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ORIGINAL ARTICLE

The Case of Proclamations (1610), *Aldred's Case* (1610), and the Origins of the *Sic Utere/Salus Populi* Antithesis

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The principle captured in Cicero's ancient Roman law motto, *Salus populi suprema lex est* (the people's welfare is the supreme law) grounded the ambitious regulatory regimes that various continental nations built during the 1700s.[1] Within this framework, the authority of the state to subordinate private rights to collective interests served as a foundational premise.[2] By contrast, the corresponding Anglo-American school of thought viewed the protection of individuals, rather than of the community as such, as the only legitimate grounds for governmental restrictions on the use of property. Under the latter, the substantive scope of legislative police power was limited to the remedial functions that common law courts had long implemented via nuisance law. Rather than *salus populi*, the applicable Anglo-American motto was the common law maxim *sic utere tuo ut alienum non laedas* (use your own [property] without injuring another).[3]

The foundational case establishing *sic utere* as a guiding legal principle was Sir Edward Coke's *William Aldred's Case* (1610).[4] A private nuisance decision celebrated in the annals of environmental history,[5] *Aldred's Case* concerned a

[1] Martin Loughlin, *Foundations of Public Law* (New York: Oxford University Press, 2010), 418; Diethelm Klippel, "Reasonable Aims of Society: Concerns of the State in German Political Theory in the Eighteenth and Early Nineteenth Centuries," in *Rethinking Leviathan: The Eighteenth-Century State in Britain and Germany,* ed. John Brewer and Eckhart Hellmuth (Oxford: Oxford University Press, 1999), 74; and Albion Small, *The Cameralists, the Pioneers of German Social Polity* (Chicago: University of Chicago Press, 1909), 194.

[2] Small, *Cameralists*, 16.

[3] Christopher G. Tiedeman, *A Treatise on the Limitations of the Police Power in the United States: Considered from Both a Civil and Criminal Standpoint* (St. Louis: 1886), 4.

[4] *William Aldred's Case* 77 Eng. Rep. 816; 9 Co. Rep. 57b (K.B.).

[5] For a description of *Aldred's Case* as "a mainstay of US jurisprudence "and "a foundation of modern environmental law" see Kathleen A. Brosnan, "Law and the Environment," in *Oxford Handbook of Environmental History*, ed. Andrew C. Isenberg (New York: Oxford University Press 2014), 517. See

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neighbor dispute over the stench of a pigsty and the obstruction of light. After the jury found against him on both counts, the defendant "moved in arrest of judgement that the building of the house for hogs was necessary for the sustenance of man: and one ought not to have so delicate a nose, that he cannot bear the smell of hogs."[6] Rejecting this claim, Common Pleas upheld the verdict. An action on the case lay, as Coke explained it, both for interference with necessary lights, and the infection and corruption of the air.[7] He cited *sic utere* in answer to the defendant's argument on the utility of hogs, denying the relevance of economic balancing to the situation.[8] Nowhere in the text is there anything to suggest that *sic utere* also construed nuisance adjudication (and legislation declaratory of nuisance law) as the sole legitimate means for regulating land use and economic relations. Yet the latter was indeed how the phrase came to be read by Blackstone's time a century and a half later.[9]

Opponents of Edwin Chadwick's Public Health Act and other sanitary reform initiatives in nineteenth-century Britain questioned both the desirability and constitutionality of legislative measures other than those that were premised on nuisance law.[10] In the United States, this argument transformed by the latter part of that century into an alleged substantive constitutional limitation on the scope of the police power. For adherents of this perspective, *sic utere* precluded an open-ended plenary legislative power such as was implied by *salus populi*.[11] In light of *Aldred's Case's* complete silence on anything relating to legislation, how the maxim came to be infused with its latter meaning has remained unknown. To answer this puzzle, I argue, *Aldred's Case* must be placed in its larger context.

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also Daniel R. Coquillette, "Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment," *Cornell Law Review* 64 (1979): 761–821.

[6] *Aldred's Case,* at 817.

[7] Ibid., at 817, 821.

[8] Coquillette, "Mosses," 776.

[9] Blackstone said of *sic utere* that "it is the only restriction our laws have given with regard to oeconomical prudence." A rule inconsistent with this prinicple, he indicated in the same context, may well have its advantages but would not be "calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please." William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press 1765–69) 1:305.

[10] Toulmin Smith, *The Laws of England Relating to Public Health [...],* (London: S. Sweet 1848), 15–22.

[11] In the words of Christopher Tiedeman "[T]he police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil-law maxim, *sic utere tuo, ut alienum non laedas.*" *Limitations of Police Power,* 4. By contrast, in defining the police power as "the power of promoting the public welfare by restraining and regulating the use of liberty and property" the progressive jurist Ernst Freund implicitly invoked *salus populi. The Police Power: Public Policy and Constitutional Rights* (Chicago: Callahgan, 1904), iii. On *sic utere* and *salus populi* as competing principles of "law" and "police" in nineteenth century American legal thought, see Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005), 111–12. On the coexistence of both *sic utere* and *salus populi* in nineteenth-century American law, see William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996) 42–50.

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Aldred's Case was one of two landmark land-use-related cases which Coke addressed during the Michaelmas term of 1610.[12] The other was the *Case of Proclamations,* in which Coke famously refuted the legality of royal proclamations that banned new buildings and starch manufacturing in London.[13] Both cases have long been recognized as building blocks of common law history, but have only been considered in isolation from each other. Coke's publication of an opinion on a minor quarrel over the stench of a pigsty during the same term in which the dramatic *Case of Proclamations* unfolded has implicitly been taken as a coincidence not worthy of note. The following seeks to suggest otherwise.

The path linking *Aldred's Case* and the *Case of Proclamations* begins with the realization that the most immediate beneficiaries of the building and starch proclamations were nearby landowners. This is because starch manufacturing was notorious for its stench, and new buildings could block the light and air of nearby houses and have other adverse impacts.[14] With this in mind, the parallels between the injuries of which Aldred complained and those that were suffered by the neighbors of new buildings and starch makers come into view. Aldred's asserted interference with light mirrors the obstruction caused by new buildings, and the pigs' stench recalls the fetid odor of starch making. Read this way, Coke's message seemed to be that nuisance adjudication offered injured neighbors a viable alternative to the protection that the starch and building proclamations had granted. This interpretation in turn calls for explanation as to why parliamentary legislation would not have served, in Coke's mind, as an acceptable solution to injury from starch and new buildings.

The answer is to be found in Coke's distrust of all forms of centralized legislative interference in property, including *both* proclamations and parliamentary statutes. The *Case of Proclamations* disputed the constitutionality of the building and starch proclamations solely because they were enacted outside parliament; for this reason, the text can be misread to suggest that Coke would have had no principled objection to this legislation had it been properly enacted. There is reason, however, to think otherwise. Coke, as will be discussed, was wary of building legislation and other statutory interference with property and cautioned against it.[15] In this, he was likely in part motivated by the desire to stem the encroachment of emergent continental models of urban land-use regulation.

Centralized urban improvements had characterized nascent states across early-modern Europe. Rulers from France's Henry IV to Spain's Philip II and III to Denmark's Christian IV had initiated ambitious building projects in

[12] A third land-use dispute which Coke addressed during the same Michaelmas term was *Baten's Case* (1611) 77 Eng. Rep. 810, 9 Coke 53b (K.B.). See below discussion in text accompanying notes 122–123.

[13] *Case of Proclamations* (1610) 77 Eng. Rep. 1352; 12 Co. Rep. 74 (K.B.). For a description of the *Case of Proclamations* as "one of the minor charters of English liberty;" see Joseph Robson Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* (Cambridge: Cambridge University Press, 1928), 38.

[14] See below discussion in text accompanying notes 28–33, 41–46.

[15] See below discussion in text accompanying notes 71–88.

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their respective capital cities around the start of the seventeenth century.[16] They relied for this purpose on detailed edicts and police ordinances of the type employed by that time in the implementation of wide-ranging economic and social reforms.[17] These ordinances served as the blueprint upon which James I's building proclamations appeared to have been modeled.[18]

The foundational premise behind the police ordinances, influenced by humanist political thought, was the duty of the ruler to attend to the "common weal," rather than the interests of individuals and subgroups.[19] The goal of undercutting vested economic and political interests deemed antithetical to the common weal could not effectively rely on legal institutions controlled by these same interests. The need instead, was for centralized administrative power unburdened by what common weal reformers conceived as factional, self-serving commitments. Implied by definition was the subordination of local political and judicial privileges to those of the larger commonalty. Most everywhere in early modern Europe, the result was a clash between what Gerald Strauss, writing about the post-reformation German principalities, described as "good policy, order, and uniformity" on the one hand, and "ancient customs, freedoms, and traditions," on the other.[20]

The legal principle justifying centralized power was based on the ability of the sovereign to override existing rights and privileges in times of necessity.[21] On this, the leading sixteenth-century text was the French Jean Bodin's *Les Six livres de la Rèpublique,* first published in 1576.[22] Bodin had warned that new rules and edicts could be risky and had advised the wise ruler to respect property rights and interfere with them only in truly exceptional circumstances.

[16] Hilary Ballon, *Paris of Henri IV* (Cambridge, MA: MIT Press, 1991), 4–7; James Robertson, "Stuart London and the Idea of a Royal Capital City," *Renaissance Studies* 15 (2001): 38.

[17] Roland Axtmann, "'Police' and the Formation of the Modern State: Legal and Ideological Assumptions on State Capacity in the Austrian Lands of the Habsburg Empire, 1500-1800," *German History* 10 (1992): 49; and Marc Raeff, *The Well-Ordered Police State: Social and Institutional Change through Law in the Germanies and Russia, 1600-1800* (New Haven: Yale University Press, 1983), 43–44, 125, 167.

[18] The 1605 proclamation bore striking resemblance to a recently enacted French building code. Both laws required construction with brick, rather than wood, and compliance with guidelines pertaining to alignment with the street and overall form. *Paris of Henri IV,* 7; and James F. Larkin and Paul L. Hughes, eds., *Stuart Royal Proclamations: Royal Proclamations of King James I, 1603-1625* (Oxford: Clarendon Press, 1973), vol. 1, no. 51. A 1608 proclamation explicitly referred to foreign influences in suggesting that builders who defied the requirement for brick "under colour of necessity, or pretended impossibility" "looke abroad & see what is done in other well policed Cities of Europe." Larkin and Hughes, *Stuart Royal Proclamations,* no. 87.

[19] Raeff, *Well-Ordered Police State*, 149–50.

[20] Gerald Strauss, *Law, Resistance, and State: The Opposition to Roman Law in Reformation Germany* (Princeton: Princeton University Press, 1986), 98.

[21] Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton: Princeton University Press, 1964), 12–13.

[22] Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 1978), 2:289; and James B. Collins, "State Building in Early-Modern Europe: The Case of France," *Modern Asian Studies* 31 (1997): 619.

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But in the final analysis, he offered the *salus populi* maxim as the "first and chiefe law of all Commonweales."[23]

James I's political writings echoed Bodin's ideas on legislative sovereignty and *salus populi*.[24] But in contrast with the continental practice, James initially attempted to implement land-use reforms through Parliament, rather than through royal ordinances, or "proclamations" as they were known in England. It was only after his building and starch bills failed to be enacted that James, invoking his prerogative, used proclamations. Within this context, Coke's refusal to uphold the buildings and starch proclamations precluded in practice *any* pertinent legislation.

If not only proclamations, but also parliamentary statutes, were to be rejected as an answer to the problems that neighbors suffered from buildings and starch, Coke needed to remind private property owners of the existence of alternate, common-law-based, means of protection. I argue that *Aldred's Case* served that purpose. Within that context, *sic utere* substituted for the use of legislation (be it proclamation or parliamentary statute) to override the jurisdiction of local courts that, as a matter of law or practice, privileged the right of landowners to block the windows of their neighbors or engage in polluting trades next to residences.

Just 4 years earlier, in *Bates's Case* (1606), the Court of Exchequer had upheld the legality of extra-parliamentary impositions and described "[t]he absolute power of the king" as "that which is applied to the general benefit of the people and is *salus populi*."[25] By contrast, in the *Case of Proclamations*, Coke refused James' implicit invitation to enlist *salus populi* as grounds for prerogative regulation of land use. A rejection of *salus populi* demanded the affirmative establishment of an alternative principle to guide land-use control. In *Aldred's Case,* Coke posited *sic utere* as the applicable principle.

The remainder of the article proceeds as follows: The first section describes the overlapping public and private rationales behind the building and starch proclamations. The second addresses Coke's legal-ideological aversion to building and starch statutes, and the potential contribution of this line of thought to the repeated failure of building and starch bills in Parliament. The third describes events in the Parliament of 1610 leading up to and including the *Case of Proclamations.* The fourth section then argues that it was as an alternative to land-use legislation, whether by proclamation or statute, that Coke fashioned *sic utere* as a common law solution for injury from incompatible land-uses in *Aldred's Case.*

Buildings, Starch, and Private/Public Injury

In complaining to the king about new buildings and starch in the early 1600s, Londoners were continuing a long-standing tradition. At least since the days of

[23] Jean Bodin, *Six Bookes of a Commonweale*, ed. Kenneth McRae., trans. Richard Knolles (Cambridge, MA: Harvard University Press, 1962), 471.

[24] Ioannis D. Evrigenis, "Sovereignty, Mercy, and Natural Law: King James VI/I and Jean Bodin," *History of European Ideas* 45 (2019): 1085. An annotated copy of Bodin's *Les six livres de la republique* was among the few books James is known to have owned. Ibid., 1074.

[25] *Bates's Case* 145 Eng. Rep. 267, 271 (Exchequer).

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Edward I, aristocrats, clergymen, and other elite residents of London had petitioned the crown against injurious land uses tolerated by the city's wardmotes and other courts.[26] By the reign of James I, however, the role of such complaints in prompting prerogative intervention had to be downplayed.

It was only for the purpose of protecting the common good, rather than private interests, that the crown could invoke its extraordinary, absolute, powers. As Chief Baron Fleming declared in *Bates's Case* (1606), the absolute power of the king could not be "converted or executed to private use, [or]to the benefit of any particular person," since matters relating to "the profit of particular subjects, for the execution of civil justice" were the proper domain of the common law, "and cannot be changed, without parliament."[27]

In keeping with this requirement, the building and starch proclamations offered the prevention of disease, crime, hunger, and fire as primary justifications. All of these were acute and real concerns, and there is no suggestion that these rationales were invented as a cover for underlying private property interests. But in addition to any such collective objectives, the proclamations also served private landowners who wished to keep buildings, starch makers, and other injurious land uses out of their neighborhood.

Buildings

Dramatic growth in London's population spurred a seemingly insatiable need for housing in the latter sixteenth and early seventeenth centuries. In addition to new construction on what had been gardens or empty lots, the new demand drove the conversion and subdivision of existing units, including cellars, sheds, stables, and cookhouses to accommodate large numbers of people in what were often crowded and poor conditions.[28] It was during that time that the area surrounding the royal court began to transform from what had previously been a largely rural setting into a densely built urban district to be known as the West End. Famous as the home of London's wealthiest aristocrats, as well as prosperous physicians and lawyers, the West End was also where many of the poor newcomers settled under the early Stuarts. The houses into which they moved were built cheek by jowl with those of upscale residents of the area, so that, as Malcolm Smuts put it, "a laborer might live within a hundred feet of a Privy Councillor."[29] The result for longtime residents of affected areas was a decline in the living conditions and the value of their property due to the obstruction of light and air, increased traffic and noise, and what was probably of greatest concern, socio-demographic transformation.

[26] It was in response to such complaints that Edward I prohibited the burning of seacoal in the kilns of craftsmen in London, *Calendar of the Patent Rolls Preserved in the Public Record Office: Edward I, A.D. 1281-1292* (London: Her Majesty's Stationary Office, 1893), 207, 296.

[27] *Bates's Case*, at 271.

[28] Thomas G. Barnes, "The Prerogative and Environmental Control of London Building in the Early Seventeenth Century: The Lost Opportunity," *California Law Review* 58 (1970): 1336.

[29] R. Malcolm Smuts, "The Court and Its Neighborhood: Royal Policy and Urban Growth in the Early Stuart West End," *Journal of British Studies* 30 (1991): 123, 127.

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From the 1570s onward, there can be found in the surviving records of the London wardmotes references to common nuisance presentments regarding the subdividing of houses, crammed alleys, or the lodging of tenants in cellars. For example, one James Snape was called 4 years straight before the St. Dunstan-in-the-West wardmote, for subdividing a house near Temple Bar.[30] But it seems that these proceedings had little impact, as can perhaps be deduced from the repeated presentment of Mr. Snape, as well as similar such instances.[31] The inadequacy of this regime left frustrated landowners with few options other than petitioning the crown directly, or via the city, to intervene. In or around 1579, city officials conveyed to the Royal Council their alarm over the "increase of new buildings which had been erected for harbouring of poor and roguish persons."[32] The next year the city advised the crown "'that the multitude' did 'soe overgrowe that theare was some feare and peril of theyre governance.'"[33] In both instances the city's implicit request was for the crown to step in.

In 1580, Queen Elizabeth responded with a proclamation that banned new construction and the subdividing of buildings in London. The proclamation cited the need for food and "other like necessaries for man's life" to be available "upon reasonable prices," and the queen's duty to ensure "the preservation of her people in health," as reason for why "ordinary justice," meaning here the existing city courts, was insufficient for the city to be "well governed."[34] James echoed this language in a 1607 building proclamation in which he justified the need for more than "wonted officers and ordinarie Jurisdiction" in relation to "the prices of victuals," and the "health of his loving subjects."[35]

Building on the precedent set by Elizabeth, James's 1607 proclamation banned construction on new foundations and the subdividing of houses in and around London. New to James, however, was the attempt to prescribe the materials, layout, and design of what was to be built on old foundations. Beginning in 1605, James required that building on new foundations be only made with brick or stone, and that "some fitting and orderly course may be taken and set downe for uniformitie to bee kept in every Street."[36]

James offered two public safety imperatives for building in brick: the prevention of fire, and the preservation of timber needed for the construction of naval ships.[37] But he coupled these with an interconnected aesthetic and socio-demographic goal. As a 1607 proclamation explained, the increased

[30] Paul Griffiths, *Lost Londons* (Cambridge: Cambridge University Press, 2008), 54.

[31] Valerie Pearl, "Change and Stability in Seventeenth-Century London," *London Journal* 5 (1979): 17n40.

[32] W. H. Overall and H. C. Overall, eds., "Buildings," in *Analytical Index to the Series of Records Known as the Remembrancia 1579-1664* (London: EJ Francis 1878), 41–51.

[33] London Metropolitan Archive, Rep. 20, fo. 136 (as quoted in Griffiths, *Lost Londons*, 51).

[34] James F. Larkin and Paul L. Hughes eds., *Tudor Royal Proclamations: The Later Tudors (1553-1587)* (New Haven: Yale University Press, 1969), 2:466, no. 649.

[35] Larkin and Hughes, *Stuart Royal Proclamations,* no. 78.

[36] Ibid., no. 51.

[37] Ibid., nos. 51, 78.

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building costs associated with more expensive materials and standards would not "only adorne and beautifie his said City," but also make it affordable only to "persons of some abilitie." On this issue, the same proclamation was even more blunt when it tied a ban on the subdividing of houses "into several Tenements" to the desire to stem the "surcharge of people, specially of the worse sort."[38]

Neither proclamation alluded to the property interests that stood to benefit from the proclamations, nor could it. As Lord Chancellor Ellesmere stated in the context of a building prosecution brought in Star Chamber in 1607: "the prerogative meddles not with meum et tuum; the kinge Can not take my lande or goods & give it to another, but where the Common state or wealthe of the people or kingedome require it, the kinge's proclamacion bindes as a lawe."[39] All the same, it appears that the private complaints of neighbors could prompt the prosecution of building violations.[40]

The overlap between health and safety rationales and private property interests was even clearer in the case of the starch proclamations.

Starch

The spread of starch manufacturing in the early seventeenth century prompted neighbor disputes like those associated with new buildings. First introduced to London from Holland during the 1560s to support an upper-class fashion of wearing stiffened ruffs, starch-making quickly took root, first in London, and then in other urban areas, as popular and profitable industry. Using wheat and other grains as raw material, starch-making required little space, equipment, or other capital investment and so could be performed as a home industry, in backyard sheds, often as a source of supplementary income.[41] This land-use pattern proved problematic because the neighbors of starch houses were soon engulfed in noxious stench due to the emission of acetous vapors from fermented grain residue.[42] The severity of the problem is evident in the recurrent, and at times vociferous, complaints directed at starch producers both in Britain and France into the nineteenth century.[43]

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[38] Ibid., no. 78.

[39] John Hawarde, *Les Reportes Del Cases in Camera Stellata*, ed. W. Paley Baildon (London: 1894), 329.

[40] For instance, when Sir John Holles was brought before Star Chamber and fined £200 for a building violation in Westminster in 1597, it was after "one of the attorneys" at the nearby Clement's Inn persuaded Coke, who was then attorney general, to act. John P. Ferris and Ben Coates, "Holles, Sir John (c.1567-1637), of Haughton, Notts. and Lincoln's Inn Fields, Mdx. ...," in *The History of Parliament: The House of Commons 1604-1629,* ed. Andrew Thrush and John P. Ferris (Cambridge: Cambridge University Press, 2010).

[41] Joan Thirsk, *Economic Policy and Projects: The Development of a Consumer Society in Early Modern England* (Oxford: Clarendon Press, 1978) 84; and Ayesha Mukherjee, *Penury into Plenty: Dearth and the Making of Knowledge in Early Modern England* (London: Routledge, Taylor and Francis Group, 2015) 161.

[42] Thirsk, *Economic Policy and Projects*, 92.

[43] A petition submitted around 1730 from residents living outside Paris described the stench from starch as so foul that "it rotted meat." The problem was such, the petition warned, that left unaddressed, "this noisome smell would, in time, provoke revolt and disorder." Alan

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The fetid smells were no doubt highly unpleasant, but their meaning was also colored by the prevalent belief that stenches from decaying animal and vegetable matter could spread disease, most dreadfully plague.[44] In the absence of effective customary means of redress, impacted residents turned to the king and Council. In his 1607 starch proclamation, James alluded to the "Complaints and Certificates" that reached him from various areas, especially London, as to "exceeding annoyance," suffered by those who lived near places where starch was made "by reason of the noisome stench, and unsavourie smells."[45] He by and large repeated this language in two separate starch proclamations in 1610.[46]

Both in 1607 and 1610, the reference to the noisome character of the smell was followed by carefully crafted language suggesting a potential but less than certain connection with disease. The 1607 proclamation, written in the midst of a plague epidemic, described the smells as a source of "infectious aires [which] *cannot but* encrease most contagious Sicknesses and diseases, especially in times of common Infection."[47] Using similarly tentative language, a 1610 proclamation stated that the noisome scent was "*conceived to be* no small cause of the breeding and nourishing of the plague."[48] As this suggests, absent health concerns, the unpleasant nature of the smell might not have provided the requisite public health or safety rationale for prerogative regulation of starch-making.

In fact, stench appeared only as a secondary justification for prerogative regulation of starch. Instead, it was the need to curtail the waste of scarce edible grains for the manufacturing of a luxury good that served as the leading rationale. As the 1607 proclamation complained, "the waste of Corne spent and consumed in the making of this Stuffe...is so excessive as it is not fit to be spared from peoples Food, to serve in so vaine and slender an use."[49] As a solution, that proclamation decreed that no starch be made of wheat "but onely of cleane Branne, and such like courser stuffe."[50] In 1608 James allowed for "decayed and mustie Wheate," in addition to bran and other inedible grains to be used.[51] But in 1610, he prohibited "making of Starch of any kinde of stuffe whatsoever," citing "the late dearth and scarcities of Corne and Graine," in justification.[52]

Williams, *Police of Paris, 1718-1789* (Baton Rouge, LA: Louisiana State University Press, 1979), 271–72. Starting in 1744, all French starch manufacturers were required to comply with a list of restrictions related to their process and location and were excluded from operating inside Paris. Brian W. Peckham, "Technological Change in the British and French Starch Industries, 1750-1850," *Technology and Culture* 27 (1986): 34, 36.

44 Paul Slack, *The Impact of Plague in Tudor and Stuart England* (London: Routledge, 1985), 27.

45 Larkin and Hughes, *Stuart Royal Proclamations,* no. 75.

46 Ibid., nos. 107, 112.

47 Ibid., no. 75 (emphasis added).

48 Ibid., no. 112 (emphasis added).

49 Ibid., no. 75.

50 Ibid.

51 Ibid., no. 86.

52 Ibid., no. 107.

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Under the 1607 starch proclamation, James granted specially appointed royal commissions the right to survey all houses where starch was produced. Working together with local magistrates, the commissioners were assigned two primary tasks: ensuring that no starch was made of wheat, only of bran; and that the process took place only in "fit places," so as not to cause "annoyance and offence."[53] In other words, this was, in part, a regulatory scheme geared at greater separation of starch manufacturing from residences.

In highlighting the overlapping public and private benefits of the building and starch proclamations, I do not question the sense of crisis that population growth in London precipitated, or the sincerity of the belief that starch making was a wasteful use of grain or a potential source of disease. Neither do I wish to deny the self-serving fiscal and political reasons that James had for regulating new buildings and starch.[54] But in addition to both, and most important for the purpose of the present discussion, centralized regulation of buildings and starch benefitted private landowners who wished for greater protection than existing local law provided. This factor is the first of two preliminary links between the *Case of Proclamations* and *Aldred's Case.* The second, to which the discussion turns next, is Parliament's almost complete refusal to enact building and starch legislation in the decades leading up to the *Case of Proclamations.*

Legal Ideology and the Failure of Starch and Building Bills in Parliament

Parliament's resistance to building and starch legislation

When London officials first turned to Elizabeth for help in curtailing new buildings, the Queen's Royal Council responded that "the whole subject should be submitted to Parliament for redress."[55] But as Parliament was not in session, the Queen went ahead and issued the 1580 building proclamation as a short-term measure, "as time may now serve until by some further good order to be had in Parliament."[56] Parliament was in session again in 1581, 1584, 1586, and 1589, but it took until the Parliament of 1592–93 for a building statute to be enacted. The statute, like the Elizabethan proclamation, prohibited new buildings as well as subdividing in London and its surroundings.[57] The 1593 statute expired in 1601, after Parliament refused to extend it.[58] In 1604, when James convened his first Parliament, a building bill failed to pass.[59] Next, in the 1606–7 session of Parliament, a bill to "restrain the Multitudes of unnecessary and inconvenient Buildings" made it through the

[53] Ibid., no. 75.

[54] Ibid., no. 75. Under one long-entrenched perspective, the building and starch proclamations derived solely from James's greed and desire for power. For a recent example see Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 45.

[55] Overall and Overall, "Buildings," 99.

[56] Larkin and Hughes, *Tudor Royal Proclamations*, no. 649.

[57] 35 Eliz. 1, c. 6 (1592-93).

[58] Barnes, "Prerogative," 1360–61.

[59] 1 H.C. Jour. (1604) 180-81, http://www.british-history.ac.uk/commons-jrnl/vol1/pp180-181.

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House of Lords, but not the Commons.[60] Subsequent building bills submitted under both James and Charles I similarly failed.[61] The short-lived 1593 building statute would be the sole one to make it through Parliament, until a statute enacted in the aftermath of the Great Fire of 1666.[62]

Bills aimed at restricting starch manufacturing faced similar difficulties. The first such bill was unsuccessfully promoted by William Cecil, Elizabeth's chief advisor and Lord Treasurer in the Parliament of 1585–86.[63] Following this failure, Cecil changed course and opted for a monopoly as a substitute for a ban. In 1588, he granted the exclusive right to import, make, and sell starch to a patentee, who, in addition to paying the crown for this privilege, was obligated, in an effort to preserve edible grains, to produce starch only from bran.[64] After the first starch patent expired, Elizabeth issued a second one in 1594, and then again in 1598.[65]

The starch patent was harshly criticized in the 1601 Parliament and was subsequently abolished together with a number of others in a compromise that the queen agreed to in an effort to defuse an exceptionally heated parliamentary protest.[66] Next, a bill "For Redress of sundry Abuses in making of Starch," was presented in Parliament in 1604, with the goal of obtaining parliamentary authorization for a new starch company.[67] After that bill was put off until the next session, James granted an exclusive patent for the making and selling of starch in 1605.[68] In 1607, a bill that prohibited the manufacturing of starch from wheat was once again rejected.[69]

Resistance to the building bills likely emerged from the ranks of the property owners who wished to build or subdivide, as well as from the many trades and professions whose members profited from construction, including not only craftsmen, but also entrepreneurs and lawyers. Some members of Parliament were likely themselves variously invested in building. Pressure from starch makers, as well as the grocers who marketed the product, similarly helped impede the enactment of starch restrictions in Parliament.[70] Economic interests were not all on one side, however. As has been already discussed, starch houses and new buildings adversely affected the property of their neighbors,

[60] 1 H.C. Jour. (April 27, 1607) 2nd Scribe, http://www.british-history.ac.uk/commons-jrnl/vol1/27-april-1607-2nd-scribe.

[61] 1 H.C. Jour. (1624) 711, http://www.british-history.ac.uk/commons-jrnl/vol1/p711.

[62] 18 and 19 Car. 2, c 8.

[63] Maurice F. Bonds ed., *The Manuscripts of the House of Lords: Addenda 1514-1714* (London: Her Majesty's Stationery Office, 1962), 20–21 (3217, March 26, 1586, Recusants Bill).

[64] E. W. Hulme, "The History of the Patent System under the Prerogative and at Common Law," *Law Quarterly Review* 16 (1900): 49.

[65] Ibid; and Larkin and Hughes, *Tudor Royal Proclamations,* no.794.

[66] Harold G. Fox, *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto: University of Toronto Press, 1947), 76–78.

[67] Rudolph W. Heinze, *The Proclamations of the Tudor Kings* (Cambridge: Cambridge University Press, 2008), 248; and 1 H.C. Jour. (1604) 252, https://www.british-history.ac.uk/commons-jrnl/vol1/p252 (mentioning "B[ill] for Redress of sundry Abuses in Making of Starch").

[68] Heinze, *Proclamations*, 248.

[69] Ibid.; and 1 H.C. Jour. (1604) 376, https://www.british-history.ac.uk/commons-jrnl/vol1/pp376-377.

[70] Heinze, *Proclamations,* 248.

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whether due to noxious smells, crowding, or the obstruction of air and light. These neighbors, not infrequently, belonged to the upper echelons of London society. If they nonetheless failed to secure statutory protection, it may be due, as Coke had suggested, to legal ideological concerns.

"[H]olden dangerous": Coke on legislative interference with custom

In explanation of why Parliament allowed the 1592–93 building statute to expire, Coke submitted in his *Third Institute* that it was due to it "being holden dangerous."[71] Standing alone, the cryptic reference to the statute's presumed danger would be difficult to decipher. Elsewhere, however, Coke was clear on what he meant by dangerous legislation. As he wrote in the preface to Part 4 of his *Reports*: "for any fundamental point of the ancient common laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of them *is most dangerous*; for that which hath been refined and perfected by all the wisest men in former successions of ages, and proved and approved by continual experience to be good and profitable for the common wealth, cannot without great hazard and danger be altered."[72] Coke echoed this warning in the introduction to his ninth report, in which he criticized two categories of statutes: those that gave rise to "dangers and difficulties" by detracting from the common law; and those that, in adding to the common law, left it "so fettered, that it is thereby very much weakened."[73]

Here and elsewhere, Coke's warnings against the danger of statutes spoke of those that interfered with the common law ("customs of the realm"), rather than of those that would disturb local customs. But the explanation he provided on the "great hazard" of altering that which "hath been proved and approved by continual expereience" suggested deeper qualms on the wisdom of legal change, meaning interference with custom as such.[74] Most importantly, the motivation behind Coke's repeated warnings against statutory legal change needs to be considered within the context of the continental trends noted earlier. Coke's argument on the deference to be accorded to law that has survived the test of time echoed language that defenders of custom across Europe had invoked since the later Middle Ages in opposition to government centralization.[75] An influential line of thought within that school distinguished between "reasonable" and "unreasonable" customs, with only the former having the force of law. Within this tradition, the rationality of any such custom had to

[71] Edward Coke, *The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Please of the Crown, and Criminal Causes* (London: E. R. Brooke, 1797), 204.

[72] Edward Coke, *The Fourth Part of the Reports of Sir Edward Coke …* (London: R. Gosling, W. Mears, W. Innys & R. Manby, T. Woodward, F. Clay, A. Ward, J. P. Knapton, T. Wooton, T. Longman, D. Browne, T. Osbornes, H. Lintot, & T. Waller, 1738), v–vi (emphasis added).

[73] Edward Coke, *The Ninth Part of the Reports of Sir Edward Coke …* (London: Joseph Butterworth & Son & J. Cooke, 1826), xxxvi.

[74] On Coke's aversion to legal change, see Glenn Burgess, *The Politics of the Ancient Constitution* (London: Macmillan, 1992), 22.

[75] Strauss, *Law,* 99.

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"be found to be so by knowledgable judges."[76] This, by and large, was also Coke's view. In his First Institutes, he said of the "diverse customes" of various lordships and mannors," that "whatsoever is not against reason may well be admitted and allowed." However, regardless of how long a custom had continued, "if it be against reason, it is of no force in law." Against reason, he then proceeded to underline "is not be understood of every unlearned man's reason, but of artificial and legal reason warranted by authority of law."[77] It was, in other words, the job of common law judges, rather than laymen of any rank or statuts, to determine when local customs were entitled to deference, and when not. It was on the latter point that Coke departed from humanist-influenced English contemporaries, notably Francis Bacon and Ellesmere who, as Glenn Burgess described it, "were in no doubt that laws could be altered, by authority, and did not think this a matter for regret."[78]

Coke's view of the relationship between common law and legislation was complicated and inconsistent.[79] It is immaterial, for our purpose, whether Coke believed that judges could declare statutes against common law to be void, as some have read *Bonham's Case* to suggest.[80] With respect to the Elizabethan building statute, he was clear that it was "made by authority of parliament."[81] What he seemed to question was the desirability of the building statutes (together with others that subordinated property to the common weal), rather than their validity. Coke was clear that he considered the Elizabethan building statute a regrettable example of statutory deviation from the common law when he wrote, as part of the Third Institute discussion, that with the building law no longer in force, "the ancient and Fundamental Common law is to be followed."[82] The building law, in other words, was an unwelcome, and happily short-lived, disruption of the common law. He summed up the pertinent common law rule as a prohibition against "the building of any edifice to a common nusance, or to the nusance of any man in his house, as the stopping of up of his light, or to any other prejudice or annoyance of him."[83] In other words, conflicts over new buildings ought to be addressed through the common law courts rather than parliamentary legislation.

[76] Ibid., 102, quoting the early sixteenth century author Ulrich Tengler.

[77] Edward Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton,* ed. Francis Hargrave and Charles Butler (London: J. W. T. Clarke, 1832), 1:62a.

[78] Burgess, *Politics,* 23.

[79] Glen Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven: Yale University Press, 1996) 174–76,186–87; J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions*, Baltimore: Johns Hopkins University Press, 2000) 154; Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge: Cambridge University Press, 2006), 213, 215; and William Searle Holdsworth, *Some Makers of English Law* (Cambridge: Cambridge University Press, 1966), 126.

[80] Edward Coke, *The Eighth Part of the Reports of Sir Edward Coke …* (London: R. Gosling, W. Mears, W. Innys & R. Manby, T. Woodward, F. Clay, A. Wards, J. & P. Knapton, T. Wooton, T. Longman, D. Browne, T. Osborne, H. Lintot & T. Waller, 1738), 107. See discussion in Tubbs, *Common Law Mind,* 155–56.

[81] Coke, *Third Part of the Institutes*, 204.

[82] Ibid.

[83] Ibid., 201.

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Coke, as mentioned, attributed the expiration of the 1592 statute (and by implication the subsequent absence of building legislation) to the ideological predisposition ("holden dangerous") of the Parliament of 1601. Whether in this Coke was simply extrapolating from his own perspective or reporting on what he actually knew of that Parliament is uncertain. Support, for Coke's assertion on the legal-ideological inclinations of that Parliament can be found in the tenor of the protest over monopolies during that same session. The driving force behind this protest was the lawyers, who comprised nearly a quarter of the Commons membership during that time.[84] In part, their demand was for monopolies to be subject to common law, rather than prerogative courts, a demand to which Elizabeth ultimately consented.[85] The expiration of the Elizabethan building statute during the same Parliament gives credence to Coke's "holden dangerous" argument.

The salience of legal and political ideology in early Stuart parliaments has been the subject of lively historiographical debate. The long-prevailing view that the early Stuart era was rife with internal conflict with the parliaments of the time existing as forums of anti-royalist opposition was challenged by a body of scholarship starting in the 1970s. A key argument of this revisionist school has been the existence of general agreement between crown and Parliament on the core political issues of the day.[86] With this assumption in place, legal and political ideologies were by and large deprived of explanatory power. This line of argument was, in turn, met by a group of scholars who qualified the revisionist claim on consensus and underscored divisions in early Stuart England over "intertwined, fundamental questions of religion and politics."[87] In the words of Johann Sommerville, "differences of constitutional principle contributed to political conflict, especially when they were applied to issues involving property and taxation."[88]

While I find the latter perspective persuasive, the role of legal ideology in stemming building and starch legislation is tangential to my argument. Coke's belief in the danger of building and starch legislation suffices for my purpose.

[84] Andrew Thrush, "The Composition of the House of Commons," in *The History of Parliament: The House of Commons 1604-1629,* ed. Andrew Thrush and John P. Ferris (Cambridge: Cambridge University Press, 2010), accessed June 6, 2022 http://www.histparl.ac.uk/volume/1604-1629/survey/v-composition-house-commons.

[85] Thomas B. Nachbar, "Monopoly, Mercantilism, and the Politics of Regulation," *Virginia Law Review* 91 (2005): 1331.

[86] See, for example, Conrad Russel, "A Parliament in Early Stuart England," in *Before the English Civil War: Essays on Early Stuart Politics and Government,* ed. Howard Tomlinson (London: Macmillan Press, 1983). For an overview of the revisionist literature and responses to it, see Richard Cust and Ann Hughes, "Introduction: After Revisionism," in *Conflict in Early Stuart England: Studies in Religion and Politics 1603-1642,* ed. Richard Cust and Ann Hughes (London: Longman, 1989).

[87] Cust and Hughes, "Introduction: After Revisionism," 26.

[88] Johann P. Sommerville, "Ideology, Property and the Constitution," in *Conflict in Early Stuart England: Studies in Religion and Politics 1603-1642,* ed. Richard Cust and Ann Hughes (London: Longman, 1989) 49.

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The Parliament of 1610 and the Case of Proclamations

The purported divergence of England's constitution from continental trends was a recurrent and dominant theme throughout the Parliament that convened in February 1610 and dispersed in November that year. Within weeks of the opening of Parliament, the Commons appointed a committee to investigate *The Interpreter*, a book that John Cowell, the Regius Professor of Civil Law at Cambridge, had published in 1607. Most controversial was Cowell's statement that while by custom English kings usually made law with the consent of Parliament, the "King of England is an absolute King," and as such could choose to override Parliament at his discretion.[89] In an effort to diffuse the controversy, James delivered a speech in which he distanced himself from Cowell's ideas and followed with a proclamation that suppressed all publication and reading of the book.[90]

The Commons' constitutional anxieties ignited again by May over the crown's use of extra-parliamentary taxes, or impositions. A petition that James received in May 1610 voiced the "General Conceit," that the reasoning of *Bates's Case* "may be extended much farther, even to the utter Ruin of the ancient liberty of this kingdom, and of your Subjects Right of Propriety of their Lands and Goods."[91] Similar fears were soon thereafter voiced in opposition to proclamations during the same Parliament.

The Commons' Proclamation Petition

In a petition submitted to the king in July 1610, the Commons expressed a "general fear conceived and spread amongst your Majesty's people, that proclamations will by degrees grow up and increase" so as in time "to bring a new form of arbitrary government upon the realm." The petition then outlined the various ways in which recent proclamations, notably those dealing with buildings and starch, presented such a threat.[92]

The complaints focused in part on mode of enforcement and legal process. The 1607 starch proclamation was said to have violated the law in delegating the power of punishment to officials "who have no authority to inquire, hear, and determine of those offenses," and imposing "penalties, in form of penal statutes." Both the building and starch proclamations were denounced for punishing "offenders in court of arbitrary discretion, as Star Chamber."[93] But in addition to matters of process, the Commons raised notable substantive objections. Two building proclamations, those of 1603 and 1605, were criticized for "touching the freehold livelihood of men." Likewise, the 1607 starch

[89] Cited and discussed in John Baker, *The Reinvention of Magna Carta, 1216-1616* (Cambridge; Cambridge University Press, 2017), 392.

[90] Johann P. Sommerville, *Royalists and Patriots: Politics and Ideology in England, 1603-1640,* 2nd Ed. (London: Longman, 1999), 115–17.

[91] 1 H.C. Jour. (1610) 431, https://www.british-history.ac.uk/commons-jrnl/vol1/pp431-432.

[92] Elizabeth Read Foster, *Proceedings in Parliament 1610* (New Haven: Yale University Press, 1966), 2:259.

[93] Ibid.

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proclamation was given as example of "proclamations importing alteration of some points of the law, and making new," in that it gave "a warrant to any officer or subject to seize starch, and to dispose or destroy any stuff," and restrain "all men not licensed etc. to make any starch."[94]

James responded to the petition with an ambiguous speech in which he acknowledged that proclamations "are not of equal Force, and in like Degree, as Law." He insisted, however, on his prerogative to use proclamations "to restrain and prevent such Mischiefs and Inconveniences, as We see growing in the Common Weal, against which no certain Law is extant, and which may tend to the great Grief and Prejudice of Our Subjects, if there should be no Remedy provided until Parliament."[95] The language seemed to have been carefully chosen with an eye to avoiding a direct confrontation over the *salus populi* principle. But Ellsemere's notes on proclamations, likely written around that time, made no such effort: "[T]he kinge by his p[re]rogatiue may restreyne things agaynst the Co[m]men weale, as well In Tanto, as in Toto, And maye also Restreyne the Libertie of his subjects, in things that are Against the co[m]men weal sic distingue. And what is against the Co[m]men weale the king + his Cou[n]sell, are to Judge + determyne." He specifically included among the matters that could be ordered by king "New buyldings, dyvidinge of houses, [and] inmatis [inmates]."[96]

To diffuse the controversy, James indicated in his speech that he took to heart the complaint regarding an increase in the number and reach of proclamations and promised to consult with the Privy Council and the judges and reform any proclamations "where cause shall be found."[97] In keeping with this plan, Coke, who was then chief justice of the Court of Common Pleas, was called before the Privy Council on September 20, 1610. Coke's report of what transpired would come to be known as the *Case of Proclamations* (1610).[98]

The Case of Proclamations

"[I]f the King by his proclamation, may prohibit new buildings in and about London" or "prohibit the making of Starch of Wheat" was the issue on which Coke was asked for advice.[99] The intent, Coke's report suggests, was for him to provide a quick and definitive answer upholding the legality of the proclamations in question. The dominant voice in the room was that of the Lord Chancellor, meaning Ellsemere, whose advice to the prevaricating

[94] Ibid. The coupling of centralized legislative and executive powers was a defining feature of emergent continental police regimes. Quoting Marc Raeff, "positive law as embodied in ordinances tended to blur the distinction between law and administrative regulation." Raeff, *Well-Ordered Police State,* 150. The option of following this model loomed through much of the Tudor era, splitting English elites. The use of proclamations as means of bypassing the ordinary courts was among the objectives of Henry VIII's Act of Proclamations (1539) and the criticism it precipitated. G. R. Elton, "Henry VIII's Act of Proclamations," *The English Historical Review* 75 (1960): 208-22.

[95] 2 H.L. Jour. 659 (July 23, 1610), https://www.british-history.ac.uk/lords-jrnl/vol2/pp656-662.

[96] MS 456, Ellesmere Collection, Huntington Library.

[97] Ibid.

[98] 77 Eng. Rep. 1352; 12 Co. Rep. 74 (K.B.).

[99] Ibid., at 1352.

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Coke was for the "Judges to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects."[100] The sentiment was echoed by others, all of whom "concluded that it should be necessary at that time to confirm the King's prerogative."[101] Nonetheless, Coke asked for time to consider the question, and an opportunity to consult with other judges but indicated, as a preliminary matter, that "the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament."[102] This, as Coke reported it, was by and large the final answer that the Privy Council received later that fall after three more judges were added to a panel formally appointed for this purpose. Notably included among them was Thomas Fleming, Chief Justice of King's Bench, and the earlier author of *Bates's Case*.

Besides Coke's, there survive two additional reports of the judges' advice on proclamations, both of which complicate aspects of Coke's account. The first is a document entitled "Certain resolutions concerning proclamations" and dated October 26, 1610. The manuscript, which Esther Cope identified as the likely text of the actual advice that the judges delivered, by and large parallels Coke's report in holding that the king could not create by proclamation "anything to be an offence which was not an offence before against the laws of this realm."[103] But in addition, as Rudolph W. Heinze has highlighted, the "Certain resolutions" language deviated from Coke's report in suggesting a right for the king to rule via proclamation in times of necessity.[104]

The second document qualifying Coke's report was authored by a Common Pleas justice (Peter Warburton) and overlooked until recently.[105] Whereas Coke reported complete agreement among the four participating judges, as Warburton described it, three of the judges answered that disobedience of a royal proclamation was a contempt punishable by fine or imprisonment. Only Coke "held strongly" that absent an offense in common law or under an act of Parliament, no such punishment could be meted out. Sir John Baker offers two possible explanations for the discrepancy. The first is the possibility that Coke's report reflected his desired, rather than actual, outcome. The second is that Coke ultimately brought the other judges to his side, a conclusion toward which Baker is more inclined based on the emphatic prohibition on making new law through proclamations in the "Certain resolutions" document.[106] A compromise included both in the latter and in Coke's report allowed for aggravated punishment of existing offenses via proclamation.[107]

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[100] Ibid., at 1353.

[101] Ibid.

[102] Ibid.

[103] MS 1576, fol. 18, Harley Collection, British Library, printed in Esther S. Cope, "Sir Edward Coke and Proclamations, 1610," *American Journal of Legal History* 15 (1971): 221.

[104] Heinze, *Proclamations,* 256.

[105] Warburton's reports, MS. Li.5.25, fol. 160v, Cambridge University Library, translated and discussed in Baker, *Reinvention,* 395.

[106] Ibid.

[107] Ibid.

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The *Case of Proclamations* would go on to acquire canonical stature, but, as Cope has shown, it remained unpublished and unknown until the 1650s. Having failed to obtain the judicial imprimatur it desired, the government ignored, and perhaps suppressed, the one it received.[108] Nonetheless, in depriving proclamations of judicial validation like the one that impositions obtained under *Bates's Case,* the *Case of Proclamations* denied the *salus populi* principle a crucial foothold.

Most importantly for our purpose, the *Case of Proclamations* offered nothing to the neighbors of new buildings and starch on how, with the king unable and Parliament unwilling to intervene, the land-use injuries they suffered were to be redressed. Enter *Aldred's Case.*[109]

Sic Utere, Centralization, and *Aldred's Case*

Whereas Coke opposed the use of centralized legislation banning new buildings and other offensive land uses to override the jurisdiction of customary courts, the solution he favored likewise entailed a form of centralization, albeit via common law courts. To stem the demand for land-use statutes, Coke turned to the practice that defined the common law at its inception: expanding the jurisdiction of the royal courts over matters traditionally subject to customary and other local adjudication.[110]

Going back centuries, the primary customary instrument for regulating land use and polluting trades was presentment for "common nuisances" before leets, wardmotes, and other local courts.[111] The degree of protection that this system accorded landowners against injury from other land uses was limited in two ways. First, and most important, were governing customs and norms that precluded presentment of certain activities such as polluting trades when these were considered necessary for the larger good or because of the political influence of a particular craft. Second, even when presentments did take place, in the absence of real enforcement powers, the ability of the

[108] Cope, "Coke and Proclamations," 218.

[109] In saying that Coke conceived of *Aldred's Case* as a response to the interests of landowners who benefitted from the starch and building proclamations, I do not mean to suggest that he intended the case as an urgent intervention in an immediate crisis. Evidence to the contrary comes from the fact that Coke delayed the publication of the case until his ninth report (1613), even as he included other cases from Michaelmas 1610 in his eighth report (1611). The reasons for this delay are unknown but may well have included Coke's desire to avoid a political provocation during a sensitive time. It seems relevant that Coke similarly delayed the publication of *Baten's Case*, which, as will be discussed, was an assize of nuisance decision relating to new buildings in London. Both cases together positioned the common law as the desirable instrument for addressing the long-standing land-use problems that had generated pressure for royal intervention.

[110] R. C. Van Caenegem, *The Birth of English Common Law* (Cambridge: Cambridge University Press, 1988), 17–18.

[111] F. J. C. Hearnshaw, *Leet Jurisdiction in England* (Southampton: Cox and Sharland, 1908) 43–78; Sidney Webb and Beatrice Webb, *English Local Government from the Revolution to the Municipal Corporations Act: The Manor and the Borough* (London: Longmans, 1908) 1:21–27; and Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge University Press, 2008) 267.

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leets to restrict new development or remove offensive trades was quite limited.[112] It was for this reason that, notwithstanding repeated presentments, the London wardmotes were powerless against the subdivision of buildings. Similar political dynamics appear to have impeded the ability of presentment juries to abate the presence of pigs in towns.[113]

For injured landowners who wished for greater protection against polluting trades and other injurious land uses, the option of bypassing the leets in favor of criminal presentment of common nuisances before the common law courts was absent before the seventeenth century.[114] But going back to the days of Henry II, the royal courts had provided freeholders with an alternative forum to that of the customary courts for the adjudication of private land disputes.[115] It was within this larger context that there developed a writ, later known as the assize of nuisance, via which litigants could abate non-trespassory interferences with free tenement such as the diversion of water courses and the building of banks. Disputes stemming from sensory interferences with the enjoyment of land due to vibrations, smoke, or stench, remained, however, the domain of local courts.[116] Starting in the mid-1300s, there developed a new category of trespass writs to be known as "actions on the case." The focus of these actions was wrongdoing, an open-ended, flexible formula geared at allowing for common law adjudication of matters that were earlier handled by local courts.[117] Early in the Tudor era, to bring greater flexibility to the common law's writ system, and to counter the rise of equitable jurisdictions, the lawyers expanded the reach of case actions.[118] Among the issues newly brought under the heading of case during that time were neighbor disputes concerning sensory discomfort.[119] Damages were the sole remedy available under case actions, in contrast to the assize of nuisance where abatement could be obtained. Whether action on the case could be brought where there existed a remedy under the assize of nuisance was a source of disagreement between the Court of Common Pleas and King's Bench during much of the sixteenth century. But by the start of the seventeenth century, action on the case and the assize of nuisance were recognized as overlapping remedies,

[112] F. J. C. Hearnshaw described the court leet as "incurably weak on its executive side…its eye is keen, its ear is quick, its nose is sensitive, but its arm is feeble." *Leet Jurisdiction,* 139.

[113] As one Southampton jury put it in 1551, "if the 'masters of the town' persist in keeping hogs in the town…the common people say 'why shullde nott we kepe hoggs who are poore as well as they who are ryche.'" Southampton Record Society, *Court Leet Records*, vol. 1, bk. 2, ed. F. J. C. Hearnshaw and D. M. Hearnshaw (Southampton: Gilbert, 1905), 22.

[114] John Robert Landrey Milton, "The Concept of Nuisance in English Law" (PhD diss., University of Natal, 1978), 149, http://hdl.handle.net/10413/393. Over the course of the seventeenth century, the common nuisance concept was gradually absorbed into the common law. Ibid., 149–55.

[115] John Baker, *An Introduction to English Legal History,* 5th ed. (Oxford: Oxford University Press, 2019), 250–52.

[116] Ibid., 451–53.

[117] Ibid., 69–70.

[118] Baker, *Introduction to English Legal History,* 454–55; and David J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999), 95.

[119] John Baker, *The Oxford History of the Laws of England: Volume VI, 1483-1558* (Oxford: Oxford University Pres, 2003), 777.

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with the former clearly gaining the upper hand.[120] Despite this, for the purpose of seeking abatement, the assize of nuisance, or the related writ of *quod permittat*, remained an option.[121]

It was as the latter that *Baten's Case* came before Coke (in his capacity as chief justice of Common Pleas) during the same 1610 Michaelmas term as the *Case of Proclamations* and *Aldred's Case*. It concerned a dispute over a new building in London and hence spoke directly to the concerns behind the building proclamations. The plaintiff, we are told, lived in "the Parish of St. Clements Danes without Temple Bar," in other words, squarely within the rapidly crowding West End.[122] He successfully argued that a new building that hung over his property should be abated as a nuisance. It was not necessary, as Coke reported it, for the plaintiff to allege or prove any specific damage (such as falling rain, or obstruction of air). The overbuilding per se sufficed (in part because it prevented the plaintiff from building higher). In support, Coke cited the maxim: *cujus est solum ejus usque ad coelum* (Whose is the soil, his it is up to the sky).[123]

Star Chamber issued several demolition orders against violators of the building proclamations by 1610.[124] More often, however, prosecutions resulted in the imposition of fines. The crown's frequent willingness to settle for payments meant that the offending buildings remained in place, to the resentment of their neighbors. Notably, Temple Bar, the location of Baten's house, was the site of one such controversy by 1616.[125] In easing the evidentiary burden of plaintiffs who wished to remove a nuisance via *quod permittat* writs (assize of nuisance), Coke increased the attractiveness of common law litigation over prosecutions before Star Chamber.[126] In a note to the reader, which he added to his report, Coke specifically described self-help, meaning abatement by the aggrieved party, as one of the two options available for the redress of nuisance.[127] The other was action directed at the recovery of damages. For the latter, he offered the example of *Aldred's Case*.[128]

Aldred's Case

The dispute to be known as *Aldred's Case* began in the summer of 1609 as an action on the case in the Norwich Assizes. Coke presided over the trial together

[120] Baker, *Introduction to English Legal History,* 454–55; and Ibbetson, *Historical Introduction*, 95–106.

[121] Milton, "Concept of Nuisance in English Law," 101.

[122] *Baten's Case,* 77 Eng. Rep., at 810.

[123] Ibid., at 811.

[124] Barnes, "Prerogative," 1347.

[125] Griffiths, *Lost Londons*, at 50.

[126] This was the second of two cases in which Coke addressed the availability of abatement as a remedy against interference from new buildings. The first was his report on *Penruddock's Case* (1598) 77 Eng. Rep. 210; 5 Co. Rep. 100b.

[127] *Baten's Case*, 77 Eng. Rep., at 812.

[128] *Baten's Case*, in Coke, *Ninth Part of the Reports*, at 95nB ("Vide . . . Aldred's Case, post. P. 103"). https://hdl.handle.net/2027/nyp.33433009487152?urlappend=%3Bseq=150%3Bownerid=27021597768693680-158

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with another judge. The plaintiff, William Aldred, complained of two separate injuries to his property: the obstruction of the windows and lights of his house due to the construction of a high pile of wood; and the "corrupt and unwholesome smells" coming out of Benton's pigsty, a stench so bad, it was alleged, that no person could stay in the house "without danger of infection."[129] The jury found for the plaintiff on both nuisances, and damages were awarded. The defendant then brought a motion for arrest of judgment before the Court of Common Pleas, where Coke once again presided. In addition to Coke's report of the appeal, there also survives an anonymous report of the proceedings.[130]

As Coke reported it, Benton's defense was that a "house of hogs was necessary for the sustenance of man: and one ought not to have so delicate a nose, that he cannot bear the smell of hogs."[131] In answer Coke offered his reading of two precedents dating back to Edward III and Henry VII. "[T]he building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calve skins and sheep skins so near the said water course that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it."[132]

What made pollution from such necessary trades actionable, Coke then pronounced, was an underlying "rule of law and reason, sc. *Prohibetur ne quis faciat in suo quod nocere possit alieno; et sic utere tuo ut alienum non laedas*."[133] If *sic utere* could override an alleged right to raise pigs, notwithstanding their necessity, it would, through *a fortiori* reasoning, apply to luxury goods such as starch.

As already suggested in the introduction, the two separate injuries complained of in the case, obstruction of light, and stench, corresponded to those inflicted on neighbors by building and starch, respectively. Whereas the similarity between the barrier created by new buildings and a large wood pile seems straightforward, the analogy between pig raising and starch making is less evident.

Pigs were a long-standing source of conflict in towns across England, and a recurrent, and frequently futile, object of common nuisance presentments

[129] John Herne, *The Pleader; conttaining Perfect Presidents and Forms of Declarations, Pleadings...* (London: Henry Twyford, Thomas Dring, and Timothy Twyford, 1657), 180. The quoted text appears in Latin at the start of Coke's report.

[130] *Aldred v. Benton* (1610) (C.P.), MS 1192, fol. 206r-206v (formerly catalogued at MS 2069, fol. 206v), Harvard Law School, MS. add. 25209, fol. 211v, British Library, translated in John Baker, *Baker and Milsom Sources of English Legal History: Private Law to 1750* (Oxford: Oxford University Press, 2010), 659.

[131] *Aldred's Case*, 77 Eng. Rep. at 817.

[132] Ibid., at 821. Coke's statement on the actionability of lime-kiln smoke built on *Dalby v. Berch* (1330) Y.B. Trin. 4 Edw. III, fol. 36, pl. 26; 4 Lib. Ass. 3. Cited and discussed in Baker, *Sources,* 655n47. On the rule regarding the corruption of water from a lime pit for calf skins, Coke says that it was "adjudged in 13 (f) H. 7. 26. b." *Aldred's Case,* 77 Eng. Rep. at 816. This is likely a reference to *Prior of Christ Church, Canterbury v. Hore* (1493) CP 40/922, m. 244d; and Selden Soc. vol. 115, p. 176, translated in Baker, *Sources*, 644.

[133] *Aldred's Case*, 77 Eng. Rep. at 821. The Latin translates to "It is forbidden for anyone to do [or make] on his own land what may injure another; use your own without injuring others."

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before local courts.[134] As such, an action on the case relating to the stench of pigs would not have been unusual in any sense. Several considerations, however, support the hypothesis that the stench of starch was part of the larger subtext. To begin, Norwich, the site of this litigation, was a leading starch manufacturing area during that time.[135] Second, by the early 1600s, swine were closely associated with starch houses, because the grain residue these created made a fine meal for pigs, which in the case of large manufacturers might have numbered in the thousands.[136] But the most pertinent indication on the perceived relevance of starch to the case comes from *Aldred v. Benton,* the second report on the case mentioned previously. As described in that manuscript, in support of the lawfulness of making a hog-sty in a market town, the defendant's counsel offered by way of analogy, and as a matter of presumed fact, that "if someone sets up a starch-house next to [another's] house, no action lies." Two of the three sitting judges, Coke included, then "denied the case of the starch-house clearly," meaning that they made a point of refuting the suggestion that starch houses were not an actionable nuisance.[137] The disagreement between the plaintiff's counsel and the judges over the actionability of starch, during a case about pigs, shows, at the very least, an existing association between the stench of both activities. Perhaps from its inception, or at least by the time of the arrest motion, starch pollution, together with buildings, were the ultimate subtext of *Aldred's Case.*

Custom, reason, and Sic Utere

Coke considered the reasonableness of local customs to be the proper domain of common law adjudication, as already discussed. This meant that common law judges could void specific customary norms or claims of prescription. The local laws and customs that Coke considered particularly deserving of judicial scrutiny, David Chan Smith has written, permitted interference with private property in the name of the commonweal.[138] Squarely fitting within this category were norms allowing polluting trades to operate inside towns or near residences. As one judge put it in 1605 about the making of candles, the "needfulness of them dispenses with the noisomeness of the smell."[139] Five years later, Coke would rebut this notion in *Aldred's Case.*

The use of maxims, or nutshell summaries of legal principle, began with medieval lawyers and became a prominent feature of legal reasoning by

[134] E. G. Dawson, *A History of Lay Judges* (Cambridge, MA: Harvard University Press, 1960), 269.

[135] Sudha Shenoy, *Towards a Theoretical Framework for British and International Economic History* (Auburn, AL: Ludwig von Mises Institute, 2010), 482.

[136] Thirsk, *Economic Policy and Projects*, 91; and Hannah Velten, *Beastly London: A History of Animals in the City* (London: Reaktion Books, 2013), 27–28. Well into the nineteenth century, starch makers were known to feed large numbers of swine. John Ayrton Paris and John Samuel Martin Fonblanque, *Medical Jurisprudence* (London: W. Phillips, George Yard 1823), 1:332.

[137] *Aldred v. Benton*, at 659.

[138] David Chan Smith, *Sir Edward Coke and the Reformation of the Law* (Cambridge: Cambridge University Press, 2014), 164.

[139] *Rankett's Case* (1605) 2 Rolle Abr. 139 (KB), cited and translated in Baker, *Sources*, 661n69.

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Coke's time.[140] "A maxime," Coke wrote, "is a proposition, to be of all men confessed and granted without proofe, argument, or discourse." It is "a sure foundation or ground of art, and a conclusion of reason," and, as such, not to be disputed.[141] It was with an attempt to confer such inevitability on his conclusion in *Aldred's Case* that Coke invoked the *sic utere* maxim.[142]

The phrase "*alterum non laedere*" (not to injure another) appears near the start of Justinian's *Institutes*, as one of the three principles of law.[143] In its complete familiar version, however, the *sic utere* motto cannot be found until the later sixteenth century.[144] Christopher Wray, as counsel for the plaintiff, invoked the maxim in *Hales Case* (1569),[145] according to an anonymous manuscript printed in 1636. Titled *A briefe declaration for what manner of special nusance a man may have his remedy,* the document recounts an action on the case that Hales, a London resident, brought against a neighbor whose new house "stopped [his] lights."[146] As the *brief declaration* described it, the "defendant pleaded a custom of London for freeholders to build new houses which stopped their neighbours' lights at the side of their houses."[147] The validity of that custom was subsequently the central question on which Robert Mounson and Christopher Wray, representing the plaintiff, and Edmund Plowden and Roger Manwood, arguing for the defendant, disagreed. In support of the reasonableness of the purported London custom, Plowden offered that "houses are necessary for the sustenance of man" and Manwood that "our custom is for the maintenance of the city,"[148] to which Wray responded:

"I think the same is no good custom; for a custom is not against law and reason, but this custom of yours is against reason, and is in effect as if a man should

[140] Ian Williams, "Legal Maxims and Early-Modern Common Law," in *Law in Theory and History*, ed. Maksymilian Del Mar and Michael Lobban (Oxford: Hart Publishing, 2016) 180–205; Tubbs, *Common Law Mind,* 66, 173–78; and Smith, *Sir Edward Coke*, 159–60.

[141] Coke, *First Part of the Institutes*, 1:10b–11a, 67a.

[142] *Sic utere* is typically described as a maxim. For a recent example of this designation, see Baker, *English Legal History*, 5th ed. (Oxford: Oxford University Press, 2019), 455. As Coke himself did not describe *sic utere* as a maxim, however, the claim that he intended it as such requires justification. As Ian Williams has cautioned, Coke at times could use "a pithy Latin statement," to summarize an argument, rather than suggesting a maxim. Maxims were distinguished by two features: Formulations as "narrow rules of law," and a concern with "property alone." Williams, "Legal Maxims," 190, 197. *Sic utere*, both because it related to property, and because Coke described it in *Aldred's Case* as a "rule of law and reason," satisfied both criteria. 77 Eng. Rep. at 821.

[143] *"[I]uris praecepta sunt haec: honeste vivere; alterum non laedere, suum cuique tribuere"* (The precepts of law are these: to live honestly, to injure no one, [and] to give to each his own). B. Moyle, trans., *The Institutes of Justinian,* 3rd ed. (Oxford: Clarendon Press 1896), 3.

[144] Joshua Getzler, *A History of Water Rights at Common Law* (Oxford: Oxford University Press, 2004) 123-24; and Elmer E. Smead, "Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power," *Cornell Law Review* 21 (1936): 277.

[145] Sir John Baker dates the case under discussion (*Hales Case*) to 1569 based on its close similarity to a case decided that year in Queen's Bench. *Sources*, 652n41. Getzler describes *A brief declaration* as "possibly a moot case." *Water Rights*, 124n25.

[146] *Hale's Case*, at 652.

[147] Ibid.

[148] Ibid., at 654, 656.

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take my life from me, for these be the instruments to maintain and preserve man's life. And the law saith, *sic utere tuo ut alienum non laedas.* Therefore a custom against this precept is malus usus, and therefore *abolendus.*"[149]

It was Coke who next cited the maxim as counsel for the plaintiff in *Bland v. Moseley* (1587), an action on the case for interference with light.[150] The defendant pleaded a custom of "the city of York that anyone having land facing another's windows might build so as to obstruct the lights." In partial explanation of why the defendant could not rely on the alleged custom, Coke offered "in our case here, the old rule holds place, *sic utere tuo ut alienum non laedas*."[151] Though Coke won the case, CJ Wray appears to have declined Coke's invitation to cite the *sic utere* maxim.[152]

Sic utere's next known appearance was in a 1594 case that addressed the standard of liability for damages due to the collapse of a loaded floor in a warehouse. By one account, the maxim was cited by plaintiff's counsel (but not the judgement of the Exchequer) in support of the defendant's liability for damages regardless of fault.[153] By contrast, as Coke described it in his notebooks, the Exchequer judgment itself cited the maxim as the pertinent "rule of law."[154] Regardless, it would be Coke's report in *Aldred's Case* that would cement *sic utere's* elevation from an argument put forth by counsel to the applicable rule in a reported nuisance case.

Rather than custom or prescription, the defendant in *Aldred's Case* relied on the legality and necessity of hog sties as sufficient reason for allowing them in towns, "for one cannot be so tender-nosed."[155] As a matter of practice, pigs were a regular feature of English towns during that time, with local courts unable or unwilling to displace them. In lieu of a solution based on royal commissions and other forms of prerogative intervention, Coke relied on *sic utere* to bolster a common law alternative.

In placing the right of landowners to light and clean air above all competing economic interests, *Aldred's Case* could be read as indifferent to the larger social value of incompatible land uses and as such, absolutist in its protection of property rights. As the language previously quoted suggests, however, Coke did not reject the argument from necessity, but instead deemed it immaterial for the question before him, a question that revolved around the appropriate location, rather than the utility, of pigsties, lime kilns, glovers, or starch makers. The underlying principle was the need for polluting trades to be placed away from residences to more isolated locations (or at least away from the

[149] Ibid., at 654.

[150] *Bland v. Moseley* (1587) Harvard Law School MS. 16, fol. 402; Cambridge University Library MS. Ii 5. 38 fol. 249, translated in Baker, *Sources,* 657. See also Coke's account of the case in John Baker, *Reports from the Notebooks of Edward Coke* (Selden Society, forthcoming), 347b.

[151] *Bland,* at 657.

[152] *Bland,* at 658.

[153] *Edwards v. Halinder* (1594) 2 Leon 93, pl. 116 (Exchequer), in Baker, *Sources*, at 665.

[154] *Edwaardes v Holmenden* (1594); Baker, *Reports from the Notebooks*, 596b.

[155] *Aldred v. Benton*, at 659. Reference is made to a 1619 Common Pleas case in which the defendant justified the use of a hogsty against a nuisance action "by prescription." The outcome is not clear, but as the reference is attached to a report on *Aldred's Case*, the suggestion appears to be that the argument from prescription failed. Herne, *Pleader,* 180.

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houses of the well to do). In this, *Aldred's Case* converged with the stated intent of the 1607 starch proclamation to restrict starch making to "fit places," so as not to cause "annoyance and offence."[156] But whereas the proclamation envisioned for this purpose an administrative licensing process subject to the Crown, Coke's *Aldred's Case* put common law judges in charge.

Conclusion

Sic utere, understood within the four corners of the text of *Aldred's Case*, was a private-law principle entitling plaintiffs to recover for injuries created by their neighbors. The case made no mention of legislation or of the maxim as a constraint on statutory interference with private rights. There is nothing there to suggest that *sic utere* was juxtaposed against *salus populi* or to construe nuisance law as the constitutional alternative to continental police. Yet this is how *sic utere* came to be read by an influential Anglo/American jurisprudential school by the mid-1700s. The steps linking the legislation-constraining meaning of *sic utere* with its private-law origins in *Aldred's Case* have remained obscure. We are consequently left with two options. One is that the antithesis between *sic utere* and *salus populi* was superimposed after the fact by subsequent generations, and the other that it was implicit in *Aldred's Case* from the start.

In arguing for the latter, this article places the divisions over land-use legislation in early Jacobean England within the larger European context of the time, meaning debates over emergent models of police regulation. Under the latter, the organizing principle was the right of the ruler to override existing laws and privileges in the name of the common good. With this background in mind, the deeper stakes at issue in the conflict over building and starch regulation come into view. In the wake of *Bates's Case*, the larger status of *salus populi* under English constitutionalism was the volatile matter before the Parliament of 1610. Ultimately, I argue, it was that question that stood as the subtext of the *Case of Proclamations*. Against this backdrop, Coke's identification of *sic utere* as the applicable principle for resolving land-use conflicts implied rejection of *salus populi.*

Coke's target audience in *Aldred's Case* were the London elites who backed the building and starch proclamations, due to the failure of existing institutions to adequately protect them against injury from new buildings or the stench of starch. Support for this interpretation comes from the parallels between the land-use problems at issue in the *Case of Proclamations* and *Aldred's Case.* The message that Coke imparted in the process was that the desirable solution to land-use problems ran via the common law, rather than any form of social-change legislation. Coke's warning against the dangers of all forms of centralized land-use intervention, including parliamentary legislation, is key to the recovery of the origins of the *sic-utere/salus-populi* antithesis. In invoking property rights to override local institutions that tolerated injurious economic activities, *sic utere* performed a centralizing function, not unlike *salus populi*. But whereas the latter opened the door for expansive regulatory agendas, *sic*

[156] Larkin and Hughes, *Stuart Royal Proclamations,* no. 75.

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utere conditioned regulatory interventions on a judicial finding of a nuisance; that is, interference with property rights. Barred by implication were continental-inspired police reforms. In this, Coke's invocation of *sic utere* in *Aldred's Case* presaged the maxim's role as a substantive limit on the scope of the police power in subsequent centuries.

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