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JOHN LILBURNE AND THE CITIZENSHIP OF 'FREE-BORN ENGLISHMEN'*

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ABSTRACT. *John Lilburne's extensive writings were a major part of the pamphlet output of the Leveller movement. The apparent traditionalism of his language has obscured the extent to which he developed a radical line of thought. For Lilburne, all Englishmen are 'free-born'; his radicalism lies in his assertion that this free status is to be seen as political status. The phrase 'free-born Englishman' comes to be a signifier of a uniform and inclusive citizenship, and the word 'subject' drops out of Lilburne's vocabulary. He reinterprets the language of the English legal tradition – following the lead of Sir Edward Coke – to make a collection of 'liberties', 'franchises', and 'privileges' into a uniform set of citizen entitlements. His writing suggests varying and sometimes incompatible grounds for this citizen status: historical arguments, and arguments depending on different notions of positive law, are employed alongside appeals to divine or natural law. However, Lilburne's attachment to the English legal tradition persists, and is an effective vehicle for the politicized vision of the English nation which he wants to convey.*

John Lilburne was a charismatic figure who could rally impressive popular support in London. As one of the leaders of the Leveller movement which flourished from the mid-1640s in the period of uncertainty following the end of the first English civil war, he was in and out of prison repeatedly, and communicated his experiences and his political vision in his prolific pamphlet writings. Central to these was his self-depiction as a 'free-born Englishman.'

Lilburne's writing emerges out of the context of parliamentarian argument during and after the first civil war. There has been a tendency to classify political theories of the early to mid-seventeenth century in England by asking whether they resulted from historical or theoretical modes of thought.[1] This question has been particularly pressing with regard to the Levellers, who have been put at both ends of the spectrum (as historically minded defenders of an ancient constitution still largely embodied in the common law, or as natural law consent theorists

* Thanks are due to John Morrill and Quentin Skinner for generous help with earlier versions of this article, and to the anonymous readers of the journal for their constructive criticisms.

[1] Quentin Skinner, 'History and ideology in the English revolution', *Historical Journal*, 8 (1965), pp. 151–78; J. P. Sommerville, 'History and theory: the Norman Conquest in early Stuart political thought', *Political Studies*, 34 (1986), pp. 249–61. John Sanderson, '*But the people's creatures': the philosophical basis of the English civil war* (Manchester, 1989), p. 7, sees the historical and theoretical arguments as fused in parliamentarian argument and separated out only by the Levellers.

who broke away from a dependence on historical precedent), and in the middle (as theorists of the Norman yoke, harking back to heavily idealized Anglo-Saxon liberties).[2] It is surely worth asking how the Levellers have managed to be read so differently by different historians. The answer lies partly in the lack of uniformity between Leveller leaders, as well as in the habitual combining of different modes of argument which was characteristic of many civil war writers, including Lilburne and the other Levellers. In this article I will situate Lilburne's political thought in relation to the language of the common law, while acknowledging that the centre of gravity of his colleagues' thinking was much closer to natural law. This further raises the question of how their collaboration could have been so fruitful: I hope to suggest answers here too, showing how Lilburne's thinking, developed through common law language, offered a useful complement to the consent theory more consistently employed by his colleagues.[3]

The interpretation of the Levellers has turned on this question of the historical or theoretical basis of their thinking partly because that has been taken to be some measure of 'conservatism' or 'radicalism'.[4] The historical mode of thought, basing political prescription and analysis on the ancient constitution, has been linked to the use of the language of the common law, and has been taken to be inherently conservative for a number of reasons. Clearly, treating the past constitution, and the existing law which is said to preserve it, as ideal is unlikely to be a prescription for radical change; but also it is widely agreed that the common law was the almost unchallenged 'language' in which early Stuart politics was conducted: it would be those who wanted to change the basis of argument, presumably, who would see the need to move outside this consensual language.[5] These claims, however, need

[2] See below, section V.

[3] Roger Howell and David E. Brewster, 'Reconsidering the Levellers: the evidence of the *Moderate*', *Past and Present*, 46 (1970), pp. 68–86, emphasize the diversity and range of Leveller thought.

[4] 'Radical' is of course a modern term of evaluation; I use it to express the Levellers' formal, theoretical innovation – their changing of structures of thought – harnessed to their practical hopes of changing the form and bases of government. See J. C. Davis, 'Radicalism in a traditional society: the evaluation of radical thought in the English commonwealth, 1649–1660', *History of Political Thought*, 3 (1982), pp. 193–213, especially pp. 201–3, for constructive comments on the issue. Conal Condren, 'Radicals, conservatives and moderates in early modern political thought: a case of Sandwich Islands syndrome?', *History of Political Thought*, 10 (1989), pp. 525–42, is a provocative dismissal of the applicability of the term to early modern thought.

[5] Conrad Russell, 'The rule of law: whose slogan?', ch. 6 of his *The causes of the English civil war* (Oxford, 1990); Glenn Burgess, *The politics of the ancient constitution: an introduction to English political thought, 1603–1642* (Basingstoke, 1992). Burgess does not argue that the common law was the only language available for talking about politics, but that it formed 'a self-sufficient language for the discussion of *domestic* political issues', controlling the limits of other jurisdictions and thus providing the crucial framework for the early Stuart consensus (pp. 99, 119). This emphasis on the comprehensiveness of the common law mind owes much to J. G. A. Pocock, *The ancient constitution and the feudal law: a study of English historical thought in the seventeenth century* (Cambridge, 1987 edn). For Pocock 'the belief in an immemorial law was not a party argument put forward by some clever lawyer as a means of limiting the king's prerogative: it was the nearly universal belief of Englishmen' (p. 54), although in his 1986 'Retrospect' on the book he places more emphasis on the instability of the pre-war Fortescuean consensus, which set 'two unrelated conceptions of authority … side by side' (p. 306). M. A. Judson,

to be modified in significant ways. Using the common law as a means for preserving the ancient constitution could be, and was, seen as a very dynamic process involving constant struggle and reassertion of liberties through the exercise of the law itself, which both embodied and guaranteed those liberties. This means, too, that however predominant the language of the common law was in pre-civil war politics, it was not a univocal carrier of political consensus, as revisionist historians have sometimes suggested. Recognizing what Greenberg calls the 'radical face of the ancient constitution' allows us to see that our much-touted 'languages' of politics really do function as languages: they enable thought as much as they constrain it, and arguments can be carried on *within* as well as *between* them.[6]

In this article I suggest that Lilburne was using the language of the common law in innovatory ways, but ways which had their origin in the 'radical' common law tradition which had begun to develop before the civil wars. He made the phrase 'free-born Englishman' into a shorthand for an emerging concept of citizenship. He did this by restructuring, from within, the legal language out of which much of his thought grew: the legal vocabulary continues to be used, but the foundational assumptions underlying it have changed.

I

The collocation 'free-born Englishman' is not common before Lilburne. Its novelty may have been overlooked because historians have found its ingredients unremarkable, and perhaps one of the advantages of the use of the phrase was that contemporaries would be familiar both with the appeal to 'free-born' status and with patriotic language, and would thus find the idiom unthreatening. Lilburne himself had been nicknamed 'free-born John' at the time of his earliest public defiance of the authorities in 1638, an earnest of the availability of the phrase 'free-born'.[7] The usual context for the expression was not 'free-born Englishman', but 'free-born subject'. The phrase 'free-born subject' is the correlate of the standard parliamentarian (and pre-civil war) call for the 'liberties of the subject' – the topic avowedly at issue, for example, in the debates leading up to the Petition of Right.[8] Indeed, Levellers and pamphleteers of similar political

The crisis of the constitution: an essay in constitutional and political thought in England, 1603–1645 (New Brunswick and London, 1988 edn; originally 1949), offers a fine survey of the elements of consensus, since stressed by revisionists, in her first three chapters on the shared beliefs of 'Englishmen' about their polity, but similarly suggests that the balance of liberty and prerogative was or became unstable.

[6] Janelle Greenberg, *The radical face of the ancient constitution: St. Edward's 'Laws' in early modern political thought* (Cambridge, 2001); Derek Hirst, 'Revisionism revised: the place of principle', *Past and Present*, 92 (1981), pp. 79–99; J. G. A. Pocock, 'Languages and their implications: the transformation of the study of political thought', in his *Politics, language and time: essays in political thought* (Chicago, 1989 edn). J. P. Sommerville, *Politics and ideology in England, 1603–1640* (London, 1986), tends to suggest that ideological conflict in early Stuart England is to be located in a conflict between discrete languages expressing discrete theories.

[7] Pauline Gregg, *Free-born John: the biography of John Lilburne* (London, 1961), p. 63.

[8] Robert C. Johnson et al., eds., *Commons Debates, 1628* (6 vols., New Haven, 1977–83), III: entries for 23 Apr. to 2 May, for example.

hue did not completely abandon this vocabulary themselves – which makes it very notable how far Lilburne himself did abandon it, and how early. In Lilburne's early writing we do find references to 'subjects', and in January 1645, in a hint of things to come, he refers to 'freeborne English Subjects'.[9] By the summer of 1645, however, he seems to have found his own language which avoids the word 'subject' altogether, replacing it with the notion of the 'free-born Englishman'. Lilburne creates a consistent language in which 'subjects' become 'Englishmen'. The modern opposition between subjects and citizens might push us towards taking Lilburne's linguistic shift as a move in the direction of a notion of citizenship; I will argue that the details of Lilburne's language support such a view. The transformation of 'subjects' into citizens is marked by the appearance of the term 'Englishman' as much as by the disappearance of the word 'subject'. Cognates of the word 'subject' when they do recur at a later period of Leveller discourse have become clearly pejorative: to be subjected is to be vassalized, enslaved; one can only be 'subjected' to a power which is arbitrary.[10] The logic of Lilburne's elimination of the word 'subject' in favour of 'Englishman' is borne out by this later development.

II

Who are Lilburne's 'free-born Englishmen'? In talking of the 'free-born' and of 'free-men' or 'free men', Lilburne might be thought to be distinguishing these men from others who fell outside this status. I think it is clear, however, that these terms are inclusive rather than exclusive in their force.

It has been well demonstrated by Thomas, Hampsher-Monk, and Wende that the term 'free-born' was not used by Leveller writers to distinguish a select group of Englishmen from the remainder, as C. B. Macpherson had argued. All Englishmen were taken to be free-born. One opponent of the Levellers remarked that it was redundant to talk about free-born Englishmen, asking rhetorically, 'are there any Englishmen that are not Free-borne?'[11]

There is more scope for confusion with 'free-men', as the term has two different meanings. To be a freeman of a guild or company, and hence of a city, was certainly to be a member of an exclusive group. Such status was connected to a locality, however, and not to the nation as a whole. So when Lilburne talks about

[9] Lilburne, *Coppy of a Letter … to James Ingram and Henry Hopkins* (1640), p. 4; idem, *Copie of a Letter … to Prynne* (1645), pp. 2–3. All pre-1700 works were published in London unless otherwise stated.

[10] See Don M. Wolfe, *Leveller manifestoes of the puritan revolution* (New York, 1944), pp. 265, 374, for examples of complaints against being 'subject(ed)' to arbitrary powers.

[11] Keith Thomas, 'The Levellers and the franchise', in G. E. Aylmer, ed., *The interregnum: the quest for settlement* (London, 1972), pp. 73–5; Peter Wende, '"Liberty" und "property" in der politischen Theorie der Levellers', *Zeitschrift für historische Forschung*, 1 (1974), pp. 147–73; Iain Hampsher-Monk, 'The political theory of the Levellers: Putney, property and Professor Macpherson', *Political Studies*, 24 (1976), pp. 397–422; C. B. Macpherson, *The political theory of possessive individualism* (Oxford, 1962), pp. 120–9; Frost, *A declaration of some proceedings*, in William Haller and Godfrey Davies, eds., *The Leveller tracts* (Gloucester, MA, 1964), pp. 116–17, and cited in Thomas, 'The Levellers and the franchise', p. 75.

'free-men of England' we can be fairly sure that he does not mean only those men who were freemen in the narrower sense. The broader sense of 'free man' is exactly parallel with 'free-born.' One of Lilburne's favourite references was to chapter 29 of Magna Carta which set out what could not be done to a 'free man'. Keith Thomas's discussion shows that the status contrasted with freedom in the seventeenth-century texts is either slavery or villeinage. Since villeinage had been ended, the 'free men' referred to in Magna Carta would now be all Englishmen. Coke's discussion of the 'liber homo' of Magna Carta chapter 29 included in it even villeins, 'saving against their lord', and made no other exclusions.[12]

Even in contexts where we might expect the narrow meaning of 'freeman' to be dominant, Lilburne and his associates often either use, or clearly invoke, the broader meaning. Lilburne reprints a petition, on behalf of 'all the freemen of England', which complains that charters of incorporation to specific merchants 'disfranchis[e] … all other the free-borne people of England'.[13] Playing consciously on the narrower and broader meanings of 'free-man', Lilburne laments that 'the poor *Weavers*, though Free-men of *London*, are not only in miserable poverty, but in the miserablest slavery (in the City where they by name are Free-men)'.[14] In Leveller idiom, the status of Englishman could even be used to *override* the status distinctions of London politics. In *Londons liberties in chains*, Lilburne's co-author urged London freemen to demand the right to elect the lord mayor; he justified his own interest in the topic by saying that though he was not a citizen of London, 'yet [he was] no stranger, nor forreigner, but a free-man of England who hath freely hazarded all, for the recovery of the common Liberty, and my Countries freedom'.[15] In fact, as a non-citizen of London the writer *was* technically a 'foreigner': this was the word used to describe English London residents who were not freemen of the city.[16] But his status as 'a free-man of England' outweighed, for him, the fact that he was not a freeman of London.

In his writings specifically on London – where he avoids spelling out exactly which 'free-men' he is talking about – Lilburne is again driving at inclusiveness, although he surely draws on his readers' familiarity with the assertion of the liberties of the privileged freemen of the city. The whole thrust of his argument is against the exclusiveness of 'these Prerogative-Monopolizing Patentee-men of London'; 'the Prerogative-Monopolizing arbitrary-men of London'. Their offensive activities take place through their 'Patentee-Monopolizing Companies, Corporations and Fraternities. So that to speak properly, really, and truly, their Brotherhoods are so many conspiracies to destroy and overthrow the lawes and liberties of England, and to ingrosse, inhance, and destroy the trades and Franchises of most of the Freemen of London.'[17] These 'conspiracies' and

[12] Thomas, 'The Levellers and the franchise', pp. 73–5; David Sacks, 'Parliament, liberty and the commonweal', in J. H. Hexter, ed., *Parliament and liberty* (Stanford, 1992), pp. 85, 290n1; Sir Edward Coke, *The second part of the Institutes* (1642), p. 45. [13] Lilburne, *Londons liberty in chains* (1646), pp. 41–3.
[14] Lilburne, *An impeachment of high treason* (1649), p. 38. [15] Lilburne, *Londons liberty in chains*, p. 10.
[16] Steve Rappaport, *Worlds within worlds: structures of life in sixteenth-century London* (Cambridge, 1989), p. 42. [17] Lilburne, *Londons liberty in chains*, pp. 38–41.

'monopolies' of private interest are diametrically opposed to the Leveller ideal of the common good as exemplified in the equal freedoms of individuals. Carlin points out that this makes the Levellers very different from the guild-members who agitated *within* their corporations in these years; Houston is, I think, right to assert that Lilburne does attack monopolies and the company system directly, as part of this campaign against private interests.[18] Lilburne himself pointed to his own writings as demonstrations of 'the unjustnesse of Corporations and Monopolies, which are both sons of one father'.[19]

The inclusive force of Lilburne's insistence on calling Englishmen 'free-born' and 'free-men' is clear. The assumption that Englishmen were free and not bond was not controversial. What was controversial was the assertion that the free status of Englishmen gave them, as individuals, political status. Sir Thomas Smith had written that the lowest class of free men 'have no voice or authoritie in our common wealth, and no account is made of them but onelie to be ruled, not to rule other'.[20] Ireton, at Putney, was quite prepared to put free Englishmen into that category. The Levellers' innovation was not in saying that all Englishmen were free men, but in drawing extensive conclusions about political rights from that.

III

I have said that for Lilburne being a free-born Englishman brought with it political status. The content of that status, and indeed the argument that it did, in some sense, already exist, are fleshed out through Lilburne's richly textured usage of legal terminology. His treatment of the word denizen, in particular, works to justify his claim that there is a set of political rights which Englishmen possess.

The phrase 'free denizen' is another alternative for 'free-born Englishman', and denizen in this context simply means 'inhabitant'. Thus Lilburne amplifies his claim to be a free man with the phrase 'a free-borne Denizen of England'[21], where the added ingredient seems to be the reference to Englishness, backed up by the connotations of birth in England (free-born) and residency in England (denizen). Again, Lilburne refers to good laws made for the protection of 'all the free Denizens' of the country.[22]

Denizen, however, had a technical legal meaning as well; and as the *Oxford English Dictionary*'s examples show, this was familiar enough to be usable figuratively as well as literally. Coke, giving a false etymology, sums up the two

[18] Norah Carlin, 'Liberty and fraternities in the English revolution', *International Review of Social History*, 39 (1994), pp. 223–54; Alan Houston, '"A way of settlement": the Levellers, monopolies and the public interest', *History of Political Thought*, 14 (1993), pp. 381–420, at p. 397.

[19] Lilburne, *The legall fundamental liberties*, in Haller and Davies, eds., *The Leveller tracts*, pp. 436–7; he is referring back to his *Innocency and truth justified* (1646), pp. 46ff, and to his writings on London.

[20] Sir Thomas Smith, *De republica anglorum*, ed. Mary Dewar (Cambridge, 1982), pp. 64–77.

[21] Lilburne, *The copy of a letter … to a freind* (1645), p. 2.

[22] Lilburne, *The grand plea of Lieut. Col. John Lilburne* (1647), p. 1.

meanings: 'he that is borne within the King's liegeance is called sometime a Denizen, quasi deins nee, born within … But many times … Denizen is taken for an Alien borne, that is infranchised or denizated by Letters Patents.'[23] In the latter case there are two things to notice: first that the denizen only gains rights like those of an English person by being formally granted them; and secondly, that the denizen never gains *all* the rights of a native subject. Thus the definition of the phenomenon in *Les termes de la ley*: 'where an Alien born becommeth the Kings subject, & obtaineth the Kings letters patents for to enioy all priuiledges as an Englishman, but if one be made denizen, he shall pay customes & diuers other things as aliens'.[24] Cowell is even more explicit about the status of denizens: the word

> signifieth in our common law, an Alein [sic] that is infranchised here in England by the Princes Charter, and inabled, almost in all respects, to doe as the Kings native subjects doe, namely to purchase, and to possesse lands, to be capable of any office or dignitie.
>
> Yet it is said to be short of naturalisation, because a stranger naturalised, may inherit lands by descent, which a man made, onely a Denizen cannot.[25]

One useful connotation of this technical sense of 'denizen' was that it implied freedom. An alien becomes a denizen by being 'infranchised', which literally means being made free or given freedoms. This literal meaning was clear to at least some of Lilburne's contemporaries: Henry Cockeram's *Dictionarie* defined 'Enfranchise' as 'To make free' and 'Disfranchise' as 'To make one lose his freedome'.[26] Cowell's *Interpreter* gives a suggestive definition of 'Enfranchisement':

> It signifieth in our common law, the incorporating of a man in any society, or body politicke. For example, hee that by Charter is made Denizen of England, is said to be enfranchised; and so is hee that is made a Citizen of London, or other City, or Burgesse of any Towne Corporate, because hee is made partaker of those liberties that appertaine to the Corporation, wherinto he is enfranchised. So a villaine is enfranchised, when hee is made free by his Lord, and made capable of the benefits belonging to Free-men.[27]

Thus being enfranchised means several things: being made part of a group; being granted liberties belonging to the members of a particular body; and being literally made free, from a status regarded as a kind of servitude.[28] This set of associations is a powerful one for Lilburne to draw on, as he clearly does in his use of the term 'disfranchise', and the often linked term 'denizen'.

As well as using the noun 'denizen', apparently in its original sense of native inhabitant, Lilburne also uses various versions of the word 'undenize/undenizenize' to denote the removal of liberties. This is often linked with the notion of disfranchisement. The two ideas are linked, for example, when he talks

[23] Coke, *The first part of the Institutes* (1639), 129a.
[24] John Rastell, *Les termes de la ley* (1629 edn), p. 134.
[25] John Cowell, *The interpreter* (1637 edn), s.v. 'Denizen'.
[26] Henry Cockeram, *The English dictionarie* (1626, 2nd edn).
[27] Cowell, *The interpreter*, s.v. 'Enfranchisement'.
[28] Ibid., s.v. 'Villein'.

of what might lead 'to the disfranchising me of being a Denizon and freeman of England'.[29] A supporter of Lilburne wrote that through the imposition of the Covenant in the army 'men of excellent publique principles' would be 'disfranchised, and undenized'.[30] In *Londons liberty* Lilburne uses the term 'disfranchise' to refer to the denial of a vote both to Londoners who were not livery men in choosing their MPs, and of those elsewhere falling short of the 40*s* income required to vote:

> and this undenezing of those Corporations, is an undenezing to all the towns and villages adjacent, in which live thousands of people, that by name are free-men of England, and divers of them men of great estates in money and stock; which also are disfranchised and undenezed, by the fore-mentioned unrighteous Statute; because they have not in land 40s. *per annum*.[31]

Thus references in almost modern vein to disfranchisement as the deprivation of a vote are linked with references to 'undenezing'. By depriving someone of a vote the authorities had made him less of a denizen. Someone who was 'undenezed' was pushed outside that group of people whose consent was considered essential to government.

Lilburne drew on the concept of the granting of a set of quasi-native rights to (foreign) denizens in order to reinforce his own conceptualization of just such a coherent set of rights which belonged to natives by right and birth. Given that there was no bill of rights stating in a comprehensive way what was due to all native English subjects, the granting of denizen status was in a way a legal acknowledgement that there *was* a set of rights which accrued to native Englishmen precisely because of that status. The denizen could be seen as being granted exactly that package, minus a couple of important entitlements.

When Lilburne uses the word 'denizen' he blends its two meanings, combining the idea of a package of entitlements for Englishmen with the emotive appeal of the idea of being a native inhabitant of England, a denizen. The word in Lilburne's usage takes on some of the connotations of the modern term 'citizen'. Thus he laments the result of monopolies as 'but an indenosonizing of a few, to undenosonize a many', and juxtaposes this with the comment that England is supposed to be 'a Kingdom governed by one Law made by universall and common consent'.[32] Thus a legal grant (a corporation's patent) makes a few people into denizens, in the way that letters patent could 'indenosonize' an alien; the effect of this is to 'undenosonize' most people – not from rights that they had ever been *granted*, but from those rights due to them as denizens, native inhabitants who are supposed to be equal in the eyes of the law.

What were the uniform entitlements of Lilburne's free-born Englishmen? Wende has pointed out that the Leveller writers used a whole list of

[29] Lilburne, *Innocency and truth justified* (1646), p. 67.
[30] [Anon.], *Englands birth-right justified* (1645), p. 29.
[31] Lilburne, *Londons liberty in chains*, pp. 52–3.
[32] Lilburne, *The charters of London* (1646), p. 39: reading as in the errata.

interchangeable terms, in both singular and plural forms, to denote what they were fighting for: rights, liberties, freedoms, free customs, privileges, property, safety, laws, immunities. He rightly sees this as significant. His explanation is that freedom was seen by the Levellers as a composite, resulting from all these things. It would perhaps be more accurate to say that the Englishman's freedom *consists* in his rightful claim to all of these things; this explains why it often seems to be identified with the liberty of every subject to enjoy the benefit of the law. Wende perceptively emphasizes this logical shift from plural liberties to the single 'liberty' of the law.[33] Lilburne's language actively remodels individual legal freedoms into a more unified conception of a set of citizenship-rights. Law is the mediating term in this transformation: freedoms under law retain their names but come to signify the single and universal freedom guaranteed by the law.

One unifying expression denoting the entitlements of an Englishman is 'birth-right'. Like the terms 'denizen' or 'free-man' which come to connote the role of citizen, 'birth-right' comes to connote all that is due to a citizen. On occasion Lilburne may use the term of quite specific entitlements: he opposes monopolies 'that so all the people may inioy their birth right, free trade.'[34] But generally, birth-right comprehends all that an Englishman is entitled to claim under English law, and sometimes under higher authorities too: the 'inheritance of our Fathers, and the Birth-right of us and our children' is 'our Fundamentall Lawes and Liberties, Franchises and Priviledges, that God, Nature, and the just Customes of the Land in which wee live, hath given us'.[35] The term is an indicator of the crucial influence of the legal tradition and specifically of Coke's interpretation of English law. In the speech which he reports himself giving to the Committee of Examinations, Lilburne first declares: 'I am a free-man, yea, a free-borne Denizen of England', and he goes on to quote Magna Carta to justify his rights: 'Sir, the Priviledges contained herein is my Birth-right and Inheritance.'[36] This follows Coke's Ciceronian assertion that the law is 'the best birth-right the subject hath', which Lilburne quotes directly elsewhere.[37] Lilburne found similar statements about birth-rights in the parliament's *Book of declarations*.[38] Parliament had declared 'That the law, and the ordinary course of iustice, is the common birth-right of every subiect of England.'[39]

Another text from the legal tradition, not quoted in Lilburne, makes clear how specific to those born within the realm the notion of birthright was supposed to be: 'for the law is our birthright, to which an alien is collateral & a stranger, & therfore disabled to take any benefit thereby'.[40] Lilburne's vision of an essentially English inheritance of law is in accord with this.

[33] Wende, '"Liberty" und "property"', pp. 158ff.
[34] Lilburne, *The juglers discovered* (1647), p. 12.
[35] Lilburne, *The charters of London*, p. 1.
[36] Lilburne, *The copy of a letter … to a freind*, p. 2.
[37] Coke, II *Institutes*, p. 56; Lilburne, *Innocency and truth justified*, p. 64.
[38] Lilburne, *Innocency and truth justified*, p. 55.
[39] Lilburne, *The resolved mans resolution* (1647), p. 24.
[40] Rastell, *Les termes de la ley*, s.v. 'Disabilitie'.

Lilburne's use of old legal terms such as 'privilege', 'immunity', 'liberty', and 'franchise' is part of this project of unifying the entitlements of English law. All of these terms denoted specific rights or exemptions granted piecemeal to individuals or bodies, and they were overlapping concepts. Cowell defines 'Franchise' as 'a priviledge, or an exemption from ordinary jurisdiction, and sometime an immunity from tribute'. A 'libertas' (literally equivalent to 'franchise') 'is a priviledge held by grant or prescription, whereby men enjoy some benefit or favour beyond the ordinarie subject'. In defining privilege he follows Cicero and others in seeing it as a 'privata lex' granted to one man. *Les termes de la ley* defines privileges as 'liberties and franchises graunted to an office, place, towne, or mannor, by the Kings great charter, letters patents, or act of parliament'.[41] So, with all these terms, the inherited legal meaning was of specific privileges which specific persons or institutions possessed not through right but ultimately through grant. This is very far from the way in which Lilburne uses these terms.

The tenor of Lilburne's references to privileges, immunities, and franchises is that these are things which are due to all Englishmen. Lilburne refers to the 'priviledges' in Magna Carta being his 'Birth-right and Inheritance'.[42] He declares that 'Englishmen have some priveledges to stand for if they were not fooles.'[43] Since he has not impaired his own status as denizen and free man of England, he 'ought to enjoy as great a priviledge in the enjoyment of the benefit of the law of England, as any free Denizon of England whatsoever, by what name or title soever he be called'.[44] Again, Lilburne 'ought by the fundamentall lawes of this Land, to enjoy the benefit of all the lawes, liberties, priviledges, and immunities of a free-born man'. The universality of the concepts is suggested by a reference to 'the liberties, immunities, and priviledges of all the Commons of England'.[45] *An anatomy of the lords tyranny* was 'published to the view of all the Commons of England, for their information, & knowledge of their Liberties and Priviledges'.[46] In the same vein 'our Fundamentall Lawes and Liberties, Franchises and Priviledges' are mentioned in one breath.[47] It is not that some Englishmen have some privileges, some others. All are supposed to have the same privileges and liberties.

My argument, then, is that Lilburne's thought is rooted in a legalistic vocabulary, and can be seen to have developed largely through the medium of this vocabulary. In the course of its development, however, the fundamental logic of this language was changed. The roots of the argument developed by Lilburne may lie in the set of notions described by Conal Condren as 'liberties of office': liberties tied to an office or status because they are necessary for the fulfilment of

[41] Cowell, *The interpreter*; Rastell, *Les termes de la ley*, s.v. terms cited.
[42] Lilburne, *The copy of a letter … to a freind*, p. 2.
[43] Lilburne, *Innocency and truth justified*, p. 16.
[44] Ibid., p. 67.
[45] Lilburne, *Londons liberty in chains*, pp. 71–2.
[46] Lilburne, *An anatomy of the Lords tyranny* (1646), title page.
[47] Lilburne, *The charters of London*, p. 1.

the duties inherent in that status. The legal 'privileges' and 'franchises' claimed by individuals as their particular rights may have been seen as liberties of this kind. However, if Lilburne is exploiting the logic of this kind of 'liberty', the status to which the liberty is tied is that of an Englishman, or sometimes simply a man – which, as Condren himself comments, 'is to extend the notion of an office to, or even beyond, its limit'. Condren may be right that such extensions of the relevant 'offices' testify to the power of the language in warding off potential charges of rebelliousness, but they surely also begin to nudge at more modern notions of liberty, where it has an absolute value, freed from dependence on social roles. Liberty of office may leave traces in the importance which Lilburne attaches to the status of Englishmen: if Condren is right, then the logic which led Lilburne to tie his claims to a status, albeit a universalizing one, in this way, is one which is rooted in persistent political languages of the period.[48] Such universalizing usages as Lilburne's, though, push this language to or beyond its logical limits. In Lilburne's writing, all Englishmen enjoy identical political 'privileges' – which effectively means that the meaning of 'privilege' has changed.

IV

Lilburne, of course, was not dealing with an unmediated tradition of medieval legal terms. His materials were not 'raw' but embedded in discourses which were already politically specific. It is clear that for Lilburne the writings of Sir Edward Coke were a major source, and Lilburne's usage of legal terminology is undoubtedly influenced by the particular cast given to it by Coke and others in the early seventeenth century.

The tendency to generalize from unhelpfully specific medieval legal provisions was certainly not confined to the works of Coke and Lilburne. Weston describes the supposed Saxon laws as 'a farrago of items from which Stuart Englishmen fashioned legal and constitutional principles of wide application', and notes the way in which their application was extended by the framers of the Petition of Right – who of course included Coke.[49] Sacks has discussed the evolution of 'liberties' into 'the liberty of the subject', dating this shift in language to the late sixteenth and early seventeenth centuries, and linking it to a 'process of conceptual expansion' of other terms, particularly 'monopoly'.[50] Coke and Lilburne, I would argue, are particularly prominent figures in this history of expansive legal interpretation.

Modern scholarship on Coke has demonstrated that, however authoritative his pronouncements on the ancient laws of England were later taken to be, his legal writings were far from being neutral collations of the materials of the common law. Apart from his tricks of misreporting cases and inventing 'maxims', his very

[48] Conal Condren, 'Liberty of office and its defence in seventeenth-century political argument', *History of Political Thought*, 18 (1997), 460–82, at pp. 470–2.

[49] Corinne Weston, 'England: ancient constitution and common law', in J. H. Burns and Mark Goldie, eds., *The Cambridge history of political thought, 1450–1700* (Cambridge, 1991), p. 385.

[50] Sacks, 'Parliament, liberty and the commonweal', pp. 93–101; p. 99 quoted.

understanding of the nature of the common law implied principles of interpretation and generalization which could not be neutral. If the common law was for Coke a system of artificial reason comprehending all that needed to be talked about in political life, as well as more narrowly legal matters,[51] then the new questions which might arise for the law's consideration would have to be answered from old materials, which meant, essentially, that they would have to be answered from principles taken to be exemplified in these old materials. This could be done unremarked, by a redefinition of vocabulary or the extension of the applicability of a maxim; it could be helped along by a newly coined 'maxim' or a tendentiously reported case; or it could be done in the name of the spirit or reason of the law.[52]

It is clear from Coke's parliamentary career in the 1620s as well as his writing that he became more and more concerned to assert the law's control over, or at least bounding of, royal prerogative.[53] In his fostering of the Petition of Right we see him using expansive arguments from legal premises to reach conclusions which were quite different from those reached earlier in his career.[54] Among his writings it is in the *Institutes*, parts II–IV of which were confiscated after his death and recovered and published by the Long Parliament for their own purposes, that Coke's most potentially radical legal interpretations are found.

Magna Carta drew from Coke in the second part of his *Institutes* the same generalizing impulses as it had during the framing of the Petition of Right. He invokes its authority to argue for the illegality of monopolies, on the grounds that the 'liberty of the subject' guaranteed by Magna Carta includes the liberty to follow any trade. (His definition of monopoly in the third part of the *Institutes* as an institution by which persons or corporations other than the monopolists 'are sought to be restrained of any freedome, or liberty that they had before' seems suspiciously well suited to the workings of this extremely tendentious argument.)[55] Commenting on the famous chapter 29 of Magna Carta, which set out the legal limits on what could be done to a free man ('liber homo'), Coke not only extended the 'libertates' mentioned to specifics such as the right to trade, but also glossed the term, in one of its 'significations', as meaning 'the laws of the realme' *tout court*.[56] Similarly, he quotes an unexceptionable common law maxim from

[51] Alan Cromartie, 'The constitutionalist revolution: the transformation of political culture in early Stuart England', *Past and Present*, 163 (1999), pp. 76–120, at pp. 87–8, 100; Glenn Burgess, *Absolute monarchy and the Stuart constitution* (New Haven and London, 1996), pp. 166–71.

[52] Christopher Hill, *Intellectual origins of the English revolution revisited* (Oxford, 1997), pp. 224–5; Stephen White, *Sir Edward Coke and the grievances of the commonwealth* (Manchester, 1979), p. 226; Pocock, *The ancient constitution and the feudal law*, p. 268; Alan Cromartie, *Sir Matthew Hale* (Cambridge, 1995), p. 19; J. W. Tubbs, *The common law mind* (Baltimore and London, 2000), pp. 174–5.

[53] Burgess, *Absolute monarchy and the Stuart constitution*, pp. 200–1; White, *Sir Edward Coke*, pp. 219ff.

[54] White, *Sir Edward Coke*, pp. 238–42.

[55] Coke, II *Institutes*, p. 47; Coke, *The third part of the Institutes* (1644), p. 181. Hill, *Intellectual origins*, p. 208, citing Wagner's conclusions.

[56] Coke, II *Institutes*, p. 47; Wende, '"Liberty" und "Property"', p. 159.

Plowden's *Commentaries*, but then glosses it with a significant extra phrase – derived from Cicero – in his translation:

> *Le common ley ad tielment admeasure les prerogatives le roy, que ilz ne tolleront, ne prejudiceront le inheritance dascun*, the common law hath so admeasured the prerogatives of the king, that they should not take away, nor prejudice the inheritance of any: and the best inheritance the subject hath, is the law of the realme.[57]

A defence of the property of individuals – itself a great concern for Coke – has been transformed into an assertion of an equal property of all subjects in the law. This glossed version of the maxim was transplanted from Coke's work to lend support to Lilburne's case.[58]

In spite of such examples, Coke had to be used carefully for Lilburne's purposes. There were limits to Coke's capacity to transform the connotations of legal language. Wende is right to point out the ways in which Lilburne followed Coke, but he seems to overlook the inconvenient aspects of Coke in much the way that Lilburne does himself. Thus, while Wende even cites Coke himself to show that in the common law a 'freedom' was essentially a privilege enjoyed by some and not others, he sees as more important those statements in Coke which imply that the law has to be equal for all and that it cannot privilege any individual or group. On the contrary, Coke says, for example, 'that ecclesiasticall persons have more and greater liberties then other the king's subjects'.[59] Lilburne, I would argue, made a new and consistent egalitarian language out of these terms, where Coke had merely redefined or glossed them in particular instances.

How well Coke's vision could nourish Lilburne's, and how subtle the changes were which could make Coke's language into truly Lilburnian language, can be seen in one example. Lilburne was trying to make out of the materials available in English law a unified set of rights which applied not haphazardly and individually, but as a package and evenly to a whole section of the population. Magna Carta is a central foundation for this set of rights. An ally of Lilburne's makes use of Coke for this purpose, declaring that 'the Reasons … why it [Magna Carta] is called *Charta Libertatum Regni*, The Charter of the Liberties of *England* from the effect, *Quia liberos facit*, It makes us Free-men, and for the same cause it is called (*communis libertas*, common liberty) and *Le charter des franchises*.'[60] The passage of Coke from which this is taken did not translate the Latin phrases.[61] Here the writer has chosen translations which are slightly more emotive than the Latin might suggest: the Latin phrase 'liberties of the kingdom' is translated as 'liberties of England'; the Latin phrase which could simply mean 'because it makes [us/them/people] free' becomes fixed as a statement of essential transformation in

[57] Coke, II *Institutes*, p. 63; Cromartie, 'The constitutionalist revolution', pp. 102–3. The quotation from Cicero is given on the title page of Coke, I *Institutes* (1639): 'CICERO. Major haereditas venit unicuiq; nostrum a Jure, & Legibus, quam a Parentibus.'

[58] This Coke passage is quoted verbatim in [Anon.], *Liberty vindicated against slavery* (1646).

[59] Coke, II *Institutes*, p. 3; Wende, '"Liberty" und "Property"', p. 159.

[60] [Anon.], *Liberty vindicated against slavery*, p. 1.

[61] Coke, II *Institutes*, proem, unpag.

English: 'It makes us Free-men'. Together these translations recall Lilburne's key phrase 'free-men of England'. Coke and Lilburne's supporter agree: the 'liberties' and (a direct translation) '*franchises*' may be in the plural, but each man affected does not simply acquire a series of separate liberties, but is made a free man.

V

My discussion so far has focused on Lilburne's use of materials from the English legal tradition in shaping an inclusive and uniform conception of English citizenship. I believe this is the key to understanding the nature of Lilburne's political language, but it does raise further questions about his understanding of history and law.

Much has been written about the nature of Leveller theorizing. Lilburne's writings raise a problem of legitimation. His arguments in defence of the liberties of free-born Englishmen imply much about the basis of those liberties, but explicit argument on the point is rare. On a couple of occasions he articulates a whole list of foundations for these liberties: they are 'our natural, rationall, nationall, and legal liberties, and freedoms', 'the rationall, natural, nationall, and legall liberties of my selfe and all the Commons of England'.[62] Thus reason, nature, the nation, and the law are all cited as sources of English commoners' liberties. These seem to suggest two different lines of argument: reason and nature belong most comfortably to natural law theory, while the nation and the law suggest an appeal to history, and specifically to the supposed ancient constitution of the English nation. Interpreters of Leveller writings have noted both aspects, but the overwhelming emphasis – with the honourable exception of Seaberg – is on natural law thinking.[63]

In Lilburne's case these two positions prove to be much less starkly opposed than the scholarship might suggest. There are certainly times when he appeals specifically to the law of nature, but it is appropriate that the most often-cited passage of this kind is found in a postscript to one of Lilburne's pamphlets, and not in the main text. In the body of that pamphlet, as in his writing in general, Lilburne is far less explicit about the foundations of his case, and while he criticizes some aspects of the common law, he appeals repeatedly to Magna Carta.[64] While at a stretch one might argue that the mixture of natural law and

[62] Lilburne, *The charters of London*, p. 1; Lilburne, *The juglers discovered*, p. 5.

[63] For natural law in Leveller writings, see David Wootton, 'Leveller democracy and the Puritan revolution', in Burns and Goldie, eds., *The Cambridge history of political thought, 1450–1700*; Hampsher-Monk, 'The political theory of the Levellers'; Brian Manning, 'The Levellers and religion', in J. F. McGregor and B. Reay, eds., *Radical religion in the English revolution* (Oxford, 1984); R. Gleissner, 'The Levellers and natural law', *Journal of British Studies*, 20 (1980–1), pp. 74–89. For historical and legal argumentation in Leveller writings, see R. B. Seaberg 'The Norman Conquest and the common law', *Historical Journal*, 24 (1981), pp. 791–806, and Michael Levy 'Freedom, property and the Levellers', *Western Political Quarterly*, 36 (1983), pp. 116–33.

[64] Lilburne, *The free-mans freedom vindicated* (1646).

historico-legal language in Lilburne's writing was logically consistent – the common law was in his view simply not at odds with natural law – in fact we can see that there are much more subtle tensions and congruences running through and between his arguments from law and from nature. This suggests to me that his thinking really did go on in a space between the two extremes, rather than merely being channelled one way or another according to expedience.[65] Indeed, such blending of the different forms of argument is not confined to Lilburne or to Leveller writers.[66] Consideration of the nature of Lilburne's writings also militates against seeing his choice of argument and language as cynically tailored to his audiences: his publication, republication, annotation, and cross-referencing of his own works show that he considered his published writing as a single, ongoing œuvre intended for an overwhelmingly consistent audience: precisely the inclusive audience of concerned free-born Englishmen. While utterances originally composed for particular contexts – law courts of varying degrees of perceived illegitimacy, either of the Houses of Parliament or their committees, private conversations with public figures – do certainly show the marks of their origins, they are embedded in Lilburne's editorial comments to his readers, and commended to readers for their use. Lilburne would like *all* the types of argument he uses to be absorbed into the thinking of his readers.

At one pole, Lilburne appeals frequently to legal liberties, and often draws out the point that these are national liberties because they exist under English law. He often implies that it is the English law itself which *confers* certain rights. Thus, he remarks that he has published a specific collection of legal material so that people can read 'their chiefest freedomes, that the Statute law of England gives them'.[67] He backs up his assertions of his rights contained in the phrase 'I being a free man of England' by glossing 'England' with the phrase 'a Kingdome that professeth to be governed by law'.[68] More often it is the whole phrase 'free-man of England' which is interpreted in terms of a right to fair treatment under the law. This is what underlies Lilburne's repeated insistence on his Englishness in *Innocency and truth*. Lilburne's frequent references to specific statutes when contesting for a particular right – for example annual parliaments[69] – support the view that the law itself was the primary source of the Englishman's rights. The constant references to the trope that the law was the 'birthright and inheritance' of Englishmen reinforce this impression.

[65] Scholars who have suggested that Leveller writers use common law language strategically are Burgess, 'Protestant polemic: the Leveller pamphlets', *Parergon*, n.s., 11 (1993), pp. 45–67; idem, *The politics of the ancient constitution*, pp. 90–3; Andrew Sharp, 'John Lilburne's discourse of law', *Political Science*, 40 (1988), pp. 18–33; Pocock, *The ancient constitution and the feudal law*, pp. 125–6.

[66] Andrew Sharp, 'John Lilburne and the Long Parliament's *Book of declarations*', *History of Political Thought*, 9 (1988), pp. 19–44, at p. 23, points out that parliament similarly used arguments both from natural and from positive law. Greenberg, *The radical face of the ancient constitution*, ch. 5, while picking out the ancient constitution elements in parliamentarian thought, shows how they were integrated into arguments for resistance which might have looked familiar from other sources.

[67] Lilburne, *The peoples prerogative* (1648), p. 5.

[68] Lilburne, *Innocency and truth justified*, p. 32.

[69] Lilburne, *The peoples prerogative*, p. 9.

These references to the law could be seen as broadly in line with Coke's celebrated 'ancient constitution' thinking, but historical legal arguments could take a variety of forms, and at the other end of the spectrum from a robust defence of current law as ideal there is the more romantic and aggressive historical vision of ancient Saxon liberties currently crushed under the 'Norman yoke'. To see where Lilburne comes on this spectrum – how far he sees ancient liberties as persisting in current laws, and how far they exist only as an ideal to be restored – we must ask what *kind* of law it is that he appeals to.

Here Lilburne's meaning is often unclear. Sometimes he seems to be concerned with the law as it stands: thus 'the Law of England' is the 'birthright and inheritance' of royalist peers on trial 'in every punctilio of it'.[70] But generally the status of the laws which Lilburne appeals to is less clear. When he asserts that 'by the antient, good, just and unrepealed laws of England' parliaments should be held annually, only the fact that parliaments were clearly *not* held annually tells us that 'unrepealed' does not mean 'effectively in force'.[71] This must be true for many of the laws which he sees as ideal. Lilburne's ambivalence about the existing law is clearly expressed in a pamphlet of 1649:

> And though the law of England be not so good, and so exact in every particular, especially in the administrative part of it, as I could, wish it were, yet till I can see a better, I for my part will make much of that which we have, as the principall earthly preserver and safeguard of my life, liberty, and property.[72]

Here it is unclear whether Lilburne is looking forward or back to a 'better' law – to an ancient constitution or to natural law to be implemented in the future. Lilburne's appeals to law often do not state the type of law he means, but where he distinguishes statute from common law he either calls on both or comes down in favour of statute.[73] Even when he appeals explicitly to 'common law' we might be wary about the precision of the term.[74] There are also less technical terms which he uses to characterize the kind of law he appeals to: it is often 'known' or 'declared' or 'fundamental'. The law has different connotations in different contexts: sometimes it is important to distinguish what is written (and therefore 'known' and 'declared') from the unwritten law which has the inherent danger of arbitrariness;[75] sometimes to distinguish the 'tenour' or 'equity' from the letter of the law;[76] sometimes to imply that some provisions, even if in some sense 'laws', may not be 'fundamental' ones.[77] These categories and priorities do not map simply on to each other: written law may be preferable to unwritten, but the spirit

[70] Lilburne, *The legall fundamental liberties* (2nd edn, 1649), p. 70 (mispaginated as 52).

[71] Lilburne, *The resolved mans resolution* (1647), pp. 19–22.

[72] Lilburne, *A preparative to an hue and cry* (1649), pp. 1–2.

[73] Both common law and statute appealed to: Lilburne, *A defiance to tyrants* (1648), sig. Av, marginal note; statute superior to common law: Lilburne, *The just mans justification* (1647), pp. 14–18.

[74] An unqualifiedly positive reference to 'common law' (rather than 'English law'): Lilburne, *The lawes funerall* (1648), p. 9.

[75] Lilburne, *The free-mans freedome vindicated* (1646), pp. 3, 7.

[76] Ibid., p. 10; Lilburne, 'On the 150th page', in Andrew Sharp, ed., *The English Levellers* (Cambridge, 1998), pp. 3–4.

[77] Lilburne, *The prisoners plea for a habeas corpus* (1648), unpag.

may be preferable to the letter. These factors complicate any attempt to determine whether Lilburne's allegiance is primarily to the common law or to parliament-made statute, to existing law of either kind, or to past or future ideal laws.

These shifting emphases do to some extent reflect the requirements of the argument in which Lilburne finds himself. Thus he can specifically argue that while common preservation is 'the ouldest Law' and can override normal laws in times of emergency, in safer times one should be satisfied with nothing less than 'the absolute benefit of the Law, and the common justice of *England*'.[78] However, this view is not actually incoherent, convenient though it might be; and the same can be said of other ambivalences in his language. In fact, even while arguing that much of the 'content and form' of Leveller writings, and especially the nature of the foundational arguments they invoked, was 'determined' or 'dictated' by 'rhetorical exigencies', Burgess concedes that it was not strictly incoherent to invoke both natural and positive law, as equity and reason could effectively reconcile the two. While Burgess suggests that the common lawyers' logic of equity is ignored or reversed in Leveller writing, so that law can be corrected from outside the legal framework rather than from within it, I do not see such a clear distinction.[79]

Much of the breadth and ambivalence of Lilburne's view of law would not have been alien to Coke's thinking. He too could emphasize the intent of the law (its 'true sense and sentence') as a crucial principle of interpretation,[80] say that what is against reason is against law ('this is another strong argument in law, *Nihil quod est contra rationem est licitum*'),[81] and assert the importance of at least the penal law being known to those who would be punished under it.[82] Like Lilburne, he could confess a dislike of the law's being in French, and count this among the negative effects of the Norman Conquest: 'we would derive from the Conqueror as little as we could'.[83] He too was ambivalent about the relationship between the common law and parliamentary statute, and, like Lilburne, saw principles of interpretation and correction flowing between the two rather than simply in one direction – although clearly Coke's inclination was to assert the superiority of common law over statute, where Lilburne would make the opposite claim.[84]

Given Coke's commitment to the reason of the law – albeit, for him, an artificial reason[85] – Lilburne can be seen as developing Coke's legacy even when he apparently steps outside legal and historical arguments and appeals to God, nature, and reason as legitimators – and measures – of the English law.[86]

[78] Lilburne, *The lawes funerall*, pp. 4–5.
[79] Burgess, 'Protestant polemic', pp. 49–59.
[80] Coke, *Le quart part des reportes* (1635), unpag. preface.
[81] Coke, 1 *Institutes*, 97b.
[82] Coke, *Le quart part des reportes*, unpag. preface.
[83] Coke, *The third part of the Institutes* (1644), unpag. proem; Coke, 1 *Institutes* (1639), proem; Lilburne, *An impeachment of high treason* (1649), p. 48.
[84] Burgess, *Absolute monarchy and the Stuart constitution*, pp. 175–92; Tubbs, *The common law mind*, pp. 154–9, 183–6; Cromartie, 'The constitutionalist revolution', pp. 97–9.
[85] Tubbs, *The common law mind*, pp. 161–6.
[86] Diane Parkin-Speer, 'John Lilburne: a revolutionary interprets statutes and common law due process', *Law and History Review*, 1 (1983), pp. 276–96, at pp. 278–9.

Certainly, Lilburne's tone is sometimes radical: thus, the freedoms which were given by the law of England are admitted to be 'very slender and short to what by nature and reason they ought to be'.[87] The law of England consisted of all England's existing laws, *providing* that they were 'agreeable to the law Eternall and Naturall'. Those which did not fulfil these conditions are tellingly described as 'contrary to [the people's] Birth-rights and Freedomes' – a phrase which more often suggests the English law than a higher and more perfect one.[88] Lilburne himself can characterize the *fundamental* law of the land as 'the Perfection of Reason'[89] – since it is by definition that part of existing law which is in accord with nature and reason. When he quotes St Germain to the same effect, he also makes it clear that this means that non-fundamentals in law may be changed for the better.[90] Again, law can – and should – be interpreted on the assumption that the law-giver did not intend to enact something which went against reason.[91]

The instabilities in Lilburne's account of law and history are nicely summed up in his use of Magna Carta. Accounts of 'ancient constitution' thinking by Weston and Greenberg, and Seaberg's work on the Levellers, suggest that the line between the common law ancient constitution and the Norman yoke can be a thin one: much can depend on whether the 'Confessor's Laws' are maintained through prescription, as well as on the nature of the Norman Conquest itself. Magna Carta could be seen as an assertion of ancient rights, an example of prescription, and the authors of *Englands birth-right* perhaps hint at the thesis that Magna Carta and other statutes merely 'declare' the common law when they talk about 'knowne and declared' laws.[92] But when, under pressure from Leveller colleagues, Lilburne does criticize the common law as Norman, Magna Carta can be slotted into the category of statute. He admits that 'though there may be some veines issuing from former originals, yet the main stream of our Common law, with the practice thereof, flowed out of Normandy'. This shows clearly that he did, when forced to stop and think about it, accept that the law in large part was Norman; it also contradicts Seaberg's argument that Lilburne saw this Norman corruption of the law as extending only to procedure and not to the provisions of the law itself.[93] Yet Lilburne then immediately rescues those elements of law which he most often appeals to as expressing English liberties: 'in the harshness of my expressions against the Common Law, I put … a cleare distinction of it, from the Statute Law'. The statute law, he says, is flawed, but contains 'gallant Lawes' such as chapters 28–9 of Magna Carta, the Petition of Right, and the act abolishing Star Chamber. Magna Carta still, however, falls short of Edward the

[87] Lilburne, *The peoples prerogative*, p. 5.
[88] Lilburne, *Londons liberty in chains*, p. 41.
[89] Ibid., p. 41.
[90] Lilburne, *Rash oaths unwarrantable* (1647), p. 28.
[91] Lilburne, *The legall fundamental liberties*, p. 54.
[92] *Englands birth-right* (1645), p. 3. I suspect that this pamphlet is not by Lilburne alone. Weston, 'England: ancient constitution and common law', pp. 379–84; Greenberg, *The radical face of the ancient constitution*, pp. 19–32, 226–9; Seaberg 'The Norman Conquest and the common law', passim.
[93] Lilburne, *The just mans justification* (1646), p. 13; Seaberg, 'The Norman Conquest and the common law'.

Confessor's laws 'which the Conquerour rob'd England of'.[94] The excellence of the three statutes Lilburne mentions might easily have been justified by their alleged conformity with the ancient principles of the common law.

Lilburne does, of course, employ natural law ideas as well as common law thinking. Natural law thinking is present, alongside the common law, in his work from as early as 1646 (in *The freemans freedom*, discussed above.) Some of the later works, such as the two parts of *Englands new chains* in 1649, might support the view that Lilburne's thought does increasingly engage with natural law over time. Yet natural law never eclipses English law, precisely because Lilburne's version of English liberties can be vindicated by natural alongside national law. Even when making reference to the more universal laws of God, nature, and nations, and talking about what human nature itself requires, Lilburne's attachment to the legal tradition of England is not eclipsed. On two occasions, rather than grounding the specifics of English law in overarching natural and divine law, he puts it the other way round. Thus the best elements in the Petition of Right and Magna Carta 'are of universall concernment to all the sons of men, under any just Government in the world'.[95] As late in his career as his *Apologeticall narration*, written in exile in 1653, he can talk about 'all English men or people being all borne free alike, and the Liberties thereof equally entayled to all of them alike', and then go on to subordinate the divine law to this English law: 'And suitable to these most righteous Maximes of the Law of England, are the most glorious and righteous dealings of the Soveraigne Lord of Heaven & Earth.'[96]

One final example – again relatively late in the development of Leveller thinking, in May 1648 – confirms that Lilburne really does seem happy to invoke 'rationall, natural, nationall, and legall liberties' alongside each other without feeling the need to rank them:

> it is not only my undoubted naturall right, by the light and Law of nature; yea, and by the ancient common Law of *England* to plead my owne cause my selfe, if I please, but it is also the naturall and undoubted right of every individuall Englishmen [sic], yea and of every man, upon the face of the Earth, in what Countrey soever; and therefore, Sir, I demand from you, liberty to speake freely for my selfe, not only by the Law of nature, but also by the ancient Common Law of England.[97]

VI

We have seen, then, that Lilburne's constant invocation of 'free-born Englishmen' is something that carries a strong political message with it. Certainly Lilburne uses 'English' as a moral shorthand, declaring himself to be 'a true bred Englishman', 'a true-hearted Englishman', 'Englands Cordiall Freind', 'a true

[94] Lilburne, *The just mans justification*, pp. 14–15. [95] Lilburne, *Rash oaths unwarrantable*, p. 28.
[96] Lilburne, *L. Col. John Lilburne his apologeticall narration* (1652), p. 17.
[97] Lilburne, *The lawes funerall* (1648), p. 3.

and real-hearted *Englishman*', 'As much an Englishman as ever', '*A faithful* English-man'.[98] Lilburne often urges his audience to act by appealing to their sense of their Englishness, and implying that an Englishman *ought* to have certain qualities. Sometimes this implicit message is reinforced by a quite explicit use of 'English' or 'Englishman' as a normative term. Thus Prynne's charges against Lilburne are described as 'unsufferable slanders, wicked, bloody and un-English-man-like provocations'.[99] The expression may be whimsical, but it is typical of Lilburne's conceptual world. Similarly, Lilburne's way of praising Wildman's pamphlet *Truths triumph* is to call it 'his late masculine english peace'.[100] Again, it is 'every knowing English eye' and 'every unprejudiced and truly English heart' which are appealed to as the proper judges of the government of the country. It was 'old English valour' which was shown by the army's actions at its rendezvous of 4–5 June 1647. London citizens wanting to defend their goods and liberty by not paying tithes must 'play the Englishman'.[101] Adjectives are often added to the word 'Englishman' which are intended, in Lilburne's discourse, not so much to indicate that certain Englishmen are *also* 'honest', 'true hearted' etc., as to suggest that these are the qualities that *all* Englishmen ought to have. This is clear from Lilburne's proposal in *The additional plea* to appeal to 'all that have honest, english hearts'.[102]

Lilburne's imagined audience is made up of these 'true hearted', 'true bred', and 'honest' Englishmen. For example, he appeals 'to every true hearted Englishman that desires a speedie end of these warres';[103] publishes information for the benefit of 'all true hearted English-men';[104] and addresses only those 'True bred Englishmen, that have a life to lay down, for the defence of your just Liberties and Freedomes'.[105] He recommends books that 'are worth every honest English mans buying' in order to know about government,[106] and wants to replace monopolizers with 'honest Englishmen … that love the Fundamentall lawes, and the common and just liberties of the Nation'.[107]

The drive of this language, then, is at inclusivity. It implies only the most general limits to the membership of the polity: Lilburne appeals to all adult English males, and if some are excluded by their lack of true-heartedness, that is

[98] Lilburne, *The just mans justification*, p. 16; *The legall fundamental liberties*, p. 22; *Jonahs cry out of the whales belly* (1647), p. 7; *To his honoured friend, Mr. Cornelius Holland*, reprinted in *An impeachment of high treason* (1649), pp. 7, 9; *A Letter … to Mr John Price* (1651), p. 12.

[99] Lilburne, *The copy of a letter … to a freind*, p. 12.

[100] Lilburne, *The peoples prerogative*, unpag. proem.

[101] Lilburne, *The legall fundamental liberties*, in Haller and Davies, eds., *The Leveller tracts*, p. 426; *As you were* (1652), pp. 14, 13; *A defiance to tyrants* (1648), p. 74.

[102] Lilburne, *The additionall plea of Lieut. Col. John Lilburne* (1647), p. 24.

[103] Lilburne, *The reasons of Lieu Col. Lilbournes sending his letter to Mr Prin* (1645), p. 7.

[104] Lilburne, *The peoples prerogative*, title page.

[105] Lilburne, *The freemans freedome vindicated* (1646), p. 1.

[106] Lilburne, *Innocency and truth justified*, p. 52. The books are Pym's speech against Strafford, St John's speech for Hampden against ship money, and the judgements of Hutton and Crooks in the ship money case.

[107] Lilburne, *Londons liberty in chains*, p. 57.

for them to judge. Lilburne's writings themselves may even be the diagnostic tool: it is true-hearted Englishmen who will respond to them in the way that he hopes.

Lilburne's language, and provisions in other Leveller texts, hint that there are circumstances under which Englishmen who are not 'true-hearted' must be formally deprived of their legal liberties. In asserting that he retains his English liberties because he has not done anything that would disfranchise him, Lilburne implies that others could forfeit their liberties by their actions. Even the suspicion of treasonable behaviour does not justify disfranchisement from the protection of the law: due process must be used to decide such cases, as that is, after all, what the law is for.[108] One can only forfeit one's English liberties by actions directed at the foundations of those liberties. These are not spelled out in Lilburne's works, but the provisions of the various joint Leveller programmes suggest that royalism, or acting against a future constitution established through an Agreement of the People, would count. Essentially, what is implied here is a Leveller version of treason, appropriate to a state reconstituted on Leveller principles; that the Levellers were aware how many of their fellow Englishmen might qualify as traitors on such terms is clear in their provisions for indemnity, oblivion, and the eventual readmission of past royalists, and initial non-subscribers of the *Agreement*, to political life. Even when inclusiveness is not immediately practicable, they aspire to achieve it in the long term.[109]

It is worth noting that even this account of the forfeiting of citizen rights does not settle the question of the foundations of those rights. While most of the time it is the benefit of English legal protections which is seen as forfeit by treasonable action, Overton writes that 'mankind must be preserved upon the earth, and to this preservation, all the Children of men have an equall title by Birth, none to be deprived thereof, but such as are enemies thereto'. The parallelism of this natural law case with the provisions of a positive, national law is clear when Overton goes on to redefine treason in natural law terms as 'a destruction to humane society'.[110] Indeed, this type of forfeiting of rights could be seen as occurring at precisely the point where even for a legalistic writer the laws of England are left behind and those of nature come into force: by stepping treasonably outside the laws of England, one puts oneself into a state of nature, outside the protection of this law; one also violates natural law in so doing, as it is natural law which requires us to live under law – English or other – in the first place. For Overton,

[108] Lilburne, *The grand plea of Lieut. Col. John Lilburne* (1647), pp. 5, 13; *The copy of a letter … to a freind*, p. 2; *The legall fundamental liberties*, p. 70; Hampsher-Monk, 'The political theory of the Levellers', pp. 418ff.

[109] The third *Agreement of the People*, of 1 May 1649, excludes royalists from the franchise and from office for ten years only; actions against the constitution established under the *Agreement* will be proceeded against as treason. Sharp, ed., *The English Levellers*, pp. 170, 177. Lilburne's version of the second *Agreement* provides for a time lapse between subscribing the *Agreement* and being able to vote: Wolfe, *Leveller manifestoes*, p. 297.

[110] Overton, *An appeale from the degenerate representative body* (1647), in Wolfe, *Leveller manifestoes*, p. 178.

natural law corrects narrower, national definitions of treason; for Lilburne, the two can run alongside each other.

The Leveller œuvre suggests some exclusions which are more difficult to reconcile with Lilburne's inclusive language. It is well known that at certain points in their career, the Levellers, or people associated with them, were prepared to countenance the exclusion of 'servants' and almstakers from the franchise. However narrowly these categories are defined, they are still exclusions.[111] Lilburne's writing does not, I think, address this problem. The inclusive thrust of the writing does however tally with the hints to be found in Leveller proposals that they see the political nation as extending beyond heads of household only. The second, most compromised, Leveller *Agreement* did restrict the franchise to 'Housekeepers', and stipulated in detail that they should not be 'servants to, or receiving wages from, any particular person', and that, so far from being almstakers, they be contributors to poor relief. Given these detailed restrictions, and the fact that at other points in the third *Agreement* the words of the second are carried over verbatim, it is surely significant that the *Agreement* of 1 May 1649 reverts to the formula of 'all men of the age of one and twenty yeers and upwards' except servants, almstakers, and, for the time being, royalists.[112] The disappearance of the 'householder' requirement must be significant, even though the exclusion of servants remains. This exclusion is in some tension with Lilburne's language, which implies an appeal to *all* English men, potential as well as actual householders. In fact the document which most explicitly applies Lilburne's language to the franchise is *The case of the armie*, which gives the vote to 'all the freeborn at the age of 21. yeares and upwards … excepting those that have or shall deprive themselves of that their freedome'. No other exclusion is here stated or suggested than 'delinquency': one might exclude oneself by one's acts, but no free-born man (maleness is not spelt out, but was perhaps easily assumed in an army context) was excluded on grounds of status.[113]

Lilburne's language suggests a wish to include all men, but gives a strong impression of excluding women. His masculine language – he even uses 'masculine' as a term of praise for writings he approves of [114] – may not entirely exclude English women from being 'free-born' or 'true-hearted', and women are sometimes mentioned alongside men as being entitled to protection under the law, but clearly women are not the prime examples of English citizen qualities in Lilburne's mind. Why this should be is a difficult question, but I think that for

[111] See Macpherson, and the works in response to him, cited above, n. 10.

[112] Wootton, 'Leveller democracy and the puritan revolution', pp. 432–3; Wolfe, *Leveller manifestoes*, pp. 297, 342; in Haller and Davies, eds., *The Leveller tracts*, p. 321.

[113] Wolfe, *Leveller manifestoes*, p. 212. Wootton, 'Leveller democracy and the puritan revolution', pp. 432–3; and Ann Hughes, 'Gender and politics in Leveller literature', in Susan Amussen and Mark Kishlansky, eds., *Political culture and cultural politics in early modern England* (Manchester, 1995), both argue for the centrality of household heads to Leveller thinking.

[114] Lilburne, *The peoples prerogative*, unpag. proem; *An impeachment of high treason*, p. 5; *The legall fundamental liberties*, in Haller and Davies, eds., *The Leveller tracts*, p. 403.

Lilburne the exclusion of women from the polity is not necessarily a function of a view about political dependence on household heads; rather, it is a more basic understanding of all males – household heads or not – as political beings in a way in which women are not. Lilburne's language of political struggle can be very martial, and he regards women as unlikely candidates for this kind of political valour.

VII

We have seen that Lilburne's language constitutes an appeal and a reminder to Lilburne's male English readers to consider themselves as Englishmen and act as such, and that the main force of the language is precisely its inclusiveness. Lilburne is robustly redrawing the boundaries of the political nation. The significance of this in terms of contemporary political thinking is demonstrated most clearly at the Putney debates of October–November 1647. There, Ireton argues that some relatively narrow property qualification for the franchise should be retained. The civilians, agitators, and Colonel Rainborough argue instead that all those who live under a government should put themselves under that government – which they interpret to mean that it is Englishness which is the significant qualification for the franchise. Mendle is rare in taking this theme of the debates seriously, arguing that 'Putney … was in good measure a debate over who really constituted the English nation.'[115] Nobody, however, was disputing that the rank and file of the army were English, just as no one was disputing that all Englishmen were free-born. The question was whether English or free-born status were in any way relevant to inclusion in the political nation. Ireton said not. He explicitly argued that for this purpose, there was no difference between an Englishman and a foreigner: 'the same reason doth extend' to both cases. For Sexby this claim was simply insulting. Perhaps the angriest speech of the whole debate is his assertion that it was precisely for the English rights which according to Ireton were non-existent that he and his fellow-soldiers had fought: 'We have engaged in this kingdom and ventured our lives, and it was all for this: to recover our birthrights and privileges as Englishmen; and by the arguments urged there is none. … I wonder we were so much deceived.'[116]

The question remains of the actual content of the political rights of the free-born Englishman. One might think that both in Lilburne and in the Putney debates there is a strange gap: the English rights which it is so crucial to assert take so much effort in the asserting that there is little energy left for thinking out the substance of those rights. In the Putney debates and the *Case of the armie* there was a commitment to government by consent through a franchise extended to fit the boundaries of the political nation as army and civilian radicals saw it. In

[115] Michael Mendle, 'Putney's pronouns: identity and indemnity in the great debate', in Mendle, ed., *The Putney debates of 1647* (Cambridge, 2001), p. 125.

[116] A. S. P. Woodhouse, ed., *Puritanism and liberty* (London, 1992), pp. 67, 69.

Lilburne even this is not generally spelt out. In *Englands birth-right* it was suggested that ideally 'every freeman of England … would bestow his service one yeere at least, freely for the good of the Civill State', those who 'want outward means' being paid for this service.[117] Such sweeping proposals for the content of egalitarian citizenship disappear as the Leveller movement grows in sophistication, and this must surely be because the Levellers' formal proposals for overhauling the constitution, including franchise and local office-holding arrangements, are taken to imply the practical level of participation. Again we see how comfortably Lilburne's language of Englishmen's rights and duties sits alongside the natural law consent theory more characteristic of the Leveller movement as a whole. Lilburne urges on Englishmen the active defence of their rights; but, once established, English customary rights, as provided for under common law, are maintained simply by their exercise. Englishmen would thus fulfil their obligation to defend their rights precisely through the voting and holding of office provided for in Leveller constitutions. These actions would also be the expression of their continued consent to government.

There is evidence for this view in Leveller references to the significance of voting and petitioning. The franchise is interpreted – sometimes within the same sentence – in terms both of the ancient right of Englishmen and of consent theory. For Lilburne, the House of Lords was attempting 'to rob us of our native and undoubted liberties and rights (which is to chuse and impower all our law-makers, and to be bound by n[o] law imposed on us, by those that never were chosen & betrusted by us, to make uo [*sic*] lawes)'.[118] Similarly, Lilburne combined consent theory with a belief in the pre-existing constitutional right of free men when he argued that the actions of corporations and the 40*s* franchise itself disenfranchised people 'that by name are free-men of England' who under the present system 'shall have no vote at all in chusing any Parliament man, and yet must be bound by their Lawes, which is meer vasalage'.[119] The Leveller petition of January 1648 set out its demands for the widening of the franchise in terms of ancient rights and the 'Birth-right of all English men':

> Whereas it hath been the Ancient Liberty of this Nation, that all the Free-born people have freely elected their Representers in Parliament, and their Sheriffs and Iustices of the Peace, &c. and that they were abridged of that their native Liberty, by a Statute of the 8. H. 6. 7. That therefore, that Birth-right of all English men, be forthwith restored to all which are not, or shal not be legally disfranchised for some criminal cause, or are not under 21 years of age, or servants, or beggers;[120]

While the franchise presented here is more limited than an adult male franchise, reflecting the concessions made at Putney, the thrust for its widening is expressed by giving it – in theory – to 'all the Free-born people', 'all English men', *before* then excluding certain categories. The franchise in shrieval elections is also

[117] G. E. Aylmer, *The Levellers in the English revolution* (London, 1975), p. 62.
[118] Lilburne, *A whip for the present House of Lords* (1648), p. 16.
[119] Lilburne, *Londons liberty in chains*, p. 52.
[120] Wolfe, *Leveller manifestoes*, p. 269.

claimed as a rightful possession of free-born Englishmen: in 1649 Lilburne complains that under the new regime selection of sheriffs has been entrusted to a few factious men 'while the right owners (the people) are rob'd of their free and popular elections of them'.[121] Petitioning, too, can be seen as part of the political rights belonging to the people: in *Englands new chains discovered*, Lilburne lists the denial of petitioning as a fundamental contradiction of the consent theory of government which the new Rump has itself now espoused: 'to so small an account are the people brought [in having their petitions scorned], even while they are flattered with notions of being the Original of all just power'.[122] Perhaps too Lilburne's insistence on the Leveller version of the second *Agreement of the people*, which unlike the Officers' version required voters to have subscribed to the *Agreement*, underlines the importance of voting as a continuing expression of the consent of the political nation to government under the constitution which they had approved.[123]

This consonance between Lilburne's legal thinking and consent theories is more than accidental. Claims of political status resting purely on natural right could become threatening and uncontrollable, as they were for Ireton at Putney; being able to domesticate that political status by limiting it to 'free-born Englishmen' gave radicals a way of countering Ireton's anarchic fears. It also gave adult English males compelling reasons for, and ways of, thinking themselves into the role of active citizens of England, giving or withholding their consent to the actions of their governors – according to their traditional rights.

I have talked about Lilburne's 'free-born Englishman' as a citizen, and shown how the materials of that citizenship were assembled from traditional languages of English law. Pocock suggests that English subjects' traditional rights, properties, and obligations could not in themselves make an individual into 'an active citizen or a political animal'.[124] While it would be wrong to see the Levellers' writings, which are in quite a different idiom, as an early flowering of the classical republicanism of the 1650s,[125] Lilburne's remaking of the English materials surely marks one stage in this transformation. As Pocock says, what is already there in England is a set of relatively uncontested ideas about the rights, duties, property, and obligations of individual Englishmen. Citizenship does not consist of this alone: these elements must be remade, or overlaid, by an idea which can animate these individuals' sense of themselves as citizens in relation to a state. Lilburne's language of Englishness did much to bring that about.

[121] Lilburne, *An outcry of the youngmen and apprentices* (1649), p. 2.

[122] Lilburne, *Englands new chains discovered* (1649), p. [7]; J. P. Kenyon, *The Stuart constitution: documents and commentary* (Cambridge, 1966), p. 324, for the Rump's resolution of 4 Jan. 1649.

[123] S. R. Gardiner, ed., *The constitutional documents of the puritan revolution* (Oxford, 1906 edn), pp. 363–4; Wolfe, *Leveller manifestoes*, p. 297. Obviously, the measure was also a pragmatic limitation of the franchise to those sympathetic to the Levellers' constitutional aims.

[124] J. G. A. Pocock, *The Machiavellian moment* (Princeton, 1975), p. 335.

[125] Samuel Glover, 'The Putney debates: popular vs. elitist republicanism', *Past and Present*, 164 (1999), pp. 47–80, argues for the Levellers as republicans, but rests his argument on sparse and atypical examples.

At the Putney debates, while Ireton could not concede to Englishmen any direct connection to the state – meaningful status in the nation could only be achieved via *local* ties of property or status – the radicals had a way of connecting individuals directly with their nation and polity. That this was the key argument of the debates must surely be due to Lilburne's influence. For Lilburne, the content of citizenship could largely be taken as read; what 'liberties and privileges' actually *were* did not need to be spelt out. It was more effective simply to accuse opponents of 'incroaching', 'engrossing', 'invading', or 'usurping' Englishmen's privileges and liberties, as if the content of those liberties was self-evident. The real task facing Lilburne was to make those liberties and privileges into citizenship. The content of that citizenship might begin to be articulated under pressure – as it was by others at the Putney debates – but the important thing was to establish that Englishmen, as Englishmen, had political status.