Bonham’s Case (1610) as reported by Sir Edward Coke has often been regarded as an early instance of judicial review of legislation. Lawyers, particularly in the United States, have taken it as a common law precedent for permitting judges to strike down unconstitutional statutes. Using contemporary evidence from English and Continental legal works, this article contends that Bonham’s Case actually rested upon then commonly accepted principles of the law of nature, and that those principles stopped short of embracing judicial review in the modern sense. The argument depends on establishing four points: first, that Coke accepted the existence of natural law and used it in his own writings; second, that the facts of Bonham’s Case lent themselves naturally to application of the law of nature to a parliamentary act; third, that as understood at the time, natural law did not permit judicial invalidation of statutes; and fourth, that other contemporary evidence supports this more restrained understanding of Coke’s statements in Bonham’s Case. In its contemporary setting, the case was therefore compatible with Parliamentary supremacy. It well illustrates, however, one way in which the law of nature was applied in actual litigation.

The student who picks Bonham’s Case as a topic had better take a deep breath first. S.E. Thorne described the academic literature devoted to the case as “voluminous and repetitious” (1938, 543 n.1). And that was in 1938! Since then, it has only become more so—more voluminous and more repetitious. Few seem to have been deterred by his warning, which (to be fair) he did not heed himself. Writing about the case and controversy about what place it occupies in the development of judicial review of legislation have

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It is hard to suppose anything remains to be said. I believe something does remain to be said about the case nonetheless, and I have therefore taken it as a subject for research and discussion. My reason is that Bonham’s Case illustrates the part played by the law of nature in the working jurisprudence of past centuries. That part has not always been fully understood, and on that account the case repays a further look.

1. The Case

Legal historians, particularly those whose interests include the history of the American Constitution, will not need a recitation of the facts of the case or an introduction to its principal reporter, Sir Edward Coke, but others may need a brief reminder. Dr. Bonham, a Cambridge University graduate in medicine, was forbidden to practice his profession in London by the Royal College of Physicians unless he first secured its license (Clark 1964, 208-217). He rejected the demand. In response, the College first fined him, then ordered his imprisonment, in both instances acting under a royal grant, one expressly confirmed by an Act of Parliament, and which confined the practice of medicine in London to men who had first been admitted to practice by the College. Dr. Bonham had not been so admitted. He did not have a license from the College and he refused to seek one. He disputed the validity of the action taken against a graduate of his ancient university. In due course, he sued the College for false imprisonment and the case came on before the Court of Common Pleas, in which Sir Edward Coke then served as Chief Justice. The Court held in Dr. Bonham’s favor. Several arguments were raised by the case, but the most challenging of them concerned the effect of the Parliamentary statute which, the College maintained, gave

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it the unquestioned right to take the action it had taken against Dr. Bonham. The statutory language did give the College the right to administer fines; there was little doubt about that. However, said Coke, because the College received one-half of all the fines they collected, they were in effect acting as judges in their own cause by putting Dr. Bonham on trial and imposing a fine upon him. The College was pocketing the proceeds. As for the statute, Coke wrote, “the common law will control 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 control it and adjudge such Act to be void.”

Strong words! And they came from a great and influential authority, nowhere more influential than in the United States. For generations of Americans, Sir Edward Coke and Sir William Blackstone were the authoritative expounders of the common law. They shaped American law. It is no cause for wonder that Bonham’s Case has long been regarded as authorization for accepting the judicial review of legislation we have embraced.

The case was recently described as “the fountainhead of the doctrine of judicial review” by a federal judge, and he does not stand alone. A law review article published a few years ago called Sir Edward Coke the “legal father of judicial review,” principally because of his opinion in Bonham’s Case (Smith 1966, 297). In fact, many American judges and scholars have echoed the theme: Bonham’s Case was an early example of the possibility of judicial review of legislation. Judicial review may thus have been a part of the heritage of the

5 See, e.g., Julius Goebel, Jr. (1971, 91-95); Charles Haines (2d ed. 1932, 32-36); Edward Corwin (1929, 365, 379-380).
7 See also Calvin R. Massey (1992, 49, 54-57), and Douglas Kmiec (1997, 627, 643-645).
8 See, e.g., Seminole Tribe v. Fla., 517 U.S. 44, 163 (1996) (Souter, J., dissenting) (in Bonham’s Case, “Coke appears at one time to have attempted to establish a paramount common law”); Dyer v. Calderon, 151 F.3d 970, 984 (9th Cir. 1998) (Bonham’s Case is “often identified as the first case in which a court struck down a duly enacted legislative act”); Jones v. Clinton, 869 F. Supp. 690, 693 (E.D. Ark. 1994) (Bonham’s case described as “an early expression of judicial review”); Pulaski County Municipal Court v. Scott, 612 S.W.2d 297, 300 (Ark. 1981) (Bonham’s case cited as having “voided an act of Parliament tending to contravene [a fundamental rule of law]”) (Dudley, J., concurring in part and dissenting in part); Smith v. Smith, 386 P.2d 900,
common law.\textsuperscript{9} Some learned commentators, including Professor Thorne himself, have been more cautious in their understanding of the holding in the case,\textsuperscript{10} reading it as asserting no more than a strong judicial power of statutory construction. However, its importance as precedent for judicial review continues to be asserted in textbooks,\textsuperscript{11} monographs\textsuperscript{12} and law reviews.\textsuperscript{13} Re-reading Coke’s words shows why.

\section*{2. THE PROBLEM}

A problem encountered by every student who has looked seriously at Bonham’s Case as a source for judicial review is that Coke’s words seem quite incompatible with the English doctrine of Parliamentary supremacy. It became settled law that English judges could not “strike down” acts of Parliament on the grounds that they transgressed a higher law, and this has stood as the rule of practice for a very long time.\textsuperscript{14} Indeed Coke himself seems to have taken that position. Elsewhere in his writings, he described Parliamentary authority as “so transcendent and absolute, as it cannot be confined, either for causes or persons, within any bounds.”\textsuperscript{15} How can such a statement be reconciled with what he wrote in Bonham’s Case? The task seems well-nigh impossible. And Sir William Blackstone, whose \textit{Comments on}...
taries served as the summary of English law for generations of American lawyers, also held that “no power” existed “with authority to control [an act of Parliament]” simply because the act was “contrary to reason.” At the same time, it is noteworthy that he cited Coke’s report of Bonham’s Case with evident approval (1765, *91).16

Modern commentators have struggled to make sense of this seeming inconsistency.17 Some have described Coke’s statements in Bonham’s Case as “mere dicta” or “academic” in character.18 A few have regarded them as the product of “confusion” or worse on Coke’s part,19 and they have dismissed them on that account. The words were casual or even dishonest comments. They could not have been meant as law.20 Other commentators, however, have suggested that Bonham’s Case did in fact envision judicial review as an application of the law of nature, and that Coke’s opinion stood for an older approach to Parliamentary authority, one that in time simply became outmoded.21 It has sometimes been said, for example, that the Glorious Revolution of 1688 was the decisive event in the demise of Coke’s more aggressive approach to limiting the legislative powers of Parliament.22


17 A few have simply pronounced Coke’s views mistaken; the influential A.V. Dicey was one (1926, 8th ed. reprint 1996, 58-61). See also Plucknett (1926, 69) (describing the case as “too strange and too uncertain” to establish the legality of judicial review of legislation).

18 See, e.g., Robert Clinton (1989, 37). The description is not entirely new; see David Mays, ed. (1967, 2:422) (describing Coke’s words as “mere speculative opinions”). I owe the latter reference to Treanor (1994, 491, 530-538), in which he describes Pendleton’s puzzlement.

19 E.g., Christopher Hill (1965, 227); Louis Boudin (1929, 223, 225) (Coke’s “over-mastering ambition, and a complete absence of scruples”).

20 See, e.g., O. Hood Phillips & Paul Jackson (8th ed. 2001, 3-011) (“This statement was obiter, and is also inconsistent with what Coke says in his Institutes.”); F.E. Dowrick (1961, 56-57) (describing the same language as “exceptional dicta” that was “receding into the background of orthodox legal philosophy”). See also A.K.R. Kiralfy, ed. (1958, 39); C.K. Allen (5th ed. 1936, 425-428); William Holdsworth (4th ed. 1936, 2:440-446).

21 See, e.g., Brinton Coxe (1893, 177); John Orth (2003, 23-29); R.C. van Caenegem (2003, 13:5, 11). Probably the most influential American statement of the importance of this development has been Bernard Bailyn (1992, 177, 198-202).

22 See, e.g., Haines (1932, 35) (“[T]he Revolution of 1688 marked the abandonment of [Coke’s] doctrine as a practical principle of English politics.”). See also Stefan Vogenauer (2001, 2:742) (“Die Wirren endeten 1688 mit der Glorious Revolution . . .”); J.M. Sosin (1989, 64) (“[T]he Revolution in England in 1688 for practical purposes marked the abandonment of the doc-
others have pointed to early Parliament’s status as a court — the “High Court of Parliament” as it was called — and concluded that Coke must have meant to describe only the internal workings of a court system. In other words, he was speaking of Parliament as another court and did not mean to put limits on what it could do when acting as a truly sovereign legislature. Finally, a few historians have indulged in more fanciful explanations — one said that which view Coke and Blackstone were espousing depended on what “mood” they happened to be in at the time. That can only be a sign of scholarly desperation.

Something must be wrong. None of the possible explanations of the two sides seems wholly satisfactory. It is also puzzling that Bonham’s Case itself seems to have created little controversy at the time it was decided. The controversy came later. In fact, Coke and Blackstone said pretty much the same thing about its subject. At one point Blackstone asserted that no law was “of any validity” if it contradicted the law of nature. At another point, however, he noted that no judge had the right to invalidate an act of Parliament because it contradicted a fundamental law. To all appearances, little doctrinal development on this particular point took place between the early seventeenth century, when Coke wrote, and the mid-eighteenth century, when Blackstone did. It appears to be something of a mystery.


24 W.W. Buckland (1945, 38) (speaking of Blackstone as “accepting the dogma in some moods, but not in all”). See also Jeffrey Goldsworthy (1999, 112) (concluding that even if Coke did accept “something like a power of judicial review, he later changed his mind”); George Mosse (1950, 126-174) (surveying the subject and finding, at 161, “some elements of contradiction” in Coke’s attitude).


26 1 Bl. Comm. (1765, *41) (“This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other, . . . , no human laws are of any validity if contrary to this.”).

27 1 Bl. Comm. (Id. at *91) (“[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power . . . with authority to control it.”).
either they themselves were confused about this subject and we ought to admit it, or else there is a way to unlock what they meant and to resolve the apparent contradiction.

3. A POSSIBLE SOLUTION

I believe there is a way to resolve the apparent contradiction. In fact, there is really no mystery at all. The answer is that both of these men accepted the existence of natural law, and the traditions of natural law embraced both positions, reconciling them in a fashion I hope to be able to make clear. Invocation of the law of nature was no idiosyncrasy on their part. A commonplace of the legal culture of their times held that certain general principles of justice were part of human nature, formed within us by God. These principles were common to all men, they were constant and immutable, and they provided the necessary foundation of all human law. Although the limited character of our understanding prevented men from knowing them fully, the basic tenets were accessible in part through human reason and observation.  

Many were stated in venerable legal maxims. Moreover, they were capable of application in legal practice. They could decide the outcome of litigation. Indeed under certain circumstances they were capable of rendering a statute inoperative — “void” if we follow Coke’s terminology. Bonham’s Case was in fact a relatively simple example of the application of the law of nature to its facts.

To make this argument, I want to take the law of nature as it was understood in Coke’s day and place Bonham’s Case within the context of its tenets. Four points need to be established:

First, that Coke accepted the existence of the law of nature and made use of it in his writing about English law; he saw no inconsistency between reliance on natural law and his own veneration for the English common law. Neither would other English lawyers of his era;

28 See, e.g., James Tyrrell (1701, 5) (noting that we discover the principles of the law of nature if we “contemplate this system of things, called the visible world, but more especially God, as its creator and governour”).

29 Francis Bacon called them regulae rationales as distinguished from regulae positivae; see James Spedding, ed. (1858, 7:360). See also Peter Stein (1966, 177-178).
Second, that the law of nature established that no man should be judge in his own cause. A statute allowing the practice would be contrary to the law of nature and repugnant to the essence of the judicial process. The facts of Bonham’s Case permitted the invocation of this fundamental principle; Third, that application of the principle was regarded as compatible with legislative supremacy. Natural law in its classical formulation did not admit judicial review of legislation in the sense we know it today. Coke was not asserting that it did. No inconsistency existed in the words asserting the breadth of Parliamentary power quoted above and Coke’s famous statement in this case; and,
Fourth, that other evidence supports this understanding of Bonham’s Case. It shows that there was nothing shocking, surprising, or contradictory about Coke’s position in the Case, though his words were incautious, and indeed capable of being misunderstood. In fact, however, from the perspective of jurists who accepted the existence of the law of nature, it was not a particularly difficult dispute.

### 3.1. Coke and Natural Law

The first of these four points—that Sir Edward Coke was familiar with and indeed endorsed the validity of natural law—is the easiest to establish. Coke tells us so himself. In his view, the law of nature was a part of the law of England. The famous treatise known as *Coke on Littleton* says this without ambiguity. Coke listed natural law together with the law of God and the common law as being in force in England.  

This is only to be expected. Coke was steeped in the classics and he had easy access to learned works in the traditions of the law of nature, and indeed, acceptance of natural law was a point of view he shared with virtually all common lawyers of his time.

This was not simply abstract theorizing. Nor was it a rhetorical frill. The law of nature had practical applications; it made a difference in then current law. For example, it established that slavery was not permissible with-

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31 See W.O. Hassall (1950); Allen Boyer (1997a).

out clear sanction under the positive law.\textsuperscript{33} It required fathers to find competent marriages for their daughters and to endow them adequately.\textsuperscript{34} It determined that dueling was unlawful and must be prohibited by the positive law.\textsuperscript{35} So wrote Sir Edward Coke himself about practical consequences drawn from the law of nature. In this he was, of course, accepting conclusions that were legal commonplaces of his day. But that does not mean he did not believe them. To understand the history of those who made early law, said Maitland, we have to be able to think \textit{their} common thoughts, not ours.\textsuperscript{36} In this instance, it means thinking about natural law.

Readers may find this recognition of the law of nature at odds with Coke’s reputation among historians. He is known as a champion par excellence, not to say an idolater, of the English common law. J.G.A. Pocock’s influential work, \textit{The Ancient Constitution and the Feudal Law}, described Coke as holding the “firm belief” that English law was “a purely insular product,”\textsuperscript{37} excluding fanciful and sophisticated laws drawn from the Continent. This interpretation has embedded itself in the minds of many historians. What, then, are we to make of his citation with apparent approval of what most of us assume is the most non-insular of sources, the law of nature, as a component part of English law? It doesn’t seem to fit.

But it did fit. Pocock’s depiction of Coke’s veneration for the common law is surely right, but it does not mean that Coke disparaged the law of nature.\textsuperscript{38} It is wrong to draw so sharp a distinction between the law of nature and the common law. Coke thought the two were entirely compatible. For example, he specifically described usury and dueling as contrary to the laws of the realm, the law of nature, and the laws of God.\textsuperscript{39} These evil practices violated all three. Such a description of particular laws was, in fact, a nor-

\textsuperscript{33} Co. Lit. *116b.
\textsuperscript{34} 2 Co. Inst. *234.
\textsuperscript{35} 3 Co. Inst. *157.
\textsuperscript{36} F.W. Maitland (1897, 520). See also J.W.F. Allison (2007a, 263); Hans Thieme (1954, 32-38).
\textsuperscript{37} See J.G.A. Pocock (1957; Cambridge ed. 1987, 63).
\textsuperscript{38} As is done, for example, in G.W. Paton (1972, 119) (dismissing Coke’s use of the law of nature in Bonham’s Case as “a rhetorical figment.” A more balanced assessment is found in Mosse (1950, 144-148); see also Frederick Pollock (1904, 107-138).
\textsuperscript{39} 3 Co. Inst. *152, *157.
mal way of thinking in his time. Here Coke was doing no more than giving voice to a widely held opinion.\textsuperscript{40}

Magna Carta was probably the best English example.\textsuperscript{41} It contained some of both. The natural lawyers held that positive law — that is, the municipal law as they would have said, or the common law as we would say — was somehow dependent upon the law of nature. It provided specific rules and added penalties to the more indefinite principles of natural law, but there was no necessary conflict between them. Of course, there could be such a conflict. That is true. But ordinarily there was not. Both could therefore be cited as good evidence of what the true law was.

As applied to Bonham’s Case, the assumption of harmony between common law and the law of nature means that what has become a frequent scholarly approach to interpreting the case can actually mislead. That approach has been to ask whether Coke was relying on the common law, or instead, relying on “some higher law” in reporting the case. The approach assumes that it must have been one or the other. What we have to do, it has been thought, is to look carefully at the evidence to determine which of the two it actually was.

The trouble with this way of seeing things is that it is based on the necessity of making an either/or choice. Contemporaries saw no such necessity.\textsuperscript{42} They regarded the two sources of law as being in agreement with each other in normal circumstances. The one was “built upon” the other.\textsuperscript{43} Lawyers therefore naturally invoked them together, the law of the land standing in harmony with the law of reason.\textsuperscript{44} If the two were not in agreement, something had gone wrong. And as Pocock shows clearly, the instances when Coke thought the common law had gone wrong were very few. Harmony

\textsuperscript{40} See Glenn Burgess (1992, 37-48); Martin Kriele (1970, 16-17).
\textsuperscript{41} See, e.g., Edward Hake (D.E.C. Yale, ed. 1953, 72-75).
\textsuperscript{42} See Hans Pawlisch (1985, 170).
between them was the order of the day. Thus, it was entirely normal to suppose that the principle — no man should be a judge in his own cause — would be affirmed both by the positive law and the law of nature.

3.2. Nemo debet esse iudex in causa sua

The second point requires showing that the law of nature itself fit Coke’s approach in Bonham’s Case and called for application of the rule that no man should act as judge in his own cause to the facts of the case. The broader problem is to ascertain what powers over statutes Coke was asserting in his report of the case. My argument is that far from announcing a new or controversial approach to statutes, the case illustrates a common feature of both the law of nature and the English common law.

There is no doubt, in the first place, that acting as a judge in one’s own cause had long been regarded as a violation of the law of nature. At another place in his works, Coke himself repeated the point, writing: “[I]t is also against the law of nature for a man to be judge in his own proper cause.”

This was not something he had invented. The rule was found in the Digest of the Roman law, in the Codex, and also in the medieval canon law. From the Middle Ages and into the early modern era, the proceduralists of the ius commune repeated it as axiomatic. It was equally recognized by several precedents in the English common law.

Like many rules of the law of nature, jurists carved out exceptions to it — in most cases where the necessity of having some final judge capable of deciding a controversy required relaxation of this otherwise salutary

45 See, e.g., Harbert’s Case, 3 Co. Rep. 11b, 13b, 76 Eng. Rep. 647, 661 (1584) (citing “the rule of the common law, which is built on the perfection of reason”); Ratcliff’s Case, 3 Co. Rep. 37a, 40a, 76 Eng. Rep. 713, 726 (1592) (describing the common law as “grounded on the law of God”).

46 This point is effectively made by J.W. Tubbs (2000, 159). See also James Q. Whitman (1991, 1321).


48 Dig. 2.1.10; 5.1.17.

49 Cod. 3.5.1.

50 Decretum Gratiani, C. 4 q. 4 cc. 1-2; d. p. C. 2 q. 1 c. 17.

51 E.g., William Durantis (1574, tit. I, pt.1, no. 12); Julius Clarus, (Venice 1595, Quaest. 43, no. 4).

52 See Thorne (1938, 547); Yale (1974, 49).
rule. Unless a lord could hold a court for his men, for example, disputes in which the lord’s interests intervened could not have been heard at all, had no deviation from the rule been permitted. Unless the pope could sit in judgment in a dispute involving one of his own grants of privilege, no truly final sentence could have been given in the canon law. Legal systems must make concessions to the realities of human life. In the law of nature, they often came into being, but here the exceptions never became so extensive that they swallowed the rule. They only limited its reach.

The underlying principle forbidding men to act as judges in their own causes was not simply a matter of prudence or good “public policy,” as we today are likely to see it. In the understanding of Continental jurists, the rule was of the essence of a valid judgment in law. A judgment was, by definition, an actus trium personarum. It required an actor, the plaintiff, a reus, the defendant, and a iudex, the judge. Each had a separate role to perform in litigation. Without the three, proceedings did not count as a valid iudicium. This is, incidentally, one reason the initiation of inquisitorial process in the criminal law of the thirteenth century was a challenge for the jurists. The classical law had required an accusator to initiate a criminal prosecution. He was one of the three essential persons. This change seemed to dispense with that requirement, allowing the judge to initiate the process himself, thereby violating the rule that three different persons were required for a valid judgment.

The jurists were up to the challenge, of course. They found precedent in the biblical history of Sodom and Gomorrah, support from an obvious need for stronger measures to repress crime, and comfort in the supposition that, in reality, it was not the judge who was acting as the accuser, but instead public voice and fame.

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53 See, e.g., Antonius de Butrio (d. 1408) (Venice 1578, X 2.1.12, no. 9). See also the expedient endorsed for cases involving the English monarch in Richard Hooker (Arthur Stephen McGrade ed. 1989, VIII:7:214).

54 C. 4 q. 4 c. 1; X 5.40.10; Hostiensis (d. 1271) (Venice 1574, Lib. II, tit. De iudiciis, no. 1) (“Iudicium est legitimus actus trium personarum, scilicet iudicis, actoris et rei”). See the discussion and texts assembled in Knut Wolfgang Nörr (1993); Pier V. Aimoni (1994).

55 See Ruud G.W. Huysmans (2006, 469).

56 X 5.1.40 (asserting “non tanquam idem sit accusator et iudex, sed quasi denunciante fama
cedures were brought within the confines of the rule that no man could be a judge in his own cause.

Whether one considers this reasoning a shabby subterfuge to justify high-handed behavior by society’s governors or instead a legitimate response to the necessity of an effective body of criminal law, the point it makes that proves helpful in understanding Bonham’s Case is that, according to the lights of jurists who accepted the traditions of natural law, for any judgment by a court to be valid three different actors in a trial were required. For the College to be two of the three persons, as Coke asserted had happened in Bonham’s Case, was thus no judgment at all. A grant, Parliamentary or royal, allowing this to happen was contrary to the very nature of legal process. This is what Coke meant when he used the word “repugnant” to describe the Act of Parliament as contrary to law. Allowing the College to fine Dr. Bonham, acting as a judge, and to collect the proceeds of the fine was repugnant to the nature of a valid legal judgment.

3.3. Statutes and Natural Law

The third point required to understand what Bonham’s Case stood for in its time is that judicial review, at least in the modern American sense of the term, was not a part of the law of nature. Despite their unstinted praise for the immutable laws of nature and despite their emphatic statements that all statutes and grants must conform to the law of nature to pass the test of validity, for jurists versed in the law of nature it did not follow that judges had the final word. Judges could not “strike down” statutes simply because the statutes violated the tenets of natural law.

Probably the most significant reason for denying this power to judges was that, in the communis opinio of the time, to allow judicial review would have perverted the right order of government. As Blackstone would later


58 It was a principle of the ius commune that the lesser authority should not sit in judgment over the greater; see, e.g., Hostiensis (1574, Lib. II, tit. De iudiciis, no. 5). This principle stood in the way of judicial review of legislation. For an English expression of this position, see Richard Wooddeson (1783, III: 48) (“[I]f their [the legislators’] proceedings are to be decided upon by their subjects, government and subordination cease.”). See also Russell Hittinger (2004, 261, 275-276).
put it, “[T]hat were to set the judicial power above that of the legislature, which would be subversive of all government” (1765, *91).\textsuperscript{59} Some laws, it is true, no judge might enforce — a statute directly contrary to the Word of God, for example.\textsuperscript{60} But that was a rare situation, one not raised by Bonham’s Case. In ordinary litigation, judges were subordinate officers in a commonwealth. They were not vouchsafed a right to nullify the considered acts of their governors.\textsuperscript{61} The right to weigh the merits of any statute belonged to the sovereign.\textsuperscript{62} Even the errors of the prince were normally to be obeyed as if they were law.\textsuperscript{63}

Another way of making the point is to recognize that judicial invalidation of statutes was not regarded as a necessary consequence of the law of nature itself. Natural law was not treated as if it were a constitution in the American sense. It had no written text whose words could be parsed and compared to challenged statutes. It admitted a variety of interpretations. It allowed a range of limitations. It might be restricted and modified by the exigencies of human life.\textsuperscript{64} Indeed, the organization of society itself compelled the abridgement of some natural rights. Curtailment of the right to self-defense — by delegating it to the government in the interests of peace in society — was a familiar example.\textsuperscript{65}

The dispiriting example of slavery also demonstrated the limited nature of judicial power to upset legislative enactments. Though contrary to the law of nature, slavery was recognized by the positive law of many states.\textsuperscript{66}

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\footnote{59 \textit{Bl. Comm.} (1765 at *91). \textit{See also} Sir John Vaughan (1677) (citing Littleton & Coke as holding that law cannot be inconvenient and inequitable, but adding that these “defects, if they happen in the law, can only be remedied by Parliament”).}

\footnote{60 \textit{See, e.g.,} William Noy (1792, ch. 1) (if a statute enacted “that no one shall give alms to any object in never so necessitous a condition, such an Act is void”).}

\footnote{61 \textit{For commentary, see} Michael (1991, 427-435) (examining the writings of Grotius, Puffendorf, Burlamaqui and Vattel and finding no support for the theory that judges possessed the power to declare statutes void if contrary to natural law). The article was a response to Suzanna Sherry (1987, 1127). \textit{See also} Sylvia Snowiss (1990, 5-12); J.P. Sommerville (1986, 96-97).}

\footnote{62 \textit{Cod. 1.14.1.}}

\footnote{63 \textit{See gl. ord. ad D. 4 c. 3: “[E]tiams error principis ius facit (citing Dig. 33.10.3).” \textit{See also} Thomas Smith (1982, Bk. II, c. 1 at 78).}

\footnote{64 \textit{See} Walter Berns (1992, 1, 3); Christopher Wolfe (1998, 157).}

\footnote{65 \textit{See} Walter Berns (1982, 49, 58-59).}

\footnote{66 \textit{See, e.g.,} John W. Cairns 22-23 (n.s.) (2001-2002).}
\end{footnotesize}
Under then accepted tenets of the law of nature, judges could not change that fact. They could not ignore the positive law. It often happened that men did not live fully in accord with nature’s plan, and nowhere in the law was this more apparent than in the daily abridgement of some men’s natural right to freedom.

In evaluating the place of natural law thought in judicial practice, it is also noteworthy that normally, other less drastic means existed to do justice than judicial review of legislation. Bonham’s Case provides a good example. Judges were entitled to assume that the legislators had intended their acts to conform to the principles of the law of nature. The assumption seemed entirely reasonable. If the law-giver had ordered explicitly that someone might act as judge in his own cause, showing that he knew what was involved, then that order would have to be obeyed. This might also be so if there were no other means for justice to be done. However, in the absence of unusual circumstances or absolutely compelling language, it was not easily to be taken for granted that a statute was intended to deviate from the path of justice. The reverse was true. Jurists took it for granted, reasonably enough, that the legislator had wished to act in accordance with the principles of natural and divine law. And if one assumed that the legislator wished to have statutes read in light of natural law, and that the legislator had not in fact intended to stray from its paths, then a decision in the case could be made in accordance with a reading of the statute that allowed natural justice to be done. That is what happened in Bonham’s Case.

The obvious objection that can be raised against this reading of Bonham’s


68 This theme has been repeated often and in a variety of forms, not least in the United States; see, e.g., Willard v. Harvey, 24 N.H. 344, 354 (1852) (“[N]o legislature could have intended to violate the Constitution, or to tread under foot the great principles of justice. And such a proviso . . . must be implied as will prevent injustice.”). See also Gardner v. Village of Newburgh, 2 Johns. Ch. 162, 164–65 (N.Y. 1816); McArthur v. Kelly, 5 Ohio 140, 143 (1831).


70 See the pertinent statement in Sheffield v. Ratcliffe, Hob. 334, 346, 80 Eng. Rep. 475, 486-87 (1615) (asserting the “liberty and authority that Judges have over laws, especially over statute laws”).
Case — a reading shaped by the law of nature as then understood — is that it seems to ignore the plain meaning of Coke’s words. He spoke of “repugnancy.” He said the statute was “void.” That is strong language to use if he was only interpreting a statute. Coke was criticized at the time for the “perpetual turbulent carriage” of his words and behavior,71 and this language was indeed at the outer limits of what was acceptable. Indeed, Lord Ellesmere did object that Coke had gone too far.72 However, the substance of his position in Bonham’s Case was not out of line with normal usage, and even his words were far from unparalleled in the vocabulary of the time.73 Lawyers sometimes used the word “void” to mean simply “empty,”74 or “ineffective.”75 Parliament itself had endorsed the usage.76 The term did not mean that legislation could be set aside — declared to be invalid ab initio by the judges — simply because it did not accord with the law of nature.77

A particularly frequent instance of this contemporary usage of the word “void” occurred in judicial evaluations of royal grants of a privilege. In
Bonham’s Case, Coke himself made a connection between statutes and grants. Unless such grants contained a clause specifically overriding normal principles of law, they were treated as of having no effect if they seemed to call for a result that conflicted with fundamental principles of law. They were described as “void” — as they were in fact in the particular case — without necessarily asserting the power of judicial review of legislation. So, for example, it was said that if a Parliamentary grant of a fee simple in land contained a proviso that the grantee could not enjoy the profits therefrom, the proviso was “void” as repugnant to the grant of the fee (Baker 2004, 17; St. German 1974, 140-141). Bonham’s Case presented a textbook situation where the law giver had to have granted jurisdiction with an express stipulation that the College could act as judge in a cause although the College was also in effect a party in it. Otherwise it would be assumed that this result had been outside of Parliament’s intent.

3.4. Other Evidence

The fourth point takes up other evidence relating to the same subject. It shows that Coke’s opinion in Bonham’s Case was in line with other evidence from the common law. It was not idiosyncratic. As others have pointed out, occasional judicial statements in later cases mirror Coke’s own formulation. But it is worth looking a little beyond them. Consider, for example, these words of a common lawyer in argument during a case heard in the Common Bench fifty years before. He was speaking of the place of a statute in the court’s decision:


79 See, e.g., Emerique de Vattel (1863, II, c. 17:7 §282) (“As it is not to be presumed that any one means what is absurd, it cannot be supposed that the person speaking intended that his words should be understood in a manner from which an absurdity would follow. . . . We call absurd not only what is physically impossible, but what is morally so.”).

80 Christopher Hatton (1677, 9) ([No] law positive, or constitution, should bind, but that which is rightly ordained.”).

And as to the Statute, it was made to remedy divers great mischiefs and inconveniences, ... , and it was also made for the preservation of tranquility, peace and concord. ... And then I say, although the statute gives a penalty, yet seeing it is very beneficial to the public weal, things which are out of the letter shall be taken within the equity of it: And if the words of it are obscure, they shall, for the same reason, be expounded most strongly for the public good. For words, which are no other than the verberation of the air, do not constitute the Statute, but are only the Image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes. And if they are dispersed so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words, and these are the sages of the law whose talents are exercised in the study of such matters.82

Who those “sages” were, no one could doubt. They were the learned judges and senior members of the legal profession; that is, Coke and his fellows. This lawyer went on to give three examples of cases in which the judges had not “taken the Words [of a statute] according to their common meaning” but rather according to the “informed meaning” of what the judges knew the statute’s real intent to have been. It was a meaning informed by the law of nature. For him, this was a normal way of proceeding. Parliament’s intention, not just the language they had chosen, was what counted.83

These words from a sixteenth century case were spoken in argument, of course. They were tendentious, and they could be countered by other examples, extolling the benefits derived from careful examination of the exact words of a statute.84 However, they do demonstrate that what Coke said in Bonham’s Case captured a then current view of the influence of the

82 Partridge v. Strange & Croker, 1 Plowd. 77, 81-82, 75 Eng. Rep. 123, 128-30 (1553); Sharington v. Strotton, 1 Plowd. 298, 304, 75 Eng. Rep. 454, 463-64 (1565); see also Eyston v. Studd, 2 Plowd. 459, 464, 75 Eng. Rep. 688, 694 (1574) (“[O]ftentimes things, which are within the words of statutes, are out of the purview of them, which purview extends no further than the intent of the makers of the act”).


law of nature on the task of dealing with statutes. The judges had freedom to make use of it when confronted with a statute that seemed to compel a result incompatible with reason. Judges were free to assume the statutes had not been meant to command injustice.\footnote{See J.H. Baker (2001, 26-28). An example is \textit{Leader v. Moxon}, 2 Black. W. 924, 96 Eng. Rep. 546 (1773).}

The same attitude towards statutes was expressed with greater calm in a work of a following century ascribed to Matthew Bacon:

\begin{quote}
In order to form a right judgment, whether a case be within the equity of a statute, it is a good way to suppose the law maker present: and that you have asked him this question. Did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. \ldots [By this means] in some cases the letter of an act of parliament is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter (1813, *383-386).
\end{quote}

In other words, Bacon suggested that a judge might ask himself whether the legislature had really meant to require him to reach an unreasonable result. It was fully in accord with natural law ways of thinking to suppose that the legislature had not meant to contravene fundamental principles that underlay all law. One might express this aggressively, as did Coke, by saying that the statute was being “controlled” by reason, or one might express it serenely, as did Bacon, by saying that the judges were merely doing what the legislature had truly intended. It comes to the same thing.

Today, we draw a distinction between interpreting a statute and invalidating one. That fits our own constitutional framework. We are used to it. It would be idle to propose that we turn the clock back, but at the same time it would be just as foolish not to recognize that thereby we have largely lost contact with a way of thinking characteristic of an earlier era, an era when jurists believed as a matter of course that positive law should and did stand in harmony with the law of nature. They thought that the two were meant to be in accord. Bonham’s Case is one example of how they fit together, or at least how they were made fit together.

Most modern commentators on the law do not accept the existence of
a law of nature.\textsuperscript{86} At least, they do not regard it as a working source of law, and it is this change that has made Bonham’s Case hard to understand. It is this that has rendered the case impossible to reconcile with early statements recognizing the supremacy of Parliament. Probably it accounts for much of the modern academic writing (and dispute) about the case. Coke, Blackstone, and the rest simply did not see the inconsistency. An eighteenth century Digest purporting to state the laws of England recorded both that \textit{Parliamentum omnia potest} and that Parliament could not change the laws of nature.\textsuperscript{87} Contemporaries saw nothing wrong with this seeming contradiction.\textsuperscript{88} They were not puzzled. We are.

Still, we have not entirely lost touch with the older way of thinking, at least in a few corners of our law. This can be shown by a homely example: the problem posed in the title of an old article by James Barr Ames (1897): “Can a murderer acquire title by his crime and keep it?”\textsuperscript{89} Suppose a state’s Statute of Descent and Distribution says that A, a child, shall inherit from B, his or her parent. They quarrel, and A kills B, perhaps in order to prevent B from disinheriting him by making a will in favor of someone else. Shall A inherit under the statute? It seems unjust to let him do so, but that is what the statute says. American courts have struggled with the dilemma, and a variety of remedial devices have been suggested. One strand of cases says that the case is simply outside the statute. No one should be permitted to profit by his own wrong. For that reason, A does not inherit B’s property.\textsuperscript{90} That is the strand that approximates the natural law approach. Would those who advocate it say that they were rendering the Statute of Descent and Distribution “void,” controlling it by fundamental principles of natural law? I myself doubt it, but what really is the difference between what they advocate and the position Coke took in Bonham’s Case? Not very much, it

\textsuperscript{86} See, e.g., John Hart Ely (1980, 48-54).

\textsuperscript{87} See John Comyns (1785, 4, tit. Parliament (H.1 and K), 352, 359).

\textsuperscript{88} See D.J. Ibbetson (2001, 4).

\textsuperscript{89} James Barr Ames (1913, 310).

\textsuperscript{90} The most famous case so holding is Riggs v. Palmer, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889) (“[A]ll laws . . . may be controlled in their operation and effect by general, fundamental maxims of the common law”). See generally William McGovern (1969, 65). For earlier examples of similar construction of English statutes, see Thorne (1942, 140-172).
seems. One can easily imagine a judge saying to himself: “Did the legislature really mean to allow a murderer to inherit from his victim when they enacted the Statute of Descent and Distribution? No. I don’t think they could have meant to violate a fundamental principle of the law.” He would thus feel justified in disregarding the plain language of the statute in favor of both what the law of nature prescribed and what (he assumed) the legislature had truly wished.

Admittedly this is a controversial subject. There may be preferable ways of understanding the homicide cases. It would not be sensible to belabor the point here, particularly since the Uniform Probate Code has largely rendered the question academic by making the disqualification statutory. I mention it only as a modern example of that approach to statutes that was typical of a mind formed by contact with the tenets of the law of nature. In my opinion, that is exactly what Bonham’s Case was. Putting to one side the characteristic extravagance of Coke’s language, that is all his words implied. It is difficult for us to think our way back into that frame of mind, and it is that difficulty that has kept us from seeing Bonham’s Case for the unremarkable case it was.

4. CONCLUSION

There is little doubt that the words of Coke’s opinion in Bonham’s Case retain the power to impress. He said that the common law would “control Acts of Parliament, and sometimes adjudge them to be utterly void.” After all the explanation — all the explaining away — these words still appear to endorse judicial review of legislation in something like the modern sense. I grant this.

But the appearance is false all the same. Coke was merely stating an accepted doctrine of his time. It was conventional wisdom to suppose that a law contrary to fundamental legal principles was no law at all. The medieval ius commune had held that a statute or custom contrary to natural law “was to be held for naught.” Later writers on the general law regularly described
statutes as invalid if they offended against principles of the law of nature. For example, Grotius (1953 ed., 1:2) held that whatever “is forbidden by the law of nature may not be enjoined by positive law.”  

Burlamaqui expressly asserted that the acts of the sovereign that contravened the laws of nature were “void and of no effect” (1752). An influential English writer on natural law similarly noted that the law maker was “forbidden” to violate the law of nature in enacting legislation (Rutherforth 1832, II:6: no. 3 at 361).

None of these commentators meant to assert that judges had the power to declare legislative acts invalid because they did not conform to the law of nature. They did mean that in some (but not all) circumstances, individual men and women might make a legitimate claim to disobey statutes that ran counter to natural law. Such statutes might not bind in conscience. In extreme cases, they might even be justified in casting off the yoke of a tyrant. But in the eyes of natural law thinkers, the supremacy of the law of nature did not give judges a power to invalidate statutes that came before them in litigation. That is not what the jurists meant by using the word “void.” For them, the test of whether a statute was a true law was not whether a judge would enforce it. It is undeniable that Coke’s words in Bonham’s Case appear very striking to modern readers. To us, they appear to allow and even to encourage judicial review of legislation. In fact, however, they did not. Coke was simply taking the approach to positive law that was characteristic of his time. It accepted the law of nature as both a source of law and a working part of deciding individual cases. That is all Bonham’s Case stood for then, and that is all it should stand for now.

script “ledens ius naturale est nullum”); Thomas Aquinas, Summa theologiae, 1a2ae, Quaest. 95, art. 2, Resp. (arguing that any human law not in harmony with the natural law, “non erit lex, sed legis corruptio”). See generally Rudolf Weigand (1967).


94 Jean Jacques Burlamaqui (1752, 7, §22 at 52). See also Samuel Pufendorf (1688, Lib. VIII, c. 1, §2 at 771-772) (refuting the view of Thomas Hobbes that upon entering civil society men obliged themselves to obey every civil law, even if contrary to the law of nature).

95 Thomas Rutherforth (1832, Bk. II, c. 6, no. 3 at 361).

96 See, e.g., Samuel Pufendorf (1691, c. XII, no. 8 at 224).
REFERENCES


Aquinas, Thomas. *Summa theologiae*, 1a2ae, Quaest. 95, art. 2, Resp.


Clarus, Julius. 1595. Practica criminalis. Quaest. 43, no. 4.


de Butrio, Antonius. 1578. Commentaria in libros decretalium. X 2.1.12, no. 9.


Huysmans, Ruud G.W. 2006. The Inquisition for which the Pope did not ask Forgiveness, 66 *The Jurist* 469.


Maitland, F.W. 1897. *Domesday Book and Beyond.* The Fontana Library.


Orth, John. 2003 *Due Process of Law: A Brief History.* Lawrence, Kan.: University of Kansas.


Pufendorf, Samuel. 1688. *De jure naturae et gentium libri octo*. Lib. VIII, c. 1 § 2.

Rutherforth, Thomas. 1832. *Institutes of Natural Law*. Bk. II, c. 6, no. 3.


Thieme, Hans. 1954. *Das Naturrecht und die europäische Privatrechtsgeschichte*. 


Williams, Ian. 2006. Dr. Bonham’s Case and ‘Void’ Statutes, 27 J. Legal History 111.


