

Bacon (1593–1660) in *An Historical Discourse of the Uniformity of the Government of England*\* (London, 1647–51).

Writing in an age when, except for the Netherlands, every other major European state was slipping into absolutism and England's first two Stuart kings, James I and Charles I, were thought to be trying to extend the prerogatives of the Crown and perhaps even do away with Parliaments in England, these writers were all anxious to erect legal and constitutional barriers to ensure security of liberty and property against such exertions of royal power. Accordingly, they searched the records of both Parliament and the courts for evidence of an "ancient constitution" that, antecedent even to the common law itself and finding expression through the law, could be appealed to by public leaders as justification for an expanded governmental role by Parliament as protector of the rights of the people and security against arbitrary government by the Crown. Despite the fact that monarchs had frequently violated or ignored it since the Norman conquest, this ancient constitution, Coke and his colleagues contended, provided the context for *legal* government in England. Composed of a variety of maxims, precedents, and principles that these writers traced back through Magna Charta to the ancient Saxon era and that included freedom from arbitrary imprisonment and taxation without consent, this ancient constitution was at once said to serve as the foundation of all governmental authority in England; to confine the scope of the discretion, or "will," of the Crown within the limits specified by the higher, fundamental, or natural laws it expressed; and, in particular, to prevent the Crown from governing without Parliaments.

This view was not without its critics. Royalist antiquarians like Sir Henry Spelman (1564?–1641), Robert Brady (1627?–1700), and Thomas Madox (1666–1727) attacked the whole idea of an ancient constitution as a myth manufactured by the legal writers. In a variety of works — Spelman's *Archaeologus* (London, 1626–64) (Logan), Brady's *An Introduction to the Old English History* (London, 1684) (Logan), and Madox's *Formulare Anglicanum; Or a Collection of Ancient Charters* (London, 1702)—they showed that, far from being immemorial like the common law, Parliament was a relatively recent institution that had been created by the Crown during the twelfth and thirteenth centuries when England was a feudal lordship. According to this view, Parliament thus owed its existence to the royal will. These works showed that when the common-law writers were unable to find clear evidence for the existence of an ancient constitution,

they either seized upon insubstantial and often ambiguous evidence or simply invented precedents to support their case.

Despite its historical authenticity, this view was immediately challenged by a number of Whig writers in a barrage of late-seventeenth-century works that reaffirmed the existence of an ancient constitution. These included legal treatises, like *Pleas of the Crown*\* (London, 1678) and *The History of the Common Law of England* (London, 1713) by Chief Justice Sir Mathew Hale (1609–76), and *Vox Populi, Vox Dei: Judgement of Kingdoms and Nations, Concerning the Rights, Privileges, and Properties of the People*\* (London, 1709), usually attributed to John, Lord Somers (1651–1716); works of history, like *The Antient Right of the Commons of England Asserted* (London, 1680) by William Petyt (1636–1707); and statements of Whig principles, like Henry Care (1646–88), *English Liberties*\* (London, 1682). Even works which were by no means unfriendly to royal authority in its struggle with Parliament for supremacy, such as the popular *History of the Rebellion and Civil Wars of England*\* (Oxford, 1702) by Edward Hyde, 1st Earl of Clarendon (1609–74), accepted the notion of an ancient constitution protecting Englishmen from arbitrary exertions of governmental power.

Because they advocated an expanded role for Parliament, a view congenial to Whig opponents of the later Stuart kings and to supporters of the Revolutionary Settlement of 1688–1715, these writers carried the day. The works of Spelman, Brady, and Madox fell into disuse during the early eighteenth century and rarely found their way into American libraries. In the Library Company of Philadelphia in 1789, they were represented only by a 1769 edition of Madox's *History and Antiquities of the Exchequer of the Kings of England* (London, 1711). But the Scottish philosopher and historian David Hume (1711–76) provided powerful support for their view in his extraordinarily widely read *History of England*\* (London, 1754–62). With his customary skepticism, Hume challenged the concept of the ancient constitution and argued that the eighteenth-century British constitution was, in fact, largely the modern product of the struggles between Crown and Parliament during the seventeenth century. Despite its allegedly Tory sentiments, Americans bought Hume's history in numbers nearly equal to Locke's *Essay Concerning Human Understanding*.

But Hume's view was not shared by his contemporaries within the English legal establishment. The principal eighteenth-century works in the English jurisprudential tradition, including William Hawkins (1673–1746), *A Treatise of the Pleas of the Crown*\* (London, 1739);