Holt developed a subtle and somewhat technical argument for a learned audience. The great publicist, Daniel Defoe, however, was well aware that he was emphasizing ideas neither inaccessible nor unflattering to a large part of the nation and that this had political consequences:

The meanest *English* Plow-man studies Law,
And keeps thereby the Magistrates in Awe;
Will boldly tell them what they ought to do,
And sometimes punish their Omissions too.¹⁸⁷

Although Defoe probably was at least as interested in frightening the Tories as in alerting the "people" to their power, he seems to have understood that the power of the people depended in part upon the power of ideas and that the power of some ideas depended upon their dissemination among the people.

Through the writings of Defoe and numerous others, the modern natural-law theory had anything but a scanty or superficial reception. In the past few decades, numerous historians and lawyers have argued that natural-law ideas were of relatively minor significance for political debate during the eighteenth century, particularly during the first half of the century. They have argued further that when eighteenth-century Englishmen and Americans did discuss Locke in connection with politics, they did so chiefly for the authority of the philosopher's reputation, without much understanding of his arguments. As a result, it has become a staple of recent historiography—challenged only in the last decade—that the reception of modern natural-law and, particularly, Lockean ideas was both narrow and shallow.¹⁸⁸ Yet Somers's and especially Defoe's propa-

186. After Holt's opinion, the principle was used, among other things, to condemn the Commons for the very type of abuse of power that had troubled Holt in *Ashby v. White* and, presumably, also in *City of London v. Wood*. See, e.g., J.B., *The Ancient and Fundamental right of English Parliaments in General Asserted; and the Particular Right of the Commons of England Justified . . . with Some Reflections . . . in Answer to Sir Humphrey Mackworth's Late Pamphlet, call'd Free Parliaments, &c.*, Preface (London, B. Bragg 1705).

187. [Defoe], *The True-Born Englishman*, in [Defoe], *True Collection*, supra note 59, at 21.

188. See supra note 6. For responses, see supra note 8 and infra note 189.

gation of such ideas (and not merely in the pamphlets discussed here)¹⁸⁹ has been familiar to historians of literature for more than two centuries,¹⁹⁰ and Holt's application of these ideas in *City of London v. Wood* suggests that the full breadth and depth of their significance has yet to be explored.¹⁹¹

Together, Holt's opinion and Defoe's pamphlets speak volumes about the intelligent appreciation of Lockean and other modern natural-law ideas that could reach from bookshops to the bench. Ideas the journalist employed in some of the best-selling, most influential and effective polemical tracts of the early eighteenth century, the Chief Justice used in an opinion carefully prepared for publication but still, ironically, in manuscript. Rather than paraphrase any particular version of the natural-law theory with the precision of a philosopher, Holt, as one might expect, applied the gist of the theory, and by combining ideas of Locke and other writers (including, perhaps, Pufendorf) he revealed—even in the very awkwardness of at least one of his combinations—the degree to which he had thought about the problems he faced and the ideas that could solve them.¹⁹² Similarly, Defoe's departures from Lockean ideas can disclose as much as his apparent borrowings. Although Defoe had a very broad audience and restricted himself to untechnical arguments, he, like Holt, analyzed Lockean and other ideas for himself and adopted these in ways calculated to persuade his readers.

189. See, e.g., Defoe's rhyming exegesis of natural-law political theory in *The True Born Englishman* (1701) and *Jure Divino* (1706). Of the first of these, it has been said that "[i]t is very probable, that from the invention of printing to the end of 1701, an equal number of copies had never been sold of any book within the space of one year." 1 Lee, *supra* note 92, at 45. By 1704, it had gone through more than twenty-one editions; Defoe estimated that 80,000 copies of the small, cheap, pirated editions had been sold. See *id.*

See also the argument of Ashcraft and Goldsmith that Defoe may have been the author of *Vox Populi, Vox Dei* (1709), also published under the title, *The Judgment of Whole Kingdoms and Nations* (1710)—best sellers that plagiarized arguments and even exact language directly from Locke, Ferguson, Burnet, and others. See Richard Ashcraft & M.M. Goldsmith, *Locke, Revolution Principles, and the Formation of Whig Ideology*, 26 *Hist. J.* 773, 776–800 (1983). Ashcraft and Goldsmith describe their work as a "concrete illustration of the complex process by which political ideas are transmitted from one generation to another." *Id.* at 773.

190. See, for example, the works of Chalmers, Wilson, and Lee, discussed *supra* note 92.

191. Defoe also drew upon the ideas of Bernard Mandeville and disseminated an ameliorated version of Mandeville's notion that private vices could be public virtues. Strangely, Mandeville scholars have taken little notice of Defoe's use of Mandeville's ideas, including what appears to be the first extended borrowing from Mandeville. See Letter from Sir Malecontent Chagrin [i.e., Daniel Defoe] to *Mist's Journal* (Feb. 7, 1719), in 2 Lee, *supra* note 92, at 100–04. For other uses by Defoe of ideas similar to Mandeville's, see James V. Elliott, *The Political and Social Thought of Daniel Defoe: A Study in the Rise of Liberalism as an Ideology* 299–301 (1954) (unpublished Ph.D. dissertation, Harvard University).

192. For Locke, see *supra* text accompanying notes 116–122 & 129–132. For Pufendorf, see *supra* note 128 and accompanying text.

The response to Defoe's writing indicates that he had not misjudged his audience. As already noted, many modern historians would have us believe that early eighteenth-century Englishmen were not familiar with, or even responsive to, Lockean and other modern natural-law ideas. John Dunn, for example, has argued that Locke's *Two Treatises* were not popular before 1750 and that citations to it were largely for the philosophical authority of Locke's name.¹⁹³ Yet in 1701 the most influential political journalist and one of the most prominent Whigs of the period made use of Locke's ideas, and they did not publish Locke's name any more than they did their own. Although not all who followed the parliamentary struggles of 1701 could read the pamphlet reworkings of Lockean ideas with as much sophistication as John Locke himself in his study at Oates, the multitude of other readers clearly responded to the Lockean arguments of Defoe and the Whigs.¹⁹⁴ Most, surely, were blissfully ignorant of ponderous natural-law tomes and hence oblivious to many distinctions between the ideas of, for example, Pufendorf and Locke.¹⁹⁵ Yet they could appreciate a generalized and non-technical natural-law theory of limited government, and this process of homogenization of the ideas of the theorists, whether through ignorance or latitudinarianism, is not insignificant. From Pufendorf and Locke, to Holt and Defoe, and directly or indirectly to the variegated reading public, some general, non-technical features of natural-law analysis were widely if also variously received.¹⁹⁶

193. See John Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in *John Locke: Problems and Perspectives* 45, 57 (John W. Yolton ed., 1969).

194. Put more bluntly, it was not the influence of John Locke, but the persuasiveness and usefulness of his ideas that allowed them to be so extensively received, and even his ideas were assimilated and used merely as a part—albeit a very important part—of a more general reception of natural-law ideas. For related though slightly different arguments focusing on Revolutionary America, see Ralph Lerner, *The Thinking Revolutionary* 1–38 (1987).

195. A more sophisticated process of homogenization occurred among the learned, who when studying the moral theory of Grotius and Pufendorf, turned to Locke for an acceptable political gloss.

196. These observations about the extensive reception of natural-law ideas in the first years of the eighteenth century can be reinforced by an examination of the natural-law basis of some of the language used during and shortly after the Revolution of 1688 and '89. For example, in January and February 1689, there was much discussion of breach of "contract," which was largely drawn from Grotius and other "civilians." As one participant observed, this was "a Language that hath not been long used" in Parliament, "nor [is it] known in any of our Law Books, or Publick Records. It is sprung up, but as taken from some late Authors." *Debate at Large*, *supra* note 145, at 18 (statement of Earl of Clarendon, Feb. 5, 1689). Although more traditional and less radical than the ideas of Locke and Defoe, these natural-law ideas about contract illustrate the dissemination of natural-law concepts.

What was true of discussions about contract was especially true of the analysis that linked contract to abdication. During the meeting of the Convention Parliament, the Commons resolved that James II was guilty, among other things, of "having Endeavoured to Subvert the Constitution of the Kingdom, by Breaking the Original Contract between King and People," of "having violated the Fundamental Laws, and having Withdrawn

Just as some historians have been dismissive of the importance of Lockean and other modern natural-law theory prior to the late eighteenth century, so too some have misunderstood Holt's use of that theory in connection with judicial review. Notwithstanding the assumptions of Plunknett, Corwin, Gough, and others, Holt was far from confused about the possibility of judicial review. He said courts would "review" the acts of corporations against the common law and the statutes of the realm and also, in some instances, against right reason or equity. When discussing acts of Parliament, however, he said nothing about statutes being void or subject to judicial review. On the contrary, statutes were "absolutely" binding and could not be questioned on grounds of equity or justice. They were the acts of a body with "sovereign power," and the Chief Justice had a clear understanding of judicial review as a means of enforcing rather than challenging such acts. Nonetheless, even Holt's judicial review implied some limitation on government, for by arguing that judges were required to enforce the acts of a body with sovereign power, Holt

himself out of the Kingdom;" on this basis, the Commons concluded, James had "Abdicated the Government" and "the Throne is thereby Vacant." *Id.* at 3 (Jan. 28, 1689). Grotius had written about "a King or any other Superior Magistrate" who "shall *abdicate* or manifestly *desert* the Government." Hugo Grotius, *De Jure Belli et Pacis* (I.iv.9), translated in *The Proceedings of the Present Parliament Justified by the Opinion of the most Judicious and Learned Hugo Grotius . . . written for the Satisfaction of some of the Reverend Clergy who Yet Seem to Labour under Some Scruples . . .* 13 (London 1689). More to the point, Samuel Pufendorf had recently argued in his essay, *de Interregnis*, that abdication was a ground for concluding that the contract was broken: "[H]e who Rules, cannot be called in question for breaking his *Contract*, unless he either wholly *Abdicate* the Care of the Government, or . . . manifestly, with evil Intention, depart from those Rules of Governing, upon observance of which, *as upon a Condition*, the Allegiance of the Subjects depends . . ." Samuel Pufendorf, *de Interregnis in Dissertationes Academicæ Selectiores* 344 (1675), as translated by [William Atwood], *The Fundamental Constitution of the English Government* 61 (William Atwood trans., 1973) (London, J.D. 1690) (emphasis added by Atwood, citing page 272 of another edition); see also James Tyrrell, *Bibliotheca Politica: Or, An Enquiry into the Ancient Constitution of the English Government* 717 (London 1694). Reversing the order of this sort of analysis to conclude with James's abdication and the vacancy of the throne, whoever formulated the Commons' resolution shaped language that the Convention would debate and the nation would read. Thus, in 1689, as in 1701 and 1702, the ideas of natural-law theorists could be significant even for those unfamiliar with their publications.

An objection to this account may be that much of the discussion about contract during and following the Revolution of 1688 concerned an historical rather than a purely abstract contract. Yet members of the convention appear to have been quite capable of employing both an historical and an abstract notion of contract, and a great many of them probably viewed the historical contract as the English exemplar of the theoretical one. The danger of overemphasizing the incompatibility of the historical and the abstract arguments about contract can be illustrated by Sir Robert Howard. He was the author of an historical tract against arbitrary government, *The History of the Reigns of Edward and Richard II* (London 1690) (circulated earlier in Ms.), to which he added a preface that included a discussion of contract theory. See *id.* at xxiii–xxiv. Similarly, in the Convention he argued from the example of Edward and Richard yet also cited Grotius to the effect that "Compact is the origin of power." 2 Misc. State Papers from 1501 to 1726, *supra* note 53, at 402.

suggested very different treatment of the acts of a body without that power.

Holt's account of judicial review (as requiring judicial enforcement of acts of Parliament) was not inconsistent with his account of extrajudicial restraints on government, for each could be derived from his theoretical assumptions about natural law. Natural law explained both submission to government and resistance to it. On the one hand, self-preservation could be understood to imply that the acts of a body with sovereign power—in England, the acts of Parliament—were laws that could not be questioned and thus had to be enforced. This was a large part of Holt's judicial review. On the other hand, self-preservation could concomitantly be understood to imply that if government seriously abused its power, it would be dissolved, and the people would have a right to resist it. This was the right of revolution. Thus, Holt's judicial review and the dissolution of government could both be understood to have a basis in the law of nature.¹⁹⁷

The Chief Justice's discussion of judicial review is suggestive of later, American developments. Holt assumed that the acts of a body with sovereign power could be defeated only by those who gave this power and that therefore the judges had to enforce such acts. Yet the same reasoning that led Holt to enforce and defer to acts of Parliament led Americans later in the century to reach similar conclusions about the acts of constitutional conventions. These were acts of bodies with a power the judiciary had to enforce.

Holt's analysis of corporations acting as states was somewhat similar to the reasoning later applied to American governments. Precisely because corporations were bodies that "have not a sovereign power," their acts were tested by judicial review against both law and equity, "and if contrary to either they are ipso facto void." Yet there was an exception. Corporate acts were not reviewable against equity if they were performed with "subordination to the government of the kingdom or state"—if they were done by a corporation acting "as a state or commonwealth." Such acts shared the unquestionable character of acts of a body with sovereign power and were reviewed only against the acts of the body that, indeed, had sovereign power—that is, only against acts of Parliament.

This judicial review of corporations acting as states or commonwealths seems similar to the judicial review of American states or commonwealths when we recall what Holt tacitly recognized and Defoe made explicit in prose and verse: "the Power of the People." On the basis of this power, the people of America acted to dissolve their relations with Britain and to constitute their own governments, stipulating what power they relinquished to their governments and what they reserved. Like Holt's corporations that acted as states or commonwealths, American

197. See generally Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 Sup. Ct. Rev. 49.

states or commonwealths acted with a power that was binding and not subject to judicial review, except to ensure their conformity to the acts of those who were the source or original of their power.

American judicial review partially solved the problem seventeenth-century political philosophers had described in terms of the prohibition against being both judge and party. Locke, among others, had asked "the common Question . . . *Who shall be Judge* whether the Prince or Legislative act contrary to their Trust?"¹⁹⁸ Locke answered that neither the people nor their rulers could be judge in their own case. There was no judge on earth between these parties, and therefore the people could only appeal to heaven—that is, could only resort to arms. Americans, however, had an intermediate solution, for they could first appeal to their judges. Although a branch of government, the judiciary in America was not necessarily judge in its own case if it did not make the law it enforced and was not beholden to those who did make the law. Thus, American judicial review—based on written constitutions, the separation of powers, and the independence of the judiciary—offered a partial, temporal solution to the problem that, as Americans knew all too well, might otherwise require an appeal to heaven.¹⁹⁹

With or without written constitutions enforced by judicial review, it was apparent to increasing numbers on both sides of the Atlantic that beyond constitutions were the people, and that they rather than the judges were the ultimate guarantors of liberty. Holt argued that Parliament was subject to the law of nature, by which, he suggested, the people could hold it accountable. It was the threat of this "extrajudicial" limitation rather than any judicial "review of the kings courts" that would restrain Parliament. In this way, Holt applied to legislative power and representative institutions the theoretical lessons seventeenth-century philosophers had developed for use against monarchical power, and he thereby ushered in the eighteenth century with a remarkably clear understanding of the new, post-Revolutionary constitutional debate. Although not as bold as Defoe, who challenged parliamentary power in the name of "We the People," Holt hardly failed to make himself clear when he more discreetly adverted to the dissolution of government and the return of men to the state of nature.

198. Locke, *Two Treatises*, *supra* note 32, at 476 (II.xix.240); see also *supra* text accompanying notes 139–140.

199. For the earlier development a feudal context of some similar ideas, see Yale, *supra* note 5, at 84, 95–96 & *passim*.