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## **Liberty Against Itself: British Freedoms in North America**

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LIBERTY AGAINST ITSELF: BRITISH FREEDOMS IN NORTH AMERICA

A Dissertation

Submitted to the Graduate Faculty of the  
Louisiana State University and  
Agricultural and Mechanical College  
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requirements for the degree of  
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in

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by

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## **ABSTRACT**

My dissertation explores the theoretical foundations of what I refer to as the Canadian liberal ethos. Taking the British parliamentary revolution of 1688 as pivotal event I examine the development of political liberty in its English incarnations and trace its development as it was expressed in colonial British North America.

This dissertation hopes to provide an explanatory analysis the of the liberal ethos that can: (a) shed light on the pre-suppositions of liberty in a liberal democratic order, (b) contribute to our understanding of the principles that informed the settlement of British North America through an examination of community and coercion, and, (c) consider the role that 1688-89 had on the development of political thought and the exercise of political power in British North America.

This dissertation contributes to the growing literature that examines Canadian political foundations and the principles that informed it. By approaching the topic from a British perspective I hope that the theoretical and philosophical currents that emerged in 17<sup>th</sup> century Britain can be understood as they were applied, with both success and failure, to the colonization of British North America.

## CHAPTER I: CONSCIOUSNESS, ORDER, AND THE ENGLISH EXPERIENCE

### Part I. Introduction

#### A. The Question

This dissertation begins with a question: To what extent can the Canadian understanding of political liberty be traced back to the principles articulated during the British parliamentary revolution of 1688-89? More generally though, it explores the intellectual and institutional roots of the Canadian experience of liberty through the prism of both Western and British political development. The thesis argued is simple: the roots of Canadian order, with varying degrees of success, and within the limits of the practicable, confronts the very contemporary challenge of political order that is unique to modern governments, namely, diversity and community. These realities become confrontational within the context over competing self-understandings that lurk behind a liberal government's constitutional face. As such, this topic engages with questions beyond the strictly material and attempts to be attentive to an understanding of human nature, its differentiated ontological structures, and what is recognized as legitimate authority. Scholarship on the Canadian founding has largely dismissed philosophical foundations as undergirding the Canadian polity.<sup>1</sup> And it is true: a single political philosophy that typifies the Canadian political experience is oxymoronic, particularly if Canada is understood as multi-cultural, both in point of fact and as a prescriptive matter of policy. The difficulties of locating philosophical substance to Canadian government

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<sup>1</sup> See Donald Smiley, *Canada in Question* (McGraw-Hill Ryerson, 1972); E.R. Black *Divided* Cook, "Canada 2000: Towards a Post-Nationalist Canada," *Cite Libre* (Fall 2000): 81-88. Cook sums up much of this shared sentiment, stating: "It is well known that the Fathers of Confederation were pragmatic lawyers for the most part, more given to fine tuning the details of a constitutional act than waxing philosophical about human rights or national goals." 82.

however, lessen when approached through the *experiences* of political philosophy and its applications in practice. This dissertation seeks to contribute to this effort by examining the development of the liberal ethos, specifically British liberty and the transformative effect it has had upon both British and non-British nationals in British North America.

The classical understanding of political community emphasized *homonoia* – or “like-mindedness” - as the basis of a political community. In *The Politics*, Aristotle claimed that, “it is peculiar to man as compared to the other animals that he alone has a perception of good and bad and just and unjust and other things [of this sort]; and partnership in these things is what makes a household and a city.”<sup>2</sup> In other words, according to Aristotle, the substance of a political regime depends upon its ability to share an orientation directed towards a good; this capacity to recognize moral goods is the source of political order and is a political community’s distinctively human feature. Understanding a political society according to a shared *telos* demands a specific understanding of human consciousness or nature (which Aristotle provides); only through this understanding of a shared nature can a community orientate itself towards collective public goods. Unsurprisingly however this philosophical anthropology breaks down when the component parts of a political community do not share a vision of a mutual good or do not recognize foundational principles that they can call common.

While discerning human goods on Aristotelian foundations is in itself no small feat, the rise of natural sciences, and the adoption of their methods to study political phenomena, has at the very least created, “a fundamental, typically modern dualism of a

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<sup>2</sup> Aristotle, *Aristotle’s Politics*, translated by Carnes Lord (Chicago, IL: The University of Chicago Press, 1984), 37.



nonteleological natural science and a teleological science of man.”<sup>3</sup> Where the *telos* of Aristotle insists upon natural ends as the basis of understanding and organizing human activity, modern natural sciences replace teleology with an understanding of human activity rooted in a causal determinism with no natural *telos*. In contrast to Aristotelian *telos* the modern citizen requires require direction and management regarding the exercise of political right. This is all to say, that this dualism of modernity has compounded the problem of political difference by creating competing foundations by which communities strive to achieve a sense of shared purpose. Broadly speaking, one self-understanding grounds itself in an understanding of a natural justice, the other, concerns itself with facilitating a diversity of wants. Contemporary politics contends with these competing foundations as well as with the internecine controversies particular to each understanding. A problem however cannot be solved multiple ways. When Aristotle calls attention to the problem of ethnic or racial tribalism as a basis of faction, the “cooperative spirit” that he understands as capable of overcoming this factionalism can only embrace one vision; the question of consensus in a political community then is almost always a question of horizons.<sup>4</sup> Aristotle writes:

Dissimilarity of stock is also conducive to factional conflict, until a cooperative spirit develops. For just as a city does not arise from any chance multitude, so it does not arise in any chance period of time. Hence those who have admitted joint

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<sup>3</sup> Strauss, Leo, *Natural Right and History* (Chicago, IL: University of Chicago Press, 1953), 4.

<sup>4</sup> This problem of horizons, and unanimity, was recognized by Plato in his telling of “The Phoenician Tale.” “‘Could we,’ I said, ‘somehow contrive one of those lies that come into being in case of need, of which we were just now speaking, some one noble lie to persuade, in the best case, even the rulers, but if not them, the rest of the city.’” Plato, *The Republic of Plato: Second Edition*, translated by Allan Bloom (New York, NY: Basic Books, 2<sup>nd</sup> Edition, 1991), 95.

settlers or later settlers [of different stock] have for the most part split into factions.<sup>5</sup>

From its inception American political thought made claims to like-mindedness, based not only on aspirations grounded in “nature’s God,” but in large part, upon the homogeneity of its composite parts. These were claims that eighteenth century pre-Confederation Canada could never make. In Federalist 2, John Jay, writing as Publius, states:

Providence has been pleased to give this one connected country to one united people -- a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.<sup>6</sup>

The American regime was initially understood, or approached as culturally homogenous, not simply as exceptional by virtue of political principle; this homogeneity was understood, as foundational to its political order. That is, cultural consensus, i.e. homogeneity, was understood by Jay to be the basis of a public orthodoxy that provided firm foundations for political institutions. Canadian political history began the opposite way: as a political confrontation with a heterogeneous population premised, to degrees, on conquest. Both countries though, committed themselves to a national liberal ethos derived from British sources. The Canadian ethos is rooted in a difference of principle and experience. Canada diverged in *principle* by seeking imperial reform over revolution; its *experience* of seeking to reconcile British institutions with non-British subjects further distinguished Canada from the United States. The shared patrimony of British liberty

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<sup>5</sup> Aristotle, *Aristotle’s Politics*, translated by Carnes Lord (Chicago, IL: The University of Chicago Press, 1984), 152.

<sup>6</sup> Hamilton, Alexander, James, and John Jay, *The Federalist Papers*, edited by Clinton Rossiter (New York, NY: Penguin Putnam Inc., 1999), 32.

however remains instructive, insofar as reminding one that a consensus regarding first principles can find divergent expressions of what constitutes a practicable and just social order.

## B. The Liberal Ethos, Consensus and Force

Questions of consensus and divergence, broadly construed, and historically considered, are settled on the spectrums of force, persuasion, and principle. In the opening lines of the *Republic* Plato illustrates the superiority of force when Polemarchus compels Socrates to remain with him and his cohorts at the Piraeus.

Polemarchus said, "Socrates, I guess you two are hurrying to get away to town."

"That's not a bad guess," I said.

"Well," he said, "do you see how many of us there are?"

"Of course."

"Well then," he said, "either prove stronger than these men or stay here."

"Isn't there still one other possibility ...," I said, "our persuading you that you must let us go."

"Could you really persuade," he said, "if we don't listen?"

"There's no way," said Glaucon.

"Well then think it over, bearing in mind we won't listen."<sup>7</sup>

Of course Socrates remains with Polemarchus. Yet for the remainder of the dialogue Socrates explores the limits of persuasion and consensus or *homonoia* with those he has not freely chosen to remain with. Conquest and colonization afford similar opportunities to the defeated (though actual life involves an existential threat of life and death, removed, at least by several degrees, from the text of a Platonic dialogue). Still, several key points bear mentioning regarding the significance of Polemarchus and Socrates. First, any dialogue between force and persuasion requires a receptive audience

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<sup>7</sup> Plato, *The Republic of Plato: Second Edition*, translated by Allan Bloom (New York, NY: Basic Books, 2<sup>nd</sup> Edition, 1991), 4.

unless it is to devolve into further conflict. Secondly, any consensus achieved will be imperfect and occur over a length of time (the *Republic* is a long book, so to are political foundings and settlements). Third, obviously the settlements between political powers do not occur at the level of a Socratic dialogue, insofar as historical actors are not philosophers. Nonetheless, persuasion occurs, not only according to the dictates of power, not only on the field of rational thought, but also in the realm of respectable opinion. That is to say, that symbols of consensus may convey a broad self-understanding that, while not philosophical, at least points towards a political philosophy or political principles at work in history. And insofar as consensus is established on political principles, true revolutions in consensus occur at the level of sentiments more often than they do at the level of power politics. Sentiments then matter, and are indicative of a philosophical orientation.

Harkening back to the English Civil Wars, the Commonwealth period, and the Restoration, John Locke, wrote:

People are not so easily got out of their old Forms, as some are apt to suggest ... This slowness and aversion in the People to quit their old Constitutions, has in this and former Ages, still kept us to, or, after some interval of fruitless attempts, still brought us back again to our old Legislative of King, Lords, and Commons: And whatever provocations have made the Crown be taken from some of our Princes Heads, they never carried the People so far, as to place it in another Line.<sup>8</sup>

The strength of attachment to particular “Forms” of government betrays a commitment, not only to established authority and the attachments of tradition and habit, but also perhaps to the resilience of the sentiments that formed a community in the first place. A revolution may be “revolutionary” insofar as one figure of authority is replaced with

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<sup>8</sup> Locke, John, *Second Treatise of Government*, edited by C.P. MacPherson (Indianapolis, IN: Hackett Publishing, 1980), 107.

another (for example, a king with a president), but as historians of revolution have observed, a new, post-revolutionary regime will often assume common characteristics with the one it replaced.<sup>9</sup>

In studies of revolutionary periods scholarly attention most obviously concerns itself with why a group of people have chosen to rebel. Still, there is a meaningful distinction between those who believe that reform is possible within the system, and those who believe that reform can only be pursued outside it. This distinction, and the various historical tipping points that separate reformists from revolutionaries vary across the historical spectrum. Where these tipping points differentiate themselves, along the lines of prudence and principle, sentiment and expediency, matters. They matter insofar as they articulate how and when political principles that can counsel either reform or revolutionary resistance. Which brings one to the question of loyalism: Can a reforming political system teach lessons a revolutionary regime cannot?

Gandhi, for example, before India, in his early years in South Africa, advocated for reform within the imperial system; only after 20 years of combatting British imperial policies did he become an anti-imperial nationalist.<sup>10</sup> His example and others, illustrate that revolutionaries are often the product, not of revolutionary enthusiasm, but are created by a regime's inability to be responsive or reform itself. In 1829 Ireland's Daniel

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<sup>9</sup> An excellent example of this would be Richard Cromwell (1626-1712), the second Lord Protector of England, a position he inherited from his father and from the republican revolutionary interregnum. The lesson that Richard Cromwell's ascent seemed to teach the English people was a distrust of republican pretensions to virtue. Furthermore, it illustrated that the office of the monarch does not only have an institutional and conventional existence, but perhaps arises due to more elemental components.

<sup>10</sup> See Ernest Hellner, *Nations and Nationalism* (Oxford, UK: Blackwell, 1983); David Hardiman, *Gandhi in His Time and Ours: The Global Legacy of His Ideas* (New York, NY: Columbia University Press, 2003).

O'Connell removed many of the legal and political barriers imposed by the United Kingdom on Ireland's majority Roman Catholic population. And though O'Connell was an Irish nationalist he never sought to cut ties with the British Empire; in this sense, his loyalism succeeded where the revolutionary nationalism of Michael Collins failed.<sup>11</sup> O'Connell's belief in the rule of law, his rejection of violence, and his distrust of the forces unleashed through revolution would inspire Frederick Douglass and the 19<sup>th</sup> century reform movements in the United States. Douglass's eventual conviction that America's federal union offered the best means of ending slavery came, in part, from O'Connell's view that Ireland's best future resided in observing the rule of law and seeking reform within it.<sup>12</sup> This view stood in contrast to Douglass's mentor, William Lloyd Garrison who viewed the constitution as a "covenant of death." Douglass too then, can be viewed as a reforming loyalist.

The point of these examples is simply to illustrate that when political principle mobilizes itself for historical action it does not always do so within the sphere of pure power politics and revolutionary resistance. Furthermore, these historical examples illustrate how loyalty amidst a political grievance isn't necessarily acquiescence to injustice or without principle. Behind loyalty similar principles and convictions regarding

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<sup>11</sup> Hoppon, Theodore, K. "Riding a Tiger: Daniel O'Connell, Reform, and Popular Politics in Ireland, 1800-1847," in *Reform in Great Britain and Germany, 1750-1950*, edited by T.C.W. Blanning and Peter Wende, (New York, NY: Oxford University Press, 1999.) 121-43.

<sup>12</sup> Rolston, W.J. "Daniel O'Connell," In *Encyclopedia of African American History, 1619-1895: From the Colonial Period to the Age of Frederick Douglass*, edited by Paul Finkelman (New York, NY: Oxford University Press, 2006.) "Frederick Douglass idolized O'Connell. In 1845 he attended a repeal meeting in Dublin's Conciliation Hall to hear O'Connell speak. 'I have heard many speakers within the last four years – speakers of the first order; but I confess, I have never heard one by whom I was more completely captivated than by Mr. O'Connell.' That evening, O'Connell introduced Douglass to the large audience as 'the Black O'Connell of the United States.' In later years Douglass bewailed O'Connell's death because the 'cause of the American slave, not less than the cause of his country, had met with a great loss'" 479.

good government can exist alongside those who see no future in reconciling their politics with political oppression. Yet where the two depart from one and other can illuminate significant differences of value. This is the case with the British loyalists during the American revolutionary period and their particular understanding of British liberties. Political reform, often seeking the middle ground between established order and political principle, lacks the allure of revolutionary enthusiasms. Reform movements are mindful that the first material principle of consensus resides in the territorial stability of the regime itself. The *homonoia* of a revolutionary movement will forgo such stability; if revolutionary movements can be comprehended by one unifying element, it would be the willingness to sacrifice both lives and stability for the sake of its cause.

#### C. 1688-89 and the Problem of Origins

In examining British liberty and its formative effect on Canadian national sentiment I take the revolution of 1688 as my ultimate point departure. The revolutionary settlement of 1689, ending almost a century of uninterrupted war, was forged in a culture of disparate and competing elements. Austin Woolrych writes that, “The revolutionary years can be more fruitfully and accurately seen as part of a process: a process that reached some kind of period ... in the Revolution settlement of 1689 and after – for Scotland in 1707.”<sup>13</sup> Classical and Christian philosophy, the tradition of the ancient constitution, and Enlightenment thought all existed alongside each other in this settlement; all claimed a representative stake in what this settlement meant for British liberty in terms of how it was understood within the realm and within the expanding empire. The settlement of 1689 incorporated disparate elements but is crown achievement

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<sup>13</sup> Woolrych, Austin, *Britain in Revolution: 1625-1660* (New York, NY: Oxford University Press Inc., 2002), 795.

was the articulation of Parliamentary supremacy and what this supremacy represented. Unlike Magna Carta, 1688-89 was a civilizational achievement that signified a new and universal order had made a claim upon English politics; 1688-89 further distinguished itself from Magna Carta according to its orientation towards political power. The post-1688-89 consensus understood legitimate political rule to be grounded in popular consent and represented through Parliament. The disorders of the seventeenth century can only be understood in the context of broader forces: the collapse of the universal church, the emergence of national and independent states, the rise of power politics and self-interpretive sectarianism, Enlightenment political thought in competition with Classical and Christian anthropologies.<sup>14</sup> In general the crisis was (and in a sense, continues to be) a crisis of legitimating and grounding authority in relation to what individuals can claim as their own. 1688-89 articulated an understanding of legitimate authority and power based upon Parliamentary representation and a limitation on executive power and prerogative.

Philosophically the revolution of 1688-89 infused, not just Britain, but her colonies with a renewed political self-understanding based upon its principles. If, as contended by a recent school of Canadian political theorists, most notably Janet Ajenzstat, both Canada and the United States share a Lockean understanding of

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<sup>14</sup> Voegelin, Eric, *From Enlightenment to Revolution*, ed. John Hallowell (Durham, NC: Duke University Press, 1975), 5: "The trend towards a new order of substances thus, has a considerable breadth and momentum. Nevertheless we do not find before 1700 a comprehensive interpretation of man in society and history that would take into account the constituent factors of the new situation, that is: the breakdown of the Church as the universal institution of Christian mankind, the plurality of sovereign states as ultimate political unities, the discovery of the New World, and the more intimate acquaintance with Asiatic civilizations, the idea of a non-Christian nature of man as the foundation from speculation on law and ethics, the demonism of the parochial, national communities and the idea of the passions as the motivating forces of man."



governance, specifically in regards to legislative bodies, where does the consensus and divergence occur within each country's respective understandings of liberty - especially in reference to the principles of 1688?<sup>15</sup> It is the contention of this dissertation that the North American political founding's of the 18<sup>th</sup> and 19<sup>th</sup> centuries were re-articulations of the principles of 1688-89, though re-purposed, modified, and, differentiated by either the radicalism of their intent, the breadth of their vision or the cultural consensus they were able to achieve. The initial focus then is both the scope and the animating force behind the demand for free government, first in an examination of the authority in the West, of British liberty in its antecedent and formative stages, then the seventeenth century itself, and finally an examination of the British experience of in North America. Regarding the Canadian colonies I limit myself primarily to the eastern Canadian experience. It contains the representative elements that indicate the depth of the challenge faced by Great Britain in the years prior to Canadian nationhood.

In the twenty-first century both Canada and the United States typify the modern democratic state, albeit in very different ways. Their shared origins but differing national characters cannot be reduced to mere ethnic and demographic variance, though that plays a significant part. The variety of representations that political life has assumed does not only speak to the formative power of raw power politics; it challenges the notion that a shared culture or history commits a people to a shared political destiny. What was

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<sup>15</sup> Ajzenstat, Janet, *The Canadian Founding: John Locke and Parliament* (Montreal, QC: McGill-Queens University Press, 2007), 101-102: "The 'better way' is a political nationality. I have said that it owes much to Locke...Can we, indeed through assertion of principles or through a constitutional division of powers so confine passionate loyalties?...The Fathers' formula for a political nationality escapes this difficulty since Canadian identity at the national level attaches to inclusive institutions and principles, not to a substantive culture and exclusive way of life." Ajzenstat is primarily concerned with the distinction between political values and social values. The Locke she emphasizes regarding Canadian political identity is specifically institutional, and politics, furthermore, is considered through a strictly institutional prism.

“revolutionary” about 1688-89? When examining a revolutionary period it is instructive to ask how “revolutionary” an event was, and furthermore, who the revolutionaries represented. If the American founding was a conservative or restorative revolution of pre-existing British liberties, then what, if anything, differentiates Canada’s political origins from their southern neighbor?

#### D. Problems of 1688-89: Culture, Consensus, and Historical Experience

Eric Voegelin wrote: “Human society is not merely a fact, or an event, in the external world to be studied by an observer like a natural phenomenon. Although it has externality as one of its important components, it is a whole little world, a *cosmion*, illuminated with meaning from within by the human beings who continuously create and bear it as the mode and condition of their self-realization.”<sup>16</sup> This consensus view of a community depends upon the shared understanding of human beings within social existence and their capacity to live in community based upon similarity and difference. That is, consensus not only depends upon those who comprise a particular community, but consensus depends upon *how* communication and consensus is achieved within that community. The height of a community’s civil theology or shared moral purpose therefore will depend on the achievable degree of consensus amongst its members. The means of achieving consensus comprises an element of its substance.

The disorders of seventeenth century England were largely predicated and justified upon competing teleological visions of governance aspiring to consensus through coercion. That is the sacred rights of Parliament, the divine right of kings,

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<sup>16</sup> Voegelin, Eric, *The History of Political Ideas (Vol. V): Religion and the Rise of Modernity (Collected Works of Eric Voegelin, Vol. 23)*, edited by James L. Wiser (Columbia, MO: University of Missouri Press, 1998), 109.

Aristotelian republicanism, and the Puritan movements, descended from an elevated sense of purpose into fields of battle. Teleology was the problem to the degree that man's supernatural destiny gave articulation to a, "metastatic apocalypse deriving directly from the Israelite prophets, via Paul, and forming a permanent strand in Christian sectarian movements."<sup>17</sup>

This is the context in which Thomas Hobbes rejected the Aristotelian teleology and its attendant philosophical anthropology. In the *Leviathan* Hobbes states: "I believe that scarce anything can be more absurdly said in natural philosophy than that which is called Aristotle's *Metaphysics*; nor more repugnant to government than much of that he hath said in his *Politics*, nor more ignorantly, than a great part of his *Ethics*."<sup>18</sup> Hobbes rejected Aristotelianism and proposed a political, philosophy that derived its first principles from the most elemental of teleologies, i.e., matters of life and death. The Hobbesian anthropology grounded itself in a psychology of the passions with a mechanistic view of humanity as bodies in motion, coming to rest only in death. It places great, even reverential value in life *qua* life. The character that life assumes is without a specific teleology in Hobbesian thought, or rather, life is not marked by a shared destiny or a shared set of goods. This diversity of goods is especially characteristic of our politics.

John Locke has the distinction of being considered by many as an intellectual father of both the Parliamentary Revolution of 1688 and the American Revolution. The

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<sup>17</sup> Voegelin, Eric, *Autobiographical Reflections, Revised Edition with Glossary*, edited by Ellis Sandoz (Columbia, MO: University of Missouri Press, 2011), Pg. 93.

<sup>18</sup> Hobbes, Thomas, *Leviathan, Revised Edition*, edited by A.P. Martinich and Brian Battiste (Calgary, AB: Broadview Press), 543.

substance of Lockean thought then matters. Does Locke proceed from an Aristotelian/Thomistic tradition of natural law, or is he ultimately Hobbesian in his account of politics, understood as a psychology of the passions?<sup>19</sup> This will be considered at a later point, but for now it is worth noting that the Lockean emphasis on property and acquisition harmonized with the English regime that emerged post-1689, i.e., the emergence of England as a commercial republic in the Dutch mold. Is it overstating things to maintain that the liberal creed of 1688 – 89 gave the West a *new* foundation for political legitimacy or, was its legacy, as others have maintained, consistent with classical natural law and English constitutionalism.<sup>20</sup> It is the contention of this dissertation that 1688-89 was innovative and new yet carried with it the vestiges and habits of traditional English rule. Understanding 1688-89 as a bloodless, conservative revolution, only concerned with the recovery of ancient liberties, obscures its achievement. Bernard Bailyn recognized this, writing that, “awareness of the radicalism of 1688 faded in the triumph of Parliament’s supremacy and Victorian complacency. But not everywhere. It survived intact, even enhanced, in revolutionary North America.”<sup>21</sup> Emphasizing the innovative and radical nature of 1688/89 puts the North American movements for self-government and representation perhaps in a less revolutionary perspective. Considered in

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<sup>19</sup> Stoner, James. “Was Leo Strauss Wrong about John Locke,” and Michael P. Zuckert, “Comments” *The Review of Politics*, 66, no. 4: 553-563.

<sup>20</sup> See Michael Zuckert’s *Natural Rights Republic* (University of Notre Dame Press, 1996). Zuckert links Whig principles with the pre-modern natural law tradition.

<sup>21</sup> Bailyn, Bernard. “How England Became Modern: A Revolutionary View” Rev. of *1688: The First Modern Revolution* by Steve Pincus, *New York Review of Books*, Nov. 19, 2009. Web.

this light, the significance of America's revolutionary origins are diminished while American constitutionalism assumes a greater prominence, significance, and interest.<sup>22</sup>

British North America, and the Canadian regime, did not experience a revolution in the defining and revolutionary manner that the American colonists did. The Canadian system of government established in 1867, while concerned with the same questions of self-governance, remained in political partnership with Britain. In the 19<sup>th</sup> century, this was due in large part to the fact that Canadian revolutionary momentum was more or less always countered by imperial reforms.<sup>23</sup> For these reasons the revolution of 1688-89, as a model of both Canadian and American constitutions, remains highly instructive, in terms of one order replacing another; if one is looking for shifts in philosophical orientation regarding matters of governance and attitudes towards political liberty, 1688-89 articulates the ascendant ethos that would find further expression in the British colonies. This ethos then, the political ethos of 1688-89, carried over into *both* loyalist and

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<sup>22</sup> For instance the most exceptional aspect of the American Revolution was not the success of the revolution itself. Its most significant accomplishment was in the revolutionary settlement and the durability of the constitutional settlement. Furthermore, the success of the Constitution shouldn't obscure the ways in which many founding fathers (Hamilton particularly) had a vision for the United States that was strikingly similar to the as the system of government that had been recently replaced - despite its outward republicanism.

<sup>23</sup> Ajzenstat, Janet, *The Political Thought of Lord Durham* (McGill-Queen's University Press, 1988). After the rebellions of 1837-1838 in Upper and Lower Canada, John Lambton, Lord Durham, issued a 'Report on the Affairs of British North America.' To address the unrest Durham recommended responsible government, which would give the legislative assemblies and weaken the office of the governor general. Durham also recommended increased British immigration into Canada, in an effort to secure the British character of Canadian government. Furthermore, he advised the repeal of the Royal Proclamation of 1763 and the Quebec Act of 1774 which empowered both French and aboriginal peoples. Ajzenstat notes the importance of balance constitutionalism to the settlement of 1688-89 and how it remained central to the concept of British governance: "Durham describes the constitutional reforms he proposed for the colonies as the expression of the principles of 1688. 'It needs no change in the principles of government,' he argued, 'no invention of a new constitutional theory, to supply the remedy which would, in my opinion, completely remove the existing political disorders.' He apparently to persuade the colonists and assure his whig colleagues that the tried and true British formula was more appropriate for British North America..." 54.

revolutionary camps – i.e., it carried over into both Canada and the United States, playing a significant part in laying foundations for two diverging visions of the liberal ethos.

The post 1688/89 consensus shifted the center of political authority locating it in the supremacy of parliament – the subjects retained a share in this supremacy through the principle of representation. The post 1688/89 consensus encountered its limits, not within the realm, but throughout the empire, (in Ireland, Scotland, and North America, and also in Asia, and Africa); there the universal claims of British order collided with the forces of an alternate historical consciousness and to territory's unattached to British institutions. The cultural preconditions required for partaking in British liberties were circumscribed by both nationalism and tradition. In the empire this limitation provided no basis for extending community, no foundation for consensus, and no vision of community, unless it was predicated upon the majority or dominant principle of British representation. In short, the stresses of empire compelled both Britain and her colonists to reevaluate their understanding of liberty in light of its parochial and cosmopolitan elements.

Consideration of the topic requires explaining a methodology capable of comprehending the breadth of the subject. Approaching a “Canadian liberal ethos” is difficult methodologically. How can a “Canadian liberal ethos” be properly considered when the political reality it comprehends understands itself according to its divisions as much as it does its unifying principles? To approach the topic I approach it from the Western, and then British experience of order. I do this by relying on Eric Voegelin's approach to consciousness, representation, and history. To the degree that I am successful, it can be considered a Voegelinian approach.

## Part II: The Liberal Ethos and the Origins of Order

### A. Eric Voegelin, Consciousness, and Grounding Order

To understand and to approach the liberal ethos requires comprehending it in a representational form. The thought and methodology of Eric Voegelin is conducive to this approach. Voegelin placed the participatory consciousness at the center of his political philosophy, writing that, “the problems of human order in society and history originate in the order of consciousness. Hence the philosophy of consciousness is the centerpiece of a philosophy of politics.”<sup>24</sup> Self-understanding then essentially defines the order of a political arena according to this argument. But when Voegelin writes that the “reality of experience is self-interpretive,” he is speaking, not only of an individual consciousness enmeshed in history,<sup>25</sup> he is speaking of a self-understanding that extends beyond the individual and orientates political communities in an aggregate of shared meaning. Derived from Plato, he calls this the “anthropological principle.” The “anthropological principle” holds that the polis, or the state, is representative of the human person writ large. The question that this understanding of politics confronts then is one of an articulated consciousness, followed by a question of consensus and coherence.

In a free society premised on the rights of individual conscience, what shared political self-interpretation is possible? Or put differently, can Socrates, as a legislator,

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<sup>24</sup> Voegelin, Eric, *Anamnesis: On the Theory of History and Politics (Collected Works of Eric Voegelin, Volume VI)*, edited by Gerhart Niemeyer and translated by M.J. Hanak (Columbia, MO: University of Missouri Press, 1990), 33.

<sup>25</sup> Voegelin, Eric, *Order and History, Vol. IV: The Ecumenic Age, (Collected Works of Eric Voegelin, Vol. 17)*, edited by Michael Franz (Columbia: University of Missouri Press, 2000), 233: “Reality was experienced by Anaximander (fl. 560 B.C.) as a cosmic process in which things emerge from, and disappear into, the nonexistence of the Apeiron. ... Hence, to exist means to participate in two modes of reality: (1) in the Apeiron as the timeless arch of things and (2) in the ordered succession of things as the manifestation of the Apeiron in time.”

persuade Polemarchus to share with him a philosophical anthropology? If not how will they live together? If, as Madison famously declared, “liberty is to faction what air is to fire,” then the liberal ethos of popular governments and their inherent pluralism might impose more modest aims regarding issues of consensus and, in turn, on Voegelin’s theory of consciousness. The consciousness characteristic of Voegelin’s noetic science might be more prudentially and practically realized *via negativa*: a government not actively hostile or closed to the noetic consciousness would be representative of the type of order that Voegelin would find favorable.<sup>26</sup>

Voegelin understands consciousness as a participatory experience of the “in-between” reality, or, what he refers to as the Platonic *metaxy*, a tensional existence between our embodiment and our experience of *nous*, i.e., transcendent reality.<sup>27</sup> Noesis is the ordering font of consciousness. Noting its Aristotelian basis, Voegelin states that, “by nous he understands both the human capacity for knowing questioning about the ground and also the ground of being itself, which is experienced as the directing mover of questions.”<sup>28</sup> This puts the noetic consciousness in a participatory relationship with the

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<sup>26</sup> According to Voegelin’s understanding of representation and reality however, this might be an impossibility due to his understanding that reality is constituted by its relation to transcendent expression. In other words, political bodies *will* have a civil theology - it is only a question of *what* that civil theology will be.

<sup>27</sup> Voegelin, Eric, *Anamnesis: On the Theory of History and Politics (Collected Works of Eric Voegelin, Volume VI)*, edited by Gerhart Niemeyer and translated by M.J. Hanak (Columbia, MO: University of Missouri Press, 1990), 119: “Existence has the structure of the In-Between, of the Platonic *metaxy* and if anything is constant in the history of mankind it is the language of tension between life and death, immortality and mortality, perfection and imperfection, time and timelessness; between order and disorder, truth and untruth, sense and senselessness of existence; between amor Dei and amor sui, l’ameouverte and l’ame close; between the virtues of openness toward the ground of being such as faith, love and hope, and the vices of unfolding closure such as hubris and revolt; between moods of joy and despair; and between alienation in its double meaning of alienation from the world and alienation from God.” *Noesis* is both the experience *of* and the pull *toward* the divine ground of being.

<sup>28</sup> *Ibid.* 149.



noetic ground of reality. Consciousness is participatory in its apprehension of nous but nous is also the force that creates order within consciousness. Order then is derived from a consciousness that is consubstantial with the noetic ground of being.<sup>29</sup> Its structure is revealed in what Voegelin understands to be the luminous experience of participation. Political power is not existentially subordinate to Noesis, reason or spirit. Yet the recognition of order allows one to recognize its opposite, and to the degree that disorder institutionalizes itself, this recognition allows one to see a specifically political eclipse of human potential.

Voegelin relies on Aristotle to outline a philosophical anthropology and a vision of the human personality in all its gradations. Human life encompasses the lateral *aperieon* of Heraclitus, along with the inorganic and vegetative nature, animal nature, the passions, the noetic consciousness and divine nous. It is the experience of the noetic that is constitutive of our essential humanity according to Voegelin. Rejection or rebellion against the noetic consciousness, particularly a rejection of the “in-between” status of consciousness leads to disorders that manifest themselves as social pathologies. Voegelin sees these disorders as an outgrowth of modern political philosophy’s rejection of classical metaphysics and through that rejection, an abandonment of restraint. According to Voegelin “the history of philosophy is in largest part, the history of its derailment.”<sup>30</sup>

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<sup>29</sup> *Ibid.* 95. Voegelin writes: “From the Parmenidean outburst, the classic experience has inherited the noetic endowment of man (the Aristotelian *zoon noun echon*) that makes his psyche a sensorium of the divine *aition*, as well as the sensitiveness for the consubstantiality of the human nous with the *aition* it apperceives ... Could the divine *aition* indeed be one of the elements as earlier thinkers who were still closer to the gods of myth had assumed, or would it not, rather than an element, have to be a formative force that could impose structure on matter.”

<sup>30</sup> Voegelin, Eric, *Order and History (Volume Three: Plato and Aristotle)*, edited by Dante Germino (Columbia, MO: University of Missouri Press, 2000), 331.

This derailment finds expression and self-interpretation in the disorders of history. In the case of the Anglo-American tradition, for example, he characterizes John Locke as follows: “His is a case of spiritual disease in the sense of the Platonic nosos [disease]; it belongs in the pneumatopathology of the seventeenth century ... In Locke the grim madness of Puritan acquisitiveness runs amuck.”<sup>31</sup> For Voegelin, the substance of politics related to questions of order and spirit and was born of the experience of consciousness.

#### B. Consciousness, Symbol, and Disorder

The “derailment” of philosophy that concerned Voegelin, and which he saw in Locke, was the rejection of noetic reasoning, and with it, what he considered to be the soul’s closure to the experience of its own structure. In his *Essay Concerning Human Understanding* Locke articulates an understanding of reason on naturalistic grounds. On reason and revelation, Locke states: “Whatsoever God hath Revealed is certainly true. No doubt can be made of it. But whether it be a Divine Revelation or no, Reason must judge, which can never permit the mind to reject a greater evidence for that which is less evident, or prefer less certainty to greater.”<sup>32</sup> To this Voegelin writes: “The bond of faith is broken and the experiences that give meaning to the symbols of myth and religion are lost ... Reason has become an autonomous, natural faculty. The formula that it originates in “the Father of Light” is empty because this very symbol is meaningless without the

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<sup>31</sup> Voegelin, Eric, *History of Political Ideas (Vol. VII): The New Order and Last Orientation (Collected Works of Eric Voegelin, Vol. 25)*, edited by Jurgen Gebhardt and Thomas A. Hollweck (Columbia, MO: University of Missouri Press, 1999), 151-152.

<sup>32</sup> Voegelin, Eric, *History of Political Ideas, Vol. VI, Revolution and The New Science of Politics (Collected Works of Eric Voegelin, Vol. 24)*, edited by Barry Cooper (Columbia, MO: University of Missouri Press, 1996), 171. Quotation from John Locke in *An Essay Concerning Understanding*.

experience from which it springs.”<sup>33</sup> What Voegelin is accusing Locke of doing is detaching the meaning of experience and truth from its ground; of creating a strictly propositional and prudential level of judgment, removed from the participatory, experiential level or order.

The experiences of consciousness, and its corresponding order, find representations that emerge in history, “clad in the mantle of authority as a self-interpretation of reality.”<sup>34</sup> This self understanding is expressed through, “elaborate symbolisms, communicating the fundamental consensus of the society and shaping the fabric of institutional life and the personal and public lives of its people.”<sup>35</sup> Symbols then are the expression of subjective experience; they represent the experience of consciousness participating in the fullness of reality and are reflected in our social lives. Reality itself is understood symbolically as something that consciousness participates in, represented by God, man, world, and society. “The community of being with its quaternarian structure is, and is not, a datum of human experience. It is a datum of experience insofar as it is known to man by virtue of his participation in the mystery of its being. It is not a datum of experience insofar as it is not given in the manner of an object of the external world but is knowable only from the perspective of participation in

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<sup>33</sup> *Ibid.* 152.

<sup>34</sup> Sandoz, Ellis, *The Voeglinian Revolution: A Biographical Introduction* (Edison, New Jersey: Transaction Publishers, 2000), 98.

<sup>35</sup> *Ibid.* 98.

it.”<sup>36</sup> Symbols then are the language by which we convey the meaning and depth of participatory experience in the “community of being”.<sup>37</sup>

Identifying order in history then requires looking at complex symbolisms that constitute both their internal and external existence. Following Voegelin, Ellis Sandoz writes that “social reality” in its non-material dimensions illuminates meaning in the political realm. “For social reality is not an object in nature to be studied by the theorist merely externally. Rather one finds that social reality is organized into a great multiplicity of concrete human societies in a variety of historical contexts, dispersed geographically over the whole globe.”<sup>38</sup> It is not only through representative institutions that a political community finds definition. These different regimes all have an internal element of “meaningfulness through which the human beings who inhabit it interpret existence to themselves. Each society is an illuminated ‘cosmion’ or little world to itself; and the self-interpretation of existence through the elaborate symbolisms arising therein comprise the substance of the cosmion as social reality.”<sup>39</sup>

According to Voegelin these symbols are, “[not] a human conventional sign signifying a word of God conveniently transmitted in the language the recipient can understand [but are] engendered by the divine-human encounter and participates,

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<sup>36</sup> Voegelin, Eric, *Order and History (Volume Three: Plato and Aristotle)*, edited by Dante Germino (Columbia, MO: University of Missouri Press, 2000), 39

<sup>37</sup> Voegelin, Eric, *Autobiographical Reflections, Revised Edition with Glossary*, edited by Ellis Sandoz (Columbia, MO: University of Missouri Press, 2011), 99.

<sup>38</sup> Sandoz, Ellis, *The Voeglinian Revolution: A Biographical Introduction* (Edison, NJ: Transaction Publishers, 2000), 93.

<sup>39</sup> *Ibid.* Pg. 93.

therefore, as much in divine as in human reality.”<sup>40</sup> Yet this understanding of the divine for Voegelin is characterized as much by its inaccessibility as by its accessibility. It is symbols of the noetic encounter and their limits that illuminate the structure of consciousness, history, and reality through the depth of their participation. When a symbol becomes a proposition, as in the case of Lockean Christianity, its very claim to validity, the engendering experience that articulated it, is lost and it becomes abstracted into a preposition before the tribunal of Locke’s natural reason. This is to say, Voegelin’s symbols retain their vitality as long as the experiences that engendered them remain attached to the experience of life. Furthermore, symbols can be evaluated, not simply by whether or not they are propositional or experiential. According to Voegelin, symbols can also be evaluated by the degree to which they are open or closed to the fullness of reality itself. Participation for Voegelin, especially regarding noetic and transcendent consciousness, is of particular importance, not simply because it illuminates the height to which humanity grasps, but also in the limits by which it acknowledges that we must live.

This noetic ordering of consciousness and its participation within “quaternarian” reality gives Voegelin a methodological apparatus by which to judge representations of consciousness and their symbols. That is, it provides a methodological language to differentiate between order and disorder. Voegelin “came to understand deformed consciousness as a closure to or revolt against reality as it had been experienced and symbolized in myth and philosophy. Ancient mytho-poets and philosophers symbolized the quaternarian structure of reality (i.e. the community of being: God, man, world, and

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<sup>40</sup> Voegelin, Eric, *Autobiographical Reflections, Revised Edition with Glossary*, ed. Ellis Sandoz (Columbia, MO: University of Missouri Press, 2011), 100.

society), and Voegelin recognized that significant segments of modernity were locked in closure to reality structured this way.”<sup>41</sup> Voegelin wrote:

The deformation of which I am speaking is the fateful shift in Western society from existence in openness toward the cosmos to existence in the mode of closure against, and denial of, its reality. As the process gains momentum, the symbols of open existence – God, man, the divine origin of the cosmos, and the divine Logos permeating its order – lose the vitality of their truth and are eclipsed by the imagery of a self-creative, self-realizing, self-expressing, self-ordering, and self-saving ego that is thrown into, and confronted with, an immanently closed world.<sup>42</sup>

Voegelin himself realized the difficulty of noetic order, writing that by, “order is meant the structure of reality as experienced as well as the attunement of man to an order that is not of his making ... order is reduced to one’s own person and is perhaps not to be found even there; these experiences produce certain extreme states of alienation in which death may appear as the release from a prison or as convalescence from the mortal disease of life.”<sup>43</sup> That is all to say that an ordered consciousness of the Platonic metaxy may avoid an orientation to pure materialism or divinizing the intramundane, but nonetheless the metaxy remains a state of existential tension, an acknowledgement of human limits within a consciousness of limitless aspirations. For this reason the vitality of symbols, expressed in myth, religion, and philosophy, give order and meaning to existence and are therefore of paramount importance to our social existence. Their

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<sup>41</sup> Embry, Charles R., *The Philosopher and the Storyteller; Eric Voegelin and Twentieth-Century Literature* (Columbia, MO: University of Missouri, 2008), 24.

<sup>42</sup> Voegelin, Eric, *Published Essays: 1966-1985 (The Collected Works of Eric Voegelin, Volume, 12)*, edited by Ellis Sandoz (Columbia, MO: University of Missouri Press, 1990), 151.

<sup>43</sup> Voegelin, Eric, *Autobiographical Reflections, Revised Edition with Glossary*, edited by Ellis Sandoz (Columbia, MO: University of Missouri Press, 2011), 101, 75.

importance lies articulating, and rearticulating the dignity and limits of one's political and personal existence.

The vitality of a symbol then, is dependent upon the degree to which participation reflects the experience of living persons. There is an active component, as well as a contemplative component, to the vitality of symbols. The experience of symbols occurs, not just self-reflectively but historically and the vitality of a symbol depends upon the self-understanding of those who, enmeshed in time, engage with it. In other words, "the range of participation is layered in ascending grades of greater reality from the physical to the spiritual, rational, and divine. This insight into the hierarchical structure of order of reality is, at the same time, an insight into the hierarchical structure-order of the psyche or consciousness of the self-reflective man whose composite nature is understood as the epitome of all realms of being and whose specific nature is *Nous*."<sup>44</sup> And while this understanding may characterize man's specific nature as noetic, the pre-condition for the experience of *noesis* is physical existence. In one's person, physical existence constitutes enmeshment in history, as a body, amongst others. In a political community physical existence constitutes being part of a political body with defined borders that comprehends all those who live within its boundaries. Within these confines self-understanding occurs both on an individual level and as a community; they find expression through harmonizing symbolisms that articulate a consensus regarding political life.

It forms the belief structure which is the distinctive foundation of association in society; and it also shapes the essential humanity of the individual members of the society by supplying meaning in their existence as participants in a reality which they experience as transcending merely private existence. Such ordering truth,

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<sup>44</sup> Sandoz, Ellis, *The Voeglinian Revolution: A Biographical Introduction* (Edison, New Jersey: Transaction Publishers, 2000), 204.

then, has the status of existential representation, in that it articulates in an authoritative way the meaning of human existence in society and history ...<sup>45</sup>

A political community, articulating a shared understanding through a series of complex symbols, remains, “burdened with the task, under its concrete conditions, of creating an order that will endow the fact of its existence with meaning...”<sup>46</sup> And if such an order is somehow created, it is only by active *participation* wherein symbols retain their validity and their life as representative of experience.

### C. Temporal Representation, Spiritual Representation and Sectarianism

Voegelin identified three levels of representation: elemental, existential, and transcendental. Elemental representation is the physical and external existence of a society, i.e., what physically binds a society together. Voegelin writes that elemental representation refers to:

...geographical districts, to human beings who are resident in them, to men and women, to their age, to their voting, which consists in placing check marks on pieces of paper by the side of names printed on them, to operations of counting and calculation that will result in the designation of other human beings as representatives, to the behavior of representatives that will result in formal acts recognizable as such through external data, etc.<sup>47</sup>

Elemental representation then is concerned with descriptive analyses regarding political reality. Beyond being descriptive elemental representation offers little by way of theoretical insights. In fact, elemental representation exists to actualize or articulate the “existential representation” of a political culture. Existential representation is understood as the animating idea or spirit of a political culture, it is the inner-world of meaning

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<sup>45</sup> *Ibid.* 98-99

<sup>46</sup> Voegelin, Eric, *Order and History (Vol. I): Israel and Revelation (Collected Works of Eric Voegelin, Vol. 14)*, edited by Maurice P. Hogan (Columbia, MO: University of Missouri Press, 2001), 19.

<sup>47</sup> Voegelin, Eric, *The New Science of Politics* (Chicago, IL: University of Chicago Press, 1987), 33.



expressed through a complex series of symbols. Examples of these symbols would be *democracy, liberty, freedom, participation, the people*, and so on. If there is incoherence between the elemental representation and the existential representation of a society then, disorder will characterize the regime.

Voegelin's third level of representation is the transcendent, i.e. a society's self-understanding in relation to that which is beyond itself. Historically, according to Voegelin, these truth symbols are distinguished according to three types: "The first of these types is the truth represented by the early empires; it shall be designated as 'cosmological truth.' The second type of truth appears in the political culture of Athens and specifically in tragedy; it shall be called anthropological truth' – with the understanding that the term covers the whole range of problems connected with the psyche as the sensorium of transcendence. The third type of truth that appears with Christianity shall be called 'soteriological truth.'"<sup>48</sup> Cosmological truth found representation, most typically, in ancient societies that sought to reflect the order of the cosmos in harmony with their political communities; political society therein was a microcosm of the cosmos itself. Anthropological truth, most vividly expressed by Plato, was a differentiation of the cosmological representation insofar as it interpreted reality from the perspective of the well-ordered soul and the experience of nous, that is, the orders and disorders of a community are the orders and disorders of the soul. Voegelin says, that, in regards to "anthropological truth", it is as compelling, "today quite as much as in the time of Plato."<sup>49</sup> Soteriological truth is, according to Voegelin, a further

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<sup>48</sup> *Ibid.* 76.

<sup>49</sup> *Ibid.* 61.

differentiation. Soteriological truth is the Christian “experience of mutuality in the relation with God, of the *amicitia* in the Thomistic sense, of the grace that imposes a supernatural form on the nature of man...”<sup>50</sup>

Voegelin understands St. Paul to have articulated symbols of experience whereby the new soteriological representation would not only survive, but would thrive in the world. He accomplished this by bridging the gulf between the aspiration of soteriology – that is communion with God - and the stratified and imperfect reality of the given world. According to Voegelin these symbols took the form of five compromises.<sup>51</sup>

Paul had found the essential compromises with the world. The theory of charismata, of the different spiritual gifts in the one body of Christ, had prevented Christianity from becoming a religious aristocracy and given it a broad popular basis; potentially, mankind as a whole could be organized in the new community. The recognition of the existing social structure, furthermore, had made the community compatible with any society into which Christianity would spread, influencing social relations only through the slowly transforming force of brotherly love. And finally, governmental authority was integrated into the community as being ordained by God, making the community compatible with any form of government. The outlines were given for the creation of a new people out of the Spirit of Christ, of a people that would grow deeper and deeper into the existing world, slowly transforming the nations and civilizations into the kingdom of God.<sup>52</sup>

Herein Paul sought to take the new dispensation of Christianity and to relate it effectively to the social realities of political community. Voegelin wrote that the “Epistles

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<sup>50</sup> *Ibid.* 150.

<sup>51</sup> Voegelin, Eric. *History of Political Ideas (Vol. I): Hellenism, Rome, and Early Christianity (Collected Works of Eric Voegelin, Vol. 19)*, edited by Athanasios Moulakis. (Columbia, MO: University of Missouri Press, 1997), 169. Voegelin identifies these five compromises: 1. A compromise with history; 2. A compromise with the weakness of human beings as realized in the differences of gifts that accrue to the members of the mystical body of Christ; 3. The addition of the law of love to the codified law of the Old Testament; 4. Eschatological indifference to social problems; and 5. The compromise with authority by the acceptance of governmental authority as being ordained by God.

<sup>52</sup> *Ibid.* 173.

of Paul present the momentous step from radical perfectionism to the compromise with the realities of the Christian community in its environment. From Hebrews the path could have led to a small community of saints; Paul opens the way to imperial expansion, the way to Rome.”<sup>53</sup> And this ideal of imperial Christianity, notes Voegelin, while never coming to fruition, achieved significant representation in the Middle Ages before parochial Christianity replaced the *corpus mysticum* and the *sacrum imperium* was replaced by the national and autonomous political bodies. The reasons for this were embedded in the compromises themselves.

The “Compromise with the world” and its institutionalization in the *sacrum imperium* have had the effect of gradually weakening the sentiment of distinction between this world and the realm that is not of this world ... The transcendental order of God was supplemented by an intramundane order of forces filling the realm.<sup>54</sup>

The tension between the *corpus mysticum* and the *sacrum imperium* can be credited to their overlapping spheres of jurisdictions. This tension eventually collapsed into a singular spiritual and political unit, controlled by a representative apparatus, that, “outlines of a form of government that today we are accustomed to call totalitarian.”<sup>55</sup>

The Pauline *corpus mysticum*, for a time, was the spiritual counterpoint to the *sacrum imperium*. It was a counterpoint until the *sacrum imperium* took the universalizing

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<sup>53</sup> *Ibid.* 169.

<sup>54</sup> Voegelin, Eric. *History of Political Ideas, (Vol. II): The Middle Ages to Aquinas*, edited by Peter Von Sivers. (Columbia, MO: University of Missouri Press, 1998), 109. Also see Jeffry Herndon’s book *Eric Voegelin and the Problem of Christian Political Order* (Columbia, MO: University of Missouri Press, 2007). Herndon’s book was an invaluable resource in understanding Voegelin’s specific linkage of soteriological representation and empire, and in analyzing Voegelin’s understanding to Christendom in general.

<sup>55</sup> Voegelin, *History of Political Ideas: Hellenism Rome and Early Christianity*, (Columbia, MO: University of Missouri Press, 1997), 38.

message of the spirit and transformed it into the political aspiration of *Christendom*. The overlapping of jurisdictions between temporal and sacred authorities, notwithstanding, soteriological representation, and the effectiveness of the *sacrum imperium* as a source of order, depended upon sustaining the tension of dual authorities.

St. Augustine's doctrine of "two cities," articulates a dualism rooted in the *corpus mysticum* and its destiny in the Heavenly City. "Two cities have been formed, therefore, by two loves: the earthly love of self, even to the contempt of God; the heavenly by love of God, even to the contempt of self. The former glories in itself, the latter in the Lord. For the one seeks glory from men; but the greater glory of the other is God, the witness of conscience."<sup>56</sup> This division then is not institutional but rather, it is eschatological. And because time is linear according to Augustine, having begun with Adam and ending in the Final Judgment, our temporality dictates that the members of the two cities will intermingle in what Augustine calls the *saeculum*, that is, the realm of temporal existence in which politics takes place.<sup>57</sup> According to Voegelin this understanding of two cities and the *saeculum* also, along with Paul, had a decisively weak point:

[The] Christian world has no structure of its own. After the appearance of Christ, history simply goes on having no internal aim until at some unknown point of time the aimless course is cut short by the second appearance of Christ, an appearance that, as far as the internal structure of the Christian community life is concerned might come today as well as tomorrow or in a thousand years.<sup>58</sup>

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<sup>56</sup> Augustine. *The Political Writings of St. Augustine*, edited by Henry Paoluccie. (Washington, DC: Gateway Editions, 1996), 8.

<sup>57</sup> For details and interpretation on Augustine's understanding of history, in its six stages see, with the the pivotal and final moment gives way to profane history and the *saeculum*, and the division the *civita terras* and the *civitas domani* coexisting until the Final Judgment, see Herndon on Augustine (30-65); see R.A. Marks, *Saeculum: History and Society in the Theology of St. Augustine* (New York, NY: Cambridge University Press, 1989).

<sup>58</sup> Voegelin, Eric. *Order and History (Volume One: Israel and Revelation)*, edited by Maurice P. Hogan. (Columbia, MO: University of Missouri Press, 2001), 212.

The difficulty of this spiritual teleology and the rejection of a political eschaton made Augustine's distinction important, yet existentially and politically, it was a difficult, if not impossible, tension.

Human destiny, and the *telos* of every soul, according to Augustine, is hidden behind the impenetrable finality of divine judgment. Profane history then has no *eidos* insofar as it has no recognizable *telos*; it is an arena where salvation and the road there occurs and is experienced through faith symbols. Yet faith symbols themselves, and those who gravitate towards them require, according to Voegelin, a disposition and a temperament to counsel against, "treating a symbol of faith as if it were a proposition concerning an object of immanent experience."<sup>59</sup> Order for Augustine, is "that which if we follow in our lives will lead toward God." Nevertheless, the gulf between the two loves, *amor sui* and *amor Dei*, is so great and irreconcilable, and so constitutive of reality that it counsels a consensus between the two rooted in stability. Augustine writes, "A people is an assembled multitude of traditional creatures bound together by their common agreement on the objects of their love."<sup>60</sup> This common agreement, insofar as it is political, need not, indeed it cannot transform the *saeculum* into unified whole consisting of a shared love. What binds a community therefore will be a *concordia*, regarding the goods of a shared political life, i.e., of peace and order. Governments are able to provide peace during the period of the *saeculum*, where Augustine's two cities are mixed and

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<sup>59</sup> Voegelin, Eric. *The New Science of Politics*. (Chicago: University of Chicago Press, 1987), 120: "The course of history as a whole is no object of experience; history has no *eidos*, because the course of history extends into the unknown future. The meaning of history thus, is an illusion; and this illusionary *eidos* is created by treating a symbol of faith as if it were a proposition concerning an object of immanent experience."

<sup>60</sup> Augustine. *The Political Writings of St. Augustine*. 182.

members of both cities are able to, “make use of the peace of Babylon.” Augustine further notes, regarding the faithful, “We do so even though the people of God are delivered from Babylon by faith, so that it is only for a while that we are pilgrims in her midst.”<sup>61</sup> Insofar as political order is good, it derives this goodness from its instrumental character. Yet, despite the diminishment of the political, the earthly city is not a morally neutral terrain; the Augustinian dualism places the *saeculum* in the shadow of the Heavenly City; it remains subject to moral judgment and moves in stark relief beneath the impenetrable reflection of the heavens.

## **Part II: Christendom, Power, and the Cracks in Consensus**

### **A. The Gelasian Swords**

The soteriological experience given expression through Paul’s *corpus mysticum* and Augustine’s two cities received a more direct political articulation in the Gelasian doctrine of the two swords. In 494 Pope Gelasius I wrote: “Two there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power. Of these the responsibility of the priests is of more weight insofar as they will answer for the kings of men themselves at the divine judgment.”<sup>62</sup> The Gelasian division, while emphatic on the dual functions of church and state, nonetheless supported the notion that priestly authority superseded royal authority. And while the point of these dual jurisdictions was to divide authority along spiritual and temporal lines, this division itself was as much representative of the new problem regarding political authority within

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<sup>61</sup> *Ibid.* 183.

<sup>62</sup> From Pope Gelasius’s letter to Emperor Anastasius, in James Greenaway’s *The Differentiation of Authority The Medieval Turn Toward Existence*. (Washington, DC: Catholic University Press of America, 2012), 25.

Christendom. The aspiration then of the *sacrum imperium*, and its impossibility, prefigured the sectionalism and wars that would characterize Europe from the late Middle Ages through modernity. That is, the problems of soteriological representation created the conditions of modernity insofar as they prefigured a crisis in the understanding of authority and freedom by attempting to co-exist with overlapping spheres of spiritual jurisdiction. Nevertheless, Christian evocations, the *Pauline corpus mysticum*, Augustine's two cities, and the Gelasian doctrine of two swords, represented an ethos that can be understood to articulate a semi-coherent, albeit fractured civil theology, that lasted as the political orientation of Western Europe for a significant time.<sup>63</sup> Still, the organization of the *sacrum imperium*, and the Gelasian separation of the temporal and spiritual, began to insufficiently account for their experience within the world. Leo III's crowning of Charlemagne as Holy Roman Emperor (800 A.D.) marked the temporal ruler's inclusion within the *corpus mysticum*. According to Voegelin, the inclusion of temporal power in the *corpus mysticum*, coupled with the increasing involvement of the church in temporal affairs, increased the preexisting tensions between the two spheres, and culminated in the Investiture Controversy of 1075.

#### B. The Investiture Controversy

At issue in the Investiture Controversy was who had the authority to install church officials on the local level, i.e. the installation of bishops of cities and the abbots of monasteries. While the historical details have been recounted more thoroughly elsewhere,

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<sup>63</sup> See James Greenaway's *The Differentiation of Authority: The Medieval Turn toward Existence*. (Washington DC: Catholic University Press of America, 2012). Greenaway provides a persuasive analysis of the continuity between modern Western society and the Middle Ages as well as an important methodological tool for a Voegelinian approach to the Middle Ages.

the controversy and its settlement exposed new fissures in the tension between temporal and spiritual authorities.<sup>64</sup> The general outline of the controversy is as follows: with the deposition of the Merovingian dynasty and the installation of the Carolingian dynasty, most significantly represented in the figure of Charlemagne, the papacy maintained that a precedent had been set establishing its superior authority. Furthermore, according to this understanding, the papacy reserved the right to intercede in temporal matters based upon its role in conserving the spiritual integrity of the *sacrum imperium*. Therefore as the representative of the spiritual authority, all members of the *corpus mysticum*, royal authority included, were ultimately subject and contained within its jurisdiction.

The emperor's position was more consistent with an interpretation of the Gelasian doctrine of two swords that relied on separate jurisdictions. That is, though the anointment ceremony included royal authority within the *corpus mysticum*, papal authority over kings remained limited to questions of doctrine and orthodoxy. The *sacrum imperium* depended on the cooperation between sacred and temporal realms, not the ultimate subordination of political authority to spiritual authority. Finally, by, "custom of the imperium the emperor had the protectorate over Rome and that influence on ecclesiastical appointments from the pope downward was his due."<sup>65</sup> This controversy exposed the dangers and weakness inherent in the very idea of a Christian Commonwealth. "The institutional realization of Christian homonoia was always exposed to the danger of cracking historically [and] ... once the spiritual freedom of cooperation

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<sup>64</sup> For details of the controversy see Greenaway, 42-53.

<sup>65</sup> For Voegelin's analysis see *History of Political Ideas, (Vol. II): The Middle Ages to Aquinas (Collected Works of Eric Voegelin, Vol. 20)*, edited by Peter Von Sivers. (Columbia, MO: University of Missouri Press, 1998), 86. This is not an exhaustive account of what happened. Voegelin himself acknowledges this. Nonetheless it gives the contours of what was at stake regarding the issues.



has atrophied to the point that unity must rest on the decision of one of several socially entrenched rival authorities, the danger of schism is near...”<sup>66</sup> The Investiture Controversy resulted in Henry IV’s “walk to Canossa” and the humiliation of begging Pope Gregory VII for forgiveness, over the course of three days wearing a hairshirt and kneeling in the snow. Though the papacy could claim victory in regards to that instance the Investiture Controversy revealed new cracks in the *sacrum imperium* that would be harbingers of Christendom’s transformation into modern Europe.

### C. Cracks in Consensus: The Rise of Self-Interpretive Authority in England

The Anglo-Norman realm produced one of the most strident defenses of royal authority to arise from the Investiture Crisis, a collection of treatises titled, *Tractatus Eboracenses* or the *York Tracts*.<sup>67</sup> Written by Norman Anonymous, the *York Tracts* reject the Augustinian understanding of history and the *saeculum* and reconceives history as occurring in three ages each of which correspond to the realization of God in history.<sup>68</sup> According to Anonymous, as history moves toward the kingship of Christ, humanity as well moves in a similar fashion. The political office of kingship more directly reflects divine nature than that of the priesthood insofar as the priesthood is a mediating force,

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<sup>66</sup> Voegelin, Eric. *History of Political Ideas (Vol. I): Hellenism, Rome, and Early Christianity (Collected Works of Eric Voegelin, Vol. 19)*, edited by Athanasios Moulakis. (Columbia, MO: University of Missouri Press, 1997), 40.

<sup>67</sup> Voegelin’s interpretation of Norman Anonymous is found in *History of Political Ideas (Vol. VIII): Crisis and the Apocalypse of Man (Collected Works of Eric Voegelin, Vol. 26)*, edited by David Walsh. (Columbia, MO: University of Missouri Press, 1999), 92-101. Jeffrey Herndon elaborates an account of Norman Anonymous consonant with Voegelin’s interpretation. For a more full account of the implications of Norman Anonymous and what he was challenging one of the best books during the research for this section was *The King’s Two Bodies: A Study in Mediaeval Political Theology* by Ernst H. Kantorowicz. (Princeton, NJ: Princeton University Press, 1997).

<sup>68</sup> Voegelin, Eric. *History of Political Ideas (Vol. VIII): Crisis and the Apocalypse of Man (Collected Works of Eric Voegelin, Vol. 26)*, edited by David Walsh. (Columbia, MO: University of Missouri Press, 1999), 95.

and though, at one time this mediation may have been necessary, in the second age of history, initiated by Christ and represented through a priesthood of true believers within the *corpus mysticum*, such mediation has lost its necessity. Accordingly then, the Church, no longer retains the same relevance and a new institutional representation is demanded. In the place where the Gelasian understanding of authority had previously resided, a new understanding of authority asserted itself. The alliance between temporal and spiritual authority, while once a necessity, is in this view, a source of disorder. National kingdoms independent of the imperium and independent churches free from the interference of Rome were foreshadowed in this early vision. Furthermore, and perhaps more importantly, Norman Anonymous signified a new self-interpretive authority of the individual as an oracle, capable of divining cosmic meaning in regards to intramundane reality.

Voegelin also notes the importance of John of Salisbury (c. 1120-1180) as significant in the rise of self-interpretive authority and modern consciousness. Salisbury's *Polcraticus* considered "man in the political state," a closed unit of inquiry, where the forces of pride and will are expressions and aspirations to power. According to Salisbury, politics is an expression of *libido domanandi* and the "political man" has a right to resistance according to the dictates of his conscience. Through this understanding the political unit was reconceived into individual units of power, embodied by John's "political man," who according to the logic of this own reason, had a right and duty to kill tyrants. Salisbury writes:

Liberty means judging everything in accordance with one's individual judgment, and does not hesitate to reprove what it sees opposed to good morals. Nothing but virtue is more splendid than liberty, if indeed liberty can ever properly be severed from virtue...it has been the opinion of philosophers that men should die, if need arose, for the sake of virtue, which is the only reason for living.<sup>69</sup>

#### D. Cracks in Consensus: The Rise of Self-Interpretation and Christendom

Monasteries too, began to understand themselves apart from the *corpus mysticum*.

Reacting to the worldliness and corruption of ecclesiastical institutions they began to understand themselves as studies in contrast, beacons of purity, and alternative visions.

This self-understanding led to new vistas of historical speculation notably found in

Joachim of Flora. Joachim, a 12<sup>th</sup> century Christian mystic, followed Norman

Anonymous in articulating new historical patterns that broke with the Augustinian

saeculum and, "attempted to endow the immanent course of history with a meaning that

was not provided in the Augustinian concept."<sup>70</sup> Joachim articulated an understanding of

history that moved through three phases: the first age was of Law (represented by the Old

Testament); the second stage was the Age of the Son (represented in the figure of Christ);

the third stage was the Age of the Holy Spirit (this would be the age of both historical and spiritual fulfillment).<sup>71</sup> Accordingly, these ages are progressive. Whereas the Augustinian

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<sup>69</sup> Salisbury, John. *Policraticus*, translated by Cary J. Nederman. (New York, NY: Cambridge University Press, 1990), 167-175.

<sup>70</sup> Voegelin, Eric. *The New Science of Politics* (Chicago, IL: University of Chicago Press, 1987), 119.

<sup>71</sup> Cohen, Norman. *The Pursuit of the Millennium*. (New York, NY: Oxford University Press, 1970), 109: "Horried though the unworldly mystic would have been to see it happen, it is unmistakably the Joachite phantasy of the three ages that reappeared in, for instance, the theories of historical evolution expounded by the German Idealist philosophers Lessing, Schelling, Fichte, and to some extent Hegel; in Auguste Comte's idea of history as an ascent from the theological through the metaphysical up to the scientific phase; and again in the Marxian dialectic of the three stages of primitive communism, class society and a final communism which is to be the realm of freedom which the state will have withered away. And it is no less true – if even more paradoxical – that the phrase 'the Third Reich' ... would have

understanding of history took Christ to be the apogee of spirituality, Joachim articulated a spiritual progress that evoked a new understanding of man. This new man would not be constrained by the limitations of the *saeculum*; this individual would be transformed into a new freedom and a new spiritual maturity. As with Anonymous, history assumes a teleological significance that later resurfaced in progressive historical narratives of modernity, from Marxist dialectics to Whig historiography.<sup>72</sup>

New self-interpretative sentiments, inconsistent with the *corpus mysticum*, illustrate, not only the fracturing of the *sacrum imperium* into a multitude of divisions, but also how each of these divisions became, “engaged simultaneously in justifying its specific action by attributing to it a specific function or mission that supposedly could not be fulfilled by any other unit.”<sup>73</sup> Voegelin cites Francis of Assisi and Frederick II as prime examples of this. That is, both figures represent to Voegelin, not only a shift in the self-understanding that represents a break with the medieval synthesis; they are also studies in contrast, an illustration and foreshadowing of an incipient sectarianism characteristic of modern politics.

In Francis, Voegelin sees a mysticism directly linked to Joachim’s evocation of the spirit moving into intramundane history. Put differently, the divine kingship of Christ is absent in the Franciscan vision. Rather, “the Christ of Saint Francis is an innerworldly

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had but little emotional significance if the phantasy of a third and most glorious dispensation had not, over the centuries, entered into the common stock of European social mythology.”

<sup>72</sup> Along with teleological immanentization, Voegelin identifies axiological immanentization and mystical activism as variants on the problem of meaning in history.

<sup>73</sup> Voegelin, Eric. *History of Political Ideas, (Vol. II): The Middle Ages to Aquinas (Collected Works of Eric Voegelin (Vol. 20))*, edited by Peter Von Sivers. (Columbia, MO: University of Missouri Press, 1998), 109.

Christ of the poor; he is no longer the head of the whole *corpus mysticum* of mankind. The greatest achievement of the compromise with the world, particularly in the Western imperial period was the understanding of the natural differentiation of men and of the spiritual and temporal hierarchies as functions in the mystical body.” That is, “Christ was no longer the head of the differentiated body of Christianity but only the symbol of particular forces who claimed for themselves a privileged status in conformance with him.”<sup>74</sup> The Franciscan understanding of Christianity did not simply articulate the dignity of the poor, but rather raised their status to agents of worldly change. Voegelin argues, “the spirit of revolt against the established powers was spreading all over the Western world, ranging from the intellectuals to the townspeople and the peasants. The movement was increasingly directed against the feudal organization of society.”<sup>75</sup> In this sense St. Francis provided a symbol of opposition to the established order of the society generally. His followers have seen this in him and, understanding Francis in light of Joachim, they understood themselves, not only according to monastic vows, but also as organizations of civilizational leadership.

Voegelin understands Frederick II as Francis’s opposite, a monarchical counterpoint to Franciscan brotherhood. Frederick sought to create “an image of rulership in conformance with Christ as the *cosmocrator*, with the Messiah in all his glory.”<sup>76</sup> He did so by insisting on the independence of imperial authority from the papacy. This independence was predicated on a new understanding of authority, an authority where the

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<sup>74</sup> *Ibid.* 142.

<sup>75</sup> *Ibid.* 138.

<sup>76</sup> *Ibid.* 157.

distinction between temporal and spiritual realms collapsed into the singular figure of Frederick II. Frederick elevated the spiritual authority of political rule, “by creating two types of humanity: the unruly general populace and the king as a second Adam, responsible for the divinely ordained governance of the world.”<sup>77</sup> The Christian Fall then, according to Frederick, presents a condition by which humanity is born into a world of divinely appointed leadership, of which humanity’s destiny is one of collective obedience to divinely appointed rule. Order, is dictated by the necessity of the world, and the majority of the world are born to be subjects.<sup>78</sup> The nature of spiritual representation and authority according to Frederick’s understanding is vested in the cloak of royal authority; the papacy is relegated to another power unit, and rival authority, more fully expressed later in its British *Act of Supremacy*. In Frederick’s *Prooemium* to the *Constitutions of Melfi*, written in 1213, Voegelin notes that former imperial categories move into the realm of individuated and sovereign units, each with its own constitution, governed by a politics that encompasses, and demands conformance on questions of routine political issues as well as the dictates of spiritual substance. Under such authority, dissent amounts to heresy. That is, in Frederick, “the irruption of intramundane forces that was

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<sup>77</sup> *Ibid.* 157.

<sup>78</sup> Voegelin notes that the difference herein is that necessity is understood, apart from categories of sacred scripture, i.e., : “the Christian theory of law considers the problem of communal order in its connection to sacred history; the *Prooemium* uses the Christian symbolism but if the story of the Fall were omitted, the theory of order and rulership would suffer no change. Embedded in Christian language, the *Prooemium* advances a naturalistic theory of government, deriving the function of rulership from the structure of intramundane human reality. The conception of the *necessitas rerum* introduces an element into the idea of divinely ordained rulership that later develops into the *raison d’etat*.” *Ibid.* Pg. 157.

characteristic of the theories of John of Salisbury reappears on the scale and with the responsibility of imperial action.”<sup>79</sup>

The *sacrum imperium* is of enduring significance because, in it, soteriological experience was given representation wherein the goal was to balance the tension between temporal and spiritual authorities. The failure to maintain this tension occurred, broadly speaking, by the assertions of *libido domanandi* and metaphysical speculation, and the spiritual realm and the political realm moving into ever closer proximity. For spiritualists - efforts to transform the intramundane into a realm of the spirit only succeeded in delegitimizing transcendent authority. For Salisbury’s “political man” efforts to emancipate the political realm from questions of first principles elevated power to a level of sanctified action. Within the breaking of this tension then lies a question regarding the liberty that might properly be considered political. That is, if existence is understood as tensional, then the abdication of this tension is both a renunciation of order, and of freedom. Political freedom, according to the Voegelinian analysis, recognizes various and distinct of spheres of authority; the failure to recognize these various spheres compromises the jurisdiction of each; these breaches constitute, not just a failure of civilization or a political failure - they are the perennial failures of humanity itself.

#### E. Conclusions

The twelfth century marked a period in Western political culture where the traditional understandings of communal life, derived from classical and Christian sources, maintained the veneer of a public orthodoxy but no longer the substance.<sup>80</sup> Spiritually,

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<sup>79</sup> *Ibid.* 150.

<sup>80</sup> *Ibid.* 150

these schisms would climax in the Reformation, but the sentiments that undermined the universality of the Christian church and shifted its authority to other spiritual authorities were already underway as evocative sentiments in the twelfth century. The problem of representation, insofar as representation is an expression of self-consciousness, was exacerbated for political communities, because the old consensus had given way to a period of radical self-interpretation that rendered the old institutional order without credibility. Accordingly, if political consensus were to be achieved, it would occur, at least in large part through coercion.

As a practical matter, the universal church of the *sacrum imperium* could only exist under the shelter of a temporal power that aspired to universal empire. With the disintegration of the empire into sovereign power units, spiritual representation became more complicated as it became parochial. Discrete social units are necessarily parochial insofar as they are circumscribed by geography. Though the *sacrum imperium* had disintegrated into a new landscape of multiple political units the character of what political representation encompasses, in terms of spiritual import, remained constant. Representation, encompassing metaphysical purpose, and assuming historical representation, then transforms parochial politics into a contest where the stakes are elevated beyond the intramundane. Political units became vessels of the spirit. As David Walsh points out, overcoming parochialism requires “a nondogmatic mysticism” that, “is capable of apprehending the unity of the two forms in their one source.”<sup>81</sup> The figure of Saint Thomas Aquinas, according to Voegelin, exists in the between-space of medieval

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<sup>81</sup> Voegelin, Eric. *History of Political Ideas, (Vol. III): The Later Middle Ages (Collected Works of Eric Voegelin, Vol. 21)*, edited by David Walsh. (Columbia, MO: University of Missouri Press, 1998), 21.



Europe and modernity. Aquinas points toward an understanding of law and government that sought to link the order of the medieval synthesis with the emerging nation states and their claims to a legitimate authority.

#### **Part IV: Aquinas, Authority, and Natural Law**

Voegelin notes that with the irruption of these new forces within the disintegrating *sacrum imperium*, political theory became preoccupied with, “two distinct additional tasks: “(1) the ordering of the field of new forces; and (2) the proper fitting of the new order into the old Christian order, which had not ceased to exist.”<sup>82</sup> Ordering the field of new forces occurred through the revival of Aristotelian thought in scholasticism. This revival signified a renewed interest in republican government and Aristotelian teleology; both typologies that Hobbes would later combat, blaming them, in large part, on the English Civil Wars and political disorder in general. Hobbes chief grievance was that they sanctioned private judgment for public goods. In regards to the second point of reconciling the intramundane forces with the Christian saeculum, the Thomistic attempt to synthesize faith and reason was both a diagnosis and therapy regarding the new self-interpretive elements in the political world.

Insofar as the *sacrum imperium* gave way to an age of new spiritual self-interpretation Aquinas preserved, but sought to temper the tendencies of the self-interpretive intellect, by grounding it in transcendent truth. That is, “the human intellect carries the impression of the divine intellect; it is impossible that God should be guilty of deceiving man by leading him through his intellect to results conflicting with the revealed

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<sup>82</sup> Voegelin, Eric. *History of Political Ideas, (Vol. II): The Middle Ages to Aquinas (Collected Works of Eric Voegelin (Vol. 20)*, edited by Peter Von Sivers. (Columbia, MO: University of Missouri Press, 1998), 110.

faith. It follows that the human intellect, though capable of errors, will arrive at the truth wherever it goes. The revealed faith however, contains besides the truths that are accessible to the natural intellect, such as the existence of God, other truths, such as the Trinitarian character of divinity, that are inaccessible to reason.”<sup>83</sup> A theory of natural law, grounded in divine and eternal law, sought to answer the challenge of soteriological representation in civil society by re-orientating human order, not according to immanent or autonomous constructions, but by articulating the ground of justice inherent in the political order and by grounding and directing reason so as it is not a self-referential authority unto itself. That is, the spiritual substance of man and his politics is understood as *participatory*, as moving beyond the purview of the political insofar actions are mediated and judged by their participation in Thomistic natural law.

Voegelin writes that, “Thomas’s theory is a classic solution insofar as it gives a religious foundation to a legal order that respects the ontological structure of human existence.”<sup>84</sup> The “legal order” achieves this through an understanding of itself in relation to natural law. The eternal law, insofar as it impresses itself upon rationality, orientates reason toward its appropriate ends in the good.<sup>85</sup> The participation of reason in eternal law is what Thomas understands as natural law. Accordingly then, it is an orientation

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<sup>83</sup> *Ibid.* 209.

<sup>84</sup> *Ibid.* 211.

<sup>85</sup> Aquinas bases the natural law on the following principle: “Good is to be done, and evil is to be avoided.” Ellis Sandoz writes: “The basic truth that is the self-evident foundation or first principle of all prudential or practical reason, and governs all action, is that all things seek Good. This is interpreted as empirically vindicating the Golden Rule as the foundation of all law: the first precept of law is that “good is to be done and ensued and evil is to be avoided.” Thus, “whatever practical reason naturally apprehends as man’s good belongs to the precepts of the natural law as something to be done or avoided.” We should mention that “true Good for Thomas is finally validated by cognition, however, not by desire.” See, Sandoz, *The Politics of Truth and Other Untimely Essays*. (Columbia, MO: University of Missouri Press, 1990), 118.

towards the good and is capable of recognizing general principles. The first among these is simply: “Good is to be done and evil is to be avoided.” From this Aquinas derives the following more specific precepts: Preserve life and avoid its destruction; foster marriage and the focus on the upbringing of children through education and care of the young; the preservation of the community and avoid giving unnecessary offense to others. Lastly, respect for private property except in extreme cases when the health of the community demands upon its shared provision. Thomas’s influence would reappear in English jurisprudence, in the figures ranging from John Fortescue to Christopher Saint-German.<sup>86</sup>

Thomistic legal foundations are elastic then insofar as the type of community that may be formed through them is manifold. It is an ontological theory translated into a specific type of jurisprudence that incorporates Christian spirituality with emerging social units; these units weren’t bound by organizational strictures. The question of Aquinas, natural law, and the best regime – be it kingship or the mixed regime – would play out during the crisis between the Stuart monarchs and the Parliamentarians. That is, kingship, though an ideal form of government, is problematic as it is the one most susceptible to tyranny. In considering the ancient Israelites, Thomas sees an example of a more stable regime. The term used by Aquinas was *politia*, or, mixed regime. Voegelin notes that this

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<sup>86</sup> McIlwin, Charles Howard. *Constitutionalism: Ancient and Modern*. (Indianapolis, IN: Liberty Fund, Inc., 2010), 62. Saint German divided the law of England, into “the law of reason primary and the law of reason secondary.” The Thomistic influence is evident insofar as the laws of nature exist universally on the one hand, but that particular deductions made from these general principles are distinct to the realm in which they are made. Yet deductions of secondary reason, according to Saint-German fall further into two subcategories based on the almost universal deduction regarding laws of property. This division is made because, “the law of property is generally kept in all countries...The law of reason secondary particular is the law that is derived of divers customs general and particular, and of divers maxims and statutes ordained in this realm And it is called the law of reason secondary particular, because the reason in that case is derived of such a law that is only holden for law in this realm, and in no other realm.” The law of reason secondary general then, in this instance, bears the universalism of Aquinas, across nations, in accord with most nations, though the extent of their Christian character in this case is not strictly circumscribed by the theory in and of itself.

Thomistic understanding is an evocation of constitutionalism and is derived from the conviction that “the stability of government depends on the participation of the people, and the spiritual Christian principle of the freedom of the mature man ... it represents the synthesis of nature and Christian spiritualism in politics.”<sup>87</sup> This synthesis is achieved, not through concern over regime types. Rather the concern centers around the categories of freedom or servitude, freedom understood as participation in the eternal law. “If the members of the community cooperate freely in the enterprise of common existence, the government is good, be it a monarchy, aristocracy, or polity. If one or many are free and conduct the government in their interest by exploiting of others, the government is bad.”<sup>88</sup> Needless to say, while there was ambivalence regarding regime type, Thomistic thought could not dispense with the universal church and in this sense his political philosophy is particularly dependent on the stability and permanence of a universal church and ecclesiastical institutions.

The synthesis of faith and reason is intended to differentiate the self-interpretive component of consciousness by insisting that the individual is not in an inherently adversarial relationship with the structure of being itself. If the desire for the whole is acknowledged and articulated as good, as an intimation of perfect justice, as a movement toward God, the participatory nature of Thomistic reason repudiates, at the level of experience, a desire for the whole insofar as it can be understood something propositional or as an object of conquest. In the West Christianity ensured that the desire for “the

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<sup>87</sup> Voegelin, Eric. *History of Political Ideas, (Vol. II): The Middle Ages to Aquinas (Collected Works of Eric Voegelin (Vol. 20))*, edited by Peter Von Sivers. (Columbia, MO: University of Missouri Press, 1998), 223.

<sup>88</sup> *Ibid.* 218, 219

whole” was is no longer simply the domain of philosophy. What “the philosopher knows through the activity of his intellect, the layman knows through the revelation of God in Christ. The supernatural manifestation of the Truth in Christ and its natural manifestation in the intellectual as the mature man stand side by side.”<sup>89</sup> Revelation and theology are elevated to a plane that exceeds the philosopher’s vision. And the community of the faithful achieves an equality of spiritual worth not dependent on the reason of Aristotle. According to Voegelin the substance of theological and philosophical experiences carries equivalences. One consequence of this is a new form of egalitarianism made evident in the rise in political reform movements that rely on Christianity as a means of appeal. More dangerously, this spiritual equality coupled with an over-emphasis on faith as a divergent from reason, can easily persuade an individual, or a group, to impose its vision upon the whole, and entranced by their own spiritual self-recognition, descend into an abyss of social narcissism and aggressive social vanity.

Voegelin’s concludes his assessment of Thomas, with admiration for his attempt to maintain the spiritual substance of Western Europe while accommodating the changing facts on the ground in terms of its shifting concrete structural organization. He states:

Thomas stands on the dividing line of the ages in the sense that his harmonizing powers were able to create a Christian spiritual system that absorbed the contents of the stirring world in all its aspects: of the revolutionary people, of the natural prince, and of the independent intellectual. His system is medieval as a manifestation of Christian spiritualism with its claim to universal validity. It is modern because it expresses the forces that were to determine the political history of the West to this time: the constitutionally organized people, the bourgeois commercial society, the spiritualism of the Reformation, the intellectualism of science.<sup>90</sup>

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<sup>89</sup> *Ibid.* 208-209

<sup>90</sup> *Ibid.* Page 231.

These rising forces would find paradigmatic expression on the outskirts of the old empire, where the English kingdom, along with the rest of Europe, developed a constitutionalism rooted in an insistence upon feudal privilege. And with the crisis of spiritual and temporal authority well underway in the twelfth century, each political unit of Western Europe began developing its own parochial understanding of their particular spiritual substance. The development of England however was determined by factors of self-understanding that would transform its parochial beginnings into an empire, complete with a conquering political evangelism that would rival the *sacrum imperium* in the scope of its territory, though perhaps not in the depth of its vision.

## **Part V: The Early English Experience**

### **A. The Constitutional Understanding of Citizenship**

English liberty is bound to its constitutional history – that is, the relationship between the few and the many, represented in monarchy and parliament, is where English political liberty ultimately found articulation. An understanding of English liberty requires attention, not only to institutions that coordinate that relationship; constitutionalism, more fully understood, deals with the sentiments and values that informed the creation of particular political institutions.<sup>91</sup> Voegelin writes:

No satisfactory general definition of constitutionalism is possible for the obvious reason that the differences between the historical types of government covered by this symbol are too profound. If we define as constitutional a government that operates within the framework of a written constitution and is limited by a bill of

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<sup>91</sup> Voegelin, Eric. *History of Political Ideas (Vol. III): Later Middle Ages (Collected Works of Eric Voegelin, Vol. 21)*, edited by David Walsh. (Columbia, MO: University of Missouri Press, 1998), 134. “The modern constitutional system did not evolve on the plane of institutions but through the superimposition of ideas on institutions that had grown in an entirely different field of sentiments and ideas.”

rights, England has no constitutional government ... If we define constitutional government more liberally as a government that observes a rule of law and has the consent of the governed, practically every de facto government that is not too much riddled by arbitrary and corrupt practices and that governs in such a manner that cries of suppressed minorities or majorities do not permanently testify to the absence of consent, appreciable sections of society would fall under the concept.<sup>92</sup>

To this degree then, constitutionalism, and its creation, is a self-interpretive act that relies on the experiences of both individuals and a group to create a sense of *homonoia*. Absent this self-articulate identity there, “is no guarantee whatsoever that the introduction of a constitution in a country will produce constitutional government; it may just as well produce a revolutionary shambles”<sup>93</sup> The social substance of English constitutionalism includes the sentiments that arise from the experiences that precede its representation through institutions; we more readily identify “the constitutional” with the concrete – institutions, documents, or procedures that express and house and understanding of public liberty. Yet, behind these symbols and institutions resides a self-understanding grounded in experience. Chief among the English experience was the figure of the monarch - a monarchy that, through its strength, created conditions for the articulation of a political identity amongst the subjects within its diversified territory.

The substance of the English people grew according to the rule of the Norman kings who bring, “into clearer relief the decisive function of Western kingship with its feudal organization of large territories as the integrating forces of the realm and of the peoples that grow in its shelter and under its pressure.”<sup>94</sup> And to the degree that the

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<sup>92</sup> *Ibid.* 141-142

<sup>93</sup> *Ibid.* 143.

<sup>94</sup> *Ibid.* 153.

people of the realm articulated a political identity of their own, it was to the degree that it was articulated vis-à-vis their shared relationship with the monarch's dominion over the realm. An English identity, in this sense, was developed according to its experience of authority. English constitutionalism proceeded according to an articulation of spheres of authority, always articulating a question: where does authority reside, where does it not?

#### B. William the Conqueror: Continuity Through Conquest

In the aftermath of the Norman invasion, William the Conqueror claimed full territorial possession of England. He made use of his land claim by confiscating the ancient estates of his opposition, and redistributing the divided up territory to Norman loyalists.<sup>95</sup> Anglo-Saxon feudalism under William centralized royal authority throughout all English territory, and it was the claim of conquest itself that was foundational in implementing the Norman model.<sup>96</sup> In return for the grant of land, these tenant-in-chiefs owed the monarch military service; they achieved a personal force of arms by sub-leasing their land to knights or vassals.<sup>97</sup> With the Oath of Salisbury William demanded fealty,

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<sup>95</sup> Voegelin, Eric. *History of Political Ideas, (Vol. II): The Middle Ages to Aquinas (Collected Works of Eric Voegelin (Vol. 20))*, edited by Peter Von Sivers. (Columbia, MO: University of Missouri Press, 1998), 144-145. Voegelin writes: "As a consequence, a first source of continental difficulties was missing in England: that is, the territorial entrenchment of feudal lords that was overcome finally in France in only the 17<sup>th</sup> century and lingered in Germany into the recent past."

<sup>96</sup> *Ibid.* 144. Voegelin writes: "The consequences of the Norman expansion were prodigious for two reasons: first, the establishment of Norman rule in Sicily, southern Italy, and England added two powers of considerable weight to the European system of political units; and second the fact that the new powers were established by conquest enabled the victorious Norman dukes to create governmental organizations with a degree of rationality hitherto unknown in the Western world."

<sup>97</sup> Warren, W.L., *The Governance of Norman and Angevin England*. (Redwood, CA: Stanford University Press, 1987), 55. Warren writes: "Domesday Book shows that about a fifth of the realm still held directly by the crown in 1086. Rather over half had been distributed to the king's principal followers in huge estates, which they then partitioned among their own men. They were all, directly or at one or two stages removed, tenants of the crown, holding their lands as fiefs, and owing military service, usually in the form of knight service. About a quarter of the land remained in the hands of the Church, but William insisted that the bishops and the abbots of the greater monasteries should hold their estates as fiefs, doing



not just from his tenants in chief, but also from all those who occupied land within the realm, that is, from under-tenants whom lords of the realm had enfeoffed.<sup>98</sup> This put the monarch in direct relation to, not only the tenants-in-chief, but also to those who had land tenure within a tenant-in-chief's jurisdiction, that is the vassals as well as the lords. As Michael Oakeshott remarked, "Norman kings of England were among the first to have 'subjects' who were not themselves 'lords.' They are the kings of 'England.'"<sup>99</sup> The effect of this was that all land claims emanated from the monarch, as did all questions of fealty.

These territorial innovations shifted the legal culture throughout the realm. In 1085 William ordered royal officials to conduct a survey, "to find out what or how much each landholder had in land and livestock and what it was worth."<sup>100</sup> This came to be known as the Domesday Book, and after the upheavals instigated by the conquest, the massive turnover regarding land-tenures, an exhaustive listing of estates allowed for a systematic approach in accounting the king's interest in terms of his share in estate revenues. For the tenants the survey amounted to a title of land-tenure; it attached legal

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him homage and rendering knight service. It obliged them to reorganize their estates and apportion manors to men of the knightly class."

<sup>98</sup> Carpenter, David. *The Struggle for Mastery: The Penguin History of Britain, 1066-1284*. (New York, NY: Penguin Books, 2005), 105. Carpenter writes: "Would these men [the under-tenants enfeoffed by the tenants-in chief] be loyal to the king or simply to their overlords? William, with characteristic precision, provided an answer. He could not demand homage from the under-tenants because they did not hold land from him. But he could demand an oath of fealty. In August 1086 he summoned to Salisbury 'all the landholding men of any account that were over all England whosoever men they were' and made them answer just such an oath."

<sup>99</sup> Oakeshott, Michael. *Lectures in the History of Political Thought* (Charlottesville: Imprint Academic, 2006), 282.

<sup>100</sup> Harvey, James Robinson. *Readings in European History, Vol. I*, (Boston, MA: The Atheneum Press. 1904), 229. Excerpted from "The Anglo-Saxon Chronicle, ad an. 1185 and 1187; ed. with an introduction by Benj. Thorpe, Rolls Series, II, 186 and 188 sqq.

significance to land claims and strengthened inheritance claims. Because of the Domesday Book, when the sheriffs of the shires reported to the Exchequer, both Crown and subject could account, in a systematic way, for questions of taxation; this accounting for land claims, the systematic grounding of property holdings as a legal relationship, extended the reach of the crown into all English territory. Yet, it also extended the reach of the subjects back to the Crown. The legal relation between the Royal authority and the barons developed over time. The significance of this legal relationship, and the strength of William I's kingship laid a foundation for a national English culture. A notable example in this development is the 1100 Charter of Liberties issued by Henry I upon his coronation – a direct result of how those with land tenure understood themselves in relation to the assertive royal authority of Norman kings.

#### C. Henry II and the Promise of Kingship

Henry I succeeded his brother William II; he immediately sought to address the royal abuses William II had visited upon the nobility. In doing so his aim was to appease the nobles and solidify support for his reign. The reign of William II was marked by what the nobility felt to be encroachments upon their land, especially in cases of primogeniture. Because William I, through the conquest, had claimed all territory as his own, the lands of nobility were returned to the king upon their death. William I, as a matter of custom, simply re-granted the lands to the deceased noble's next male heir. With the reign of William II all heirs were required to pay fees in order to regain the land that they considered their patrimony. Henry's Charter of Liberties sought to assure the barons that no fees would be required to re-grant lands to the legal heirs of estates.

Know ye that, by the mercy of God and the common counsel of the barons of the whole realm of England, I have been crowned king of the same realm... The abuses of the late reign are specified, and forbidden for the future... the English people are restored the laws of King Edward with the Conqueror's amendments; the feudal innovations, inordinate and arbitrary reliefs and amercements, the abuse of the rights of warships and marriage, the despotic interference with testamentary disposition, all of which had been common in the last reign, are renounced.<sup>101</sup>

This is one example of the growing sphere of mutual support that began constituting how English political culture came to understand the principles of “ancient liberties.” It is not insignificant that from the reign of William the Conqueror onward monarchs pledged to uphold the laws of King Edward, a Saxon king, thereby reassuring their subjects that the liberties they enjoyed prior to the Norman invasion would remain intact. This early insistence on a historical continuity, pre- and post-conquest is instructive in regards to the pride that a people feel in regards to “identity” and the steadfast claims they make upon their history. Henry’s Charter of Liberties is considered as a precursor to the Magna Carta; it includes the “laws of King Edward with the Conqueror’s amendments” as part of the authority it associates with legitimate kingship. Perhaps more importantly, the charter further exemplifies the growing sphere of mutual support and national sentiment, encouraged by post-conquest kingships.

Sentiments expressing an overarching justice found a national forum in the courts.<sup>102</sup> These courts all played a part in developing a national political culture that expressed itself as foundational to common law.<sup>103</sup> Voegelin notes:

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<sup>101</sup> *Charter of Henry I*, from *The Constitutional History of England in its Origin and Development*. Ed. William Stubbs (New York, NY: Oxford University Press, 1891), 330.

<sup>102</sup> Voegelin, Eric. *History of Political Ideas (Vol. III): Later Middle Ages (Collected Works of Eric Voegelin, Vol. 21)*, edited by David Walsh. (Columbia, MO: University of Missouri Press, 1998), 130. Voegelin writes: “...the direct grip of the royal administration on the court system achieved early the unification of local customs into the English common law so that in England the continental diversification

William the Conqueror and his successors were able to develop a centralized royal administration, that they could keep the numbers and powers of the feudal lords in check, and that the concentration of power in the hands of the king was the basis of the development of the English gentry and middle class and, consequently for the early evolution of constitutional forms of government.<sup>104</sup>

Under the legal reforms of Henry II legal culture in England became more systematic and in doing so, those mobilized for political action, i.e., the barons, became more politically articulate through practice. As for ecclesial representation in the realm, cannon law enjoyed a separate jurisdiction, and derived its jurisprudence from the civil law. That is, the King's courts in the post-conquest period developed a unique legal culture with a monarchy at the center of the national culture and with the barons in a political relationship with him. These legal forums of the 12<sup>th</sup> and 13<sup>th</sup> centuries, led to significant compromises that would eventually transform feudal privilege into political rights. Yet, insofar as something was considered a political right, it was not separated from either a developing political tradition, i.e., precedent or, of a subject's privilege and fealty. The strength of the barons and the monarchy was a strength derived from an acknowledged and mutual relationship.

These checks occurred, not through political philosophy, but through the exercise of power and the compromises they would achieve. But to say there is no political

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of the customs is missing that had to be overcome by the introduction of Roman law and later of the codes as the common law of larger national areas." The Exchequer was concerned with legal questions of taxation, and there was a separate jurisdiction of canon law, derived from the civil law, for the church; the King's Bench concerned with questions of political import; and the Court of Common Pleas assuming jurisdiction over disputes between private individuals.

<sup>103</sup> Glenn, Patrick. *Legal Traditions of the World* (New York, NY: Oxford University Press, 2010), 239. Glenn writes: "The only avenue for a Norman legal order, common to the realm, was through a loyal judiciary. This immediately marks the common law tradition from all others."

<sup>104</sup> Voegelin, Eric. *History of Political Ideas, (Vol. II): The Middle Ages to Aquinas (Collected Works of Eric Voegelin (Vol. 20))*, edited by Peter Von Sivers. (Columbia, MO: University of Missouri Press, 1998), 145.

philosophy behind this history is not to say these settlements occurred without political principle or a theory of civil association. And the political principles involved in English constitutionalism carry the familiar marks of what we call partisan contests. The principles at play in these contests, because they were largely particular cases resolved in the courts, were always attached to the concrete and tangible modes of experience in the world.

#### D. Spiritual Jurisdictions and Spheres of Authority

The Norman Invasion, undertaken with a papal blessing from Alexander II was a two-way street. In return for their blessing Rome received support from William who advanced papal reforms within the ecclesiastical organization of England. Chief among William's innovations was the creation of ecclesiastical courts, creating a separate jurisdiction for ecclesiastical matters. William Blackstone noted that at,

...the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdiction: the county-court was as much a spiritual as a temporal tribunal: the rights of the church were ascertained and asserted at the same time, and by the same judges, as the rights of the laity. For this purpose the bishop of the diocese, and the alderman, or in his absence the sheriff of the count, used to sit together in the county-court, and had there in the cognizance of all causes, as well ecclesiastical as civil: a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal. This union of power was very advantageous to them both; the presence of the bishop added weight and reverence to the sheriff's proceedings and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decrees in such refractory offenders, as would otherwise have despised the thunder of mere ecclesiastical censures. But so moderate and rational a plan was wholly inconsistent with those views of ambition, that were then forming by the court of Rome.<sup>105</sup>

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<sup>105</sup> Blackstone, Sir William. *Commentaries on the Laws of England, Vol. 3*, edited by Robert Malcolm Kerr. (London: John Murray, Albemarle Street, 1857), 63

By giving the papacy a distinct sphere of jurisdiction it not only, according to Blackstone, furthered papal authority within the realm, it weakened the temporal courts by removing the spiritual authority from questions of dispute; also, over a period of time, the separation undermined Saxon law as it was now overseen by Norman justices. Furthermore, and perhaps most importantly, Blackstone understood the division of the courts as widening the breach between temporal and spiritual authorities that made cooperation in the future difficult, if not an impossibility.

Christendom and the ecclesiastical hegemony of Western Europe was an acknowledged political reality during the time of William I. Pope Alexander II's successor, Pope Gregory VII sought to combat the fissures in Christendom by reasserting papal control over much of Western Europe; not only by asserting the right of Investiture but in terms of asserting a more vigorous temporal role. By the eleventh century, "the fringe of principalities had gained sufficient importance to inspire Gregory VII with the vision of a community of national kingdoms, dependent on the semi-spiritual, semi feudal authority of the papacy as a counterweight to the empire itself."<sup>106</sup> After clashing with the Holy Roman Emperor, Henry IV in 1075 during the Investiture Crisis, in 1080 Pope Gregory made an effort to extract an oath of temporal fealty from William I. Pope Gregory was sure, besides the oath, to remind William I of his negligence in paying the voluntary papal levy known as Peter's Pence. William replied:

Your legate has admonished me to profess allegiance to you and your successors, and to think better regarding the money which my predecessors were wont to send to the Church of Rome. I have consented to the one but not to the other. I have not

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<sup>106</sup> Voegelin, Eric. *History of Political Ideas, (Vol. II): The Middle Ages to Aquinas (Collected Works of Eric Voegelin (Vol. 20)*, edited by Peter Von Sivers. (Columbia, MO: University of Missouri Press, 1998), 35.

consented to pay fealty, nor will I now because I never promised it, nor do I find that my predecessors ever paid it to your predecessors.<sup>107</sup>

William successfully rebuffed Gregory's attempts in subordinating his temporal authority to Gregorian reforms. But the issue of temporal subordination would recur during the reign of Henry I with the issue of Investiture. Pope Urban II had forbidden the practice of the king giving the bishops their staff and ring on the grounds that it amounted to the clergy pledging fealty to temporal rulers. The principal figures in the dispute, Anselm, the Archbishop of Canterbury and Henry I, reached a compromise in the Concordat of 1107. This agreement would prefigure and resemble the continental solution reached regarding the problem in the Concordat of Worms. Their solution lay in drawing a distinction between the secular and ecclesiastical powers of the clergy. Accordingly, Henry forfeited his right to invest the clergy but required them to pay him homage for their temporalities within England. Henry I's compromise had little lasting effect in settling the issue. His successor Stephen faced the similar controversies between himself and Bernard of Clairvaux over the appointment of the Archbishop of York that ended in Bernard successfully having Stephen's Archbishop deposed by Pope Eugenius III.<sup>108</sup> Henry II's clash with papal authority ended in the famous murder of Thomas Becket in Canterbury

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<sup>107</sup> *English Historical Documents, 1042-1189*, Edited by David Charles Douglas and George William Greenaway (New York, NY: Routledge Publishing, 1981), 748.

<sup>108</sup> Dalton, Paul, and Graeme J. White, eds. *King Stephen's Reign (1135-1154)* (Rochester NY: Boydell Press, 2008), 110. Bernard of Clairvaux is quoted, addressing Stephen: "The King of kings has long chastised your royal Majesty...I humbly advise you and on bended knee implore you that on those matters for which above all God is especially chastising you and your realm, to wit the affairs of church and state, you give not the spouse of the church further cause for chastising you yet more harshly and even completely destroying you. Especially in the case of the church of York do I implore you with my whole heart to change your attitude and not attempt to hinder the termination of the affair according to the manner laid down by the Lord Pope. And if that man [Stephen's choice for Archbishop of York, William fitz Herbert] should fall, permit, I beg you, the canons to be left free lawfully to elect another, as not only the church of York but all the churches should be left free; then, if you do this, the Lord will be with you, he will render you glorious and exalt your throne."

Cathedral. James Greenaway writes that the, “attempt at achieving an equilibrium between political, ecclesial, and existential authorities is the singular mark of English constitutionalism that could later develop on the world stage into Western liberal constitutional tradition.”<sup>109</sup> He means that during the late Middle Ages, England with the rest of Europe, struggled to answer the political, ecclesial and existential claims to authority in light of a changing in self-understanding regarding both sources and spheres of authority. And the spheres of authority in England were not limited to spiritual and temporal, i.e., the church and the monarchy; the increasingly articulate and politically mobilized subjects of the realm maintained “existential authority” insofar as their self-understanding legitimated those who would govern in their name. A consequence of this is that the social cohesion of England occurred, not just through monarchical and papal authorities, but through an emerging consensus amongst the subjects themselves. The result of this cohesion was an incipient constitutional body asserting itself in place of the *corpus mysticum*, that is, as a realm. This cohesion received foundational articulation in Magna Carta. And if Magna Carta can no longer claim to be foundational to the Western political self-understanding, it remains at least something of a cornerstone, wherein the edifices of modern politics have established themselves in reference to its mark.

#### D. The Magna Carta Moment

The Magna Carta and the incipient constitutionalism it signified emerged amidst a variety of increasing disorders that challenged twelfth century politics: Heretical movements mobilizing against established ecclesial hierarchies were met with

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<sup>109</sup> Greenway, James. *The Differentiation of Authority: The Medieval Turn toward Existence* (Washington, DC: Catholic University of America Press, 2012), 86. This book was an invaluable resource, in articulating the Voegelinian approach to questions of order in England during the Middle Ages.



conformance standards, inquisitions, and the sharpening of orthodoxies; the pitched power struggles between temporal and spiritual authorities only exacerbated and entrenched respective divisions between their respective jurisdictions; and the rise of national political units shifted the ground of community as populations became more socially organized and more politically articulate.

The more immediate conditions giving rise to the Magna Carta were baronial and ecclesial resistance to royal authority. Among the issues was the abiding controversy over the appointment of bishops; in this case it was Innocent III's appointment of Stephen Langton as Archbishop of Canterbury and King John's refusal to agree to Langton's occupation of the post. The controversy over Langton's appointment led to the interdict being placed over England, John's excommunication, and his eventual return to the papal fold in 1213, only after surrendering the kingdom of England to Innocent III and receiving it back as a papal fiefdom. Of course King John also agreed to Langton's appointment as Archbishop.<sup>110</sup>

Baronial resistance to John was rooted in a variety of factors, most of which were long-standing. J.C. Holt argues that the conflict between the barons and the monarchy was rooted in longstanding issues dating back to the reign of Henry II. The monarchy had, "strained to the utmost every prerogative of the Crown, and reduced to the narrowest limits the franchises and privileges and independence of the great feudatories, his earls and barons... These, then, were the two chief sets of feudal grievances felt in the thirteenth century – increase of feudal burdens and curtailment of feudal privileges – that

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<sup>110</sup> Voegelin, Eric. *History of Political Ideas (Vol. III): Later Middle Ages (Collected Works of Eric Voegelin, Vol. 21)*, edited by David Walsh. (Columbia, MO: University of Missouri Press, 1998), 132.

made the barons restive under even the indomitable energy of the formidable Henry.”<sup>111</sup>

If the reforms sought by the barons were part of long-standing feudal grievances then the events of 1215, culminating in the Great Charter, may have had more to do with revolutionary tipping points than with unique abuses experienced under John. The reign of John was marked not just by these long-standing incursions into feudal privilege but also by extreme political instability. The source of this instability wasn't limited to John's dispute with Innocent III. Unpopular and unsuccessful wars undertaken by John in France resulted in the abuse of scutage and an increase in feudal obligations to the crown.

According to historians, personality as well as politics played a significant role: John's style of governance has been overwhelmingly viewed in the negative. A biographical survey that investigated how John was portrayed by his contemporaries concludes that, “there is no contemporary source which has anything approving to say about John's character. The most sympathetic comment comes from a writer traditionally associated with Barnwell Priory in Cambridgeshire, and it is hardly unqualified: ‘a great prince certainly, but not a happy one.’”<sup>112</sup>

And though Magna Carta, issued by John near Runnymede in June 1215, was a royal charter, the force of its authority was derived from the resistance of the baronial

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<sup>111</sup> McCechnie, William. “Magna Carta (1215-1915). An Address Delivered on its Seventh Centenary, to the Royal Historical Society and the Magna Carta Committee” in *Magna Carta: Commemoration Essays*, edited by Henry Eliot Malden. (Clark, NJ: The Lawbook Exchange, 2005), 2.

<sup>112</sup> Crouch, David. “Baronial Paranoia in King John's Reign” in *Magna Carta and the England of King John*, edited by Janet S. Loengard. (Rochester, NY: Boydell Press, 2010), 48-49. Crouch gives a more typical, though caricatured view expressed by the Bethune clerk as indicative of the hostility the barons felt towards John: “For the Bethune clerk, John was dishonest, lecherous envious, and a spendthrift, even if people benefitted from his liberality.” In the clerk's own words: “He set his barons against each other whenever he could. He was delighted when he saw them at each other's throats. He hated all *preudommes* through envy; he was most unhappy when he saw a good deed done for anyone. He was brimming with bad qualities but...he gave plenty to eat and did so generously and willingly...”

class, mediated by the English clergy. Archbishop of Langton, while acting as intermediary between the crown and the nobles, played an essential part in uniting the baronial call for reform through reference to Henry I's 1105 Charter of Liberties.<sup>113</sup> Furthermore, Langton acting as a mediator between the barons and John, is widely considered to have authored the original text of the Charter. J.C. Holt however cautions against overstating the influence of Langton: "There can be no doubt that Langton had the intellectual equipment to influence the course of events in 1215 and that he shared in the ideas from which the Great Charter drew its strength. Yet the evidence...presents him as a mediator and a moderator, rather than an originator."<sup>114</sup> The significance of monarchy, clergy, and barons (representing subjects) has carried both a symbolic and legal import in terms of articulating spheres of authority and their legitimacy of place within the realm. And though John later was able to disavow the Charter, it was reissued by Henry III, receiving its definitive seal in 1225 and would, in 1297 become statutory law under Edward I.

In this sense Magna Carta is an evocation of sentiments as much as it is a peace treaty between the warring parties or a recognition of feudal privilege. That it took until 1297 for Magna Carta to be recognized as law is to understand the space between 1215 and 1297 in much the same way as Holt came to: "To penetrate beyond the Charter in

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<sup>113</sup> Holt, J.C. "The Ancient Constitution in Medieval England" in *The Roots of Liberty*, edited by Ellis Sandoz (Liberty Fund Press, 2008), 67-68. Holt states: "The Rebellion of 1215 began with a demand for the confirmation and reissue of a basic text: the coronation charter of Henry I...It is also obvious that the older charter of Henry had a direct influence on Magna Carta : each begins with the liberties of the church and then proceeds to feudal incidents .... historico-legal research did not end there. It also extended to two texts drawn from the first half of the twelfth century, the *Leges Henrici Primi* and the *Leges Edwardi Confessoris*."

<sup>114</sup> Holt, J.C. *Magna Carta* (New York, NY: Cambridge University Press 1992), 281.

search of substantive law is to discover not so much a body of established custom, still less a set of statutes, as an argument.”<sup>115</sup> Magna Carta was a victory for the barons but it also has served as a symbol of popular resistance to executive authority. Baronial resistance, their insistence of recognition from the dual authorities of Christendom, is instructive insofar as it represents an accommodation of intramundane self-interpretation within the rising disorders that had begun to characterize Western Europe that was conducive to order.

Magna Carta then signified a new political *homonoia* that had long been understood by many but never so clearly articulated. That the event in itself signified a partnership between king, church, and subject, under laws of a clearly defined realm, belies the fact that this partnership was not only the expression of an articulate national culture but that this national culture would understand itself politically, in England’s case, legally.

What constituted a unique difference of England from the rest of Europe was a national and political people. In England, the rising national identity, initially among the baronagium but gradually extending further out to other sectors of society, met with the strength of royal power in a unique way that led directly to the formation of a national-political “people” and the articulation of various estates, communes, and strata of society.<sup>116</sup>

Insofar as national sentiment extended throughout the realm, national sentiment wasn’t restricted to the nobility and insofar as national sentiment had become tied to political activity, Magna Carta is the cornerstone of British liberty.

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<sup>115</sup> *Ibid.* 298.

<sup>116</sup> Greenway, James. *The Differentiation of Authority: The Medieval Turn toward Existence* (Washington, DC: Catholic University of America Press, 2012), 99.

The Charter begins by promising, “in perpetuity that the English Church is to be free and to have all its rights fully and its liberties entirely.” That is, the charter maintains a spiritual jurisdiction, with attendant interests and privileges, independent of temporal authority. The freedoms of particular concern were matters of canon law and the election of bishops. Chapter 1 of the Charter continues, “We furthermore grant and give to all the freemen of our realm for ourselves and our heirs in perpetuity the liberties written below to have and to hold to them and their heirs from us and our heirs in perpetuity.” That the Charter extended beyond the baronial stratum of society to include freemen distinguishes the charter as one that comprehends an expansive field of interest beyond the barons themselves. The liberal ethos of England, at least at the time of Magna Carta, understood that liberties are privileges won and achieved through agreement (or charter); they assume their authority first through custom, and if necessary through charter or statute. In this sense then the liberal ethos of the Magna Carta, and English liberty itself, is tied to an articulated sphere of authority that the individual maintains in relation to things one can call one’s own through practice. And the authority of this sphere, according to the argument of the ancient constitution, is sanctified by the habit of historical practice, or as Holt states: “Antiquity was nine-tenths of the law.”<sup>117</sup> Indeed antiquity, or the appeal to the sacred practice of history proved to evoke as much from the pool of sentiment as it could from actual concrete referents.

That the liberties of Magna Carta were granted “in perpetuity” gives counsel against reading the document as anything less than an articulate and comprehensive

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<sup>117</sup> Holt, J.C. from “The Ancient Constitution in Medieval England,” from *The Roots of Liberty*, edited by Ellis Sandoz (Columbia, MO: University of Missouri Press, 1992), 51.

expression of an emerging liberal ethos. That is to say, “perpetuity” stakes out a space in time for what the barons insist has been timeless. The liberties of Magna Carta though timeless, cannot be understood as universal. Their sphere of jurisdiction is limited to within the realm, and are further restricted within the realm according to specified parameters of privilege. And though these parameters cannot be transgressed according to the charter, the language does nothing to hinder more robust or expansive future grants of liberty. Liberties to be enjoyed in “perpetuity” are significant, insofar as they are not subject to the variance of circumstance that will be encountered in the future. Time then sanctifies practice grounded in custom. The document is absolute regarding securing protection for “ancient tenure or possession,” and “ancient customs,” and “ancient liberties” locating English liberty that operated according to an unwritten and ancient constitution under the Saxon kings, preserved by William I, and celebrated by Henry I. Henry makes explicit reference to the continuity between Saxon and Norman England: “I take away all the bad customs by which the kingdom of England was unjustly oppressed [under William II]...I restore to you the law of King Edward with those amendments introduced into it by my father with the advice of his barons.”<sup>118</sup> The liberties then of Magna Carta, assert the legitimacy of an ancient constitution defined by *custom* that had, in the words of Coke, existed from “time out of mind as man.”<sup>119</sup> And though historians, as a matter of historical fact emphatically answer “no” to the question of whether an ancient constitution existed, their position is grounded in the historical empiricism, not

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<sup>118</sup> Charter of Liberties of Henry I, Translated in *Source Problems in English History*, edited by Albert Beebe White and Wallace Notestein (New York, NY: Harper and Brothers, 1915), 367.

<sup>119</sup> Coke, Edward, *The Selected Writings of Sir Edward Coke V.I.*, edited by Steve Sheppard (Indianapolis, IN: Liberty Fund Press), 62.

the articulated experience of those who insisted that it was. That is, the ancient constitution, according to its partisans, “designates the common law view of English law as existing from time immemorial, or time out of mind, and containing all justice and liberty...[this] myth received full expression in the work of Sir Edward Coke ... Into the myth was woven the content of feudal law as well as divine and natural law as sources of common law. The myth is no doubt a fundamental symbolism of the Anglo-American civil theology.”<sup>120</sup> The emphasis on “perpetuity” then is an insistence that the English custom of the ancient constitution rises to the level of a higher law. In this sense English subjects declared for themselves a place within what Voegelin called the “community of being,” though it was rooted in the context of particular experience, sanctified, and an inheritance. This understanding became of central importance and served the subjects of the realm in resistance to early Stuart kingships acting as a continued argument against authority and as an argument for political liberty as constitutive of the English historical experience.<sup>121</sup>

The most basic liberties of Magna Carta that have endured, in “perpetuity” concern the legal protections of subjects. Insofar as they are liberties, they can be said to function as limits of royal authority and legal rights/privileges of subjects. Perhaps the most famous, Chapter 29 states:

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<sup>120</sup> Sandoz, Ellis. *A Government of laws: Political Theory, Religion, and the American Founding* (Columbia, MO: University of Missouri Press, 2001), 44.

<sup>121</sup> See Janelle Greenberg’s *The Radical Face of the ancient Constitution* (New York, NY: Cambridge University Press, 2001). Greenberg’s central thesis illustrates the uses made by the ancient constitution for present day political disputes.

No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or sent against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice.<sup>122</sup>

It condemns arbitrary power over freemen and establishes a shared standard for justice, national in its application. The national sentiment is central to both the claims and development of English identity. It is national, most significantly in the range of its vision, comprehending a “law of the land.” A shared “law of the land” is a common good, a mutual political thread connecting subjects in common, where all exist, and have claim upon its standards. The force of Magna Carta creates a legitimacy for public resistance to executive authority. It creates a shared protection against what a civil power can coerce one to do, and rests on the understanding that these freedoms, while perhaps grounded in custom, are true because they transcend it. I would take Charles Howard McIlwain’s quotation of Roger Twysden, an 17<sup>th</sup> century member of the House of Commons, as an appropriate summation of the nationalizing sentiment that Magna Carta imparted, expressed, and contributed to, i.e., that law of the land meant, “nothing else but those immunities the subject hath ever enjoyed as his owne right, perteyning either to his person or his goods; and the ground that hee doth so is that they are allowed by the law of the land, which the king alone can not at his owne will alter, and therefore can not taek them from his, they being as auntient as the kingdome itself, which the king is to protect.”<sup>123</sup>

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<sup>122</sup> Chapter 29 of Magna Carta excerpted from Kyle Scott’s *The Price of Politics: Lessons from Kelo V City of New London* (Lanham, MD: Lexington Books, 2010), 4.

<sup>123</sup> McIlwain, Charles Howard. *Constitutionalism & the Changing World: Collected Papers* (New York, NY: Cambridge University Press, 1939), 117.



## Part VI: A Political People

### A. Introduction

The liberal ethos that developed in England during the Middle Ages understood itself in terms of feudal privilege, grounded itself in Christianity, natural reason, and was restricted to the upper strata of the realm. As Christopher Hill noted regarding this period: “To be free of something means to enjoy exclusive rights and privileges in relation to it. The freedom of a town is a privilege, to be inherited or bought. So is a freehold estate...The Parliamentary franchise is a privilege attached to particular types of property. The ‘liberties of the House of Commons’ were peculiar privileges enjoyed by members, such as immunity from arrest, the right to uncensored discussion, etc....[and] kings, like their propertied subjects, had their rights and privileges. The problem of early seventeenth-century politics was to decide where the king’s rights and privileges ended and those of his free subjects began...”<sup>124</sup> Political liberty in England was originally restricted to the upper strata of the realm though it was eventually extended to all free men. These restrictions on political liberties were due, in part, because such liberty derived its power from property and inheritance. Grounding liberty in these concrete elements allowed the nobility to marshal the necessary material resources for action, if need be, to protect their interests from the authority of the Crown. That political liberty was restricted speaks to the particular circumstances under which it achieved representation. That is, the liberties of Magna Carta, are particular to England’s political history, they gathered their force and development, through the ability of the nobility to

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<sup>124</sup> Hill, Christopher. *The Century of Revolution: 1603-1714* (New York, NY: W. W. Norton, 1982), 34.

mobilize, but can only be fully understood within the context of greater crisis of authority facing medieval Christendom.

This crisis of authority is rooted in the collapse of self-understanding that had been the source of medieval order. The liberties of Magna Carta, considered in this light, are part of the phenomena that constitutes an emerging self-interpretive constitutional authority, eclipsing the older order of medieval Europe, particularly the symbol of *Christendom*. And this crisis of authority, though considered broadly, is reflected in the phenomena of self-articulation. Insofar as self-articulation is a participatory phenomena rather than a fixed one, its external representation develops or changes accordingly.

Regarding Anglo-American history, Ellis Sandoz writes:

...the process of articulation occurs over three centuries following the “Magna Carta through a succession of phases beginning from the representation of the people in “the common council of our realm” with the realm itself possessively represented by the king, to a second phase of composite representation when the shires, boroughs, cities, and principal nobility organized as the baronagium form communes for representing themselves for action; to the rise of Parliament where the lesser communes organize into a higher one as the two houses representative of the realm as a whole, in the competition with the king as representative of the realm; to the sixteenth century “melting of this representative hierarchy into one single representative, the king in Parliament. One “body politic” now emerges in the Tudor period, symbolized as having its head in the king, its members in Parliament, “the royal estate being enhanced by its participation in parliamentary representation, the Parliament by its participation in the majesty of royal representation.”<sup>125</sup>

The limit of this is reached when “the membership of the society and people becomes politically articulate down to the last individual as the representable unit ... To put it more generally: the public order of a society as institutionalized, if it is to be optimally satisfactory as a habitat for men, must truly represent the order of human existence as

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<sup>125</sup> Sandoz, Ellis. *The Voegelinian Revolution: A Biographical Introduction* (Edison, NJ: Transaction Publishers, 2000), 100

participated in by every human being.”<sup>126</sup> Voegelin himself finds this insight most effectively conveyed in Lincoln’s formulated the American experience as “government of the people, by the people, for the people.”<sup>127</sup> And insofar as the “order of human existence” finds proximate representation in the political world, great breaks in the continuity of self-articulations serve as points of essential contrast and significance. Beginning with the thought of Thomas Hobbes, western political philosophy, and constitutionalism, found a language to justify and legitimize itself according to principles at variance with the principles of Magna Carta. To the degree that the classical and Christian teachings of the late Middle Ages found expression in English institutions they have had to contend, compete, and co-exist with principles of the Enlightenment. As a point of fact though, where one derives its authority, generally from the experience of authority, the other derives its authority from social utility. The pride of the English people, their emphasis on tradition and customary, common law, their political lineage, their understanding as being exceptional would seem to only be effective from the authority of its experience. This experience, the experience of constitutionalism, assumed the form of a political identity and its authority, and ultimately the limits of its authority, can only be understood in relation to what it opposed.

#### B. John Fortescue and Double Majesty

*In Praise of the Laws of England*, written by John Fortescue around 1470, makes the political import of Magna Carta explicit and its continuity clear. Fortescue insists that English government is both political and royal (*dominium politicum et regale*) as opposed

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<sup>126</sup> *Ibid.* 100-101.

<sup>127</sup> Voegelin, Eric. *The New Science of Politics* (Chicago, IL: University of Chicago Press, 1987), 50.

to simply royal (*dominium regale*). The political rule of English government is historically unique according to Fortescue, and he cites only the Israelites and the Roman Empire as prior examples of double-majesty. The theoretical consequence of this is that both parliament and the crown govern, and are governed in turn, by law; more radically, parliament is a check upon royal authority. Fortescue writes:

For the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political. If he were to rule over them with a power only royal, he could be able to change the laws of the realm, and also impose on them tallages and other burdens without consulting them; this is the sort of dominion which the civil laws indicate when they state that “what pleased the prince has the force of law.” But it is far otherwise with the king ruling his people politically, because he himself is not able to change the laws without the assent of his subjects nor to burden an unwilling people with strange impositions, so that, ruled by laws that they themselves desire, they freely enjoy their goods, and are despoiled neither by their own king nor any other.<sup>128</sup>

The imposition of a Parliamentary limit upon royal authority was something, according to S.B. Chrimes, that had never been articulated before Fortescue.<sup>129</sup>

Fortescue uses this distinction of *dominium politicum et regale* and *dominium regale* to argue for the justice of political kingship and to illuminate the difference of the common law of England and the civil laws of France. England, governed by the common law, binds the king and the subjects together by mutual constraints of the law; in France, under the civil law, “the king alone could make law and tax his subjects, in accordance

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<sup>128</sup> Fortescue, John. *In Praise of the Laws of England, in On the Laws of Governance of England*, edited by Shelley Lockwood (New York, NY: Cambridge University Press, 1997), 17.

<sup>129</sup> Fortescue, John. *De Laudibus Legum Anglie*, edited by S.B. Chrimes (New York, NY: Cambridge University Press, 1949), xlvii. Chrimes writes: “Fortescue was the first writer to abandon merely feudal and prefeudal notions of the monarchy, and to affirm boldly that it was not only limited, but parliamentary in character. In doing so, he not only reflected the constitutional development that had been taking place since Bracton, but also illumines for us the path that was likely to be followed in the ensuing generations.”

with the Roman-law view that *quod principi placuit legis habet vigorem*.<sup>130</sup> A fundamental difference between these systems of laws was that there was no legal eddy of adjudication, no space between submission and rebellion to address grievances. Legal rights in England largely concerned the protection of property rights and it was through property rights, that is, consent to taxation that allowed English subjects to enjoy their liberty. Fortescue famously connected the property rights and holdings of English subjects with the institution of trial by jury, explaining why other countries with less abundance were unable to enjoy English liberties.

For in those other countries in scarcely a single town can one man be found sufficient in his patrimony to serve on a jury...How, then can a jury be made up in such regions from among twelve honest men of the neighborhood where the fact is brought into trial, when those who are divided by such great distance cannot be deemed neighbors?...Thus it would be necessary in those countries to make a jury either of persons so remote from the fact in dispute that they do not know the truth about it, or of paupers who have neither shame of being infamous nor fear of the loss of their goods, since they have none, and are also blinded by rustic ignorance so that they cannot clearly perceive the truth.<sup>131</sup>

This abundance is credited to the limitations that law imposes upon the Crown through its ability to tax. Abundance is also the special dispensation of English soil.

Again, that land is so well stocked and replete with possessors of land and fields that in no hamlet, however small, can be found in which there is no knight, esquire, or householder of the sort commonly called a franklin, well-off in possessions; nor numerous other free tenants, and may yeomen, sufficient in patrimony to make a jury in the form described above.<sup>132</sup>

The English then are particularly blessed according to Fortescue – and it is both through and property through a share in the political rule that liberties are able to be enjoyed by

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<sup>130</sup> Mendle, Michael. “Parliamentary Sovereignty” in *Political Discourse in Early Britain*, edited by Nicholas Phillipson and Quentin Skinner. (New York, NY: Cambridge University Press, 1993), 102.

<sup>131</sup> Fortescue, John. *De Laudibus Legum Anglie*, edited by S.B. Chrimes, 44.

<sup>132</sup> *Ibid.* 42.

all. The counterpoint to this exceptionalism would be that political justice is conditional and circumstantial.

English justice exists by virtue of its political kingship and its distribution of wealth. Through consent of the component parts and through a recognition of legal limits, English liberty is an act of coordination. Fortescue uses the body politic metaphor, and while the king remains the head, the head does not dictate the order of its unified whole:

And just as the head to the physical body is unable to change its sinews, or to deny its members proper strength and due nourishment of blood, so a king who is head of the body politic is unable to change the laws of that body, or to deprive that same people of their own substance uninvited or against their wills.<sup>133</sup>

According to Fortescue, the king rules and leads the realm, but he does so politically, according to law and principles of shared governance. And these laws are made together by both subject and king and bind them together and direct them in a shared orientation according to where the law points. Regarding the nature of law, Fortescue holds that kingship exists according to natural law as a guide to subjects, as an executive power that works with the consent of the people and directs itself, and the realm towards justice.

In *On the Nature of the Law of Nature*. Fortescue articulates a theory of natural law, Thomistic in content, but specifically English in its applicability to the realm itself. Laws of the realm are judged according to their participation in divine and eternal law. That is, natural law is, “that which has the same force among all men,” and, as universally applicable law it transcends particular realms; it is particularized in the customs and statutes of English government that endow it with a specifically English character. Fortescue goes on to consider the superiority of English law from the

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<sup>133</sup> *Ibid.* 21.

standpoint of the customary, law and its constancy, i.e., the ancient constitution. He states: “And throughout the period of these nations and their kings [that is rule by the Britons, Romans, Saxons, Danes and Normans] the realm has been continuously ruled by the same customs as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them...”<sup>134</sup> The assertion by Fortescue is that customary law derives its authority from history insofar as it has consistently been affirmed and re-affirmed as true. That is, customary law is binding, not because of ancestral authority, for according to Fortescue, reason and truth are not subordinate to custom. Its authority rests in its relation to truth and justice as reflected in the wisdom of experience.

In articulating the relationship of the particulars of human law with the immutability of divine law, Fortescue makes an analogy: “For every planet hath its functions within its proper sphere, wherein it develops the powers of its own nature, and yet escapes not the laws of the sun, in which all the planets partake.”<sup>135</sup> Within these spheres then the particular articulations of justice exist not as immutable points of theology but as a jurisprudence of first principles. That is, “human law, in custom and statute, are derived from certain universals which those learned in the laws of England and mathematicians alike call maxims... These principles, indeed, are not known by force of argument nor by logical demonstrations, but they are acquired, as it is taught in the second book of the *Posteriora*, by induction through the senses and the memory.

Wherefore, Aristotle says in the first book of the *Physics* that Principles do not proceed

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<sup>134</sup> *Ibid.* 39.

<sup>135</sup> *Ibid.* 242.

out of other things nor out of one another, but other things proceed out of them.”<sup>136</sup> And from these first principles both custom and statute derive their authority and their orientation. All laws then point toward justice attempting to be understood through reason and limits. Political freedom herein is understood as a right to justice grounded in concrete and tangible land claims. To know the law is to know justice, and that, is to be a freeman in full possession of one’s liberty. English customary law confirmed this in that it was *dominium politicum et regale*, a rule according to higher principles but confirmed in precedent, and far removed from what Fortescue understood to be the more capricious nature of civil law grounded in abstraction. Furthermore, and more importantly, political kingship understood the monarchy as limited but not subordinated to Parliament. The monarch was limited by the assent to what Parliament would permit him or her. While sovereignty was not explicitly addressed by Fortescue, implicitly both king and parliament were limited and, in that sense, subordinate to the law.

The understanding of the *liberal ethos*, grounded in common law liberty and natural law, of articulated limits upon power, would be given further and more urgent expression during the seventeenth-century conflict between Parliament and the Stuart kings. Yet in that struggle the language of limits upon powers was replaced by who would wield power. Developing alongside the revival of Magna Carta during the seventeenth century, Hobbes would propose an alternative that was not a corrective to the traditional understanding of English political order, but rather, an alternative. The confluence of these forces – ancient constitution, Enlightenment political philosophy, parliament and king - would incorporate themselves into the settlement of 1689 marking

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<sup>136</sup> *Ibid.* 21.



the emergence of England as a force of contradictions ready to be released upon the modern world.

### C. Articulating Supremacy

The disorders of seventeenth century England and the articulation of its liberal ethos cannot be understood without reference to the nationalization of the English church under Henry VIII. The English Reformation represents a final institutional break with European Christendom that subsumed spiritual jurisdiction under the banner of the crown. The 1553 *Act in Restraint of Appeals* declares that by, “divers sundry old authentic histories and chronicles it is manifestly declared and expressed that this realm of England is an empire, and so hath been accepted in the world, governed by one Supreme Head and King... and owe to bear next to God a natural and humble obedience.”<sup>137</sup> By declaring England an empire unto itself Henry eliminated papal jurisdiction and completed the break with Rome in 1554 with *The Act of Supremacy*. The Act states that

...the king his heirs and successors, kings of this realm, shall be taken, accepted, and reputed the only supreme head in earth of the Church of England, called Anglicans Ecclesia; and shall have and enjoy, annexed and united to the imperial crown of this realm, as well the title and style thereof, as all honors, dignities, preeminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity of the supreme head of the same Church...shall have full power and authority from time to time to visit, repress, redress, record, order, correct, restrain, and amend all such errors, heresies, abuses, offenses, contempts, and enormities, whatsoever they be...for the conservation of the peace, unity, and tranquility of this realm.<sup>138</sup>

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<sup>137</sup> Goodman, Ellen. *The Origins of the Western Legal Tradition: From Thales to the Tudors*. (Sydney, AU: Federation Press, 1995), 296.

<sup>138</sup> Elton, G.R., ed. *The Tudor Constitution Documents and Commentary* (New York, NY: Cambridge University Press, 1982), 180.

The English Crown then, in declaring itself as the supreme head of the Church claimed to embody both spiritual and temporal jurisdictions. And this break with papal authority signified more than simply English independence from ecclesial interference; it signified a “closed, secularized, autonomous polity.”<sup>139</sup> England experienced closure in the sense that it was a jurisdiction unto itself; it was secular insofar as infallible spiritual authority was transferred from the papacy to the King, and that articles of faith became the domain of the English clergy working in tandem with the Crown; it was autonomous insofar as actions were justified on the basis of its own discretion and logic. The English Reformation occurred under different circumstances than it did in continental Europe, basing its innovations on claims of royal power and jurisdiction as opposed to the Lutheran theology of *sola scriptura*. Still, the influence of the Reformation, particularly Puritan radicalism and its attendant political theology, were acutely felt in England. This Puritan radicalism of the later sixteenth century, led by many notables, including Thomas Cartwright, expressed hostility to both English law and to reason itself. That is, the Puritan radicals denied any authority not found in Scripture. Cartwright outlined the excesses of Puritan civil theology in an exuberant rhetoric. Vis-à-vis temporal and spiritual authority Cartwright stated “that civil magistrates must govern according to the rules of God prescribed in his word...so they must be servants unto the church, and as they rule in the church so they must remember to subject themselves unto the church, to submit their scepters, to throw down their crowns, before the church, yea as the prophet

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<sup>139</sup> *The History of Political Ideas (Vol. V): Religion and the Rise of Modernity (Collected Works of Eric Voegelin, Vol. 23)*, edited by James L. Wiser. (Columbia, MO: University of Missouri Press, 1998), 74.

speakeeth; to lick the dust of the feet of the church.”<sup>140</sup> That a nationalized church would create new national heresies was embedded in the very language of the Supremacy Act; that these heresies would produce a counter argument that synthesized medieval Thomism and Reformation nationalism is indicative of English conservatism, the ancient constitution, and its enduring adaptability.

#### D. Richard Hooker and the Christian Commonwealth

In *Of the Laws of Ecclesiastical Polity* Richard Hooker articulated a political philosophy that legitimized England as a *corpus politicum* and gave theoretical clout to the principles of the Elizabethan settlement.<sup>141</sup>

In his ecclesiology, Hooker defends the broad competence of Parliament with the convocations of bishops over the rites and government of the Church (though restricted to “indifferent” matters not pertaining to salvation), while his political theory defends the broad competence of parliament (though restricted by divine law and the special prerogatives of the Crown) over civil order. The Crown has a vital place as head of the body politic, but its powers were ultimately delegated by, and subordinate to, the body as a whole.<sup>142</sup>

Of significance regarding Hooker and the present study are three important points: the infusion of medieval natural law into a now Protestant England; the rearticulation of

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<sup>140</sup> Carthwright, Thomas “Replye to an Answer” (1573) in *Political Thought in the Sixteenth Century* edited by J.W. Allen (Whitefish, MT: Literary Licensing, 1961), 221. For this Cartwright was himself accused by rivals of modeling himself after the Pope. Indeed, what Cartwright advocated was a “two kingdom” theory within the realm. The Geneva advocates held the Church as a society set apart from political commonwealth with its own organization.

<sup>141</sup> The Act of Supremacy was repealed under Queen Mary I and then reinstated under Elizabeth I in 1559. According to the 1559 version of the Act, the language of the Oath of Supremacy, which the nobility were required to swear to the monarch, was changed. No longer would the monarch be known as the Supreme Head of the English Church; instead the oath described the monarch as Supreme Governor.

<sup>142</sup> Rosenthal, Alexander S., *Crown Under Law: Richard Hooker, John Locke, and the Ascent of Modern Constitutionalism* (Lanham, MD: Lexington Books,, 2008), 145.

political authority with an emphasis on Parliament's essential role in governance; and the independent spiritual substance of English governance.<sup>143</sup>

Hooker writes that, law, "comprehendeth all those things which men by the light of their natural understanding evidently know...virtuous or vicious, good or evil for them to do."<sup>144</sup> Hooker's law takes its first deductive principles from Aristotle and Aquinas, that all individuals seek happiness and the good and that this law is universal.

Furthermore, to achieve this, they seek a triple perfection:

Man doth seek a triple perfection: first a sensual, consisting in those things which very life itself requireth either as necessary supplements, or as beauties and ornaments thereof; then an intellectual, consisting in those things which none underneath man is either capable of or acquainted with; lastly a spiritual and divine, consisting in those things whereunto we tend by supernatural means here, but cannot here attain unto them.<sup>145</sup>

The purpose of community is to achieve these goods, this "triple perfection." And it was achieved through a combination of reason and revelation. Hooker writes:

As her [i.e. wisdom's] ways are of sundry kinds, so her manner of teaching is not merely one and the same. Some things she openeth by the sacred books of Scriptures; some things by the glorious works of Nature: with some things she inspireth them from above by spiritual influence; in some things she leadeth and traineth them only by worldly experience and practice.

Scripture was not an exhaustive and prescriptive source of knowledge – furthermore, there would be a diversity of representations and communities based on the limits of each territorial situation. From this diversity of reflections arise different communities, united

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<sup>143</sup> See Rosenthal and his understanding of Hooker's contribution to English political and religious development.

<sup>144</sup> Hooker, Richard. *Laws of the Ecclesiastical Polity Vol. I*, edited by Henry Morley (London: Routledge and Sons, 1888), 86.

<sup>145</sup> *Ibid.* 4.

in their shared participation in the natural law, but differentiated by their growth and settlements as communities.

According to Hooker nothing exists in isolation, but creation itself, from the divine ground of being to the material needs of individuals, exists in relation to each other. We are, in essence, incomplete or incomprehensible without our relations, attachments, and dependencies. It is in this state of want or lacking, that natural reason and our social existence assumes a specific character. “God hath created nothing simply for itself: but each thing in all things, and of every thing each part in other hath such interest, that in the whole world nothing is found whereunto anything created can say, ‘I need thee not.’”<sup>146</sup> This undergirds Hooker’s definition of justice. Hooker writes that, “justice is the virtue whereby that good which wanteth in ourselves we receive inoffensively at thee hands of others.”<sup>147</sup> Human purpose then, originates at the tensional level of consciousness and moves a person into reciprocal relations with others; these relations are the basis of justice itself. This understanding of justice is consonant with the common law understanding of a liberty, not considered negatively, but as a negotiation within the community one is born into. This understanding of law and community rejects the universalist aspirations of rationalist philosophies of law – human communities, while participating and guided by natural law are particular unto themselves. This was especially reflected in England’s independence from the Roman ecclesia. Law and liberty are not universal. Rather they are particular expressions of individuals negotiating common goods amongst themselves. Justice then, at the rational level, is a negotiation of

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<sup>146</sup> *Ibid.* 34.

<sup>147</sup> Hooker, Richard. *The Works of the Learned and Judicious Divine Mr. Richard Hooker, Vol. 2*, edited by Isaac Walton (New York, NY: Appleton and Co., 1873), 362.

difference and wants. And law is not the pure imposition of power, but rather it is an agreed upon sphere of mutual limits.

Hooker makes understanding of law and governance is based upon the limitations of creation itself. As he says, “no good is infinite but only God.” The consequence of this, congruent with Hooker’s notion of justice, is that we are defined by our finitude and our limitations. And we come to know these limitations through our relationships, and through reason, which is our very nature. Hooker states that, “Law is properly that which Reason in such sort defineth to be good that it must be done. And the Law of Reason or human Nature is that which men by discourse of natural Reason have rightly found out themselves to be all for ever bound unto in their action.”<sup>148</sup> This reason then is both the source of order and a resistance to disorder, whereby the *sola scriptura* of Puritan reformism is mitigated in Hooker’s hands to include both, “evidence of Gods owne testimonie added unto the natural assent of reason.”<sup>149</sup> Political legitimacy expresses itself as an exercise and participation in natural reason. Hooker’s understanding of natural reason then is a defense of political legitimacy and its source, natural law. Legitimacy is derived from the limitations of our condition; these limitations are recognized by natural law and its authoritative place in the law that governs the realm. This expresses itself from both the divine ground from which it originates, but also it is derivative of the community as a whole insofar as sovereignty is exercised, not strictly by and for the king – rather, the political community exists for all who are members of it.

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<sup>148</sup> Hooker, Richard. *Laws of the Ecclesiastical Polity, Vol. I*, edited by Henry Morley (London: Routledge and Sons, 1888), 86.

<sup>149</sup> Hooker, Richard. *The Works of the Learned and Judicious Divine Mr. Richard Hooker, Vol. 2*, edited by Isaac Walton (New York, NY: Appleton and Co., 1873), 262.

For Hooker the implications of this understanding are reflected in the authority of Parliament. For if justice deals in communal goods, “we find out some rule which determineth what everyone’s due is, from whom, and how it may be had. For this cause justice is defined, a virtue whereby we have our own in such sort as law prescribeth.”<sup>150</sup> According to Hooker’s elaboration of law, the legitimacy of authority grounded in natural law, excludes claims to the arbitrary rule of kingship and legitimizes the authority of Parliament as a representative body with a stake in the law. Kingship is something of a trust for Hooker where, “the whole body politics makes laws, which laws give power unto the king.”<sup>151</sup> The power of government is derived from the consent of those who make up the commonwealth and the king assumes his authority from the agreement of the body politic. The king is not only under natural law then but the human law of the body politic. Hooker writes:

I mean not only the Law of Nature and of God, but the National Law consonant thereunto. ‘Happier that people whose Law is their King in the greatest things, than that whose King is himself their Law.’ Where the King doth guide the State, and the Law the King, that Commonwealth is like an harp or melodious instrument...

Hooker’s understanding of the English Constitution puts the Crown in a subordinate position to the law. And in post-Reformation England Hooker is quick to point out that where the king’s power is limited, and where it is now supreme remain circumscribed by the law itself.

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<sup>150</sup> Rosenthal, Alexander S., *Crown Under Law: Richard Hooker, John Locke, and the Ascent of Modern Constitutionalism* (Lanham, MD: Lexington Books, 2008), 35.

<sup>151</sup> Hooker, Richard. *Of the Laws of Ecclesiastical Polity*, edited by Arthur Stephen McGrade (New York, NY: Cambridge University Press, 1989), 217.

It hath been declared already how the best established dominion is, where the law doth most rule the King, the true effect is found as well in Ecclesiastical as in civil affairs. In these the Kings through his supreme power may do great things himself...because so much the law doth permit.<sup>152</sup>

Parliament then according to Hooker, embodied in Lords spiritual, Lords temporal, and the Commons, is the both the origin and the source of law. The power of the king in relation to law has a narrowly construed role in legislation itself. Hooker states, “Touching the supremacy of power which our Kings have in this case of making laws it resteth principally in the strength of a negative voice.”<sup>153</sup> The original source of law in the people then continues in the present through its acknowledged assent to its relationship with the Crown. In Hooker’s understanding of the relation between Crown and Parliament one can see the contours of an argument that would sharpen in Locke’s *Second Treatise of Government*.

The King of himself cannot change the nature of pleas and courts, nor do so much as restore blood, because the law is a bar to him, not any law divine or natural, for against neither it were though the Kings themselves might do both, but the positive laws of the realm have abridged therein, and restrained the King’s power.<sup>154</sup>

Indeed, according to Hooker, where the authority of the King is limited, the liberty of Parliament begins, and is affirmed, over and again as a legislative body. Yet it is not just

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<sup>152</sup> *Ibid.* 150.

<sup>153</sup> Rosenthal, Alexander S., *Crown Under Law: Richard Hooker, John Locke, and the Ascent of Modern Constitutionalism* (Lanham, MD: Lexington Books, 2008), 127. This is not to say that Hooker doesn’t make ample room for royal prerogative. Hooker writes: “What power the King hath he hath it by law, the bounds and limits of it are known. The entire community giveth general order by law how all things publically are to be done and the King as the head thereof the highest in authority over al causeth it according to the same law every particular to be framed and ordered thereby. The whole body politic maketh laws which give power unto the King and the King having bound himself to use according to law that power, it so falleth out that the execution of the one is accomplished by the other in most religious and peaceable sort.”

<sup>154</sup> Hooker, Richard. *Of the Laws of Ecclesiastical Polity*, edited by Arthur Stephen McGrade (New York, NY: Cambridge University Press, 1989), 150.



in the legislative body that England derives her authority. England is a unified realm, spiritually and temporally. Hooker understood the church and the commonwealth as a single society governed by reason *and* through the dictates Scriptures.

#### E. Independent Spiritual Substance

The nationalization of the Church of England declared a spiritual autonomy and identity for England that was specifically Anglican in character and thoroughly English in its jurisdiction. The medieval political philosophy, as we have discussed, defined itself on the distinction between temporal and spiritual spheres of authority; the Act of Supremacy, incorporating civil and ecclesiastical power under the authority of the English monarchy, required justification on its own merits. More urgently it also demanded justification in the face of Puritan and Roman Catholic dissent.

Hooker addresses Puritan and Roman Catholic critics who maintain that, “the church and the commonwealth are corporations, not distinguished only in nature and definition, but a ‘subsistence perpetually severed.’”<sup>155</sup> Hooker’s acknowledges that the differences between the two exist but that their difference is one of accident. Indivisibility resides in the souls of the subjects who comprise the polity - that is a unity. And a church according to Hooker is nothing more than a union of individuals who congregate according to a shared commitment to the Christian faith.<sup>156</sup> This notion of community is then memorably applied to England itself:

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<sup>155</sup> *Ibid.* 328-9. “the name of Church importeth only a society of men, first united unto some public form of regiment, and secondly distinguished from other societies by the exercise of Christian religion.”

<sup>156</sup> *Ibid.* 329

We hold that seeing there is not any man of the Church of England but the same man also a member of the commonwealth; nor any man a member of the commonwealth, which is not also a member of the Church of England; therefore as in a figure triangular the base doth differ from the sides thereof, and yet one and the selfsame line is both a base and also a side; a side simply, a base if it chance to be the bottom and underlie the rest: so, albeit properties and actions of one kind do cause the name of a commonwealth, qualities and functions of another sort the name of a Church to be given unto a multitude, yet one and the self-same multitude may in such sort be both, and is so with us, that no person appertaining to the one can be denied to be also the other.<sup>157</sup>

The civil authority then, as well as the ecclesiastical authority, represented respectively in Parliament and in Convocation are joined, as the head is joined to the body, to the Crown, that is, “the lowest be knit to the highest by that which being interjacent may cause each to cleave to the other, and so all to continue one.”<sup>158</sup> The effect of this understanding regarding church and commonwealth and their unity under the Crown created what Voegelin calls, “a spiritual nationalism that is peculiarly English... Viewed from the larger Western scene, the growth of this idea caused one of the fatal cracks in the unity of our civilization; viewed from the island, it produced a nation that keeps faith with its Christian conscience.”<sup>159</sup>

The Anglican Church’s account of itself, namely its status as a territorially bound spiritual authority, existed in contrast to the institutional catholicity of the medieval order. The authority of the Anglican Church then depended upon explaining, in light of its restricted dominion, the status of universal Christianity beyond its jurisdiction. Hooker’s solution was to deny the universalism of Rome. The “Church of Rome” existed alongside

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<sup>157</sup> *Ibid.* 130, 330.

<sup>158</sup> *Ibid.* 342.

<sup>159</sup> Voegelin, Eric. *The History of Political Ideas (Vol. V): Religion and the Rise of Modernity (Collected Works of Eric Voegelin, Vol. 23)*, edited by James L. Wiser (Columbia, MO: University of Missouri Press, 1998), 81.

the Church of England as a rival power unit, an equal member of a parochial Christianity, and both contained members of the invisible church. That is to say, that according to Hooker, after the Reformation the, “Church of Christ which was from the beginning is and continueth unto the end.”<sup>160</sup> A new church was not created through the Reformation; the spiritual authority of the Church of Rome no longer extended to other churches. This refiguring of the institutional spiritual authority within Western Christendom was as much a political crisis as a spiritual one. Nevertheless it indicated a plurality of expressions that law and governance could assume in a post-Reformation Europe.

The crisis that the Anglican Church faced with Puritan non-conformists was the crisis of the Reformation itself. Specifically, at what point does the private judgment of a group regarding communal life override the established order or status quo? In the controversy between the Puritans and the English establishment the issue did not simply hinge on issues of private conscience and conformance. Rather, they equally, if not more clearly, revolved around the *experience* of authority and the self-understanding regarding its substance. That is, the Puritan position invoked Biblical revelation as prescriptive and insofar as it was prescriptive it rejected the social discernment present in natural reason that Hooker maintains to be the basis of justice. Hooker’s defense of the English church and the Supremacy ultimately rested on an appeal to the necessity of natural law and tradition. Puritan ideology that Hooker opposes and the logic under which it operates bypasses the wants that creates the need for justice, with the exception of Scripture, it rejects the experience of community and history, and in its denigration of reason it abandons the wisdom of custom and tradition. Hooker preference rests in a common law

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<sup>160</sup> Hooker, Richard. *The Works of the Learned and Judicious Divine Mr. Richard Hooker, Vol. I*, arranged by John Keble (Oxford: Clarendon Press, 1874), 346.

understanding of liberty, skeptical about universalizing systems but confident in a common and shared teleological substance. At its best it is an understanding of government as the outgrowth of the negotiation of differences, and through this negotiation, the creation of a community. At the end of the sixteenth century his arguments did little to soften Puritan passions; by the early seventeenth century it had turned decidedly revolutionary. The conflicts of that period then can rightly be seen as much as a struggle between Puritans and Anglicans as it was between the prerogatives of King and Parliament, all claiming a dominant civil theology for the good of the realm. Hooker understood the church and the commonwealth as a single society governed by reason and the Scriptures.

## CHAPTER II: INTERREGNUM OF CONSENSUS

### Part I. Civil Theologies and the Seventeenth Century

Consensus is not homogeneity. This is to say that foundational political principles do not lead to uniform conclusions. In political communities where we might say consensus exists, it is not a claim of strict uniformity of thought within such a community. Rather, consensus, as the word indicates, is the supposition of consent where the principles of community are, to an acceptable degree, reflective of a citizen's self-understanding in both dignity and security. The height of consensus depends upon what a community can call common. And this is all to say that a component of consensus rests on accommodation and compromise as much as it does on principle. But when principle descends to the level of organized sectarian factionalism, when a polity is rejected in a fundamental way, then civil war or a sovereignty movement is not far from the public sphere.

It is not possible to speak simply of a public consensus in England during the revolutionary seventeenth century. Glenn Burgess, using Pocock's concept of *mentalite*, acknowledges the multiplicity of 'ideologies' that characterized seventeenth century England; still he insists that one rose above the rest: "The 'common law mind' was, indeed, a hegemonic *mentalite*, and the ancient constitutionalism with which it linked was the 'shared language of an entire political nation.'"<sup>1</sup> This is true - but obviously not the whole story. The nature and degree of consensus that existed in England during the reign

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<sup>1</sup> Sommerville, J.P. *Royalists and Patriots: Politics and Ideology in England, 1603-1640* (New York, NY: Routledge, 2004), 261. Sommerville is quoting from Glenn Burgess in the *Politics of the Ancient Constitution* (University Park, PA: Penn State University Press, 1993), 231, 17.

of the first two Stuarts is an unresolved point of controversy amongst historians.<sup>2</sup> What is clear though, was that self-understanding in seventeenth century England was a matter of partisanship and it experienced a tipping point that hinged, not only on the ancient constitution and royal prerogatives; it also occurred within the context of revolutionary religious division, economic instability, imprudent governance, particularly under Charles I, and the furthering of animosities that these divisions cultivated. That all of these forces were related to the crisis of modernity that began to express itself in the twelfth century is persuasive insofar as advocates of the Parliament, the Crown, and Puritans alike, claimed an authority that was grounded in competing civil theologies meant to support the origins and validity of their claim. My focus will restrict itself herein to the conflict between common law liberty and royal authority. Not only because the claims of these institutions are specifically English, and take their philosophical bearings

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<sup>2</sup> A contentious historiography finds others making the argument that “consensus” around the common law *mentalite* was not quite so wide-spread. See J.P. Kenyon, in the introduction to *The Stuart Constitution, 1603-1688: Documents and Commentary* argues the common law was the shared “language” that united England. Kevin Sharpe, in *Faction and Parliament: Essays on Early Stuart History*, disagrees with the notion that England was capable of acting on principle at all, let alone the common law. It was only after the experience of war, that England articulated a philosophy of governance in the figure of Hobbes. J.P. Somerville, using pamphlets in a manner employed by Gordon S. Wood in *The Radicalism of the American Revolution*, goes so far as to speculate that underhanded motives are the source of revisionist narratives that claim a unity of thought in early seventeenth century England: “There may be good reasons for arguing as the revisionists do. In the 1970’s and 1980’s – when revisionism rose – Britain underwent economic decline that was clearly linked to social and ideological divisions. Public-spirited citizens, anxious to avert the decline, had a motive for arguing and in time, believing, that such divisions were not part of the fabric of British life, but aberrations that had no precedent even in early Stuart times – just before the greatest of aberrations, the Civil War. Perhaps there are more reasons why people have subscribed to revisionism. But conformity to the evidence is not one of them.” In *The Causes of the English Revolution*, Lawrence Stone argues that “intermingling conflicts, primarily of an demographic/economic nature, were the source of the conflict. Conrad Russell in *The Causes of the Civil War*, minimizes the significance of the event and then locates its specific source in the religious division, Charles I, and problems with his governance, a shifting economy, but not the common law. Christopher Hill elaborates upon Marx’s understanding that it can largely be understood according to economic development. Somerville was an early source in regards to guiding my research into the various interpretations of the political instability in early seventeenth century England.

from classical and Christian political philosophy but because the legacy of 1689 hinged on re-figuring the relationship between Crown and Parliament according to the law.<sup>3</sup>

## **Part II. Early Stuart Kingship and Law**

Under the Stuart kings religious divisions occasioned by the Supremacy led to increases of royal power that were justified, not only through an expanded jurisdiction, but also by a specific understanding of monarchical government that gained momentum post-Reformation, and, most significantly, was incompatible with common law liberty. In a speech to the Lords and Commons in 1610<sup>4</sup> James I articulated his understanding of kingship to Parliament:

The state of monarchy is the supremest thing upon earth. For kings are not only God's lieutenants upon earth, and sit upon God's throne, but even by God himself they are called gods. There be three principal similitudes that illustrates the state of monarchy. One taken out of the word of God, and the two other out of the grounds of policy and philosophy.<sup>5</sup>

The comparison of kingship to divinity was the very substance of James's understanding which, to the degree that it elevated itself, diminished the authority of subjects who understood themselves as living under, and having a share in the common law. James continues, "In the Scriptures kings are called gods, and so their power after a certain relation compared to divine power. Kings are also compared to fathers of families, for a

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<sup>3</sup> Zuckert, Michael. *Natural Rights and the New Republicanism* (Princeton, NJ: Princeton University Press, 1998), xv. "In the beginning, all the English were Christian Aristotelians, more or less...But they gave way to a variety of remarkably different positions. At one extreme emerged a new divine right doctrine, profoundly challenging to the inherited ways of English politics. At the other extreme emerged a variety of parliamentarily orientated contraction doctrines..."

<sup>4</sup> Charles Howard McIlwain calls this speech the, most complete exposition of the King's views of the divine right of kingship." McIlwain, Charles Howard, *The Political Works of James I* (Cambridge, MA: Harvard University Press, 1918), xxxv.

<sup>5</sup> Wooten, David, ed. *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (Indianapolis, IN: Hackett Publishing, 2003), 107.

king is truly *parens patria*, the politic father of his people. And lastly, kings are compared to the head of this microcosm of the body of man.”<sup>6</sup>

Looking at these claims, point by point, first, James states that the power of kings is the power of God, insofar as kings, “make and unmake their subjects; they have power of raising and casting down, of life and of death; judges over all their subjects, and in all cases, and yet accountable to none but God only.”<sup>7</sup> To put these powers in context requires considering them as political powers. That governments define themselves in terms of the power they wield is relatively uncontroversial. What distinguishes the claims of James here then, is not necessarily the extent of the powers that he claims for government. Rather, his claim that kingship is accountable to “but God only,” elevates the authority of individual kingship to the level of a god amongst men. This claim explicitly advances a theory of divine right and absolutism – divine insofar as the king is God’s lieutenant, absolute insofar as he is accountable to no one but God.

Secondly, James advances the familiar theory of monarchy as a form of a paternalism that would forcefully resurface in the work of Robert Filmer in 1680. The paternal analogy was consistent with interpretations of Aristotle and Aquinas, regarding both the origins of government and in the status of monarchy as the best form, if not in practice, then, at least in theory.<sup>8</sup> Insofar as the British monarch was the Supreme

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<sup>6</sup> *Ibid.* 107

<sup>7</sup> *Ibid.* 107

<sup>8</sup> Despite debate surrounding the question of Aquinas and the best regime, principally due to the tension between content of the *Summa* and his treatise *On Kingship*, the thought of Aristotle and Aquinas was used to justify the rule of James based on the compounding origins of government and kingship as *the best* form of government, not in practice but in nature and in theory. Aquinas writes that, “whatever is in accord with nature is best, for in all things nature does what is best...among the bees there is one king bee and in the whole universe there is One God, Maker and Ruler of all things....every multitude is derived



Governor of the English church, it only served to buttress and enforce the notion of paternalism in the monarchy. James writes:

...a father may dispose of his Inheritance to his children, at his pleasure: yea, even disinherit the eldest upon just occasions, and preferred the youngest, according to his liking; make them beggars, or rich at his pleasure; restraints, or banish out of his presence, as hee findes them give cause of offence, or restore them in favour againe with the penitent sinner: So may the King deale with his Subjects.<sup>9</sup>

This understanding effectively unshackled royal prerogative from anything but the monarch's discretion. Richard Hooker, himself a champion of the Supremacy, rejected the paternalism of monarchy because kings, "not having the natural superiority of fathers, their power must needs be either usurped, and then unlawful; or if lawful, then either granted or consented unto by them over whom they exercise the same...because to live by one man's will became the cause of all men's misery. This constrained them to come unto laws wherein all men might see their duties beforehand..."<sup>10</sup> Though both positions share an Aristotelian or Thomistic origins, the possibility of consensus between Hooker and James's understanding of governance is an impossibility.

Finally, James employs the body politic metaphor. The monarchy, as head, "has the power of directing all members of the body to that use which the judgement in the head thinks most convenient."<sup>11</sup> James's I self-understanding, and his understanding of

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from unity." Aquinas, *On Kingship, to the King of Cyprus*, translated by Gerald B Phelan (Toronto, ON: Pontifical Institute of Mediaeval Studies, 1982), 12.

<sup>9</sup> Wooten, David, ed. *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (Indianapolis, IN: Hackett Publishing, 2003), 107.

<sup>10</sup> Hooker, Richard. *Of the Laws of Ecclesiastical Polity, Vol. I.*, edited by R.W. Church. (Oxford: Clarendon Press, 1868), 56.

<sup>11</sup> Wooten, David, ed. *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (Indianapolis, IN: Hackett Publishing, 2003), 108.

English law, was consistent and a consequence of the understanding advanced by Henry VIII and Thomas Cromwell in the *Act of Restraint of Appeals*. That is to say, Jacobite political philosophy was, in part a consequence of understanding England as, “governed by one Supreme Head and King...a body politic compact of all sorts and degrees of people divided in terms and by names of Spirituality and Temporality.”<sup>12</sup> James’s articulation of monarchy as head rejected the double majesty of Fortescue *politicum et regaliū*, and Hooker’s understanding that, in the metaphor of the body politic, the royal head was an outgrowth of the body. A unified Britain was a further significant theoretical and practical repercussion regarding James’s understanding of the body politic. To understand politics as a body and the monarchical head as a divine creation had implications regarding territorial expansion that was apparent in James’s ambition to see a unified British Isle. This was, of course, due partly to the fact that James also held the Scottish crown. Yet James’s vision of a unified Britain can’t only be understood as a quest to consolidate personal power. A united kingdom was understood as a logical outgrowth of his vision of himself as both divinely appointed King and of how the “head” orders the “body.” It is a new vision of the *corpus mysticum* that is imperial in terms of its territorial vision as much as it is in its spiritual jurisdictions. To his Scottish and English subjects James explained himself:

What God hath conjoined then, let no man separate. I am the husband and all the whole isle is my lawful wife; I am the head and it is my body...I hope therefore that no man will be so unreasonable as to think that I that am a Christian King under the Gospel, should be a polygamist and husband to two wives; that I being

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<sup>12</sup> Holdsworth, William Searle, “The Year Book: Ecclesiastical Court,” from *Select Essays in Anglo-American Legal History, Volume Two*, Compiled and Edited by a Committee of the Association of American Law Schools (Boston, MA: Little, Brown, and Co., 1908), 265.

the head, should have a divided and monstrous body; or that being the shepard to so fair a flock...should have my flock parted in two.<sup>13</sup>

Under the divine and imperial crown of James the two body politics, Scotland and England *should by right*, be united under his kingly authority. This understanding of a unified Britain however, in addition to the authority it claimed for kingship, also dismissed the significant differences that characterized the politics of Scotland and England, particularly Roman law in the former and the common law in the latter.

For James the unity of the kingdom could ignore political culture differences and define unity through his personal kingship because, “within it selfe hath almost none but imaginarie bounds of separation...making the whole a little world within it selfe.”<sup>14</sup> The body politic was a cosmion of meaning, though its authority and unity rested in the divinely appointed kingship of which James himself embodied. England and Scotland shared a, “communitie of Language, the principal meanes of Civil socitie, An unitie of Religion, the chieftest band of heartie Union, and the surest knot of lasting peace.”<sup>15</sup> The subjects differing understanding of law was another matter, and though each kingdom had, and would have after the Act of Union (1707), their own respective Parliaments, James’s understanding of parliamentary powers diminished those differences and compensated for them through his expansive understanding of kingship, authority, and governance.

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<sup>13</sup> Stuart, James I (of England) VI (of Scotland). *True Law of Free Monarchies* as reprinted in J.R. Tanner ed., *Constitutional Documents of the Reign of James I 1603-1625* (New York, NY: Cambridge University Press, 1930), 187.

<sup>14</sup> Larkin, James F. and Hughes, Paul L. eds. *Stuart Royal Proclamations*, 2 vols: vol. I: *Royal Proclamations of King James I, 1603-1625* (Oxford: Clarendon Press, 1973-1983), 95.

<sup>15</sup> *Ibid.* 95.

It is clear that James understood his kingship as absolute, rejecting any limitation on his authority, for the king is, “above the law, as both the author and giver of strength thereto.”<sup>16</sup> Other sources of authority, particularly Parliament are, “nothing else but the head Court of the king and his vassals...it lies in the power of no Parliament, to make any kinde of Lawe or Statute, without his Scepter be to it, for giuing it the force of Law...”<sup>17</sup> And while the absolute authority of kingship is clear, James insisted that royal authority was not beyond the bounds of understanding itself as existing within the context civil of society and history. James distinguished between original kingships, including those attained by either conquest or assent, and those that eventually, and over time, settled into “civility and polity.” The king’s binds himself to the fundamental laws of a settled kingdoms, though, he himself, as king, embodies the law.

And so the king became the *lex loquens* [a speaking law], after a sort, binding himself to a double oath to the observation of the fundamental laws of his kingdom: tacitly, as by being a king, and so bound to protect as well the people as the laws of his kingdom, and expressly, by his oath at coronation.<sup>18</sup>

Kingship then rules according to the laws of the kingdom, by which the king is the law personified; the coronation oath meanwhile binds the king, though not to his subjects – the coronation oath is given to God alone.<sup>19</sup> A king can be unjust and, “degenerates into a

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<sup>16</sup> From the “Proclamation of Union, 1604” in *King James VI and I: Politicial Writings*, ed. J.P. Sommerville. (New York, NY:: Cambridge University Press, 1994), 133.

<sup>17</sup> *Ibid.* 134.

<sup>18</sup> Wooten, David, ed. *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (Indianapolis, IN: Hackett Publishing, 2003), 108.

<sup>19</sup> Regarding the Coronation Oath, and who it was made to, James stated that it, “makes not his Crown to stoupe by this meanes to any power in the Pope, or in the Church, or in the people.” It was to God alone. *The Political Works of James I, Vol. I.*, edited by Charles Howard McIlwain. (Cambridge, MA: Harvard University Press, 1918), xxxix-xl.

tyrant, as soon as he leaves off to rule according to his laws.”<sup>20</sup> More explicitly James distinguished between tyranny and kingship in *Basilikon Doron* writing that the “trew difference betwixt a lawfull good King, and an vsurping Tyran...the one acknowledgeth himself ordained for his people, having received from God a burthen of gouernment, whereof he must be countable: the other thinketh his people ordained for him, a prey to his passions and inordinate appetites...”<sup>21</sup>

Yet even when kingship descends into tyranny the divine ordination of the office prohibits resistance or usurpation. James understands tyranny to be God’s judgment on his people themselves. So monarchy, literally and absolutely, exists above the law.<sup>22</sup> The status of kingship in relation to the law, and James’s own particular relation to law, is not imposed but exists at the discretion of the king’s good will.

I have said a good King will frame all his actions to be according to the law: yet is he not bound thereto but of his good will, and for good example-giving to his subjects...a good King, though he be above the law, will subject and frame his actions thereto, for example’s sake to his subjects, and of his own free will, but not bound thereto.<sup>23</sup>

The discretion of the king in relation to the law, what he is bound to, was the definitive struggle of seventeenth century England. James advised his successor to, “manage his

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<sup>20</sup> From “Speech to Parliament, 1610” in *Divine Right and Democracy: An Anthology of Political Writing in Stuart England*, edited by David Wooten. (Indianapolis, IN: Hackett Publishing, 2003), 107.

<sup>21</sup> From the “Basilikon Doron” in *King James VI and I: Polticial Writings*, edited by J.P. Sommerville. (New York, NY: Cambridge University Press, 1994), 20.

<sup>22</sup> Shuger, Debora K. *Habits of Thought in the English Renaissance: Religion, Politics, and the Dominant Culture*. (Toronto, ON: University of Toronto Press, 1997), 156. Shuger writes: “...this Roman view of the king as *legibus solutus* entails that the king has no legally enforceable duties toward his subjects, but their relation to him ‘must consist entirely of duties, and duties to which no limits can be put; of the ‘rights subjects’ it is idle, even impious to speak”

<sup>23</sup> From “Trew Laws” in *King James VI and I: Polticial Writings* edited by J.P. Sommerville (New York, NY: Cambridge University Press. 1994), 75.

authority boldly, and yet temperately, not stretching his royall Prerogative but where necessity shall require it”<sup>24</sup> Yet the prudence of use regarding prerogative was eclipsed by the scope of its authority. James famously addressed the Judges of the Star Chamber in 1616: “If there fall out a question that concerns my Prerogative or mystery of State, deale not with it...for they are transcendent matters.”<sup>25</sup> Charles McIlwain succinctly characterized the reaction and effects regarding Stuart kingship:

To anyone, with even the slightest knowledge of the constitutional history of this time and period preceding, it must be obvious how utterly inconsistent such theories as these are with the views of practically all the common lawyers and most of the Parliamentarians of the day. By the attempt to make actual these absolutist doctrines the train was laid for the explosion which came later in the century: in fact, it made that catastrophe almost inevitable.<sup>26</sup>

With James, and with Jacobite kingship in general, there is little room for debate regarding consensus of what the best regime might be. It emanates from the royal person and is mediated by his prudence and divinely appointed power. The liberties of his subjects are not the privileges of life; they are the bequests of royal grant.

### **Part III. Edward Coke and the Ancient Constitution**

#### **A. The Use of History**

The greatest champions of the ancient constitution trace English rule of law beyond the concrete records of Magna Carta and the Anglo-Saxon kings; they continue further into a speculative history pre-Norman parliaments, Druids speaking Greek and holding court, Brutus of Troy establishing English kingship; finally, this unbroken link

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<sup>24</sup> *Ibid.* 62.

<sup>25</sup> *The Political Works of James I, Vol. I*, edited by Charles Howard McIlwain. (Cambridge, MA: Harvard University Press, 1918), xl. McIlwain is here quoting an address James made to the Judges regarding the extent of his Prerogative.

<sup>26</sup> *Ibid.* xl.

retreats into the mists of “time immemorial.”<sup>27</sup> Though a caricature, this account of strict continuity has fueled opponents of the ancient constitution who charge that the authority of tradition amounts to little more than a sophistry of precedents.<sup>28</sup> Allen D. Boyer points out an example from the *Third Part of the Reports* that is indicative of the problem. Coke writes: “And this appeareth by the book of Domesday now remaining in the Exchequer, which was made in the reign of Saint Edward the Confessor...”<sup>29</sup> The problem with this was that the Domesday Book originated with the first Norman king rather than the last Saxon monarch – and Coke, Boyer emphatically points out, knew this. Boyer’s contention then is that when Coke approached history he did so as a lawyer and exponent of common law, not as an historian.<sup>30</sup> This historical component to the common law, and the potential for its misuse and abuse gives context to the concerns about common law’s relationship with history as a means of jurisprudence. Hobbes (and James) primarily objected to what they saw as the common law’s, “appeale from custome to reason, and from reason to custome, as it serves their turn; receding from custome when their interest requires it, and setting themselves against reason, as oft as reason is against them...”<sup>31</sup>

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<sup>27</sup> See Janelle Greenberg, *The Radical Face of the ancient Constitution* (New York, NY: Cambridge University Press, 2001); J. G. A. Pocock’s *The Ancient Constitution and the Feudal Law* (New York, NY: Cambridge University Press, 1987).

<sup>28</sup> See James R. Stoner Jr.’s *Common Law-Liberty: Rethinking American Constitutionalism* (Lawrence, KS: University Press of Kansas, 2003), for a thorough study of Hobbes and his hostility to Coke.

<sup>29</sup> Boyer, Allen D. *Sir Edward Coke and the Elizabethan Age* (Redwood, CA: Stanford University Press, 2003), 139.

<sup>30</sup> *Ibid.* 146. Boyer writes: “Coke’s ...insistence that the common law is unchanging and timeless...are part of the Elizabethan initiative in propaganda history. Just as Parker wanted to find an honorable past for the English church, Coke wanted to find an equally honorable pedigree for the common law.”

<sup>31</sup> Hobbes, Thomas. *Leviathan - Parts One and Two* (Englewood Cliffs, NJ: Prentice Hall 1958), 165-166.

While not, in and of itself a critique of the unreliability of history, the charge of sophistry is unmistakable.

Yet the liberties derived from common law do not simply rest upon claims of ancestral authority. The common law's character can be more clearly understood to exist at a level commensurate with "an artificall perfection of reason" where divine order and a constancy of justice are discernable in the world; the seventeenth century revival of common law, the limitations it put upon the prerogatives of Stuart kingship and the will of Parliament, further illustrate, not only its utility, but also that its utility, i.e., method, was part of its substance. More than any other figure, Edward Coke is credited with transforming the common law from an incoherent collection of feudal privileges into a system of law that he insisted defined governance and political identity in England. Coke understood law to be the unifying principle of England and constitutive of whom they were as a people. To that point then, it is imperative to see what the common law is and to what degree it is capable of extending itself beyond its English identity.

#### B. Foundations of Consensus

Edward Coke, as first a jurist, then as a member of Parliament, and most importantly as an author, devoted his life to articulating an understanding of governance that subordinated both king and Parliament to the rule of law. Coke's specific understanding of law addressed both the threat of Stuart rule, the scope and limits of Parliament, and more generally, the crisis of authority characteristic of governments in post-Reformation Europe. Coke's understanding of law addresses the instability of an emergent modernity by reconciling the self-interpretive authority of the individual with a



form of consent that both flattered and respected individual authority under a common law by mostly restricting its exercise to those who had studied it, i.e. jurists.

For reason is the life of the Law, nay the Common Law it selfe is nothing else but reason, which is to be understood of an artificall perfection of reason gotten by long studie, observation and experience and not every man's natural reason, for *nemo nascitur artifex* [no one is born skillful]. This legall reason *est summa ratio* [is the highest reason]. And therefore if all the reason that is dispersed into so many severally heads were united into one, yet could he not make such a Law as the Law of England is, because by many succession of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this Realme, as the old rule may be justly verified of it *Neminem oportet esse sapientiozem legibus*: No man (out of his owne private reason) ought to be wiser than the Law, which is the perfection of reason.<sup>32</sup>

Coke is advancing an understanding of a shared public reason to temper the excessive claims of both royal and private conscience. If “the Common Law it selfe is nothing else but reason” then what is common to reason is capable of finding representation in an achievable and authoritative public consensus. The equation of reason with law makes law almost a consubstantial force of existence itself. If questions concerning law are the very work of reason then, how is the individual not a jurisdiction unto his or her self? The self-interpretive axiom that, *lex iniusta non est lex*, gathers force according to this equation of law with reason. Coke though qualifies this. Reason may be coeval with law however he maintains that the common law is not reason *per se* but, “an artificall perfection of reason.” By this he means that law is reason that has passed through the filters of a civil society, i.e. customs, courts, and tradition. And while this “artificall perfection of reason” may apply to all, it is not discernable to all; insofar as it has passed through filters of civil society it exists as a form of jurisprudence.

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<sup>32</sup> Stoner, James, R. *Common Law-Liberty: Rethinking American Constitutionalism* (Lawrence, KS: University Press of Kansas, 2003), 23. The quotation and translation are from: Stoner's *Common Law-Liberty*, quoting Coke, from the *First Part of the Institutes of the Lawes of England*, 97b.

These filters are the basis of a civil society according to Coke; through them the law is made authoritative. That is, law partakes and is understood through the conventional institutions English society. Coke's understanding of the source of reason, however, indicates an orientation of the law that remains rooted in classical and medieval natural law. In *Calvin's Case* Coke states:

The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is the Lex aeterna, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law was written by Moses, who was the first reporter of the law in the world ... And Aristotle, nature's secretary, in Book 5 of the *Ethics* saith that "natural justice is that which everywhere has the same force and does not exist by people's thinking this or that." And herewith doth agree Bracton ... And Fortescue ... and Doctor and Student.<sup>33</sup>

Natural law is definitively universal (i.e. not English) and, though the context of the above quotation is specific to the circumstances of the case, i.e. one without precedent, the theoretical substance of first principles do not, for Coke, provide the practical basis for a practicing jurisprudence. Nevertheless, the moral basis of law reveals a consistency about first principles at play within the tradition of its understanding. These principles of natural order, principles of discerning right from wrong, are consistent with Bracton, Fortescue, St. German and with Hooker; they form a link of continuity that gives the law a specific orientation independent of the vicissitudes of a tradition or history. Which is simply to say that tradition, in and of itself, does not constitute a first principle.

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<sup>33</sup> Sandoz, Ellis, *Republicanism, Religion, and the Soul of America* (Columbia, MO: University of Missouri Press, 2006), 59. Quoted from Edward S. Corwin *The "Higher Law" Background of American Constitutional Law* Indianapolis, IN: Liberty Fund Inc., 2008), 45-46. Coke's original Latin from Aristotle's is replaced with Martin Oswald's English by Corwin.

### C. The Authority of Tradition

The importance of history and tradition to Coke rests in the stability of its experience – both a confirmation of the wisdom of practice and a guide for the uncertainties of the present. Therefore the stability of tradition, that is the continuity of English history, mattered insofar as it reflected to him and to others, order rather than disorder. Coke argued that the common law existed as *confirmations* of English privilege; Magna Carta was simply a reaffirmation of liberties already enjoyed by subjects of the realm since “time immemorial.” For this reason Coke was able to confidently declare in *The Case of Proclamations* that, “the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.”<sup>34</sup>

To be born an English subject under the common law was to inherit principals of a practice and a law that were “sanctified by time,” and therefore not in need of sanctification by the sovereignty of a particular king or a parliament.<sup>35</sup> These principles of practices were “discovered” or “declared” and existed as precedents. That these precedents were express acknowledgements of law between subjects and king, king and Parliament, courts and king, existed as a sort of historical prior restraint. The law gave form of and to relationships through precedents. As James R. Stoner writes, common law, “is said to exist wherever precedents have the force of law, although traditionally

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<sup>34</sup> Coke, Edward, From “A Case of Proclamations,” quoted from *Constitutionalism and the Changing World* by Charles Howard McIlwain (New York, NY: Cambridge University Press, 1969), 252.

<sup>35</sup> Pocock, J. G. A. *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (New York, NY: Cambridge University Press, 1987), 51. Pocock states that the common law was, “so ancient as to be the product of no one’s will and to appeal to the almost universally respected doctrine that law should be above will.”

precedents are seen to indicate common law, not to create it.”<sup>36</sup> And prior to a declared law, though one may not have been party to its discovery, it remains binding on each generation insofar as it is a birthright and constitutive of existence.<sup>37</sup> This disclosure of order, the “fining” and “refining” of law has revealed nothing less than that the laws of England assume a stature unparalleled in world history.

If the ancient laws of this noble island had not excelled all others, it could not be, that some of the several conquerors and governors thereof, that is to say, the Romans, Saxons, Danes, or Normans, and especially the Romans, who (as they justly may) do boast of their civil laws, would (as every of them might) have altered or changed the same.<sup>38</sup>

And though they may have been “fined” and “refined,” and though “out of old fields must spring new corn,”<sup>39</sup> the substance of English law according to Coke has remained constant through the ages. Insofar as the laws are mirrors of order (which they are) they are coeval with natural law; to the degree that they are specifically English is to the degree that they reflect the historical activity of reason “fining and refining” itself, enmeshed in all the particulars of time and place. The combination of insularity in Coke’s approach, with the pride of place given to England’s laws, presented challenges with expansion of English character into territories where no English precedence existed,

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<sup>36</sup> Stoner, James R. Jr. *Common Law-Liberty: Rethinking American Constitutionalism* (Lawrence, KS: University Press of Kansas, 2003), 6.

<sup>37</sup> Coke, Edward, *A Systematic Arrangement of Lord Coke’s First Institute of the Laws of England, Vol. I*, edited by J. H. Thomas (London: S. Brooke, Paternoster-Row, 1818), 10. Coke: “The law of England is divided, as hath been said before, into three parts; I, the common law, which is the most general and ancient law of the realm, or part where Littleton wrote; 2, statutes or acts of parliament; and 3, particular customs (where of Littleton also maketh some mention). *I say particular, for if it be the general custome of the realme, it is part of the common law.*”

<sup>38</sup> Coke, Edward. Quoted from *The Reports of Sir Edward Coke, Preface to Vol. II*, from Melissa Schwartzberg’s *Democracy and Legal Change* (New York, NY: Cambridge University Press, 2007), 77.

<sup>39</sup> *Ibid.* xxi.

where others could make claims on the authority of alternative traditions. Beyond the realm Coke's view of the law risked failing to rise above the marks of rank nationalism.

Within the realm, the modesty of approaching the law on the case-by-case basis, according to particulars, with a narrowness and specificity of focus, prioritized a practical and restrained approach to politics. This insularity of England fostered a self-understanding, not only as privileged in liberties, but also as a uniquely exceptional and a world-historical carrier of spirit. How this was both a product and betrayal of the common law approach rests in the following: its attention to detail, the focus on its own unbroken history and experience allowed the common law to proceed in the realm with political questions moderately and practically. On the other hand as England moved into the greater world its self-referential jurisprudence could only encounter other traditions as either problematic or sub-English and sought to remake differences into a corresponding image of an imperial face. The authority of history is a force that any culture can invoke against another culture or invoke against an existing civil power. History itself was both a source of strength and weakness in this regard. Coke's insight however into law as the "artificall perfection of reason" and the use of precedent, i.e. law to limit the claims of civil prerogative and private conscience, when restricted to a non-imperial or culturally homogenous territories, carries implications regarding stability, the force of tradition, the dangers of historical sectarianism and perhaps even possibilities of transcending historical sectarianism. Sir William Holdsworth notes, that in his attentiveness to history, Coke changed it, by making it comprehensible and current:

First, he deduced from the scattered and often inconsistent dicta in the Year Books positive rules of law in harmony with the rules laid down by the modern reports; and he did his work so skillfully that later lawyers were content to accept

his readings of the Year Books and the Abridgements of the Year Books. Secondly, in like manner, he brought the medieval literature of the common law into line with the modern literature. Glanville, Bracton, Briton, and Fleta were made to explain and illustrate Perkins, Fitzherbert, Staunford and Lambard.<sup>40</sup>

The common law, i.e. reason itself, would be the domain and province of those like Coke himself, an ascendant political class, a new nobility – lawyers and judges in the service of all those under the law.

#### D. The Guild of Artificial Reason

Common law understood as, “an artificial perfection of reason” is emphatically not the natural reason of the Stoics, Aristotelians, or Thomists though they are connected. Natural reason in and of itself as a political force, is not something Coke advances to be trusted as authoritative; rather in it he sees the seeds of private judgment and disorder. The “artificall perfection of reason” however “gotten by long studie, observation and experience,” is a general description of judges and lawyers in a regime under common law. What this means is that “artificial reason,” and the substance that is demanded to apprehend it, limits judgment regarding questions of law to those who have an authoritative knowledge of law, of precedent, and of history. In this sense then a knowledge of “artificial reason” is a vast knowledge and experience of law that interacts with reason itself, particularly logic as it applies to specific cases. Coke states that logic, “teacheth a man not only by just arguement to conclude the matter in question but to discern between truth and falsehood...and probably to speake to any legall

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<sup>40</sup> Quoted from Boyer, Allen D. *Sir Edward Coke and the Elizabethan Age* (Redwood, CA: Stanford University Press, 2003), 154.

question...”<sup>41</sup> On questions of judgment then this elevates those studied in “artificial reason” above both king and people regarding prudential governance. Coke relates the following incident:

Then the king said, that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellenct science and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the knowledge of it.<sup>42</sup>

If law is simply the domain of natural law and reason, then the judgments of courts, for instance, would only derive their authority from the martial force that hovered behind any given opinion that was a point of controversy. That is, if equal weight is afforded to a universal judgment, removed from the ‘artificial perfection of reason’ and questions of law are afforded equal weight according to universal judgment, controversies would default to force and power rather than the wisdom or discernment regarding those equipped to make particular and informed judgments. For Coke then, where the common law ends, unreasonable things begin. For if law is “perfect reason, which commands those things that are proper and necessary and which prohibits contrary things,”<sup>43</sup> the understanding of law imposes itself wherever will expresses itself to the contrary.

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<sup>41</sup> Coke, Sir Edward, quoted in Allen D. Boyer’s *Sir Edward Coke and the Elizabethan Age* (Redwood, CA: Stanford University Press, 2003), 23. The quote is taken from Coke’s *Institutes*, Vol. I, 235a.

<sup>42</sup> Coke, Sir Edward. Quoted from *Constitutional Documents of the Reign of James I, 1603-1625*, edited by JR. Tanner (New York, NY: Cambridge University Press, 1960), 187.

<sup>43</sup> Coke Edward. Quoted from Harlod J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 2006), 242.

Coke's understanding of reason then is at once medieval in source, but is compounded by English history and the wisdom of those "grave and learned men" who came before him, i.e. students and masters of the law. And this understanding of reason, in and of itself, did not find expression in the individual. Law stood, in a certain sense, independent, both in its goodness, logic, and order, but also in its historical expression. Natural law then, though foundational, was, to repeat, not the sole criterion by which the common law liberty was justified. According to Coke, reason, alone, that is, the undiluted natural reason of Aristotle or Aquinas, the moral law infused into the hearts of man at creation, is, in and of itself, not conducive to the creation of an order that England enjoyed through its laws.<sup>44</sup> The activity of natural reason alone indeed seems incapable of accomplishing these feats by itself. Coke advocated a rule of law that was rooted in a legalism of historical experience; the sources by which it marshaled its authority were complex and restricted. Yet its application, the share of its benefits, was, if not democratic, at least expansive.

#### E. Magna Carta: Procedural Due Process and Substantive Due Process

Considered generally, and in a phrase Coke might approve of, law gives form to order. Though unwritten the logic of common law abides by principles rooted in natural reason, historical experience and judgment; it orientates itself according to discernment on questions of justice and injustice, and finally it limits its vision of judgment to what is before its eyes. All action in general is governed, not by will alone, but by will in

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<sup>44</sup> Coke: writes, "And therefore if all the reason that is dispersed into so many severally heads were united into one, yet could he not make such a Law as the Law of England is, because by many succession of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this Realme, as the old rule may be justly verified of it ..." Quoted from Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York, NY: Cambridge University Press), 66.



accordance with an understanding of order; this order is understood through the prism of English law. That is to say, law itself is the order that constitutes and shapes the good life, which is a truth Coke sees reflected in the English experience; the imposition of an arbitrary will upon it warrants resistance on general principle. James Stoner notes that the law Coke “describes is not built upon the distinction between public and private so integral to our own thinking ...Coke...treats the rights and duties of public and private life interchangeably.”<sup>45</sup> This is simply to point out that the liberal ethos of the common law, according to Coke, is not defined by two spheres of order, one public and private, but by a common sense of shared justice that has been “fined” and “refined” over time into a way of life in and of life itself.

Coke’s revival of Magna Carta ensured its prominence in English legal culture but his exposition of it also deepened the understanding of English identity in terms of citizenship. Pocock gives a summation regarding Coke’s approach to Magna Carta and its effect:

[Coke] studies it clause by clause to prove that it enacts the main principles of common law and parliamentary liberty in his own day, so that the men of 1628 could believe that they were not only repeating the solemn act of 1215, but taking part in a recurrent drama of English history at least as old as the Conquest...[the process] by which Coke discovers *the rights of parliament and property* in a feudal document of the thirteenth century was at bottom one with the greatest work of his life, the revitalization of the common law so that precedents and principles laid down by the king’s court in the attempt to govern a feudal society could be used and found in the freeholding and mercantile England of James I.<sup>46</sup>

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<sup>45</sup> Stoner, James R. *Common Law and Liberal theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence, KS: University Press of Kansas, 1992), 21.

<sup>46</sup> Pocock, J. G. A. *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (New York, NY: Cambridge University Press, 1987), 45.

Coke described the common law as, “the best and most common birthright that the subject hath for the safeguard and defense, not only of his goods, lands and revenues, but of his wife and children, his body, fame and life also.”<sup>47</sup> He could have specifically been speaking of Chapter 29 of Magna Carta itself, especially its provisions regarding property law and due process.

First, according to Coke, Magna Carta applied, not just to the nobility, but to all subjects of the realm, though, villeins, “are free against all men, saving against their lord.”<sup>48</sup> In relation to the authority of the civil government then all men were afforded the same protections under the law as *liber homo*. That due process would apply to all subjects of the realm ensured (1) a guarantee of trial by jury to all (2) the prohibition of arbitrary arrest, and (3) speedy recourse to justice. Coke equated “due process of law” with the “law of the land” in Magna Carta and by doing so a “freeman” that is any subject of the realm cannot, “be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or sent against him save by lawful judgment of his peers or by the law of the land.”<sup>49</sup> Coke in one sense equated “law of the land” with procedural limitations that must be observed by either parliament and/or royal authority when exercising power upon subjects of the realm. The application of the common law as a limit upon Parliament did not find full expression until Dr. Bonham’s Case where Coke declared that, “in many cases, the common law will control Acts of Parliament, and sometimes

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<sup>47</sup> Coke quote excerpted from Bernard H. Siegen in *Property Rights: Magna Carta to the Fourteenth Amendment* (Edison, NJ:Transaction Publishers, 2001), 13.

<sup>48</sup> From “Magna Carta” Printed in *A Concise History of the Common Law* by Theodore Frank Thomas Plucknett, (Clark, NJ: The Lawbook Exchange, 1956), 24.

<sup>49</sup> *Ibid.* 25

adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it, and adjudge such act to be void.”<sup>50</sup> In another sense though there is a substantive element that encounters an issue of fairness in consideration of liberties. Holt writes that:

The Charter only survived alongside natural law by being raised to the same universal terms...Approached as a political theory, it sought to establish the rights of subjects against authority and maintained the principle that authority was subject to law. If the matter is left in broad terms of sovereign authority on the one hand and the subject’s rights on the other, this was the legal issue at stake in the fight against John, against Charles I, and in the resistance of the American colonists to George III.<sup>51</sup>

The substantive element of due process then existed as an acknowledgement of, not just judicial procedure but as to how liberties enjoyed by subjects exist in relation to the person, their property, and what limits could be imposed upon them. The substantive element of due process then is evident in both Coke’s understanding of due process and in his understanding of law and its relation to natural reasons itself. John Bradshaw in his prosecution against Charles I, states:

This we learn: the end of having kings, or any other governors, it is for the enjoying of justice; that is the end. Now, Sir, if so be the king will go contrary to that end of his government, Sir, he must understand that he is but an officer in trust, and he ought to discharge that trust; and they are to take order for the punishment of such and offending governor. This is not law of yesterday, Sir, but it is law of old.<sup>52</sup>

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<sup>50</sup> Coke, Edward. Quoted from *The Price of Politics: Lessons from Kelo V City of New London* by Kyle Scott (Lanham, MD: Lexington Books, 2010), 11.

<sup>51</sup> Holt, James Clarke. *Magna Carta* (New York, NY: Cambridge University Press 1992), 18.

<sup>52</sup> Charles I. Quoted from *State Trails, Political and Social, Vol. I*, edited by H.L Stephen (New York, NY: The Macmillan Company, 1899), 105.

The liberties of Englishmen within the realm then emphatically, applied to all according to the law; beyond the realm the extension of English liberties would prove more controversial.

### **Part III: Facilitating Consensus**

#### **A. Hobbes and a New Consensus of Reason and Nature**

1651 saw the publication of *Leviathan* by Thomas Hobbes. In it he proposed, not just a solution to the English Civil Wars, but new foundations for politics that would provide surer footing as a means of maintaining peace and order in civil society. Hobbes blamed the disorders of England, the civil wars, and the Interregnum, in large part on the influence of classical political philosophy (particularly Aristotelianism). Behind the thought of the Parliamentarians and republicans, behind the common law, all were refuges of private judgment meted out upon the public sphere. Hobbesian philosophy presents itself as a solution to the problem of consensus and diversity by adopting nominalism as the basis of a new civil theology.

Hobbes formulated a non-teleological understanding of human nature, one that, in its rejection of the classical or Christian world-view, sought a new consensus on more durable foundations. Hobbes wrote:

For seeing that life is but a motion of Limbs, the beginning whereof is in some principle part within; why may we not say, that all *automata* (Engines that move themselves by springs and wheels as doth a watch) have an artificall life? For what is the heart, but a *spring*; and the *nerves*, but so many *strings*; and the *joints*, but so many *Wheels*, giving motion to the whole Body, such as was intended by the Artificer? Art goes yet further, imitating that rational and most excellent work of nature, man<sup>53</sup>

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<sup>53</sup> Hobbes, Thomas. *Leviathan – Parts One and Two*, edited by Herbert W. Schneider (Englewood Cliffs, NJ: Prentice Hall, 1958), 23.

In Hobbes's view politics didn't involve prudential reasoning in matters of principle. Nature is something to be controlled and managed. According to this more mechanistic worldview the political then becomes a tool to manage humanity, not vice-versa.

Self-rule is absent in the Hobbesian thought. For Hobbes the sovereign is an artificially reconstructed will of the people, existing as an abstract expression of the individual's need or desire to be ruled. Hobbes writes: "For by art is created that great Leviathan called a commonwealth or a state, which is but an artificial man, though of greater stature and strength than the natural for whose protection and defense it was intended." It is far from Coke's "artificiall perfection of reason."<sup>54</sup> Stoner, in drawing the contrast notes: "Hobbes would agree that human beings ought to be ruled by reason, but since he defines reason as a process, not as a faculty that perceives an invisible order, his principal question is not, what does reason teach? But, whose reason is to count?"<sup>55</sup>

Indeed, the artificial man of Hobbes exists in point of contrast to the Aristotelian or even Augustinian understanding of politics. According to Hobbes, politics is not an imitation of nature; there is little natural worthy of reflection or applicable in a political regime. According to Hobbes "art" or "reason" exists to create, or, put less modestly, to correct nature. This faith in the ingenuity of Hobbesian reason is most evident in Hobbes's explanation of the commonwealth as an artificial man. Hobbesian science, or our political condition, finds an orientation according to reason – just as in Coke, Hooker, Fortescue, and all those who preceded him. In Hobbes's case however reason, "is not, as

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<sup>54</sup> *Ibid.* 23.

<sup>55</sup> Stoner, James. *Common Law-Liberty: Rethinking American Constitutionalism*. (Lawrence, KS: University of Kansas Press, 2003), 100.

sense and memory born with us, reason is not born with us, nor gotten by experience only, as prudence is, but is attained by industry: first in the apt imposing of names and secondly, by getting a good and orderly method in proceeding from the elements....”<sup>56</sup> Reason then is the result of industry and is developed, first by naming things, and secondly, through the application of a calculating methodology. Reason exists to calculate consequence for, “science is the knowledge of consequences and dependence of one fact upon another...because, when we see how anything comes about, upon what causes and by what manner, when like causes come into our power, we can see how to make it produce like effect.”<sup>57</sup> In this sense then reason is utilitarian and transformative rather than illuminating or revealing. Hobbesian reason and method then, applied to politics, assumes a strictly conventional character; Hobbes’s understanding provides a foundation where the varieties of human will and judgment can be fitted together in the procurement of a stable public order based upon a radically re-imagined understanding of what reason is and how it relates to peace and order. The irreconcilable differences of the royalists, the Parliamentarians, the republican Jesuits, and the republican Puritans – Hobbesian science comprehends them all.

From diversities in judgment Hobbes formulates a political science that begins with his understanding of the state of nature. This state of nature is without a shared authority; it is a condition characterized by danger, where no common law exists, no consensus exists, where no reason is shared. Unlike Aristotelian thought that maintained

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<sup>56</sup> Hobbes, Thomas. *Leviathan – Parts One and Two*, edited by Herbert W. Schneider (Englewood Cliffs, NJ: Prentice Hall, 1958), 49.

<sup>57</sup> *Ibid.* 49.

an understanding of a hierarchy of authority, the individual in Hobbes's state of nature is a sovereign unto himself or herself. This personal sovereignty leads to his understanding of natural equality translating into a war of "all against all." Though Hobbes doesn't rely on the ahistorical state of nature to make this point: "Let him therefore consider with himself – when taking a journey he arms himself and seeks to go well accompanied, when going to sleep he locks his doors, when even in his house he locks his chests, and this when he knows there be laws and public officers, armed, to revenge all injuries shall be done him – what opinion of his fellow citizens when he rides armed, of his fellow citizens when he locks his doors, and of his children and servants when he locks his chest?"<sup>58</sup> To understand this condition then one doesn't need to look to history. The state of nature exists wherever there is no shared and enforceable authority; it even continues into civil society, whenever one is insecure in their person or property.

If reason were the ordering force of our existence according to Hobbes, peace would be our most natural condition. Hobbes rejects reason as humanity's fundamental constituting and distinctive feature. Rather, it is the passions and psychology that explains our social existence; the two most dominant of these being, fear and pride. Pride, the passion to dominate or to rise above the multitude, Hobbes understands as the source of most conflict. It seeks to impose its will over others – or according to a less savage understanding, it seeks its vision of the good to be authoritative over those who may not share it. The force of pride then provokes its opposite in fear. Fear assumes its greatest force in the state of nature; that is, in an environment of unmoored private judgment, the fear of death assumes the most prominent place alongside pride. Reason, understood as

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<sup>58</sup> *Ibid.* 107

calculative, then would seek to remove oneself from this state of insecurity. This, “reckoning reason” if directed and rightly considered, can lead one from a constant fear of death, to a peace of civil society.

Hobbes articulates 19 laws of nature that assume their orientation from this condition. The laws of nature according to Hobbes are general rules of reason; the first and most fundamental rule is to seek peace and follow it. The very reasons then of civil society assume their foundations from fear and the advantages of society depend upon controlling it. His second law of nature follows from the first, that, “a man be willing, when others are so too, as far forth as for peace and defense of himself he shall think it necessary, to lay down this right to all things, and be contented with so much liberty against other men, as he would allow other men against himself.”<sup>59</sup> The third law of nature commits men to the covenants that they make.

Together, all 19 laws provide a framework upon which a civil society secures peace. Hobbes equates his reasoning with scripture noting, in reference to covenants: “This is the law of the gospel: whatsoever you require that others should do to you, that do ye to them. And that the law of all men, *quod tibi fieri non vis, alteri ne feceris*.” Hobbes however inverts the Latin translation: “What you would not have done to you, do not do to others.”<sup>60</sup> Hobbesian morality rests upon the protection of life. It is prescriptive rather than descriptive and depends upon one’s willingness to see its benefit. To this point Hobbes writes that, “these dictates of reason men used to call by the name ‘laws’

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<sup>59</sup> *Ibid.* 110.

<sup>60</sup> *Ibid.* 110.



but improperly for they are conclusions or theorems according to what conduces to the conversation of mankind.”<sup>61</sup>

Natural laws are the domain of a practical reason that has discovered how to live peaceably with others. They are rules and accommodations, not principles. And these Hobbes sees as the only true moral philosophy capable of actual morality insofar as peace is the good we seek. But it occurs at the level of practical calculation.

In such a condition [the state of nature], there is no place for industry because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation nor use of commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and, which is worst of all, continual fear and danger of violent death; and the life of man solitary, poor, nasty, brutish, and short.<sup>62</sup>

Every individual has a natural right to life; the desire to preserve oneself then isn't simple egoism; it is the height of Hobbesian moral precepts.

#### B. Hobbesian Sovereignty and the Liberal Ethos

The creation of absolute sovereign authority is for Hobbes, the only power capable of mitigating the condition of the state of nature. Hobbes describes this sovereign as an artificial man, meaning that through a covenant it is fashioned as an institution. Insofar as the sovereign has been created according to a covenant, the role of the sovereign is to provide peace and security that didn't exist in its absence. Sovereignty according to Hobbes is absolute, supreme.

Hobbes insists that sovereign power remains absolute and undivided, whatever form it takes. Hobbes's theory of sovereignty then understands this sovereign to be the

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<sup>61</sup> *Ibid.* 132.

<sup>62</sup> *Ibid.* 107.

source of law. That is, the Hobbesian sovereign does not simply have executive or interpretive power; the sovereign creates the rules of social life to facilitate its existence. The sovereign therefore can never act unjustly because, as the sovereign is the source of law, the sovereign is equally the source of justice. Yet Hobbes maintains a distinction between a just law and a good law. Hobbes writes: “For the use of laws, which are but rules authorized, is not to bind the people from all voluntary actions. It is not to bind them from voluntary actions but to direct and keep them in such motion as not to hurt themselves by their own impetuous desires, rashness or indiscretion - as hedges are set not to stop travelers but to keep them on their way. And therefore a law that is not needful, having not the true end of a law, is not good.”<sup>63</sup> These then are good laws and a sovereign requires absolute, undivided, and supreme authority if it is to effectively facilitate social reality.

The sovereign, as a facilitator, necessarily maintains a monopoly on public judgment. Hobbes faults the influence of the Greek and Roman political thought as undermining authority, that is, undermining sovereignty, by privatizing conscience.

[A] doctrine repugnant to civil society is that whatsoever a man does against his conscience is sin; and it depends on the presumption of making himself judge of good and evil...From the reading, I say, of such books, men have undertaken to kill their kings, because the Greek and Latin writers in their books and discourses of policy make it lawful and laudable for any man so to do, provided before he do it he call him tyrant. For they say not regicide, that is, killing of a king, but tyrannicide, that is, killing of a tyrant, is lawful.<sup>64</sup>

Because Greek and Roman sources advance a reasoning that, in its conditional consent, denies the sovereign absolute authority, they create justifications for revolutionary

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<sup>63</sup> *Ibid.* 272.

<sup>64</sup> *Ibid.* 253, 257.

violence. And these prideful examples of violence undertaken and justified by philosophy and history, challenge the goods offered by Hobbesian sovereignty.

Hobbes's understanding of the sovereignty as absolute and unified is a necessary consequence of his psychology of the passions. Yet Hobbesian sovereignty allows for significant individual liberty and equality within civil society. Law, as instrumental, does not by itself recognize a social hierarchy but is rooted in the equality of nature. It is our natural equality, our natural right in the state of nature that is the source of the sovereign's power and of an individual's liberty. The liberty of the state of nature, in many ways for Hobbes, is the same liberty that exists in civil society except where law inserts itself. The sovereign exists, not simply to protect an individuals; it also exists to facilitate the rights of individuals in a community, to keep the rights of one from coming into conflict with another. The expression, "where the law ends, liberty begins," is significant in the contrast it provides the greatest form of consensus that Hobbes thinks prudent for civil society to aim for. While the liberal ethos of self-governing regimes aim for a teleological public good, the liberal ethos advanced by Hobbes remains radically private. Liberty is experienced not with others in community, but according to the personal sovereignty of the individual. It is for this reason that Hobbes can say, "whether a Commonwealth be monarchical or popular, the freedom is still the same."<sup>65</sup> The liberal ethos of Hobbes expresses itself through the private liberty it affords its citizens and how removed the subject stands from the sovereign itself, unencumbered in their movements.

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<sup>65</sup> *Ibid.* 174.

## CHAPTER III: 1688-89 AND THE LIBERAL ETHOS

### Part I: Towards Historical Consensus

#### A. Introduction

Thomas P. Neill wrote that, “it is obvious that there is no formula of faith which can be labeled Liberalism at all times and places. It is, indeed, of the very nature of Liberalism to have no set creed, no formula of faith to which all true Liberals must adhere.”<sup>1</sup> Neil is correct in his foundations but wrong in his conclusions. He is correct in observing a lack of common substance as integral to modern liberalism, especially of the Hobbesian variety, regarding a public orthodoxy. But in all times and in all places, liberalism insists on the necessity of a sovereign power to facilitate social existence. The question of this dissertation – to what extent can the political foundations of Canadian government be traced back to the principles articulated during the British parliamentary revolution of 1688-89 – presupposes that there was a philosophical component to those events. And it assumes a consensus rooted in the *experience* of English liberty.

I have tried to demonstrate that the consensus and self-understanding of 1688-89 did not spring fully formed out of the mid-to-late 17<sup>th</sup> century struggle for order. This struggle for order, especially within what Voegelin described as the quaternarian structure of reality, cannot exclude the recognition and dissolution of authority that occurred through the late Middle Ages and into the Reformation period. In focusing on the experience of self-understanding, of what an individual willingly submits to as authoritative, I hope historicism is avoided through attention to the expressions of human understanding in relation to actions undertaken. Authority, in the case of the ancient

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<sup>1</sup> Neill, Thomas P. *The Rise and Decline of Liberalism* (Milwaukee, WI: Bruce Publishing Company, 1953), 321.

constitution, divine right of kings, and the Hobbesian liberty, are civil theologies, claimed and articulated as birthrights. The events of 1688 and 1689 were revolutionary and transformative in that these claims to authority, as birthrights, were settled not only through legislation, but through a harmonizing of sentiments that incorporated many of these competing elements of English self-understanding and synthesized them into a contradictory but functional public consensus that depended upon classical, Christian, and Enlightenment elements. Through the English Bill of Rights, the Toleration Act, and the Act of Settlement, the English polity was transformed into something it had not been before. Philosophically, the thought of John Locke advanced a political philosophy that equipped individuals to *personally* evaluate whether or not a revolution was consistent with justice. Locke wrote:

This I am sure, whoever, either Ruler or Subject by force goes about to invade the rights of either prince or people, lays the foundation for overturning the Constitution and Frame of any Just Government, is guilty of the greatest Crime, I think, a Man is capable of, being to answer for all those mischiefs of Blood, Rapine, and Desolation, which the breaking to pieces of Government bring on a Countrey. And he who does it, is justly to be esteemed the common Enemy and Pest of Mankind; and is to be treated accordingly.<sup>2</sup>

Revolutions, the overturning of constitutions, can only occur within the context of a particular understanding of justice that warrants the chaos it unleashes. And this Lockean understanding of justice, elaborated and explained in the *Second Treatise*, justifies opposition to the claims of Stuart kingship and proved foundational to the public acceptance and authority of post-1689 English politics. A Lockean understanding of self ratifies the actions of, for example, the Convention Parliament.

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<sup>2</sup> Locke, *Second Treatise of Government*, edited by C.B MacPherson (Indianapolis, IN: Hackett Publishing, 1980), 116.

Understanding 1688-89 as a restorative event, with an emphasis on continuity over innovation, distorts the significance of its achievement. The restorative element of 1688-89 is misleading if one understands “continuity” and “innovation” as mutually exclusive. The Lockean contributions to English political thought, post-1688-89, includes justifying the innovative elements regarding Parliament’s role in terms of supremacy; and Lockean principles are absent in the thought of those who were partisans of the ancient constitution. It is the argument then of this dissertation that 1688-89 was both structurally and philosophically revolutionary.

A political founding or a revolution assumes mythic dimensions insofar as it is an historical incarnation of a regime’s first principles. John Adams, quick in pride and envy regarding his status as an American Revolutionary, dismissed “founding myths” as distortions and simplifications of the historical record. Yet they have a commanding authority as the historiography of the ancient constitution attests.<sup>3</sup> Relegating 1688-89 to the status of a strictly conservative or a restorative revolution robs it of its rightful significance as a transformative step in the expression of the modern liberal ethos. The assertion that nothing “new” was introduced to the English public square in 1688 ignores the settlement lasting import regarding legislative representation. Parliament asserted its power to determine the royal line of succession, but in doing so it destroyed the notion of the Divine Right of Kings and monarchical absolutism. Furthermore, Parliament harnessed royal prerogative and created a truly mixed regime under the auspices of

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<sup>3</sup> Ellis, Joseph J. *Founding Brothers: The Revolutionary Generation* (New York, NY: Vintage Books, 2000), 216-217. “The real drama of the American Revolution, which was perfectly in accord with Adams’s memory as well as with the turbulent conditions of his own soul, was its inherent messiness...all the heroic portraits of the great men were romanticized distortions.” This is how Ellis characterizes Adams feelings regarding the perception of the American Revolution, drawing from his correspondence with Benjamin Rush.

constitutional monarchy. Its effect upon the colonies, and the members of the commonwealth too constitute its legacy. In this sense, 1688-89 was a series of transformative events that have laid the foundation for questions regarding political legitimacy. 1688-89 is often seen as the humbling of the monarchy, the Crown descending into Parliament; it is perhaps more appropriate to consider it the moment where Parliament, ascended to heights of the Crown.

#### B. Events of the Revolution and Acts of Parliament

On November 5<sup>th</sup>, 1688, William of Orange landed at Torbay with a Dutch army, numbering upwards of 21,000 men.<sup>4</sup> Before departing from the Dutch republic William had insisted upon receiving a letter of invitation from leading Parliamentarians. William would arrive not as a conqueror, but as a savior of English liberties. Part of this famous invitation, signed by five leading Whigs and two Tories, reads:

The people are so generally dissatisfied with the present conduct of the government in relation to their religion, liberties, and properties (all of which have been greatly invaded), and they are in such expectation of the prospects of being daily worse, that your Highness may be assured there are nineteen parts out of twenty of the people throughout the kingdom who are desirous of a change, and who, we believe, would willingly contribute to it; and there is no doubt but that some of the most considerable of them would venture themselves with your Highness at your first landing.<sup>5</sup>

This proved true. The English people welcomed William on his arrival and James's army began to dissolve after a series of early defeats and defections. Panicked, James sent Queen Mary and his child to France and followed shortly thereafter. Historians agree that

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<sup>4</sup> Beatty, Michael A. *The English Royal Family of America: From Jamestown to the American Revolution* (Jefferson, NC: McFarland Publishing, 2012), 88-89. "William of Orange sailed toward England with a force of some 14,000 regular Dutch troops. In addition to those, William had with him French Huguenot volunteers – Swedes, Danes, Prussians, English and Scottish. In all, his forces numbered more than 21,000 men."

<sup>5</sup> From "The letter of invitation to William of Orange from seven leading Protestants, June 1688," In Angus Stroud's *Stuart England* (New York, NY: Routledge, 1999), 190.

William allowed, reportedly even wanted, James to flee England for France; the prudential wisdom of this decision avoided the radicalism of 1649 and thus allowed a debate between Tories and Whigs to occur regarding what the flight of James meant. It first of all presented a legal and constitutional dilemma regarding assembly. Only the King had the right to call a Parliament. In 1688, during James's absence, a series of Assemblies were held that included the Lords Spiritual and Lords Temporal as well as the privy councilors. These assemblies failed to reach any resolution and on January 22, 1689, William, still only Prince of Orange, summoned the Convention. On February 23, 1689, the Convention, in an effort to enhance its legal status, transformed itself by statute into the Convention Parliament. Locke understood, and hoped that the Convention Parliament would not be a formal Parliament, but "something of another nature...an opportunity offered to find remedies and set up a constitution that may be lasting, for the security of civil rights and the liberty and property of all the subjects of the nation. These are thoughts worthy [of] such a convention...the great frame of the government"<sup>6</sup>

### C. Original Contract

The Convention's first order of business was the vacant throne. The Commons sent the Lords a resolution. While the language would change, this draft is illuminating:

Resolved, That King James the Second, having endeavored to subvert the constitution of this Kingdom by breaking the Original Contract between the King and people; and by the advice of Jesuits, and other wicked Persons, having violated the fundamental Laws; and having withdrawn himself out of the Kingdom; hath abdicated the Government; and that the Throne is thereby vacant.<sup>7</sup>

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<sup>6</sup> Locke, John. "Letter to Edward Clarke." *Locke: Political Writings*, edited by David Wooten (Indianapolis, IN: Hackett Publishing, 2003), 437.

<sup>7</sup> Story, Joseph, and Thomas McIntyre Cooley, eds. *Commentaries on the Constitution of the United States, Vol. 2*, (Boston, MA: Hilliard and Grey, Company, 1833), 238.



Thomas Slaughter states: “It takes no contortion of thought to realize that the committee meant to say that James broke a Lockean type of original contract when they listed the reasons why ‘abdicated’ was a necessary element of their resolution.”<sup>8</sup> This understanding of “original contract” however divided the Convention Parliament in that it advanced the more radical notion that “abdication” meant “deposed.” According to this reading, James’s flight to France did not necessarily imply a one-sided gesture on the part of James. This in turn, would set a precedent regarding governmental resistance through “original contract.”<sup>9</sup> This Whig interpretation was inimical to 17<sup>th</sup> Century Tories and typified the tempering of revolutionary sentiments in the Convention Parliament. The debate over “abdication” spoke to the divisions, and the necessity of compromise; the debates themselves were examples of Tory attempts to temper the revolutionary precedent and characterize Parliament’s role *vis-a-vis* the vacant throne, as that of bystanders. John Miller makes the probable case that final language of “abdication”

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<sup>8</sup> *Ibid.* Pg. 332. Also see Steve Pincus in *1688: The First Modern Revolution* (New Haven, CT: Yale University Press, 2009), 16. Pincus describes Nicholas Lechmere as representative of Whig thought, post-1689. Lechmere, a prominent lawyer, famously prosecuted cleric Henry Sacheverell in 1710 for preaching that resistance to James II in 1688 had been illegitimate. Pincus writes regarding Lechmere’s prosecution of Sacheverell: “In 1688, Lechmere informed the House of Lords... ‘the subjects had not only a power and right in themselves to make that resistance, but lay under an indispensable obligation to do it.’ This was because there was ‘an original contract between the crown and the people.’ When ‘the executive part endeavors the subversion and total destruction of the government,’ which Lechmere asserted had clearly happened by 1688, ‘the original contract is thereby broke.’ This contract stipulated not only a right in the people but a duty as well. ‘the nature of such an original contract of government proves,’ Lechmere explained, ‘that there is not only a right in the people but a duty as well. ‘The nature of such an original contract of government proves,’ Lechmere explained, ‘that there is not only a power in the people, who have inherited its freedom, to assert their own title to it, but they are bound in duty to transmit the same constitution to their posterity also.’”

<sup>9</sup> See Thomas P. Slaughter’s essay, “‘Abdicate; and ‘Contract’ in the Glorious Revolution,” *Historical Journal* 24, no. 23 (1981): 323-337.

contained enough ambiguity to satisfy both Tories and Whigs in terms of their understanding of James's flight to France.<sup>10</sup>

The controversy over the section "breaking the Original Contract" illustrated the variance at which subjects understood their relationship with authority in general. Was it rooted in tradition and custom, republicanism, or was it more generally rooted in the natural right advanced by Hobbes and Locke? When the Convention spoke of contract theory, it typically did so in the context of a contract existing between a king and a subject. This understanding in and of itself is not in the spirit of Lockean equality - it presupposes the office of kingship as a fact. If royal authority exists by virtue of contract then royal authority itself is pre-political and exists by nature. Contract between king and people comprehends an understanding of order that signifies both a political and a natural relationship. A natural relationship indicates a relationship between the Crown and the subjects of the realm, individually *and* collectively, rooted in a natural fealty. This understanding of a natural relationship between Crown and subject challenged Blackstone's conclusion that the Convention Parliament, "was the act of the nation alone, upon an apprehension that there was no king in being."<sup>11</sup>

Blackstone's understanding of the original contract was the ascendant understanding of Enlightenment liberalism that would typify how contract would be more radically expressed in the American colonies. He described his understanding of original contract, clearly rooted in the necessity of Hobbesian and Lockean natural law:

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<sup>10</sup> Miller, John. "The Glorious Revolution: 'Contract' and 'Abdication' Reconsidered," *The Historical Journal*, vol. 25, no. 3, September, Pgs. 541-5.

<sup>11</sup> Blackstone, William, Excerpted from *Commentaries, Vol. I*, in J.C.D. Clarke's *English Society, 1660-1832* (New York, NY: Cambridge University Press, 2000), 244.

The only true and natural foundations of society are the wants and fears of individuals... though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the sense of their weakness and imperfection that keeps mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement, of society. And this is what we mean by the original contract of society; which though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together.<sup>12</sup>

This reading of original contract reduces the monarchical office to one of Hobbesian facilitator, consistent with an understanding of sovereignty that draws individuals into its orbit through what it can provide in terms of regulating “wants” and “fears.” The “cement” of the original contract is a common necessity insofar as social life requires regulation through a grant of supremacy. In this sense Blackstone’s understanding of “original contract” reduces the understanding of “commonwealth” to individual units of consent. In this case, “consent” involves the familiar delegation of power to the sovereign and reserving to oneself what hasn’t been given.

The language of “original contract” was excised from the final Declaration of Rights and its statute version, the Bill of Rights 1689. The case against James, and the case for English liberties, was made on the basis of specific transgressions, an appeal to legal rights, and royal limits. The issue of “original contract” and its philosophical advocates then cannot be credited with officially indicting James according to “original contract.” The Convention Parliament avoided conclusions over “original contract,” not for lack of conviction, but due to an inability to reach a consensus. Though “original contract” was not included in the Bill of Rights, the source and limits of authority, the competing interpretations of authorities origins were expressly comprehended through

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<sup>12</sup> *Ibid.* 248.

parliamentary supremacy asserting itself over the Crown as the source of law and authority. Blackstone makes clear that this was a revolution in clarity over where authority resided:

But however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and rules of natural law; in which deduction different understandings might very considerably differ; it was, after the revolution, judged proper to declare these duties expressly; and to reduce that contract to a plain certainty. So that, whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince, who has reigned since the year 1688.<sup>13</sup>

The final Declaration of Rights, and shortly thereafter the Bill of Rights, implicitly affirmed what Blackstone later loudly proclaimed: the spirit of *any* declaration of rights between citizen and sovereign speaks in the language of contract and rests upon the delegation of authority to a sovereign power. William and Mary were declared king and queen only after they had accepted the Declaration of Rights, and as much as anything else, this signified Parliament asserting supremacy over the monarchy. The opposition that James provoked was specifically concerned with *who* exercises power. The question that 1688-89 answered did not deal with the limits of power, but rather, it as well concerned who would wield power.

Coke's understanding of the constitution maintained a subtle but meaningful distinction regarding power and politics: common law, such as Magna Carta, imposed restraints and assumed an authoritative status because they were derived from the common law which did not recognize the source of its authority in the supremacy of a legislative body. The common law approach understood authority in terms of balances

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<sup>13</sup> Blackstone, William. *Commentaries, Vol. I*, edited by George Sharswood. (Philadelphia, PA: J.B. Lippincott Company, 1908), 233.

and restraints. That is, the rule of law was considered “absolute without any of saving sovereign power.”<sup>14</sup> According to how the original contract was discussed in 1688, authority had as much to do with delegation as it did with the rule of law. Nevertheless, the distinction is important: one understanding of “original contract” locates authority through the rule of law; another understanding of authority derives its understanding through representation.<sup>15</sup>

#### D. The Bill of Rights

This shift in emphasis involved more than the restoration of ancient rights and customs. James II, particularly through his liberal use of the dispensing power had moved the conflicting views of legislative powers between Crown and Parliament from a position of mistrust into a stance of firm opposition. Furthermore, and more significantly, James’s abuse had shifted the debate to the one concerned with the exercise of power. Regarding arbitrary government and James’s Catholicism, Corinne Weston writes, “it is by no means clear which contributed more to the coming of the Revolution. Whether fear of popery surpassed that of arbitrary government, to use contemporary terminology, is not easily decided; but what does seem evident is that the combination destroyed political support for James II as the alienated Whig and Tory parties united to force him into exile and settle the throne on William and Mary...”<sup>16</sup>

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<sup>14</sup> Coke, Edward, from a debate in the House of Commons, 1628. Quote excerpted from Stoner’s *Common Law and Liberal Theory: Coke Hobbes, and the Origins of American Constitutionalism* (Lawrence, Kansas: University of Kansas Press), 46.

<sup>15</sup> Reid, John Philip. *Constitutional History of the American Revolution: The Authority of Law* (Madison, WI: University of Wisconsin Press, 2013), 65.

<sup>16</sup> Weston, Corinne, Janelle Greenberg. *Subjects and Sovereigns: The Grand Controversy Over Legal Sovereignty in Stuart England* (New York, NY: Cambridge University Press, 1983), 222.

The Bill of Rights represented what Weston describes as the “community centered view of government.” Though Weston traces its origins to the republican movements of the 1640’s, it can more broadly, but properly be understood as partaking in the traditional contest between the few and the many, whose more distant antecedents included the barons at Runnymede and beyond. James’s position, in contrast, was that of an “order theory of kingship” that held the king to be the source of all law, who, while legislating in Parliament, could legally suspend enacted law with his dispensing power.<sup>17</sup> The philosophical positions, while incompatible in terms of legislative powers, would assume the character of an outward synthesis with the Commons, Lords, and Crown, wielding power together in Parliament. From the perspective of power then, the concern of 1688-89 was again, not so much the nature of its relationship to political liberty; rather it was concerned with who has it and how it was wielded.

The institutionalized balance achieved in the Commons, Lords, and Crown, together forming Parliament, effectively harnessed the dispensing power of royal authority. Stripping the king of the right to suspend and dispense with the law was a radical step that changed fundamentally the most important power the king possessed. By changing the nature of the suspending and dispensing powers and requiring Parliamentary authorization, the revolution had asserted its supremacy over the monarchy and the law itself. In an examination of pamphlets from 1688, Weston and Greenberg noted the tenor of consensus regarding James’s transgressions.

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<sup>17</sup> Coke had addressed this centuries earlier in the *Prohibitions Del Roy*. Weston, in her article “The Theory of Mixed Monarchy under Charles I and After” (*Ibid*) argues that when Charles I conceded that the king had no independence from Parliament on questions of legislation in his “Answer to the Nineteen Propositions of 18 June 1642.”

[The pamphlets of 1688] sounded the consistent theme that by dispensing with the law James had acted illegally and thus forfeited the right to rule. No dispensing power of the kind that had been claimed resided legally in the king because his authority flowed from the community, which empowered by God, was the earthly repository of all legitimate political power and authority. Since the community has vested legislative sovereignty in king, lords, and commons, the discretionary authority in the government resided jointly and co-ordinately in all three estates.<sup>18</sup>

It was this belief in the legislative power as shared amongst the three estates through a united Parliament that, more than anything, defines the Bill of Rights and the consensus of 1689. Hereafter the king had a discretionary authority under the control of parliament, where the three co-ordinate estates of king, lords, and commons made law as representatives of the community, the only earthly source of political authority. After the question of dispensing power was settled, it ceased to be an issue - the once fierce debate entered the realm of settled questions.<sup>19</sup>

#### D. Supremacy and Innovation

Weston and Greenberg state that Sir Robert Atkyns, a prominent member of the House of Lords, coined a phrase that served as the motto of the revolution: "None but the law-maker can dispense with the law, not he that hath but a share in the legislature."<sup>20</sup>

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<sup>18</sup> Weston, Corinne, Janelle Greenberg. *Subjects and Sovereigns: The Grand Controversy Over Legal Sovereignty in Stuart England* (New York, NY: Cambridge University Press, 1983), 246. This is reflected in the language of the Bill of Rights: The Declaration of Rights and the Bill of Rights both begin on the question of dispensing powers: "James had sought to subvert the Protestant religion and the kingdom's laws and liberties, 'by assuming and exercising a power of dispensing without the consent of parliament.' It continued: 'The assertions followed that the "pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. And that 'the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.'" Weston and Greenberg. 247.

<sup>19</sup> *Ibid.* 254. The debates during the Convention regarding the dispensing power and its preservation, firmly under parliamentary control then abruptly stopped. This power, "so much a storm center in two reigns, was no longer a central concern. All that was changed by the Revolution, and it was accepted that the dispensing power must now be exercised in accordance with the will of a sovereign parliament, at all."

<sup>20</sup> *Ibid.* 40.

They do not quote or attribute the source from which Atykns is drawing. In an essay published posthumously in 1681, Hobbes wrote: “It is not Wisdom, but Authority, that makes a Law...because none can make a Law but he that hath the legislative Power.”<sup>21</sup> This then begs the question: In what way was this more radical view of Parliamentary supremacy squared with the natural or fundamental laws? The most obvious answer is that they were synthesized in the preservation of outward forms of British institutions and maintained in the character of those subjects who comprised the realm. All the reforms and the stability that 1688-89 could claim as its legacy flowed from this taming of kingship through Parliamentary Supremacy. The principle of justice articulated according to this shift was that authority, indeed supremacy, is legitimate only insofar as it is popular.

Lois G. Schworer’s study of the constitutional history of each right in the Declaration found that eight rights were not “undisputed” or “ancient.” Only six of the fourteen rights, in fact, reaffirmed established laws. The other eight - articles 1 and 2 regarding dispensing powers; article 3 that dealt with commissioning the Court of Commissioners for Ecclesiastical Causes; article 6, which rejected raising and quartering troops without Parliamentary consent; article 9, which asserted free speech in Parliament; article 10 on restricting excessive bail; article 11 regarding jury makeup for trials of treason; and article 13, which asserted a requirement to hold parliament frequently and contrary to the monarch's power to call and dismiss parliament. None of these had a precedent found in ancient law to or build upon. These decisions were articulations of a particular understanding of governance, in reaction to the claims of Stuart kingship,

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<sup>21</sup> Hobbes, Thomas. *A Dialogue Between a Philosopher and a Student, the Common Laws of England*, edited by Joseph Cropsey (Chicago, IL: University of Chicago Press, 1997), 55.



advancing the form of the mixed regime, and implicitly asserting a new authority for Parliamentary statute. Considered together, these innovations represent a liberal ethos beholden to mixed government grounded in popular consent, and unshackled, by degrees, from the authority and claims of tradition.<sup>22</sup>

Schwoerer emphasized that these innovations were later minimized to support the more conservative characterization of 1688-89 as one of continuity and stability.<sup>23</sup> The king or queen was to declare his or her Protestant faith and reject Catholicism. But the innovative character of 1688-89 was evident and existed alongside the traditions and customs that it continued to carry and consider as equally definitive.

#### E. The Coronation Oath and Succession.

The Coronation Oath Act of 1689 reiterated the principles of the Bill of Rights and reflected Parliament's new authority, post-Stuarts. The traditional oath had promised to "grant and keep and...confirm to ye people of England ye Laws and Customs to them granted by ye [preceeding] Kings of England." William and Mary's Coronation Oath did not include language wherein the monarch granted the subjects their laws.

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<sup>22</sup> Schworer, Lois G. "The Declaration of Rights, 1689, Revisited" in *The World of William and Mary: Anglo-Dutch Perspectives on the Revolution of 1688-89*, edited by Dale Hoak and Mordechai Feingold (Redwood, CA: Stanford University Press, 1997), 47.

<sup>23</sup> For scholarship that understands 1688-89 as essentially a reaffirmation of ancient rights and downplays the role of innovation or radical ideas is numerous see J.C.D. Clark, *Revolution and Rebellion: State and Society in England in the Seventeenth and Eighteenth Centuries* (New York, NY: Cambridge University Press, 1986); H.T. Dickinson, "The Eighteenth-Century Debate on the Sovereignty of Parliament," in *Transactions of the Royal Historical Society*, 26 (1976): 189-210; H.T. Dickinson, *Liberty and Property: Political Ideology in Eighteenth-Century Britain* (London, Weidenfeld and Nicolson, 1977); J.P. Kenyon, *Revolution Principles: the Politics of Party 1689-1720* (New York, NY: Cambridge University Press, 1977); Howard Nenner, "Constitutional Uncertainty and the Declaration of Rights," in Barbara C Malament (ed), *After the Reformation: Essays in Honor of J.H. Hexter* (University Park, PA: University of Pennsylvania Press, 1980), pp. 291-308; G.M. Straka, *Anglican Reaction to the Revolution of 1688* (Madison, WI: University of Wisconsin Press, 1962); G.M. Straka, "The Final Phase of Divine Right Theory in England, 1688-1702" *English Historical Review* 77 (1962): 638-58.

According to the Coronation Oath of 1689, William and Mary would agree to “govern the people of England and the dominions thereunto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same.”<sup>24</sup> The shift in emphasis is decidedly substantive and reflects a more carefully considered role of self-governance grounded in consent. According to the revised Coronation Oath, statutes, laws, and customs are beyond the purview of royal authority apart from the monarch’s role in Parliament.<sup>25</sup> Secondly, the reference to dominions extended the oath, not just to England, but equally to the American colonies. Schwoerer states that “implicit” in this reference to dominions, the oath “discounted the possibility of conflict between the two.” A final change to the Coronation Oath is in the omission of any reference to the Laws of King Edward. King Edward’s laws and the duty for them to be upheld had been part of the Coronation Oath since 1308. Schwoerer states that in debate, “Hampden had pointed out that the laws of Holy Edward were uncertain. This illustrated a weakening of the role of custom and precedent in political thought. The concept of immemorialism did not disappear, but this portion of the oath reveals that its power was diminished.”<sup>26</sup> The Coronation Oath also represented a new form of “original contract” William Nenner observed that the revised Coronation Oath took the notion of legitimacy “from a concept

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<sup>24</sup> This shift in the language of the Coronation Oath has been pointed out by numerous authors. The best, I believe is Lois G. Schwoerer’s “The coronation of William and Mry, April 11, 1689 in *The Revolution of 1688-1689: Changing Perspectives* edited by Lois G. Schwoerer (New York, NY: Cambridge University Press, 2004), 123.

<sup>25</sup> *Ibid.* 108. Schwoerer holds that the language of parliamentary supremacy is embedded in the oath, language that privileges statutory law over custom and common law.

<sup>26</sup> *Ibid.* 120. Schwoerer on one final shift on the oaths language: “Whereas the traditional oath had asked the king: ‘Will you to your power cause Law, Justice, and Discretion in Mercy and Truth to be executed in all your Judgements?’ the 1690 oath dropped the word ‘Discretion’ and ‘Truth.’”

of government based in traditional right and hereditary monarchy, to government that was anchored instead in its acceptance by the subject in return for protection.”<sup>27</sup> This wouldn’t find ultimate expression until the Act of Settlement, 1701, when the establishment of Hanoverian succession and the explicit exclusion of Catholics from occupying the throne, finalized the constitutionalism of 1688-89. The settlement of 1688-89 clarified the relationship between the realm and the monarch, and, through resistance elevated Parliament, in Commons, Lords, and Crown, to a representative institution that comprehended all who resided in it. The precedent however it also set was one for exercising the power to dissolve governments. William Blackstone cautioned that though the rise of Parliamentary supremacy was rooted in its representative nature, it as well could fail in its charge of securing the goods for which it was created. Behind the settlement then remained the always latent rights of nature which instigated it in the first place:

When James the second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as this precedent leads us and no farther...If therefore, any future prince should endeavor to subvert the constitution by breaking the original compact between king and people...we are now authorized to declare that this juncture of circumstances would amount to an abdication, and the throne would thereby be rendered vacant. But it is not for us to say that any one or two of these ingredients would amount to such a situation, for there our precedent would fail us. In these, therefore, or other circumstances which a fertile imagination may furnish, it behooves us to be silent too, leaving for future generations, whenever the necessity and the safety of the whole shall require it, the exertion of those inherent but latent powers of society which no climate, no time, no constitution, no contract can ever destroy or diminish.<sup>28</sup>

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<sup>27</sup> Nenner, Howard. “The Later Stuart Age” in *In The Varieties of British Political Thought, 1500-1800*, edited by J.G.A. Pocock (New York, NY: Cambridge University Press, 1996), 206.

<sup>28</sup> Blackstone, William. *Commentaries on the Laws of England, Vol. I*, edited by George Sharswood (Philadelphia, PA: J.B. Lippincott Company, 1908), 243.

### C. A Note on Richard Price and Edmund Burke: Competing Legacies of 1688-89

Roughly around its centennial anniversary, questions regarding the significance of 1688-89 became more prominent in the public square - especially as in relation to the debate over the French revolution and Britain's own revolutionary history. Dr. Richard Price a leading member of Britain's Revolutionary Society celebrated the centennial of the revolution by calling for more and greater reforms within British society. According to Price, the Revolution accomplished substantial change and, even more importantly, laid foundations for more reforms to come.<sup>29</sup> Price made a radical claim regarding the consequences of 1688-89, specifically that 1688-89 augured well for future changes in British governance. This was the precedent Blackstone would warn against.

Price found an ideological opponent in Edmund Burke. In the *Reflections on the Revolutions in France*, Burke sought to refute Price's claims. What ultimately set these two thinkers apart was their relationship to history itself. Burke believed in the idea of the ancient constitution and that the settlement of 1689 had simply secured the nation's liberty's in the face of the Stuart threat. Price, untethered to historical arguments, understood it according to contract and Enlightenment reason.

According to Burke, 1688-89 was significant because it was uneventful. He claimed it didn't alter the rights of the people, and it certainly didn't justify future innovations regarding government. It was a "revolution not made but prevented."<sup>30</sup> That

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<sup>29</sup> Price, Richard. *A Discourse on the Love of Our Country. Delivered on Nov. 4, 1789, At The Meeting House in the Old Jewry, To the Society for Commemorating The Revolution in Great Britain*. Gale Ecco Print Editions.

<sup>30</sup> Burke, Edmund. *Reflections on the Revolution in France*, edited by J.G.A. Pocock (New York, NY: Cambridge University Press, 1987), 29.

the character of 1688-89 had become a point of contention in the hundred years since it occurred at least showed the tensions between its existential substance and the elemental realities it purported to support. Thomas Paine found common cause with Burke, except, he judged it in the negative, seeing it as a settlement for “courtiers, placemen, pensioners, borough-holders, and the leaders of the parties ... It is a bad Constitution for at least ninety-nine parts of the nation out of a hundred.”<sup>31</sup> This odd consensus between Burke and Paine maintains the same principle: things did not change. Both Burke and Paine’s narrative, though coming from very different places, conformed to the larger theme that the revolution was conservative in nature, and this was reflective in the self-interpretation of those who inherited the politics of 1688-89, including Paine’s less radical fellow patriots.

## **Part II: John Locke and the Liberal Ethos**

### **A. Locke, Nature and Civil Theology**

When John Locke described William of Orange as “our Great Restorer” in the preface to the *Second Treatise*, was he endorsing Burke’s view of 1688-89 as a “revolution averted,” or was it a restoration of a specifically Lockean conception of right?<sup>32</sup> To be sure, 1688-89 clarified a long-held, though unsettled controversy of English politics: by insisting on the authority of Parliament as the representative institution of the people, the revolution settlement institutionalized the mixed regime of Commons, Lords, and King in one legislative body. Locke hoped for William “to make

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<sup>31</sup> Paine quoted in E.P. Thompson, *The Making of the English Working Class*, New York, NY: Pantheon Books, 1964), 87, 92.

<sup>32</sup> Locke, *Second Treatise of Government*, edited by C.B MacPherson (Indianapolis, IN: Hackett Publishing, 1980), 5.

good his Title, in the Consent of the People...and [that he] justified to the World, the People of England, whose love of their Just and Natural Rights, with their Resolution to preserve them, saved the Nation when it was on the very brink of Slavery and Ruine.”<sup>33</sup> Yet the character of these “just and natural rights” Locke alludes to, the consensus that 1688-89 represented, was not a reconciliation of republican and royalist, Whig and Tory, ecclesial and temporal, dissenters and Anglicans. Rather, it was a triumph of Lockean commonwealth, ratified by practice and time.

Locke’s influence, or lack of influence, on the Revolution of 1688-89 has been the subject of much scholarship. In his *Preface*, Locke presents the *Two Treatises* as directed to both contemporaries and to posterity; it is put forth as a justification of 1688-89, though its engagement with the actual events is limited primarily to what recent scholarship has pointed out were insertions. Peter Laslett has demonstrated that both *Treatises* were written during the earlier Exclusion Crisis, noting that the “*Two Treatises* in fact turns out to be a demand for a revolution to be brought about, not the rationalization of a revolution in need of defence.”<sup>34</sup> Nevertheless, prior to the events of 1688-89, Lockean political theory enjoyed an audience sympathetic to the Whig cause. Richard Ashcraft demonstrated that Locke’s ideas about contract, dissolution of government, and the rights of popular resistance, were present in tracts and pamphlets published by radical Whigs in the early 1680’s during the Restoration.<sup>35</sup> Also during the

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<sup>33</sup> *Ibid.* 5.

<sup>34</sup> Locke, John. *Two Treatises of Government*, edited by Peter Laslett (New York, NY: Cambridge University Press, 1988), 47.

<sup>35</sup> See Richard Ashcraft’s *The Revolutionary Politics of John Locke* (New York, NY: Cambridge University Press, 1987).

Convention Parliament, Lockean ideas circulated in pamphlets and enjoyed influence.<sup>36</sup> More important is Locke's philosophical ratification of 1688-89, and popular sovereignty, evident in the widespread and acknowledged influence he has enjoyed as the philosopher of modern constitutional governments. Which return ones to the substance of Lockean political philosophy, particularly his teaching on natural law and his understanding of legislative power.

Sandoz understands Locke's *Two Treatises* in this context: "The political necessity for a generally accepted account of the ultimate reality does not diminish with the crisis or collapse of this or that particular account, but tends to become more acute; and philosophers from time to time have sought to supply such rational grounds of spiritual and emotional concord (*homonoia*) through civil or political theologies... When we realize the extent to which the seventeenth and eighteenth centuries acknowledged the necessity of a civil theology...it is not implausible to suppose that Locke's covert intention in the *Second Treatise* may have been to advance a civil theology in the form of an evocative naturalistic myth of civil government."<sup>37</sup> The settlement of 1688-89 had indeed established stability amongst the factions of the seventeenth century. The growth and relative domestic stability of the seventeenth century is indicative of the success of this settlement. Therefore, if these factions adopted a new Lockean civil theology, it is necessary to consider what compromised Locke's articles of faith.

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<sup>36</sup> See Lois G. Schrower's "Locke and Lockean Ideas in the Glorious Revolution," *Journal of the History of Ideas* 51 (1990): 531-48.

<sup>37</sup> Sandoz, Ellis. "The Civil Theology of Liberal Democracy: Locke and His Predecessors." *The Journal of Politics* 34, no. 1 (1972): 3, 11.

Locke's civil theology proceeds from a state of nature. Without a common civil authority, this state of nature moves into, not a Hobbesian state of war of all against all, but an arena where the possibility of conflict assumes a force of reason. In the Lockean state of nature, individuals reserve the right, insofar as they have suffered an injustice, to execute judgments regarding offenses against the law of nature. Though apparently tamer, Locke's state of nature, like that of Hobbes, is one of conflict, if not war.

The debate over Locke's allegiance—whether to the Thomistic or Hobbesian tradition of natural law - is an essential question regarding the nature of a Lockean consensus. The fact that his thought permits both interpretations at the level of both thought and practice supports the interpretation that Lockean political thought is primarily civil theology; at least it would be, if divergences in understanding didn't lead to very different understandings of public good. How insistent is Locke's philosophical anthropology on the point that individuals are the product of "divine workmanship," that there exists a duty to the community? If the point is non-negotiable Locke indeed belongs to the tradition of classical natural law insofar as one's rights are accompanied by attendant duties. Locke writes that "there [is] nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal to one another without subordination or subjection..."<sup>38</sup> According to Locke our very dignity is predicated on the fact of our shared humanity. This dignity, combined with the understanding of individuals as products of "divine workmanship," at least indicates and validates the Christian

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<sup>38</sup> Locke, *Second Treatise of Government*, edited by C.B MacPherson (Indianapolis, IN: Hackett Publishing, 1980), 8.



anthropology of mankind under the authority of God. The theological or medieval component to Locke is evident and present; the degree to which it is necessary, however, is questionable, but light is shed on the question in considering Locke's relation of nature to property.

## B. Locke and Property

The equality of the state of nature rests upon, not just our shared membership in humanity, but also upon the principle of common ownership. What is common becomes private however when individuals add their labor to it. Property first, however, and primarily exists in one's person and through labor it extends outward. Locke maintains that, though everything is common in a state of nature, "man has property in his person: this no body has any right to but himself."<sup>39</sup> Our birthright then is the property we hold in our bodies that is inalienable. Individuals further privatize property in the state of nature through labor.

The labour of *his* body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others..<sup>40</sup>

Our property, in one's person and in one's labor, are the basis of private right. Our bodies, but more significantly, our labor separates itself from what is common and *creates* a sphere of private right. Labor and property both are the source of the expansion

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<sup>39</sup> *Ibid.* 8.

<sup>40</sup> *Ibid.* 19

of private rights beyond one's personhood and governments exist to secure these rights. In fact, the purpose of the social existence is the cultivation of nature and the expansion and acquisition of property. Locke's natural law establishes a right to private property and this, in turn, is the impetus for civil society. And this, Locke is careful to add, is all conducive to the common good:

God gave the world to men in common, but since he gave it to them for their benefit and the greatest conveniences of life that they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and the rational...not to the fancy or covetousness of the quarrelsome and contentious.<sup>41</sup>

This view of man fits with the most recent interpretation of 1688-89. Historian Steve Pincus describes the Revolution as the first modern revolution insofar as it was the triumph of mercantilism and the Dutch model over the competing French model. In a word then, Locke's description of industry is in harmony, indeed is almost definitive, of the principles that fuel a commercial republic. The elevation of commerce within the political sphere is a modern innovation insofar as commerce had been, according to the classical understanding, subordinate to political goods. Yet the work of the industrious and rational according to Locke will not just be conducive to their own good but be a benefit to all – and the very point of civil association.

Locke's theory of property, and of nature itself, could only claim a logic of extended benefits based upon acquisition and the cultivation of nature extending benefits to the commonwealth. Locke writes:

To which let me add, that he who appropriates land to himself by his laborer, does not lessen but increases the common stock of mankind: for the provisions serving to the support of human life, produced by one acre of inclosed and cultivated land, are (to speak much within compass) ten times more than those which are yielded

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<sup>41</sup> *Ibid.* 21.

by an acre of land of an equal richness lying waste in common. And therefore he that incloses land, and has a greater plenty of the conveniences of life from ten acres, than he could have from a hundred left to nature, may truly be said to give ninety acres to mankind: for his labour now supplies him with provisions out of ten acres, which were but the product of an hundred lying in common. . . . I ask, whether in the wild woods and uncultivated waste of America, left to nature, without any improvement, tillage or husbandry, a thousand acres yield the needy and wretched inhabitants as many conveniences of life, as ten acres of equally cultivated fertile land do in Devonshire.<sup>42</sup>

Economics, and economic expansion, is according to Locke the basis of the common good, and the priority it assumes within the Lockean Commonwealth, appears to be primary. The narrative of Locke's civil theology then is clear: from the state of nature the individual, though governed by natural law, has no recourse, beyond themselves, regarding grievances. From this Locke concludes that the "government has no other end but the preservation of property."<sup>43</sup> Property, for Locke, it is important to emphasize, exists first and foremost in one's person. It is not the sheer terror of a Hobbesian war against all that impels one toward civil association. Rather it is that life becomes characterized by "inconveniences" without an umpire to settle disputes. This leads one to secure for oneself in government protection of what is privately held. The "industrious" and the "rational," then, understand that the basis of their claim upon government rests on their labor in the natural world – not upon tradition, not upon title, and certainly not upon inherited authority or birthright. Locke, as a civil theologian, elevated acquisition to a level of morality that grounded civil association, not in the life of reason correspondent with traditional English liberty, but in an ethic of the industrious. The emphasis on property and Locke's turn from history, or neglect of it, signifies its disposability, and

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<sup>42</sup> *Ibid.* 23-4.

<sup>43</sup> *Ibid.* 51.

furthermore the disposability of historical reason or experience. And Locke is clear who civil society is not for: the “quarrelsome and contentious,” those who make a claim of right or authority beyond the Lockean horizon of a stabilizing and workmanlike industry.

### C. The Parliamentary Locke: Consent and Supremacy

Civil society is the result of mutual consents that form majorities:

The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society, is by agreeing with all other men to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.<sup>44</sup>

The basis of this civil society occurs according to individuals, “thereby made that one body, with a power to act as one body, which [does so] only by the will and determination of the majority”<sup>45</sup> This notion of popular consent is a form of representation, wherein a majority is able to mobilize itself for action when, “the act of the majority passes for the act of the whole, and of course determines, as having, by the law of nature and reason, the power of the whole.”<sup>46</sup> This principle of popular sovereignty, necessarily circumscribed by territory, derives its authority from the majority consent of those who comprise it.

Whosoever therefore out of a state of nature unite into a community, must be understood to give up all the power, necessary to the ends for which they unite into society, to the majority of the community...And thus, that, which actually begins any political society, is nothing but the consent of any number of freemen capable of a majority to unite and incorporate into such a society.<sup>47</sup>

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<sup>44</sup> *Ibid.* 52

<sup>45</sup> *Ibid.* 52.

<sup>46</sup> *Ibid.* 52.

<sup>47</sup> *Ibid.* 53.

The legitimacy of government then is derived from the consent of its majority. The form of the regime, whether democratic, aristocratic or constitutional monarchy, would appear to be of secondary importance, or at least a multitude of forms would meet Locke's approval if formed through majority consent. This is the key to civil society and is the enduring appeal of Lockean constitutional sentiments: authority derived from the consent of the governed.

Consent for Locke, both active and tacit distinguishes it from Hobbesian sovereignty insofar as the power of the sovereign is explicitly limited. Lockean sovereignty exists according to law created by consent and therein rests its constitutionalism. Locke's civil society is based upon restraints of the government, and the limited aims for which it is created – that is consent, as foundational, is a limited consent. Yet, the prudential move of the individual in the state of nature, or their granting of consent, active or tacit, when witnessing a majority forming, might counsel shared membership on its own terms. Consent then, as a measure of prudence, is not dictated only by concerns regarding self-preservation of property, but is bound to social life itself. If Locke's division of citizenry into the "the industrious and rational" and the "quarrelsome and contentious" stands, his emphasis and grounding of law in property would counsel that any prudent individual would consent to the majority will, especially to secure one's ultimate property, the freedom of one's person. Locke emphasizes the importance of covenants in regards to this consent.

Locke's regime is premised on restraints imposed upon it by those who by consent to it and summon it into existence. Government, by virtue of consent, is understood to be limited, with clearly defined in its powers and purpose. For these

reasons we consider it constitutional. Locke indicates that while good government relies upon a separation of powers, it also depends upon the primacy of the legislative authority – that is, parliamentary supremacy.

The great end of men entering into society, being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society; the *first and fundamental positive Law of all Commonwealths, is the establishing of the legislative power*; as the first and fundamental natural law, which is to govern even the legislative it self, is the preservation of Society, and (as far as will consist with the public good) of every person in it. This *legislative* is not only the supreme power of the commonwealth, but *sacred and unalterable in the hands where the community have once placed it*; nor can any edict of any body else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law, which has not its *sanction* from that *legislative*, which the public has chosen and appointed...<sup>48</sup>

What is supreme regarding the legislature is its relation to the law, that is, its ability to legislate. The legislature creates “settled laws” that are known. They are the antithesis of arbitrary or confusing. Locke’s concern is not with a return to the state of nature; rather the Lockean commonwealth is concerned with despotic tyranny, as he understood England to have experienced under the Stuarts. The executive meanwhile is, “ministerial and subordinate to the legislature,” and exists, in effect, to carry out the will of the legislature. Accordingly he mocks Hobbes vision of a sovereign existing above the law.

...As if when men quitting the state of nature entered into society, they agreed that all of them but one should be under the restraint of laws, but that he should still retain all the liberty of the state of nature increased with power, and made licentious by impunity. This is to think that men are so foolish that they take care to avoid what mischiefs be done to them by *polecats* and *foxes*; but are content, nay, think it safety to be devoured by lions.<sup>49</sup>

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<sup>48</sup> *Ibid.* 69.

<sup>49</sup> *Ibid.* 50.

Existing in tension with the legislative supremacy, Locke maintains the necessity of executive prerogative. In one of his few historical examples he points to the history of England where, “the main of their conduct tended to nothing but the care of the public.”<sup>50</sup> Still, Locke notes the tension between legislative supremacy and prerogative in this famous passage:

The old question will be asked in this matter of prerogative, But who shall be judge when this power is made a right use of? I answer: between an executive power in being, with such a prerogative, and a legislative that depends upon his will for their convening, there can be no judge on earth...And where the body of the people, or any single man, is deprived of their right, or is under the exercise of a power without right, and have no appeal on earth, then they have a liberty to appeal to heaven, whenever they judge the cause of sufficient moment. ...they have, by a law antecedent and paramount to all positive laws of men, reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth...And this power they cannot part with, it being out of a man's power so to submit himself to another, as to give him a liberty to destroy him; God and nature never allowing a man so to abandon himself, as to neglect his own preservation: and since he cannot take away his own life, neither can he give another power to take it.<sup>51</sup>

The right of resistance further speaks to his conviction in the supremacy of the legislative branch and his hostility to executive and arbitrary authority. Locke's emphasis and influence on constitutionalism, limited government, and property have made the Lockean concept of political legitimacy the problem of community. The problems of this dissertation then, the philosophical problems and limitations of Lockean community, these are the legacy of 1688-89, and are very much the problems of John Locke. Until the end of his life, James II never understood himself as anything less than the English king in exile. Writing to his son and heir at the end of his life he reiterated the divine right of

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<sup>50</sup> *Ibid.* 86.

<sup>51</sup> *Ibid.* 87.

hereditary succession – *his* divine right of hereditary succession that survived through his progeny.

Kings being accountable for none of their actions but to God and themselves, ought to be more cautious and circumspect, than those who are in lower stations, and as it's the duty of Subjects to pay true allegiance to him, and to observe his Laws, so a King is bound by his office to have a fatherly love and care of them... remember always that Kings, Princes and all the great ones of the world, must one day give an account of all their actions before the great tribunal.<sup>52</sup>

Though James died in 1701, the Stuart cause remained a potent force in English politics until the mid-18<sup>th</sup> century. The prerogatives that James and his forbearers claimed as right though were just the sort of appeals to heaven Locke had in mind when he counseled men, cautiously, but clearly to take up arms against their governments. The Lockean self-interpretive individual remains singular in their motivations or interests. Locke, in seeking to ground a stable government and create consensus perhaps limits the vision of government as a bulwark against excessive claims of authority, but he clearly depends upon an equally potent energy to sustain the legislative regime he has in mind.

### **Part III: Epilogue – A Liberal Anthem**

After arriving on the shores of Scotland in 1745, and marshaling the support of an army from the Highlands of local Jacobite chieftains, Bonnie Prince Charlie, grandson of the exiled James II, began a southward march, intent on winning the throne of England for his father. Bonnie Prince Charlie won a series of early victories in Scotland that culminated in his routing of Sir John Cope's forces at Prestonpans.<sup>53</sup> When London

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<sup>52</sup> Corp, Edward T. *A Court in Exile: The Stuart Kings in France, 1698-1781*. (New York, NY: Cambridge University Press, 2009), 619.

<sup>53</sup> Tomasson, Katherine and Francis Buist. *The Battles of the '45* (London, UK: Pan Publishing, 1967), 25-26. Tomasson and Buist note that Cope, the general commanding the government forces in Scotland, was defeated though he had a significant advantage in terms of men and arms.



received word of Cope's defeat there appeared to be a credible threat to the settlement of 1688-89. With this threat came an attendant panic. The possibility of "London invaded by a horde of wild Highlanders, a Catholic king on the throne, the Protestant religion, and their hard won and now traditional political liberties taken from them in the name of James III, as they had been taken from them by his father, James II."<sup>54</sup> Eight days after the Jacobite victory, on September 28<sup>th</sup>, 1745, "a notice appeared in the London's *General Advertiser* declaring the intention of the master of the Drury Lane theater company to raise a force of two hundred soldiers, "in Defense of His Majesty's Person and Government; in which the whole Company of Players are willing to engage."<sup>55</sup> The evening ended with a song - the first ever public performance of *God Save the King*.<sup>56</sup>

The audience cheered and "encored with repeated Huzzas, [that] sufficiently denoted in how just an Abhorrence they hold the arbitrary Schemes of our invidious Enemies, and detest the despotick Attempts of Papal Power."<sup>57</sup> The third stanza explicitly located the principle of sovereignty with the singers – i.e. that sovereignty resided with the citizenry rather than with the monarch: "May he defend our laws / And ever give us cause, / With Heart and Voice to sing, / God Save the King."<sup>58</sup> It had been 56 years since Parliamentary supremacy was established in Great Britain, but it was then that the Great Britain of 1688-89 found an enduring anthem.

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<sup>54</sup> Branham, Robert James. "God Save the \_\_\_\_\_!" *Quarterly Journal of Speech*, 85, (1999): 17-37. Branham is excerpting a quote from Percy Scholes.

<sup>55</sup> Percy, Scholes, *God Save the Queen!* (New York, NY: Oxford University Press, 1954), 4.

<sup>56</sup> *Ibid.* 4. Scholes notes this as the first known performance of "God Save the King." He further notes that the first known time of its publication was in *Thesaurus Musicus* in 1744.

<sup>57</sup> *Ibid.* 6-7.

<sup>58</sup> *Ibid.* 7.

The origins and substance of *God Save the King* are more than a trivial, albeit interesting historical anecdote. Though no one knew it at the time, the simple melody and its particular lyrical point-of-view signaled the arrival of a Lockean rhetoric that has proven as versatile as it was once ubiquitous. It would spread across the globe, over the first and second British Empires. *God Save the King's* melody became, for a time, the basis for every national anthem, of every regime heir to political goods championed in 1688-89. In this sense the song is deeply representational of liberal democratic rhetoric. *God Save the King* began by articulating the vague consensus of those who sought to defend the principles of 1688-89; the song's persistence and longevity speaks to the vitality of this consensus.

And what political consensus does *God Save the King* embody? The simplicity of the melody celebrated an institutional populism that privileged "the people's voice" over the aristocratic. Secondly, the lyrics maintain either possessive pronouns or the possessive determiner as the mode of narrative perspective. In other words, *God Save the King* is a song of individual ownership, a celebration of private conscience in harmony with others. Running through the lyrics, and all subsequent variations, the singer stakes a claim upon an object of political value. The point is simple, but worth noting: in almost all cases the singers are the source of political legitimacy; it is through the singers publicly acknowledged consent that political legitimacy is established.

Finally, and most notably, the simplicity of the melody has allowed the song to be re-purposed for activist purposes. Robert James Branham and Stephen J. Hartnett catalogue the history of the song and melody, noting its appropriations specifically within the American political tradition, most famously as *America*, but more importantly, the

author's note, as a vehicle for subsequent grassroots protest.<sup>59</sup> This is appropriate because it reveals something about the values the song celebrates: the song fortifies citizens *as* individuals, though it does not require individuals to always be obedient citizens. This feature speaks most forcefully to the expansive claims of Lockean citizenship and the political consciousness of the modern citizen. Though *God Save the King* began as an anthem celebrating Hanoverian Protestant Succession over Stuart Romanist Succession, it wasn't long before it was appropriated for more radical expressions of the same liberal principles that inspired its birth.

And all of this is all just another way of saying that this song's history, through its vitality, its lyrical and melodic re-appropriations, embodies the themes of this dissertation – that is the legacy of the Glorious Revolution extended to the those who remained loyal to the Crown, from New Zealand to Canada, to the American revolutionaries, and that these convictions, that this political orientation had a shared impact on the political development of those countries heir to the goods of 1688-89

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<sup>59</sup> For a detailed account of the melodies history and a sustained meditation on the meaning of the songs various permutations see Robert James Brahms and Stephen J. Hartnett. *Sweet Freedom's Song: "My Country Tis of Thee and Democracy in America."* (New York, NY: Oxford University Press, 2012).

## CHAPTER IV: BRITISH LIBERTY AND CANADIAN SENTIMENTS

### Part I. The Canadian Founding and the Problem of Political Patrimony

Despite debate over the character of the American Founding, it is nearly universally understood to have been a deliberate enterprise undertaken with an eye to posterity and conducted through the prism of political philosophy. The same has not been said of Canada. Donald Smiley, writes: “Unlike Americans in the eighteenth century ... Canadians never experienced the kind of decisive break with their political past which would have impelled them to debate and resolve fundamental political questions.”<sup>1</sup> Philip Resnick agrees: “It is a well-known feature of Canadian history that this country, unlike the United States, was not born of revolution.”<sup>2</sup> Resnick suggests that if Canada had fought a war of independence they would enjoy a more vigorous national identity similar to that enjoyed by the citizens of the United States. Perhaps the most damning indictment of a Canadian founding is the characterization of the Fathers of Confederation as pure pragmatists – economic and otherwise. The individuals who created the federal Dominion of Canada in 1867 are understood, according to this school of thought, to have been power-brokers, emphatically not political thinkers. E.R. Black put it most succinctly: “Confederation was born in pragmatism without the attendance of a readily definable philosophic rationale.”<sup>3</sup>

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<sup>1</sup> Smiley, Donald. *Canada in Question* (Toronto, ON: McGraw-Hill Ryerson, 1972), 285.

<sup>2</sup> Resnick, Philip. *The European Roots of Canadian Identity* (Toronto, ON: University of Toronto Press, 2005), 21.

<sup>3</sup> Black, E.R. *Divided Loyalties: Canadian Concepts of Federalism* (Montreal, QC: McGill-Queens University Press, 1975), 4. These thinkers are frequently cited by Janet Ajzenstat to illustrate the consensus opinion regarding Canadian political culture.

While these opinions do not constitute unanimity on the issue, they are representative of a prevalent orthodoxy.<sup>4</sup> This understanding of Canada – born in vacuity, a political body without substance – derives its authority, in no small part, from the comparisons made with the American experience of revolution. Specifically, this vein of scholarship indicts Canadian political culture because it did not experience an event commensurate to 1776. Canada did however experience its own 1783, albeit under different circumstances. As history continues to demonstrate –insurgencies and insurrections are widely capable of achieving moments comparable to 1776. To create a lasting constitution, a crown for a revolution, an institutionalized and lasting political order, one premised on popular sovereignty - that is an altogether different achievement and it is the achievement of 1783. Canada experienced its own “1783” with the passage of the British North America Act, 1867. The formative sentiments and experiences that informed this settlement are important and predate 1867.

To ignore Canada’s constitutional history, or worse, to dismiss it as rising just above feckless to the level of utilitarian, would be to ignore a permutation of British liberty that addresses pressing problems of modern constitutional government. These problems are not specifically Canadian and are increasingly more common as ethnicity and shared culture cease to be pre-conditions of liberal democracies, or perhaps put differently, as populations culturally diversify.

Recent scholarship, notably by Janet Ajzenstat, has re-considered the Canadian founding according to the principles of the Whig parliamentarians and Enlightenment political philosophy. Specifically, Ajzenstat argues that the Canadian founders designed a

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<sup>4</sup> Also see Paul Bennet’s *Canada: A North American Nation* (Toronto, ON: McGraw-Hill Ryerson, 1995).

constitution according to principles of popular sovereignty that heavily relied on Lockean political philosophy in much the same way that their American neighbors did.<sup>5</sup> Her approach is novel insofar as it has focused on the ratification of the British North American Act in the provincial parliaments. By focusing on the debates in the provincial legislatures Ajzenstat illuminates that debates over constitutions, when premised on consent, to varying degrees, will always concern themselves with enduring questions of political philosophy. These questions include – what is political, what is the nature of community, and what are the bonds of modern constitutional governments.

Locke would take issue with following claim, as exclusive to the United States, and apply it to all regimes: “It seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”<sup>6</sup> Hamilton’s view advances the idea that American political thought is exceptional due to the historical opportunity it afforded mankind through the Constitutional Convention. The notion that such questions had been reserved for the American colonies however may have been an overstatement of privilege. Because, if one accepts Ajzenstat’s premise, i.e., that there was a Lockean component, i.e., a popular component, to the Canadian founding, one is compelled to admit similar questions and concerns preoccupied those who did not take up arms against the British during the

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<sup>5</sup> Ajzenstat’s argument doesn’t fail to point out significant divergences. She includes as founders those who wrote the Quebec Resolutions and those in the provincial legislatures who debated and ratified the BNA ACT prior to their being presented as a draft bill to White Hall and Westminster for passage into law.

<sup>6</sup> Hamilton, Alexander, James, and John Jay, *The Federalist Papers*, edited by Clinton Rossiter (New York, NY: Penguin Putnam Inc., 1999), 27.

American Revolution. Indeed, these are the questions of all popular governments.

Alleged breaks with the past and the currency they carry can overstate their importance and diminish the significance of constitutional settlements that follow. The true revolution in thought occurred with the elevation of popular consent and supremacy. According to this understanding the privileges of history and circumstance are revolving and recurring gifts and victories, never singular dispensations.

When discussing the character of a political founding one is essentially making an argument about a collective political self-understanding. The possibility of a shared understanding has been *the* perennial question of Canadian politics since Britain defeated France in the Seven Years War. Ajzenstat makes the case that Canada was founded with the classically liberal intention of securing an institutional order with the limited ends of law and order. The idea of a national public identity was consciously rejected, not only because there was no possibility of a consensus between English and French populations, but also, on the philosophical grounds that a “substantive identity is inevitably exclusive, favoring the founding peoples over latecomers, the majority over the minorities.”<sup>7</sup> By establishing Parliament and its supremacy within the dominion, the founders sought to promote what Locke held to be the hallmarks of a civilized society: rule of law, equal rights, justice, and civil peace. Ajzenstat goes on to identify Locke and his understanding of popular sovereignty as the intellectual foundation of Canada’s political settlement. She states:

The Fathers and legislators regarded Parliament as more than an institution to union, more than a mechanical device, as it were, to bring the provinces together. They thought that Parliament would define the nation. The national Legislature

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<sup>7</sup> Ajzenstat, Janet. *The Canadian Founding: John Locke and Parliament* (McGill-Queens University Press, 2007), 108.

would give the people of British North America, who had formerly identified themselves as citizens or subjects of the individual provinces, a sense of belonging to both province and larger country; that is, it would give them what we now call an “identity.”<sup>8</sup>

That is, the legislative body is a vision of national identity. According to this understanding of parliament, or of any legislative body for that matter, legislatures exist to do more than create law; legislative bodies, i.e. parliaments, are a unique political space where passion and reason congregates to resolve and express themselves peaceably, as a reflection of the greater community. Ajzenstat argues that Parliament was designed by Canada’s founders to be just this, the symbol and embodiment of a national character. In this sense political identity assumes a specific character unique unto itself, its most permanent feature being that it is unfixed, or fixed in the institution of Parliament. Furthermore, Parliament exists though, not just as an institution or as a symbol, but as an ahistorical symbol, intended to weaken claims of historical grievances and identity grounded in cultural differences.

Prior to the *British North America Act, 1867*, popular sovereignty in the British colonies was shaped by the experience and the expectation of self-government in colonial legislative assemblies. The British North America achievement of responsible government, first achieved in Nova Scotia in 1848, occurred, not through appeals to the ancient constitution, but through a Lockean insistence of a right to constitutional government, referred to as “responsible government,” i.e. based on popular representation.<sup>9</sup> The preamble to the *British North America Act, 1867* (referred to

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<sup>8</sup> *Ibid.* 8.

<sup>9</sup> Ajzenstat, Janet. “The Constitutionalism of Etienne Parent and Joseph Howe,” in *Canada’s Origins: Liberal, Tory, or Republican*, edited by Janet Ajzenstat and Peter J. Smith (Ottawa, ON: Carleton



hereafter as the BNA Act), nationalized the sentiments of the colonial legislatures regarding this self-rule and popular representation. The Constitution states that Canada is to have “a Constitution similar in Principle to that of the United Kingdom.”<sup>10</sup> Apart from this reference, the basic principles of British constitutionalism are not spelled out - though it would be obvious that British constitutionalism was clearly understood as parliamentary supremacy, post-1688-89. There are also cultural factors as well, vestiges of British constitutional forms, in the conventions, traditions, and practices that structure the practice of governance. But parliamentary supremacy remains the key: elected representatives of the people, assembled in Parliament with the power to make the law. Ajzenstat writes:

The Locke whom I discovered in the ratification debates is the “parliamentary” Locke – the John Locke who describes and defends the English parliamentary form of government. I have come to the conclusion that the idea of parliamentary government lies at the heart of Confederation and at the heart of the Canadian political identity ... Locke was the model ... Locke’s teaching on popular consent (popular sovereignty) was central in Canada’s founding debates – it was known to the Fathers and to the legislators – and that the teaching on popular sovereignty entails an argument about “identity,” as we understand identity today, and an argument about human equality and human rights.<sup>11</sup>

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University Press, 1995), 219-221. Ajzenstat describes Howe’s constitutional vision of responsible government: “In 1839 [Joseph Howe] wrote four open letters to Lord John Russell arguing that colonial grievances would cease only with the implementation of the British constitution in the colonies...How defines responsible government as requiring the political executive to ‘answer’ to the majority in the popular house. It would ‘place’ the government of the colony, ‘as it always is in England, in a majority in the Commons, watched, controlled and yet aided by a constitutional opposition.’ He means...that the government is sustained by the majority in the lower house. Responsible government concentrates the power of government in the cabinet...Howe holds to that central tenet of the mixed constitution as it was expounded in the early eighteenth century: the political executive and lower house are connected, but nevertheless distinct branches of the legislative power, each with its constitutional powers.”

<sup>10</sup> Hogg, Peter W. *Constitutional Law of Canada. 2010, Student Edition*. (Eagan, MN: Thomson Reuters Press, 2010), Appendices. A-1.

<sup>11</sup> Ajzenstat, Janet. *The Canadian Founding: John Locke and Parliament* (McGill-Queens University Press, 2007), 7.

In drafting a constitution, Ajzenstat argues that the Canadian founders limited themselves to creating a regime of strictly political values anchored in “equality, nondiscrimination, the rule of law, and the mores of representative government.”<sup>12</sup> In short, the consensus that the founders sought was a Lockean political consensus, and they consciously rejected creating a constitution that aspired to any social consensus. “The Fathers concluded that the attempt to write social values into the Constitution would offend some individuals, groups, and regions. It would breach the non-discrimination principle.”<sup>13</sup> The resistance to entrenching social positions is in and of itself both pragmatic and philosophical. The assumption is, that a culturally diverse population is incapable of sharing social values that rise above the level of Lockean political goods. She continues:

To repeat: in a free society there are differences of opinion. The Fathers believed that issues like these—big government versus small government, public safety versus the rights of the accused—were matters for deliberation in the public arena and the Legislature. To define the country in terms of social values would bias debates and call into question the inclusiveness of our national institution. *We have lost the Fathers' insight.*<sup>14</sup>

The essential insight holds that Parliament is both a political symbol and a political arena where social issues can be argued and settled through legislative action, not through constitutional prescription.

In the Canadian case this is an argument against the constitutional reforms enacted through the *Constitution Act, 1982*, which transformed the *British North America Act, 1867* and limited parliamentary supremacy, through the inclusion of the *Charter of Rights and Freedoms*. It did so by binding the legislatures, both provincial and the

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<sup>12</sup> *Ibid.* xi.

<sup>13</sup> *Ibid.* xi.

<sup>14</sup> *Ibid.* xii.

federal, to the provisions of the Charter. This marked a shift from the supremacy of the legislatures to the supremacy of the Constitution (though the Charter itself has limits).<sup>15</sup> It is appropriate that Ajzenstat advocates for Parliamentary supremacy on the basis of political identity. The ideological foil to parliamentary supremacy, a nationalized constitution with a bill of rights, exists equally as a statement of national identity, though with a more robust view of what constitutes that identity.<sup>16</sup> The issue of identity is recognized by both sides of this debate to be a central issue of the Canadian regime. It was the basis of parliamentary supremacy in the British North America Act, 1867; it was the nationalizing sentiment of the *Constitution Act, 1982* and the leveling attempt to articulate a set of values to define it. Identity has been the preoccupation of British North America since the French were defeated in the Seven Years War. Therein the British

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<sup>15</sup> 1. Restrictions on the Charter are found in: section 1; in specific restrictions; and in the notwithstanding clause. Regarding section one the charter reads: “[The Charter] guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society*.” Specific restrictions on rights, like most other constitutions qualify the right give. For example the Charter secures *peaceful* assembly, *unreasonable* search and seizures, and *unreasonable* bail. Finally the “notwithstanding clause” in section 33 limits on the Charter. It reads: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as they case may be, that the Act or a provision thereof shall operate *notwithstanding* a provision included in section 2 or sections 7 to 15 of this Charter.” Hogg, Peter W. *Constitutional Law of Canada, 2010* (Eagan, MN: Thomson Reuters Press, 2010), Appendices. A-1. Section 33 protects parliamentary sovereignty insofar as if a piece in violation of these sections can have effect by declaring that it exists “notwithstanding” those sections of the charter. It protects legislation from being subject to judicial review. Robert E. Sharpe and Katherine E. Swinton argue that, “defenders of section 33 also argue that the override is deeply rooted in the Canadian political and constitutional tradition, which accepts that Parliament itself has an important role in the protection of rights... Taken as a whole, section 33 ensures that no one has the last word. Even if the clause is invoked to overcome judicial review, the five year limitation [‘notwithstanding’ voids of the Charter have a five year limitation] ensures that the issue will have to be revisited after another election in which the people can hold accountable their democratically elected representatives.” They might have added, that this important role comes from the tradition of law and legislation being considered the fount of rights, not a charter itself. From Robert J. Sharpe and Katherine E. Swinton, *The Charter of Rights and Freedoms* (Toronto, ON: Irwin Law, 1998), 56-57.

<sup>16</sup> *The Constitution Act, 1982*, particularly the *Charter of Rights and Freedoms* aim to nationalize sentiment. Accordingly, Canadian identity can be observed anywhere in the country and exists as a respect for rights expressed in particularly through the Charter, ‘notwithstanding’ a declaration in a Parliamentary statute. The effect of this vision is to bind, particularly advocates of Quebec sovereignty, into a full, identifiable Canadian identity that doesn’t shift according to every Parliamentary statute.

liberal ethos confronted the limits of a self-understanding, that while suitable for Britain, was understood to be impossible for empire. The limits of the British experience on liberty shed light on the liberal ethos of Canada, at least until 1982, and in understanding those limits, pointed towards what would be Canada's constitutional self, and the 20<sup>th</sup> century project to endow that self with a more uniform, that is, a less political or partisan character. The rule of law and the supremacy of the legislative power, elemental to the *British North America Act, 1867*, carried with it the full scope of what Lockean civic engagement and self-ownership entailed, but perhaps no more. And that was its weakness or the reason that stronger national sentiments have been the aim of constitutional reform since. The conservatism of the British North America Act, sought to conserve the notion of representation that worked in Britain for a non-British populace. I will proceed by looking at representative instances wherein the British liberal ethos encountered a representative experience that challenged the applicability of its liberal ethos in the British North American colonies that shifted what was British to a more specifically Canadian liberal ethos.

## **Part II. The Conquest of Atlantic Canada and the Liberal Ethos**

### **A. Colonization: Territory, Religion, and Commerce**

In 1524 France financed one of the earlier expeditions to New World with the objective of mapping the region north of Florida; if fortune favored the expedition they also hoped to find the naval passage to the Orient. Giovanni de Verazzanno, a Florentine explorer led the expedition. When he made anchor off the coast of Maryland Verazzanno

was so moved by the region's beauty, he christened it Arcadia.<sup>17</sup> Verazzanno's identification of the North Atlantic as a pastoral Eden wasn't a simple romantic allusion. The name "Arcadia" was as much an acknowledgement of the region's commercial potential as it was a utopian signifier.

In the 1500s the strangers from France were more interested in mineral wealth and fish than in native souls and fur pelts. The newcomers hoped to repeat the success of the Spanish, who had discovered astonishing sources of silver and gold in Mexico and Peru, or, at least find a westerly route to Asia, whence might be drawn spices, silk, tea, and porcelain.<sup>18</sup>

The French claims extended beyond material resources. In a letter to King Francis I, Verazzano wrote:

We anchored ...and with xx men we penetrated about two leagues inland, to find that the people had fled in terror into the forests. Searching everywhere, we met with a very old woman and a young girl of xvii to xx years, who had hidden in the grass in fear. The old woman had two little girls whom she carried on her shoulders, and clinging to her neck a boy – they were all about eight years old... We took the boy from the old woman to carry back to France, and we wanted to take the young woman, who was very beautiful and tall, but it was impossible to take her to the sea because of the loud cries she uttered.<sup>19</sup>

In a Hobbesian rebuke Verrazanno's idealism he was eaten by cannibals two years later in the Caribbean.<sup>20</sup> French colonial policy shifted in the seventeenth century, moving from strictly commercial interests to settling Acadia in partnership with native

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<sup>17</sup> Schwartz, Seymour I. *The Mismatching of America*. (Rochester, NY: University of Rochester Press, 2006), 46-47. "According to a note in the margin, 'we baptized the area *Arcadia* on account of the beauty of the trees.' 'Arcadia' was probably derived from the title of a very popular 1501 novel by Jacopo Sannazzaro. The author described the imaginary locale in his work as beautiful and characterized by many trees. It is generally held that Verazzano assigned 'Arcade' to part of the eastern shore of Maryland, either in Worcester County, Maryland, or Accomac County, Virginia."

<sup>18</sup> Moogk, Peter N. *La Nouvelle France: The Making of French Canada, A Cultural History* (East Lansing, MI: Michigan State University Press, 2000), 22.

<sup>19</sup> Quinn, Frederick *The French Overseas Empire* (Westport, CT: Praeger Press, 2001), 19.

<sup>20</sup> Wroth, Lawrence C. *The Voyages of Giovanni da Verrazzano, 1524-1528* (New Haven, CT: Yale University Press, 1970), 237.

populations. This settlement occurred primarily through the leadership of Samuel de Champlain.

Least significant of his accomplishments, Champlain is generally credited with dropping the “r” from Arcadia in a 1604 map. For the next hundred years, the region would be known as *L’Acadie* or *Acadia*; its settlers would come to identify themselves, not as Frenchmen, but as Acadians.<sup>21</sup> In 1605 Champlain assisted in establishing the settlement of Port Royal under the command of Pierre Du Gua Mont. France’s Henry IV entrusted Du Gua with a Royal Charter that, in exchange for ferrying French settlers to Acadia, would grant him “seigniorial rights and commercial monopoly over eastern North America from Philadelphia to Newfoundland.”<sup>22</sup> Port Royale was the first significant French settlement in North America, its capital, located on the shores of the Annapolis Basin, its neighbors, the Mi’kmaq tribe, members of the Abenaki Confederacy.<sup>23</sup>

The French policy towards the Mi’kmaq during the seventeenth century was one of assimilation. Franciscans and Jesuits sought to convert the natives who Pope Paul II had declared “true men” who “should not in any way be enslaved.”<sup>24</sup> In 1610, Membertou, the Mi’kmaq sagamo, or chief became the first Mi’kmaq to be baptized a

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<sup>21</sup> Andrew, Sheila M. *The Development of Elites in Acadian New Brunswick, 1861-1881* (Montreal, QC: McGill-Queens), 11. “This was the eventual result of existing under the shifting rules occasioned by imperial conflict. Acadians did not identify completely with Quebec or with France because frequent English invasions and trading with English colonies had given them separate interests.”

<sup>22</sup> Choquette, Leslie. *Frenchmen into Peasants: Modernity and Tradition in the Peopling of French Canada* (Cambridge, MA: Harvard University Press, 1997), 250.

<sup>23</sup> *Ibid.* For an overview of this settlement process see Choquette’s Chpt. 1. “Regional Origins: Peasants or Frenchmen” 27-54.

<sup>24</sup> Jaenen, Cornelius. *The Role of the Church in New France* (Toronto, ON: McGraw-Hill Ryerson Press, 1976), 22.

Roman Catholic. Membertou's conversion signified both a *spiritual* and a *temporal* alliance between French and Mi'kmaq. He, "promised to look after them [the French], and that they should be no more unhappy than if they were his own children."<sup>25</sup> He expected the same care and protection in return. Indicative of French commitment to assimilating the Mi'kmaq, in 1627 a charter of the Company of New France promised a Catholic Mi'kmaq full rights of French citizenship.<sup>26</sup> Catholicism then became part of the enduring bond between Indian and French, and would eventually signal mutual defiance against British forces. For the Mi'kmaq, devotion to the Catholic faith was as much a political act as a spiritual one. Religious conversion and evangelism was part of France's overall strategy to forge a unique, assimilated culture in its North American territories.

This program of cultural transformation accorded with the French crown's aim at home. Ruling a culturally diverse and politically divided kingdom, the Bourbon monarchs of France had begun a centralizing program to impose Roman Catholic orthodoxy and to culturally assimilate the kingdom's ethnic minorities. Because religion was regarded as the key to political loyalty in the seventeenth century Europe, the achievement of religious uniformity was given priority as the surest means of ensuing loyal subjects.<sup>27</sup>

In essence, the French solution to diversity was a long-term series of policies aimed at transforming culture. Inter-marriage was another component of France's assimilation strategy. Under Louis XIV, "French settlers were encouraged to 'dispose them [native Americans] to come and settle them in community with the French and to take native

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<sup>25</sup> Champlain, Samuel d. in *The Works of Samuel de Champlain. Vol I*, translated by H.H. Langton and W.F. Ganong (Toronto, ON: University of Toronto Press, 1922-36, Reprint edition, 1971), 384.

<sup>26</sup> Moogk, Peter. *La Nouvelle France. The Making of French Canada: A Cultural History* (East Lansing, MI: Michigan State University Press, 2000), 20.

<sup>27</sup> *Ibid.* 15.

American spouses, ‘in order that...they may form only one people and one blood.’”<sup>28</sup> The French policy aimed at assimilating French and native populations into one ethnic group though what effectively happened was, “four new peoples: partly Christian Amerindians dependent upon European trade goods; Canadiens and Acadians, who had a small admixture of native culture and blood; and, eventually, the prairie Metis, who were equally the heirs of their native European parents, without belonging to either ancestral group.”<sup>29</sup> Prior to the British experience then, French and aboriginal populations forged a strong bond that aimed to assimilation through marriage, religion, and shared economic interests.

In 1710, during Queen Anne’s War, British forces conquered Port Royal, and with it, assumed control of Acadia. Port Royal was renamed Annapolis Royal in honor of Queen Anne. In 1713, the Treaty of Utrecht formalized the settlement and France officially ceded possession of most of Acadia to Great Britain. To the British the conquered terrain didn’t resemble Verrazanno’s mythic and evocative *Arcadia*; it more closely resembled Scotland. English maps thereafter referred to the territory as Nova Scotia.<sup>30</sup> The conflicts and fissures that divided Hanoverian England and Jacobite-leaning Scotland found nominal and literal a reflection in the New World through Protestant New

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<sup>28</sup> Reid, Jennifer. *Myth, Symbol and Colonial Encounter: British and Mi’kmaq in Acadia, 1700-1867*. University of Ottawa Press, 1995. Pg. 69, in her 45<sup>th</sup> footnote . Reid quotes the French Minister of the Marine, who in 1713 stated: “The French and Indians of Acadia must look up to the Sun and the Stars from the same land; they must stand shoulder to shoulder on the battlefield...live together in peace and harmony; and when the time comes, sleep side by side beneath the same sod of their common country.” Minister of Marine to Baron de St. Castin, April 8, 1713, MGI, series 2, B series, transcripts, 35:3, 188-189, PAC cited in Upton *Micmacs and Colonists*, 32. Quoted from Reid.

<sup>29</sup> Moogk, Peter. *La Nouvelle France. The Making of French Canada: A Cultural History* (East Lansing, MI: Michigan State University Press, 2000), 50.

<sup>30</sup> The naming of Nova Scotia also had to do with Scottish colonies established there earlier in the century.



England and French-Catholic Nova Scotia.<sup>31</sup> Nova Scotia's French Catholic and native populations, as both Catholic and non-British, presented an unprecedented challenge for Britain in terms of imperial policy and administration. The British conquest of Acadia created unique problems regarding the institution of what were considered uniquely British values.

The most pressing challenge was that of governance: namely how to rule both European and native populations who had no attachments to British culture, religion, British liberties, or law. Like the French, British policy in Acadia promoted inter-marriage. Richard Phillips, the third English governor of Nova Scotia promised, "subsidies to any colonists who married Mi'kmaq partners. Under the terms of the program...the European partner in any interracial marriage...would receive prizes in the form of cash and land...As it happened, Philipps never paid any prizes."<sup>32</sup>

The negotiation of the Treaty of Utrecht did not involve the Mi'kmaq and when they were informed that by right of the treaty Britain had claimed possession of their ancestral lands the Mi'kmaq resisted. The Mi'kmaq would be in open conflict with the British sporadically, but continually, until they achieved a lasting peace in 1763. From the Treaty of Utrecht the Mi'kmaq took issue with land settlement claims of the British. James Rodgers Miller writes:

Indian nations in general perceived the two European powers in North America differently. In the seventeenth century, the view of Englishman as that of a "farmer or town-dweller whose activities gradually drove the original

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<sup>31</sup> See John G. Reid, "The Conquest of Acadie" in *Conquest of Acadia, 1710: Imperial, Colonial, and Aboriginal Constructions*, edited by John Reid (Toronto, ON: University of Toronto Press, 2004). This inter-continental analogy is made somewhat frequently in books dealing with conquest of Acadia.

<sup>32</sup> Plank, Geoffrey. *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* (University Park, PA: University of Pennsylvania Press, 2003), 73.

agriculturalists deeper into the hinterland, whereas the stereotype of the Frenchman was a trader or soldier laden with baubles and brandy who asked only for furs and hospitality.<sup>33</sup>

Miller goes on to describe how an Oneida villager told a Protestant minister that the “English have an insatiable thirst for land, especially for new settlements.”<sup>34</sup> The peace that was finally achieved in 1763 however was not the settlement that the Mi’kmaq had hoped for. More than anything 1763 would signify a finality of British claims upon North America, and a weakening of the position they held vis-à-vis the French.

When the Micmacs did conclude peace with the British in 1761, it was in the expectation of re-establishing the equilibrium they had once enjoyed with the French. This was not to be. The British enjoyed total control of the Atlantic seaboard for only a few years, losing most of their colonies in the American Revolution. Halifax, unexpectedly, became their only base on the North Atlantic and so remained vital to imperial strategy. The British moved in Loyalists refugees to stabilize the area. Forced to contend with both settler and strategic interests, the Micmacs were rapidly dispossessed.<sup>35</sup>

When France ceded the Acadian territory to the British in 1713 it did so according to, “its ancient boundaries.”<sup>36</sup> The language of the treaty states:

...all Nova Scotia or Acadie, comprehended within its ancient boundaries; as also the city of Port Royal now called Annapolis Royal, and all other things in these parts which depend on the said lands and islands, together with the dominion, property and possession of the said islands, lands and places, and all rights whatever by treaties, or any other way attained, which the most Christian king, the crown of France, or any the subjects thereof, have hitherto had to the said islands,

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<sup>33</sup> Miller, James Rodger. *Skyscrapers Hide the Heavens :A History of Indian White Relations in Canada* (Toronto, ON: University of Toronto Press, 2000), 83.

<sup>34</sup> *Ibid.* 83.

<sup>35</sup> Upton, Leslie, F.S. *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver, BC: University of British Columbia Press, 1979), xiii.

<sup>36</sup> *Select Charters and Other Documents Illustrative of American History, 1606-1775*, edited by William MacDonald (New York, NY: The MacMillan Co., 1910), 232.

lands and places, and to the inhabitants of the same, are yielded and made over to the queen of Great Britain and to her crown for ever.<sup>37</sup>

This inexact phrase, “ancient boundaries” was clear in some things and unclear in others: it was undisputed that Acadia covered all of mainland Nova Scotia, but both sides continued to claim sovereignty over what is now New Brunswick. Furthermore, France retained the neighboring colonies of Ile Saint-Jean (PEI) and Ile Royale (Cape Breton). Through the Treaty of Utrecht, Nova Scotia became a British territory, almost surrounded by French settlements. Regarding the Acadians themselves, the Treaty of Utrecht gave them, “liberty to remove themselves within a year to any other place, as they shall think fit, together with all their moveable effects.”<sup>38</sup> The decision then, to leave or to stay, ultimately rested with the Acadians, most of whom remained where they settled on the lands they had occupied for centuries.

The French of Ile Saint-Jean and Ile Royale attempted to lure the Acadians to their settlement; French emissaries toured Acadia in 1714 and through offers of land and provisions in exchange for their migration, managed to attract hundreds of families.<sup>39</sup> The presence of Acadians posed challenges for the British. An exodus of Acadians however to French territory was of greater concern. There were three important reasons. British forces feared that depopulation would reduce Acadia to “its primitive state.” Acadian emigration would strengthen Ile Royale and weaken Nova Scotia. Finally, the British

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<sup>37</sup> Griffiths, N.E.S. *From Migrant to Acadian: A North American Border People, 1604-1755* (Ottawa, ON: Carleton University Press, 2005), 253.

<sup>38</sup> *Ibid.*

<sup>39</sup> Griffiths, Naomi E.S. *Acadians: The Creation of a People* (Toronto, ON: McGraw-Hill Ryerson, 1973), 25. “The French officials of Isle Royale were most anxious for the Acadians to come to them and when, by 1717, it was apparent that the Acadians were not going to do so, the governor wrote that he had always considered that the Acadians would become an essential part of the structure of Ile Royale.”

believed that the alliance between the Acadians and the Mi'kmaq helped to protect the British. In a 1715 letter to the House of Lords, Lt. Governor Cartwright wrote that if, "ye french quit us we shall never be able to maintaine or protect our English family's from ye insults of ye Indians, ye worst of enemies."<sup>40</sup> The presence then of Acadians served a very real, but short term, advantage for the British. The Acadians and Mi'kmaq peoples, as the majority of population in Nova Scotia, put the British in the position of seeking a balance where, according to their principles, no balance could be had. What was essentially missing was a British population, and insofar as a liberal ethos was a question of philosophical orientation, it proved equally, if not more so, one of cultural heritage.

It was on the question of political oaths, so essential to Locke that eventually forced the British and Acadian points of difference into one of mobilized conflict. As early as 1679 the Governor General of New France, described his frustration with the Acadians and their "slowness to obey orders without first discussing them," which he blamed on their "parliamentary tendencies."<sup>41</sup> In 1705 Joseph de Brouillan, one of the last French governors of the region, said of the Acadians: "It seems to me...that these people live like true republicans, acknowledging neither royal authority nor courts of law."<sup>42</sup> The Acadians for their part were willing to extend fealty to the Crown – but only to a point. In the end it was not a question of liberty that divided the Acadians and British but one of qualified loyalism.

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<sup>40</sup> *Selections from the Public Documents of the Province of Nova Scotia*, edited by Thomas B. Akins, D.C.L., Commissioner of Public Records. (Halifax, NS: Charles Annad Publishing, 1896), 9.

<sup>41</sup> Reid, John G. *Six Crucial Decades: Times of Change in the History of the Maritimes* (Halifax, NS: Nimbus Publishing, 1987), 30.

<sup>42</sup> Parkman, Francis. *The Works of Francis Parkman, Vol. XI* (Boston, MA: Little Brown and Co., 1907), 110.

## B. British Rule

Those Acadians who chose to remain in now-British-territory, who had occupied the land for roughly 100 years, were, according to the Treaty of Utrecht, to “be subject to the Kingdom of Great Britain” but “to enjoy the free exercise of their religion, according to the usage of the Church of Rome, as far as the laws of Britain allow the same.”<sup>43</sup> The treaty’s provision of religious tolerance combined with the extension of British law effectively excluded Acadians from holding offices in the colonial administration. With the extension of British law, and the Test Acts remaining in force, Roman Catholics were excluded individuals from holding public office. In a letter dated 1713, Queen Anne wrote the following to the officials charged with administering the colony: “We ... Signifie Our Will and Pleasure to you that you permit and allow such of them as have any lands ... in the Places under your Government in Acadie ... and are willing to Continue our Subjects, to retain and Enjoy their said Lands and Tenements without any Lett or Molestation as fully and freely as our other Subjects do.”<sup>44</sup>

The Treaty of Utrecht and the letter from Queen Anne made clear that the laws of Great Britain would be the laws of the new colony. Nevertheless, the Test and Corporation Acts forbade Acadians from voting or serving in an elective assembly. The first lieutenant-governor of Nova Scotia, Thomas Caulfield believed that the Acadians were a necessary presence and that they eventually would be assimilated into British political culture; the challenge would be waiting and ruling in such a way that this could

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<sup>43</sup> *Ibid.* 200.

<sup>44</sup> Doughty, Arthur G. *The Acadian Exiles: A Chronicle of the Land of Evangeline* (Toronto, ON: Glasgow, Brook & Company, 1916), 28-29.

occur. In 1715 he wrote that “their numbers are considerable and in case they quit us will onlie strengthen our enemys when occasion serves by so much. And though wee may not receive much benefit from them, yet their children in process of time will be brought into our Constitution.”<sup>45</sup> Until the time when this assimilation occurred, British elites set about the task of governing a non-British population.

A council was created for which the governor when in residence, or the lieutenant governor, or the senior councilor present served as president.<sup>46</sup> This body exercised not only the executive but judicial authority and, without a legislative assembly, or without specific instructions from the Board of Trade, assumed the de facto legislative powers in the colony. In other words they ruled as conquering, but benign despots. The Acadians showed no signs of assimilating to the English way of life; still governance of Nova Scotia was remarkably stable from the period between 1713-1748. Governor Vetch began the practice of dealing with the Acadians mainly by means of delegates sent to him from districts and villages. This quasi-representative system of Acadian deputies was instituted by Lt. Governor Paul Mascarene early as 1714. When, he met with the Acadians at the Minas Basin on a tribute collection mission he described the scene:

...[the inhabitants] desir'd of me to have the Liberty to choose some particular number amongst them who should represent the whole, by reason of the most of the people living scattered far off & not able to attend a Considerable time, I easily consented to it and they chose Mr. Peter Meancon & ye four formerly

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<sup>45</sup> Barnes, Thomas Garden. “‘The Dayly Cry for Justice’: The Juridical Failure of the Annapolis Royal Regime, 1713-1749” in *Essays in the History of Canadian Law, Vol. II: Nova Scotia*, edited by Philip Girard and Jim Phillips (Toronto, ON: Osgoode Society and University of Toronto Press, 2012), 11.

<sup>46</sup> *Ibid.* Barnes has an excellent summation of early colonial political organization under the British. 10-41.

Capt of their Militia with another man for Manis [Minas], one for Chicconecto & one for Cobequid.”<sup>47</sup>

By 1748 the system had become formalized. According to Mascarene, eight deputies were chosen from eight districts on the Annapolis River and Basin and sixteen others from the outlying districts around Minas and Chignecto.<sup>48</sup> Elizabeth Mancke notes that, “what is striking about Nova Scotia’s early-eighteenth century record is how assiduously officials worked to create and maintain a government that honoured ‘the rights of Englishmen,’ including the minimization of military rule...that the single most defining characteristic of English, and then British, identity in the early modern Atlantic world was a commitment to English liberty.”<sup>49</sup>

Yet the autonomy that the Acadians enjoyed in managing local affairs proved to be, in the eyes of some, too much an attractive alternative to British rule. Especially since local governments relied on Catholic priests and missionaries, who effectively answered to the Bishop of Quebec. Geoffry Plank notes that this British concern was well founded, that Catholic missionaries and priests, “issued orders to the Mi’kmaq and the Acadian villagers and that the church [was] undermining the authority of the governor and the provincial council, and furthering the imperial interests of France.”<sup>50</sup> Apart from seditious intent, the role of this “shadow government” was contrary to the British policy

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<sup>47</sup> Brebner, John Bartlett. *New England’s Outpost: Acadia Before the Conquest of Canada* (Hamden, CT: Archon Books, 1965), 149.

<sup>48</sup> See Beamish Murdoch’s *A History of Nova-Scotia, or Acadie, Vol. I* (Halifax, NS: James Barnes, Printer and Publisher, 1865), 371-372.

<sup>49</sup> Mancke, Elizabeth, “Imperial Transitions” in *The ‘Conquest of Acadia, 1710: Imperial, Colonial, and Aboriginal Constructions* edited by John J. Reid (Toronto, ON: University of Toronto Press, 2004), 188.

<sup>50</sup> Plank, Geoffrey. *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* (Philadelphia: University of Pennsylvania Press, 2003), 6.

of assimilation, as judgments on the local level were made according to French customs and canonical law, differing markedly in substance from English common law traditions.

But of primary concern was sedition – and it was a well-founded and legitimate concern.

A report to Louis XV read:

The only way we can begin to create obstacles is to make the savages of Acadia and its environs feel how much it is in their interest to prevent the English fortifying themselves, to enlist them to oppose it openly, and to stir up the old inhabitants to sustain the savages in their opposition as much as they can without exposing themselves. The missionaries to both the one and the other have orders and are inclined to conduct themselves according to these aims.<sup>51</sup>

The fruits of this sentiment were evident in all of the conflicts led by clerics, including Father Rale's War and Father La Loutre's War. These wars were informed, as much by regional and local theological convictions, as they were informed by imperial power politics. Resistance to British rule and settlement in these wars, at least on the part of the Acadians is disputed. Resistance from French and Mi'kmaq forces primarily came from the French territories of Ile Royale and Ile St. Jean. Yet the Acadians who had migrated there, and the Acadian connection to these rebels put Acadians settled in Nova Scotia under the shadow of suspicion. The Acadians however insisted on a policy of neutrality regarding taking up arms against either French or aboriginal. They claimed that their independence and autonomy, existed apart from English *or* French rule. The effect of the transfer of powers between France and England had effected them to the degree that they rejected both and claimed an Acadian identity. They willingly submitted to an oath of allegiance to the British Crown. It was the substance of the oath that was a point of controversy. It is worthwhile stressing this point: Acadian villages and districts

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<sup>51</sup> Doll, Peter M. ed., *Revolution, Religion, and National Identity: Imperial Anglicanism in British North America*. (Cranbury, NJ: Associated University Presses, 2000), 49.



returned an oath of their own composition to the British authorities, swearing loyalty to the British Crown, providing that their religious beliefs were respected and they should never be required to take up arms against French or Indian.

### C. The Oath and Expulsion

Though the period from 1713 to 1748 has been called “the Golden Age of Acadian life,” the issue of loyalty and the English hope for assimilation was matched by an un-assimilating population who would pledge fealty, though only a conditional allegiance.<sup>52</sup> The political stability and growth during this period can largely be credited to the compromise made between the Acadian inhabitants and British colonial authorities regarding the oath of allegiance to Great Britain. That the Acadian compromise proved unsustainable however, seems an obvious point of ethnic loyalism in conflict with territorial integrity.

Immediately following the Treaty of Utrecht the Acadians, were obliged to swear an oath to their new sovereign if they chose to remain in British territory. The Acadian communities affirmed their willingness to pledge allegiance to the Crown but sought an exemption from taking up arms against the French or the Mi’kmaq in the event of a future war. A compromise depended upon the willingness of British authorities to make this concession for non-British inhabitants. In 1729 the Acadians found a sympathetic figure in the person of Governor Richard Philipps. In December 1729 all the Acadian men aged 15 and older who lived in the vicinity of Annapolis Royal signed the oath of allegiance. The English text of the oath reads:

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<sup>52</sup> Griffiths, Naomi. “The Golden Age of Acadian Life: 1713-1748,” *Social History*, 17 (1984): 21-34; Griffiths details how it, “was during this time that the Acadians enjoyed a sustained period of peace and prosperity. Their population grew from 2500 Acadians in 1711 to more than 10,000 in 1750.” 34.

I sincerely promise and swear in the faith of a Christian that I will be entirely faithful and will truly obey His Majesty King George the Second, whom I recognize as the sovereign lord of Nova Scotia and of Acadie. So help me God.<sup>53</sup>

In return for signing the oath, the British authorities made a promise in return. Sometimes this promise was written into the margins of the French translation of the oath; sometimes it was rendered verbally. Alexandre Bourg, the notary at Minas, kept a record of the concession made by the governor and marginalia of his document, witnessed by priests from Grand Pre and Pisiquid, reads:

We ... certify to whom this may concern that His Excellency Richard Philipps Esquire, Captain in Chief and Governor General of the Province of His Majesty, Nova Scotia or l'Acadie, has promised to the inhabitants of Minas and other rivers dependant thereon, that he exempts them from bearing arms and fighting in wars against the French and the Indians, and that the said inhabitants have only accepted allegiance on the promise never to take up arms in the event of war against the Kingdom of England and its government.<sup>54</sup>

The Acadian compromise defined them as an independent people within the colonial North America, and it defined the latitude that Britain was willing to allow their new subjects.<sup>55</sup> The nature of the Acadian compromise was unusual in its acquiescence to British rule but neutrality regarding British defenses. This Acadian achievement of securing neutrality then, while placing them in an economically and politically advantageous position for a time, ultimately did not inspire confidence in the British

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<sup>53</sup> *Ibid.* 42.

<sup>54</sup> *Ibid.* 42.

<sup>55</sup> See James Laxar's *The Acadians: In Search of a Homeland* (Toronto, ON: Anchor Books, 2009), 43. Laxar writes: "While they lived under the British flag, British rule was, for the most part, lightly felt. There was the enviable balance in Acadian settlements around Grand Pre and Beaubassin between individualism, in which the head of the family fished and farmed for himself and his dependents, and collectivism, in which farmers worked together to sustain and extend the aboiteaux that won rich land for them from the sea. In the peculiar position they occupied, the Acadians had managed to escape from even the theoretical remnants of feudalism that had existed during the French regime prior to 1713. Acadian farmers enjoyed a position that farmers in France were not to enjoy prior to the transfer of land from the aristocrats to peasants after the French Revolution."

administration; in essence it was an anti-imperial stance, that favored the family over what had proven to be a vacillating imperial sovereignty.

Acadian neutrality was tested when hostilities resumed between French and English during King George's War in 1742.<sup>56</sup> In 1740, two years before the outbreak of the war, when hostilities seemed all but certain, Mascarene, then lieutenant governor of the colony, wrote to the Duke of Newcastle that "the frequent rumors we have had of War being declared against France, have not as yet made any alteration in the Temper of the Inhabitants of this Province, who appear in good disposition of keeping to their oaths of fidelity."<sup>57</sup> When war finally broke out the Acadians remained true to their neutrality and their oath. Mascarene described the Acadian position during the war to Governor Shirley of Massachusetts.

The French Inhabitants as soon as the Indians withdraw from us brought us Provisions and continue to testify their resolution to keep their fidelity as long as we keep this Fort. Two Deputies arriv'd yesterday from Minas, who have brought me a Paper containing an association sign'd by most of the Inhabitants of that place to prevent Cattle being transported to Louisbourg according to the Prohibition sent them from thence. The French Inhabitants are certainly in a very perilous Situation, those who pretend to be their Friends and old Masters having let loose a parcel of Banditti to plunder them, whilst on the other hand they see themselves threatened with ruin and Destruction if they fail in their allegiance to the British government.<sup>58</sup>

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<sup>56</sup> Le Loutre was a key figure in both King George's War and in Father Le Loutre's War. Together these conflicts lasted from 1744-1755. From the time he first arrived in Louisbourg in 1737 until his death in 1772, Le Loutre was determined to evangelize through his religion, and equally determined to enlist Acadians in the fight against British rule. For an excellent overview of "Father Le Loutre's War," up until the Peace of Paris in Nova Scotia. See John Grenier's *The Far Reaches of Empire: War in Nova Scotia, 1710-1760* (Norman, OK: University of Oklahoma Press, 2008), 138-176 deal with Father Le Loutre.

<sup>57</sup> Akins, T.B., ed. *Selections from the Public Documents of the Province of Nova Scotia* (Halifax, NS: Charles Annad Publishing, 1869), 39.

<sup>58</sup> Brymner, Douglas. *Report on Canadian Archives*. (Ottawa, ON: Printed by S.E. Sawson, Printer to the Queen's Most Excellent Majesty, 1895), 102.

The Acadians wrote to Mascaren in 1742 that they were determined not to take up arms for or against Great Britain, implying thereby that they had the right to make a choice in the matter and that their chosen path was neutrality.<sup>59</sup> This loyalty, to local community above loyalty to one's language or religion, in many ways defined the Acadians. When peace was achieved through the Treaty of Aix-la-Chapelle in 1748 authorities rightly understood that it would be a temporary peace and this fact signaled an end of British acquiescence to the Acadian policy of neutrality. That is, the British position became more emphatic: British security demanded not just an oath of loyalty, but British citizens.

Between 1748 and 1755 the English attempted to fortify their situation in Nova Scotia, first by strengthening their presence with the founding of Halifax and bringing in more English settlers, and finally by insisting that Acadians swear an unequivocal oath of allegiance. In 1749 Nova Scotia's new governor, Edward Cornwallis, arrived at his North America post with 15 vessels and roughly 2500 settlers; they would begin construction of a new settlement and capital, Halifax. When Acadians from nearby villages came to investigate the activity Governor Cornwallis read from a declaration he'd been instructed to deliver. Cornwallis informed the Acadians that the Treaty of Utrecht had decided their status. They had no choice but to live as perfect subjects of the King of England.

His majesty has thought fit to cause a considerable number of British subjects to be forthwith settled in the said province. In order therefore that his majesty's subjects the French Inhabitants of this province may give all countenance, assistance and encouragement to the said settlers, I doe hereby declare ... altho. fully sensible that the many indulgences, which, he and his Royall Predecessors have shewn to the said inhabitants in allowing them the entirely free exercise of their Religion and the quiet and peaceable Possession of their Lands, have not met with a dutifull Return, but on the Contrary divers of the said Inhabitants have openly abetted or privately assisted His majesty's Enemies ... Yet His Majesty

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<sup>59</sup> Akins T.B. *Acadian and Nova Scotia: Documents Relating to the Acadian French and the First British Colonization of the Province, 1714-1758* (Cottonport, LA: Polyanthos Press, 1972), 139.

being Desireous of showing further marks of his Royal Grace to the said Inhabitants in hopes thereby to induce them to become for the future true and Loyall Subjects, is Graciously pleased to allow that the said inhabitants shall continue in the free exercise of their Religion as far as the Laws of Great Brittain doe allow the same as also the peaceable possession of such lands as are under their cultivation; Provided that the said Innhabitants do within Three months from the date of this Declaration take the oaths of Allegiance appointed to be taken by the Laws of Great Britain and likewise submit to such Rules and orders as may hereafter be thought proper to be made for the maintaining and supporting His Majestys Government; and Provided Likewise they doe give all possible countenance and assistance to such Persons as his Majesty shall think proper to settle this Province.<sup>60</sup>

Acadians now as a matter of a more aggressive colonial policy, were required to pledge full allegiance to the King. For their part, the Acadians still refused to take a new and unqualified oath, claiming a right of precedent, insisting on the right to renew the conventional agreement of an oath with a qualification of neutrality. “Prior to the founding of Halifax, the presence of a stable, agrarian Acadian population was vitally important to the security of the poorly supplied garrison...Acadian recalcitrance regarding an unconditional oath of allegiance was viewed by colonial officials as a mere annoyance that did not jeopardize England’s tenuous military position.”<sup>61</sup> This period of British settlement in Nova Scotia lessened the strategic importance of the Acadians themselves and though the issue went unresolved under the tenure of Cornwallis and his successor Peregrin Hopson, 1754 would put into effect what Cornwallis had insisted upon as a matter of policy.<sup>62</sup>

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<sup>60</sup> Akins, T.B. *Selections from the Public Documents of the Province of Nova Scotia* (Halifax, NS: Charles Annand, Publisher, 1869), 165.

<sup>61</sup> Brasseaux, Carl A. *The Founding of New Acadia: The Beginnings of Acadian Life in Louisiana* (Baton Rouge, LA: Louisiana State University Press, 1987), 18.

<sup>62</sup> *Ibid.* 18. “With the establishment of Halifax, however, the Acadians were no longer a vital cog in the garrison’s chain of supply, and British attitudes toward their reluctant subjects consequently changed dramatically...Forts were built, internal communications improves, and a large number of Protestant

When Major Charles Lawrence became governor in 1754, like his predecessors, he insisted on an unqualified oath, but unlike them, he would not stand for debate, discussion, or compromise. The Acadians were viewed as subversives, a threat to British security, and as essentially “un-British” in their insistence to neutrality. Furthermore, the Acadians possession valued farmlands was an impediment in attracting further Anglo-Protestant colonists to the region. The roundups of Acadians began in the summer of 1755. Acadians filled into a church in Grand Pre on September 5<sup>th</sup>, 1755 and Winslow had the doors barred and troops moved to surround the building.

Gentlemen. I have received from his Excellency, Governor Lawrence, the King’s Commission...for almost half a century [Acadians] have had more indulgences granted them than any of his subjects in any part of his dominions ... The Part of Duty I am now upon is what, though necessary, is very disagreeable to my natural make and temper, as I know it must be grievous to you who are of the same species ... And therefore, without hesitation, I shall deliver you His Majesty’s orders and instructions: That your Lands and Tenements, Cattle of all kinds, and Livestock of all sorts are forfeited to the Crown with all other of your Effects, saving your Money and Household Goods. And that you yourselves are to be removed from this province. Thus it is peremptorily His Majesty’s order, that the whole French Inhabitants of these Districts be removed ...<sup>63</sup>

By the end of 1755 about half the Acadian population had been shipped out of Nova Scotia destined for southern British colonies where they would more easily be made loyal British subjects. On August 9, 1775 an anonymous correspondent in Halifax wrote to Boston announcing the decision to remove the Acadians.

... We are now upon a great and noble Scheme of sending the neutral French out of this Province, who have always been secret Enemies, and have encouraged our

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colonists were established in Nova Scotia...Nova Scotia’s English administrators began to view them more and more as a potentially dangerous ‘foreign’ population. They thus interpreted the Acadian rejection of the oath of allegiance as a demonstration of pro-French sympathy”

<sup>63</sup> Faragher, John Mack. *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians from their American Homeland* (New York, NY: W.W. Norton and Company, 2005), 344-345.

Savages to cut our Throats. If we effect their Expulsion, it will be one of the greatest Things that ever the English did in America; for by all Accounts, that Part of the Country they possess, is as good Land as any in the World: In Case therefore we could get some good English Farmers in their Room, this Province would abound with all kinds of Provisions.”<sup>64</sup>

As late as 1760, the Acadians were still being rounded up in present day New Brunswick:

I therefore in the Evening of the 17<sup>th</sup> in Obedience to your Instructions embarked the Troops, having two Days hunted all around Us for the Indians and Acadians to no purpose, we however destroyed their Provisions, Wigwams and Houses, the Church which was a very handsome one built with Stone, did not escape. We took Numbers of Cattle, Hogs and Sheep, and Three Hogsheads of Beaver Skins, and I am persuaded there is not now a French Man in the River Miramichi, and it will be our fault if they are ever allowed to settle there again.<sup>65</sup>

The British program of deportation lay in the conviction that non-British individuals were not suitable for British liberties. This British policy of forced deportation was similar to one the British had recently prosecuted in Scotland after the Jacobite campaign of 1745 and its logic was the same, informed by anti-Catholic and anti-French sentiment.<sup>66</sup> Maya Jasanoff notes that the experience of the Acadians would be repeated, “but in reverse, among many British loyalists during the Revolutionary war. Like the Acadians, the loyalists, in their refusal to swear a loyalty oath would be met with organized state sponsored violence.”<sup>67</sup> Acadians were, “transported to distant destinations in New England vessels...forced from their homes by troops and officers from New England, and it was expected that those very men would repossess and resettle the

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<sup>64</sup> Laxer, James. *The Acadians: In Search of a Homeland* (Toronto, ON: Anchor Books, 2009), 95.

<sup>65</sup> Basque, Maurice. *Entre Baie Et Peninsule: Histoire de Neguac*. (Neguac, NB: Village de Neguac, 1991), 55.

<sup>66</sup> Jasanoff, Maya. *Liberty's Exiles: American Loyalists in the Revolutionary World* (New York, NY: Alfred A. Knopf, 2011), 155-156.

<sup>67</sup> *Ibid.* 154.

land.”<sup>68</sup> The link between the expulsion and resettlement is an important one: British policy towards its conquest signifies the imperial faith in socially engineering a British that the felt would succeed by filling the land with British subjects.<sup>69</sup> In 1758 Nova Scotia would convene its first legislative assembly. Their first order of business would be legalizing the confiscation of Acadian lands. This was followed, 12 days later by a proclamation by Governor Cornwallis published in the Boston Gazette requesting proposals for land settlement. This was followed by a second proclamation that was more specific:

Townships were being established to contain 100,000 acres. Land would be granted according to the grantee’s ability to enclose and cultivate it. Every head of a family was entitled to receive 100 acres of wild land for himself and an additional 50 acres for each member of his household. No quit rent would be charged for the first ten years; after that it would be one shilling for each fifty acres. The grantee would be required to plant cultivate, and improve one third of his holdings each decade until all was under cultivation.<sup>70</sup>

The opening of Acadian lands instigated the greatest wave of immigration Nova Scotia would experience until the loyalist migration. These settlers, known as the New England Planters, were part of the larger strategy of remaking Nova Scotia in the image of its New England neighbors. R.S. Longley writes that, “by the end of the year 1760, Annapolis

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<sup>68</sup> Faragher, John Mack. *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians from their American Homeland* (New York, NY: W.W. Norton and Company, 2005), 333.

<sup>69</sup> This project began with the founding of Nova Scotia, continued with the expulsion of the Acadians, the resettling of Acadian land with New England Planters (1759-1764), and finally culminated in the carving out of New Brunswick as a loyalist stronghold in 1783.

<sup>70</sup> Longly, R.S. “The Coming of the New England Planters to the Annapolis Valley.” *Nova Scotia Historical Society*, 33 (1961): 19.



County...was a New England.”<sup>71</sup> Between 1759 and 1768 historians estimate some 2000 families, roughly 8000 New Englanders took up Governor Cornwallis’s offer.<sup>72</sup>

### **Part III. Loyalism and Identity**

In her book, *Liberty’s Exiles: American Loyalists in the Revolutionary War*, Maya Jasanoff provides ample historical evidence supporting the thesis that during the American Revolution, which she views as a civil war between the colonists, those who remained loyal to the British Crown did not have a markedly different set of political expectations than those who took up arms against Great Britain in the cause for independence. Jasanoff demonstrates that loyalists brought similar political expectations with them to British North America when they were exiled after the American Revolution. She vividly describes a riot during the first election in New Brunswick in 1785, noting that it could have described Boston in the 1770’s:

Armies in the streets, unlawful arrest, unfair taxation, unjust elections: the scene might as well have come straight out of the thirteen colonies on the eve of the revolution. So might the loyalists’ rhetoric. In much the way that American patriots invoked the British constitution in pleading for just representation, Saint John loyalists protested recent events as a violation of their rights as British subjects. Their outrage was directed at the king’s colonial representatives, not against the king himself: to this extent they remained loyal...<sup>73</sup>

This is simply to say that British loyalists cannot be understood as simply representative of a “Tory” faction, a 18<sup>th</sup> century Jacobite acquiescing to Stuart prerogative. Rather loyalism was equally attached to principles of limited government based on a contract

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<sup>71</sup> *Ibid.* 28.

<sup>72</sup> Gwyn Julian, *Planter Nova Scotia, 1760-1815: Falmouth Township* (Wolfville, NS: Kings-Hants Heritage Collection, 2010), 17.

<sup>73</sup> Jasanoff, Maya. *Liberty’s Exiles: American Loyalists in the Revolutionary World* (New York, NY: Alfred A. Knopf. 2011), 189.

between subject and sovereign, grounded in the protection of individual property rights, and committed to a balanced constitution. In an otherwise glowing review of *Liberty's Exiles*, Gordon S. Wood writes, "[Jasanoff] is not quite able to explain why they [the loyalists] thought and acted as they did, except to say that they were distinguished from the American patriots by their persistent loyalty to the king. This seems to be begging the question rather than answering it."<sup>74</sup> Wood goes on to state: "The problem with her argument is that even Englishmen in the metropolis tended to behave in this riotous fashion. Indeed, the British people in the eighteenth century had a notorious reputation for being rowdy and ungovernable. So the brawling, liberty-loving loyalists may have been behaving not as revolutionary Americans but as defiant but ultimately loyal Britons."<sup>75</sup> This critique exaggerates the difference between the colonists – as if the American Revolutionaries suddenly transformed from colonists into "Americans" in July of 1776. Everyone in the 13 colonies *was* cut from the common stock of the British colonial and political experience. What then were their shared principles; what ultimately divided them as colonists?

Thomas Hutchinson's description Massachusetts colonials is apt enough to extend to all 13 colonies: "The Massachusetts people in general, were of the principles of the ancient whiggs; attached to the revolution [of 1689], and to the succession of the crown in the house of Hanover."<sup>76</sup> Attachment to the Glorious Revolution, the writings of John

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<sup>74</sup> Wood, Gordon, S. "The Good Losers." Rev. of *Liberty's Exiles: American Loyalists in the Revolutionary World* by Maya Jasanoff. *New York Review of Books*, March 10 2011. Web.

<sup>75</sup> *Ibid.*

<sup>76</sup> Griffith, Samuel, B. *The War for American Independence: From 1760 to the Surrender at Yorktown in 1781* (Champaign, IL: University of Illinois Press, 2002), 32.

Locke and Enlightenment thought, together with the ancient constitution, informed a philosophy of government that was preoccupied with individual liberty and hostile to arbitrary rule. Members of the metropolis and the colonies revered the English constitution for what they felt had been achieved in 1688-89: a balance between authority and freedom. James Chalmers, author of *Plain Truth*, a response to Paine's *Common Sense*, wrote: "This beautiful system (according to Montesquieu) our constitution is a compound of Monarchy, Aristocracy, and Democracy... Were I asked marks of the best government, and the purpose of political society, I would reply, the increase, preservation, and prosperity of its members [as] in no quarter of the Globe, are those marks so certainly to be found, as in Great Britain, and her dependencies."<sup>77</sup> Loyalists, as much as the Patriots, drew from both the English experience and from political philosophy, in informing their preference for reform over revolution. The Restoration, as much as the pride in the settlement of 1688-89, proved this point to them. Chalmers notes that, "we may predict, that his scheme of independency would soon, very soon give way to a government imposed on us, by some Cromwell of our armies. Nor is this sentiment unnatural, if we are attentive to constant experience, and human nature. The sublime Montesquieu, so aptly quoted by the Congress, unhappily corroborates our doctrine,

from (says he) a manner of thinking that prevails amongst mankind. They set a higher value upon courage than timorousness, on activity than prudence, on strength than counsel. Hence, the army will ever despise a senate, and respect their own officers. They will naturally slight the order sent them by a body of men whom they look upon as cowards, and therefore unworthy to command them, so that as soon as the army depends on the legislative body, it becomes a military one.<sup>78</sup>

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<sup>77</sup> Chalmers, James. *Tracts of the American Revolution, 1763-1776*, edited by Merrill Jensen (Indianapolis, IN: Hackett Publishing 2003), 486.

<sup>78</sup> *Ibid.* 486.

The fear of a Cromwell, the wisdom of the Restoration, and the settlement of 1688-89, should, according to loyalist thought, temper revolutionary and republican schemes and counsel reform instead. Experience counseled caution. Furthermore, the pride of place occupied by the English constitution, the stature that both loyalist and revolutionary accorded to British liberties, combined with their shared opposition to British imperial policy, suggests a fracture in the understanding of political action and prudence, not on the need for reform. The colonists, both patriot and loyalist, understood the legacy of 1688-89 differently than those subjects and authorities of the realm; this difference in understanding fundamentally hinged on the notion of Parliamentary Supremacy.

Bernard Bailyn notes that the colonies rejected the supremacy of the English Parliament, the emergent doctrine of the 1688-89, and the public orthodoxy of the realm. From the colonial perspective sovereignty in the empire was divided. For the British, Parliamentary Supremacy was the essence of the English constitution, post-1689. Sovereignty, according to the understanding of 1688-89, was indivisible, was unitary, and was located in Parliament, the composite body of King, Lords, and Commons. Blackstone equated sovereignty with supremacy, “*emphatically styled the Supreme Being,*” endowed with, “*the three grand requisites of wisdom, of goodness, and of power. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.*”<sup>79</sup> Blackstone understood sovereignty and the legislative capacity to be identical terms, writing, “*sovereignty and legislature are indeed incontrovertible terms; one cannot subsist without*

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<sup>79</sup> Blackstone, William. *Commentaries on the Laws of England, Vol. I*, edited by George Sharswood (Philadelphia, PA: J.B. Lippincott Company, 1908), 46.

the other.”<sup>80</sup> In the eighteenth century English subjects of the realm understood their politics as exceptional due to the emergence of Parliament as the dominant part of the constitution. The supremacy of Parliament then was the very basis of English liberty and this Whig view was shared, not only by those who self-identified as Whigs but by all those in the administration of government, and this view was uncontested, up to and including the Crown. In the eighteenth century an English subject understood their politics as exceptional due to the emergence of Parliament as the dominant part of the constitution. The supremacy of Parliament then was the very basis of English liberty and this Whig view was shared, not only by those who self-identified as Whigs but by all those in the administration of government all the way up to the Crown itself. From the colonial perspective local controversies took recourse and appeal to English precedent. On the strength of precedent, colonists came to understand their political liberties; there was no precedent for disputes regarding the colonies and Great Britain, disputes that dealt with questions of imperial control. In the colonies, politics wasn’t reflected in Parliamentary Supremacy as much as the relationship between the Governor, the Council, and the Assembly. The majority of the laws that governed the colonists were passed by the colonial legislatures. From the colonial point of view, sovereignty in the empire was in point of fact divided, both by right and through practice.

#### **Part IV. Intolerable or Founding Document: The Royal Proclamation of 1763**

The Royal Proclamation of 1763 is considered the first constitutional document of Canada, albeit, its origins predate Confederation by over 100 years. After signing of the Treaty of Paris in 1763, France ceded not only Acadia but almost all of its territorial

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<sup>80</sup> *Ibid.* 33.

claims to Britain. This included New France, which the British renamed Quebec. The British set about re-defining the borders and settling territorial questions, i.e., disputes, in the wake of their new acquisitions. At the time, Quebec stretched from the coast of Labrador, running southwest, and finally stopping where the Ohio River met the Mississippi. The Proclamation, intended in large part to address native unrest, most famously represented in Pontiac's rebellion, by creating a boundary line between the British colonies on the Atlantic coast and indigenous lands west of the Appalachian Mountains.

King George III reserved this land west of the "proclamation line" to the "several nations or tribes of Indians" that were under his "protection" as their exclusive "hunting grounds." Furthermore, the Proclamation went on to prohibit any private person from directly purchasing land from native tribes or settling west of the proclamation line. This right of purchase was reserved for the Crown alone. As detailed in the Proclamation, George described the circumstances by which land purchases could take place. An aboriginal tribe, if they chose, could sell their land rights to a representative of the British monarch. This established the constitutional basis for Aboriginal land claims in British North America. According to aboriginal tribes it validated land claims by common law<sup>81</sup>,

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<sup>81</sup> Vogt, Ray. *Whose Property: The Deepening Conflict Between Private Property and Democracy in Canada* (Toronto, ON: University of Toronto Press, 1999), 96. In Canada, it was not until the 1973 Calder decision that 'Aboriginal title' or Indian title' of the Royal Proclamation was acknowledged as arising from the common law. The Calder decision recognized aboriginal land title in British Columbia in the case based upon the Royal Proclamation. "The real significance of Calder lies in its strong suggestion that Aboriginal title is not necessarily limited to the confines of the Royal Proclamation of 1763, but may be based on the concept of prior occupation of lands." Prior to Calder, "Canadian courts attributed legal status to Aboriginal title solely on the basis of the 1763 proclamation. While this gave some legal support to Indian claims, and has indeed been used extensively by First Nations and other Aboriginals to press their claims, it was subject to geographical and other uncertainties of the proclamation. The proclamation makes no explicit reference to pre-existing rights; it does not apply to the vast land granted to the Hudson's Bay Company; and it does not clearly apply to the westernmost provinces."

acknowledged rights of prior ownership, all of which has resulted in this Proclamation being referred to by many the “Indian Magna Carta.”<sup>82</sup>

Two distinct schools of thought exist concerning the nature and significance of the Royal Proclamation. The first argues that the document represents a Magna Carta for Canadian Indians...A second interpretation concedes the proclamation’s short-term, but not its long-term, importance...designed merely to deal with circumstances peculiar to the day.<sup>83</sup>

By recognizing native rights of land ownership, occupation of land became a recognizable legal basis for native land claims and its heritage has been one of recognition. Western tribes naturally claimed this acknowledgment as political right.

The Proclamation not only put a Crown monopoly on land west of the proclamation line - it voided settlements made prior to 1763.<sup>84</sup> The Lockean understanding of the role of government as, first and foremost, involving the preservation and cultivation of private property gave philosophical heft to colonial indignation. Furthermore, the cost of garrisons established along the proclamation line resulted in the raising of taxes, notably the Stamp Act.

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<sup>82</sup> McHugh, Paul, “The Politics of Historiography and the taxonomies of the Colonial Past: Law, History, and the Tribes,” in *Making Legal History: Approaches and Methodologies*, edited by Anthony Musson and Chantal Stebbing (New York, NY: Cambridge, University Press, 2012), 171. “First Nations put it at the very heart of their claims, seeing it as an enduring acknowledgment of their aboriginal rights, including those to land and self-government inside the Canadian constitutional system. They originate its stature in the royal foundation of Canada as a colony, and hence, they believe its ongoing stature runs arterially through the constitutional bloodstream of the country. Yet...the pattern of judicial analysis of its legal status, past and present, has been far from consistent.”

<sup>83</sup> Surtees, Robert, J. “Land Cessions, 1763-1830” in *Aboriginal Ontario: Historical Perspectives on the First Nations*, edited by Edward S. Rogers and Donald B. Smith (Toronto, ON: Dundurn Press, 1994), 93.

<sup>84</sup> Williams, Robert, A. Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York, NY: Oxford University Press, 1990), 230. “Americans such as Wharton Dunmore, Franklin, and Washington were more than ready by the early 1770s, the eve of their Revolution, to pursue their self-interest directly with the Indians without the troubling mediatory prerogative of an alien-born king” On page 279 Williams notes that Washington “directed his surveyor to violate the proclamation, “dismissing it in his own words as “a temporary expedient to quiet the minds of the Indians.”

The limitation on the colonial right to push settlements westward was compared to the struggles of 17<sup>th</sup> century Whigs. Locke's notion that the function of government, i.e., that "the great and chief end, therefore, of Men's uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property,"<sup>85</sup> revealed a divergence in between the aspirations of colonial expansion and acquisition and demands of governance on the part of the Crown. It also revealed that the logic of precedent and "time immemorial" cut both ways in debate, especially in regards to conquest. The understanding that private property and land development were foundational to citizenship and identity, informed much of the colonial indignation to the act. As Robert A. Williams has argued, "The tyranny of a government devoted to destroying individual property, rather than rightfully preserving it, demanded the fiercest resistance"<sup>86</sup> The acknowledgement of rights in conflict with colonial ambitions has led some to identify the Proclamation, along with the Quebec Act, as the basis of multiculturalism in Canada – an acknowledgment of English, French, and Native populations.<sup>87</sup> Though the British did recognize the variant ancestries of their new subjects, British policy, especially in regards to grants of self-governance were non-existent in the Proclamation though they nevertheless established a claim that would gain force and be reflected in Canadian

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<sup>85</sup> Locke, John. *The Second Treatise on Government*, edited by. C.B. Macpherson (Indianapolis, IN: Hackett Publishing, 1980), 65.

<sup>86</sup> Williams, Robert, A. Jr., *The American Indian in Western Legal Thought: The Discourse of Conquest* (New York, NY: Oxford University Press, 1990), 280.

<sup>87</sup> Saul, John Ralston. *A Fair Country: Telling Truths About Canada* (Toronto, ON: Viking, 2008), 117-118. "The Royal Proclamation and the Quebec Act represent the formal foundation of Canadian civilization...the legal basis for Canadian civilization." This position obviously assigns an intent most certainly absent from those directly involved in drafting either the Royal Proclamation and the Quebec Act.



constitutionalism, not because it was there by intention, but because it was taken and claimed as lawful.

The Royal Proclamation, in redrawing boundaries regarding its new territory created the provinces of Quebec, West and East Florida, and Grenada. The proclamation stated that colonial legislatures would be called when circumstances permitted. Quebec's boundaries were marked and it became the second French speaking territory acquired by the British after Acadia.

The proclamation asserted that the King had given "express power and direction" to the Governor, "that, so soon as the state and circumstance of the colony would admit thereof, the Governor should summon and call a General Assembly." It was furthermore, solemnly promised that, "until such Assembly be called all persons inhabiting in, or resorting to, our said colony may confide in our Royal Protection for the enjoyment of the benefit of the laws of our realm of England." In the commission to General Murray, appointing him Captain-General and Governor-in-chief of Quebec, and in the commission of his successor, General Carleton, the King repeated the promise of the proclamation.<sup>88</sup>

The provision of the Proclamation calling for an eventual assembly was vague at best. The Test Oath excluded French Catholics from governing and holding administrative positions. If an assembly *were* to be called it would have resulted in a British oligarchy, comprised of a small number of British merchants. Regarding governance then, the Proclamation satisfied no one. British merchants didn't want to move to a province without a legislature. British merchants already living in Quebec were unhappy with their lack of self-governance. The Canadiens, in losing the French civil and criminal code, not to mention the language barrier, had no voice in government - until the Quebec Act of 1774.

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<sup>88</sup> Watson, Samuel, James. *The Constitutional History of Canada, Vol. I* (Toronto, ON: Adam, Stevenson and Co., 1874), 16.

The Quebec Act of 1774 redrew the Quebec's territorial boundaries, pushing its borders further into Indian Territory, effectively tripling it in size. This in itself might not have been controversial but, in seeking to accommodate the French inhabitants of Quebec, the Act guaranteed them the free practice of Catholicism; it allowed Catholics to hold positions of administrative and political authority; Catholic bishops could once again collect tithes and therefore take on a greater power in the public arena; French civil law was restored, which significantly applied to property law (though the common law remained for public administration and criminal prosecution); implicitly in all the provisions of the Act, the French language was accepted as the language of the people.

These concessions to the French populace combined with the expansion of Quebec territory represented a betrayal of Protestant and British interests to the American colonists. Robert A. Williams writes: "Resigned to the impossibility of enforcing the policy of a closed western frontier, the Ministry reluctantly decided to turn over control of the Northwest wilderness to the Canadians of Quebec... Recognizing that no Englishman would desire to come under the Catholic and alien-inspired government of a Canadian-controlled Northwest."<sup>89</sup> American colonists were outraged. The 1<sup>st</sup> Continental Congress petitioned Parliament stating:

In the last session of parliament an act was passed ... for extending the limits of Quebec, abolishing the English and restoring the French law, whereby great numbers of the British freemen are subjected to the latter, and establishing an absolute government and the Roman Catholic religion throughout those vast regions.<sup>90</sup>

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<sup>89</sup> Williams, Robert A. *The American Indian in Western Legal Thought* (New York, NY: Oxford University Press, 1990), 266.

<sup>90</sup> Davis, Derek, H. *Religion and the Continental Congress, 1774-1789, Contributions to Original Intent* (New York, NY: Oxford University Press, 2000), 154.

Americans colonists viewed the Quebec Act, in its establishment of French civil law and Roman Catholicism within the province, as intolerable to their British Constitution.

Asserting that it was ‘at present inexpedient to call an Assembly,’ the Quebec Act conferred all legislative authority, except the power of taxation which was retained by Parliament, on the appointed governor and the appointed Council, empower them to make laws ‘for the Peace, Welfare, and Good Government of the Province.’<sup>91</sup>

In establishing both legal and religious privileges, non-British in character, the Act effectively set up a barrier between the colonists and the West. Westward expansion, under the Quebec Act, would signify submitting to both a system of law and culture that British colonists found inimical. Furthermore, the second Governor, Thomas Carleton, had little faith in the possibility of assimilation, stating that British government in Quebec wouldn’t produce, “the same fruits as at Home” because he felt it was impossible for the “Dignity of the Throne or Peerage to be represented in the American Forests.”<sup>92</sup> Carleton as well saw little hope for assimilation.

There is not the least probability this present superiority (French Canadians) should ever diminish. On the contrary 'tis more than probable it will increase and strengthen daily. The Europeans who migrate will never prefer the long, inhospitable Winters of Canada to the more cheerful Climates and more fruitful soil of his Majesty's Southern Provinces. While the severe Climate and the Poverty of the Country discourages all but the Natives, its Healthfulness is such that the Canadians multiply daily so that barring a Catastrophe shocking to think of, this Country must to the end of Time be peopled by the Canadian race.<sup>93</sup>

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<sup>91</sup> Reid, John Phillip. *The Authority of Law: The Constitutional History of the American Revolution* (Madison, WI: University of Wisconsin Press, 2003), 23.

<sup>92</sup> Jasanoff, Maya. *Liberty's Exiles: American Loyalists in the Revolutionary World* (New York, NY: Alfred A. Knopf, 2011), 60.

<sup>93</sup> Shortt, Adam and Arthur G. Doughty, eds. *Canada and its Provinces: A History of the Canadian People and Their Institutions By One Hundred Associates, Vol. XV* (Toronto, ON: Glasgow, Brook, and Co., 1914), 137.

Carleton's view represents the more broadly felt abandonment of consensus or assimilation. Uniformity based on British institutions was rejected in favor of a responsiveness to culture. In this alone the British ethos was diverging from the American one. And in this shift in the British ethos it was the British who were changing, not the Americans who continued to oppose accommodation to the French population.

### **Part V. Consensus and the Stamp Act**

Resistance to the Stamp Act in 1765 is representative of the shared understanding between those who would be future loyalists and patriots in the colonies. After the Seven Years War the critical status of English finances initiated a series of Parliamentary Acts, spearheaded by Prime Minister and Chancellor of the Exchequer, George Grenville that sought to replenish the treasury by raising colonial tax revenues.<sup>94</sup> In March 1764 Grenville presented Parliament with the American Revenue Act of 1764, i.e., the Sugar Act. The intent of the Act was to introduce, "new provisions and regulations...for improving the revenue of this Kingdom...it is just and necessary that a revenue should be raised...for defraying the expenses of defending, protecting, and securing the same."<sup>95</sup> The problematic constitutional issues of the Sugar Act were fully engaged by the colonists when the Stamp Act was passed the following year. The Stamp Act essentially required that printed materials in the colonies used stamped paper produced in London that was impressed with a revenue stamp.

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<sup>94</sup> For a detailed and definitive contemporary work on the Stamp Act see Edmund S. Morgan and Helen M. Morgan's *The Stamp Act Crisis: Prologue to Revolution* (New York, NY: Collier Books: New York, 1971).

<sup>95</sup> *Ibid.* 15-16.

Opposition to Grenville's tax, that is the English ability to unilaterally tax the colonies as a revenue source, was quick and immediate.

From this moment nothing was heard from America but questions on the right of taxation, and whether the colonists had not carried with them all the birthrights of English freemen: Whether their assemblies were not parliaments, and whether any man could be taxed who was not represented...and while all obedience was acknowledged to the Crown, the jurisdiction of the British Parliament came to be undervalued and set at nought. Every assumption of liberty that had been pleaded here against our kings, was now set up against the jurisdiction of England.<sup>96</sup>

That is, with the Stamp Act, the issue of the liberal ethos would be expressed in the vernacular of the ancient constitution: liberty is grounded in property, specifically by limiting what a government can compel a subject to do. The New York Assembly, and future loyalist stronghold, issued a petition declaring the sacred nature of consenting to taxation: "Without such a Right vested in themselves, exclusive of all others, there can be no Liberty, no Happiness, no Security; it is inseparable from the very Idea of Property, for who can call that his own, which may be taken away at the Pleasure of another?"<sup>97</sup> No less a "Tory" than Thomas Hutchinson, "pointed out that, being Englishmen, the colonists ought not to be taxed by a legislature in which they were not represented...the important question was simply whether or not Parliament ought to raise a revenue in America. He thought not, and he recommended that Parliament recognize that its power

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<sup>96</sup> Walpole, Horace. *Memoirs of the Reign of King George III, Vol. II* (New Haven, CT: Yale University Press, 2010), 72-73 In a footnote Walpole qualifies his use of the word "*acknowledged* obedience to the Crown." He writes: "I say acknowledged, because they thought it prudent in their quarrel with the Parliament, to shelter themselves under the banner of the Crown, and because they founded themselves on their charters, which were grants from the Crown. At the same time there were some men amongst them of a more democratic spirit. It was much talked of at this era, that a wealthy merchant in one of the provinces had said, 'They say King George is a very honest fellow; I should like to smoke a pipe with him,'" so little conception had they in that part of the world, of the majesty of an European monarch!"

<sup>97</sup> Reid, John Phillip. *Constitutional History of the American Revolution: The Authority of Rights* (Madison, WI: University of Wisconsin Press, 2003), 45.

to tax the colonies had lapsed, either by disuse, or perhaps by the original removal of the colonists out of England.”<sup>98</sup> In point of fact, up until the Stamp Act became law, Hutchinson’s loyalty was firmly with the colonists. In 1764 Hutchinson sent a defense of colonial right to self-taxation that he hoped would be published anonymously; which is to say that Hutchinson too opposed Parliament’s claim that it was able to tax the colonies without their consent.

He had opposed the Act, because he believed that it would violate their rights, not merely their charter rights but their natural rights as men. But he also believed in the supremacy of Parliament, believed in it to the point where defiance of Parliamentary authority, however that authority was exercised, became synonymous with revolution... The only way out of the dilemma, as Hutchins saw it, was to persuade the members to undo the injustice they had committed... Prudence in the last analysis was Hutchinson’s solution for the impasse between Parliamentary supremacy and colonial rights.<sup>99</sup>

Prudence itself becomes the hallmark of conscience in a regime that seeks to balance public order with individual conscience and in acceptance of authority. In other words, tipping points for revolutions are as much matters of prudence as they are of ideology. The difference between the Sons of Liberty and, a reviled figure such as Hutchinson, is that the former prioritizes abstract right above all else; the latter operates, at least in this instance, according to prudence and loyalty. In fact the principle of prudence was one of the most significant components of the ultimate apologia of the American Revolution on the grounds that, it too was a revolution averted, not a revolution made. That is to say, prudence, as opposed to audacity, was the foundation upon which both loyalists and revolutionaries characterized their respective positions. There is reason to think though,

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<sup>98</sup> Nelson, William, H. *The American Tory* (New York, NY: Oxford University Press, 1961), 6.

<sup>99</sup> Morgan, Edmund S., Helen M. Morgan. *The Stamp Act Crisis: Prologue to Revolution* (New York, NY: Collier Books, 1971), 278.

that, in the years leading up to the revolution, between 1765 and 1775, there was, at least as much audacity as prudence at work amongst the patriots. Michael Kammen notes the different ways Madison characterized the revolutionaries: “Madison’s [1828] stress...upon the cautious reluctance of the revolutionaries...contrasts markedly with his emphasis forty years before, when he proudly praised the founders for their bold vision and willful innovations.”<sup>100</sup>

In June of 1766 the Massachusetts House of Representatives sent a letter calling for joint colonial action and on October 7 delegates from nine British colonies met in New York City to coordinate their efforts in resistance. This body, known as the Stamp Act Congress, would be the first collective effort of resistance among the colonists and their objections and principles would remain consistent through until 1783. On October 19, 1766 the Congress produced a Declaration of Rights and Grievances that listed 14 points to “his Majesty’s Person and Government.” The first point states: “That his Majesty’s Subjects in these Colonies, owe the same Allegiance to the Crown of Great-Britain...and all due Subordination to that August Body, the Parliament of Great-Britain.” What was contrary to “due Subordination” was listed in Article V: “That the only Representatives of the People of these Colonies, are Persons chosen therein by themselves, and that no Taxes ever have been, or can be Constitutionally imposed on them, but by their respective Legislatures.” The petitions, sent to both House of Lords and Commons, were rejected by both bodies. The rioting and resistance that characterized

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<sup>100</sup> Jasinski, James, “Idioms of Prudence in Three Antebellum Controversies” from *Prudence: Classical Virtue, Postmodern Practice*, edited by Robert Hariman (University Park, PA: Penn State University Press, 2004), 168.

the reaction and indignation to the Stamp Act can convincingly be attributed to, not just the Sons of Liberty, but to represent a greater consensus.

For, “future loyalists were vocal opponents of the Stamp Act, though these protests also saw the first systematic attack against American ‘tories’ suspected of wanting to enhance royal and aristocratic power.”<sup>101</sup> The target of these “tory” attacks were mostly administrative figures who attempted to enforce the law. Figures like Zachariah Hood, a Maryland Stamp Tax collector and New York’s Lt. Governor Colden Cadwallader who put the tax into effect.<sup>102</sup> The greatest sign of unanimity was in the wide spectrum of those who participated in the riots, not just the nascent Sons of Liberty but, representatives from all walks of life. In a letter to Parliament British Commander-in-chief, General Thomas Gage wrote:

It is difficult to say, from the highest to the lowest, who has not been accessory to this insurrection, either by writing or mutual agreements to oppose the act, by what they are pleased to term all legal opposition to it. Nothing effectual has been proposed, either to prevent or quells the tumult. The rest of the provinces are in the same situation as to a positive refusal to take the stamps; and threatening those who shall take them, to plunder and murder them, and this affair stands in all the provinces, that unless the act from, from its own nature, enforce itself, nothing but a very considerable force can do it.<sup>103</sup>

The Stamp Act was repealed in 1766, but not due necessarily due to colonial resistance.

George Grenville was replaced as Prime Minister by Lord Rockingham. Rockingham was as concerned with his own political weakness and the necessity of appeasing mercantile

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<sup>101</sup> Jasanoff, Maya. *Liberty’s Exiles: American Loyalists in the Revolutionary World* (New York, NY: Alfred A. Knopf. 2011), 26.

<sup>102</sup> Morgan, Edmund S., Helen M. Morgan. *The Stamp Act Crisis: Prologue to Revolution* (New York, NY: Collier Books, 1971), 196.

<sup>103</sup> Burke Edmund. *Burke’s Speeches and Letters on American Affairs*, edited by Ernest Rhys (New York, NY: D.P. Dutton and Co., 1911), 43.



interest, as much as he was responsive to the colonists. In the end, it was the economic interests of the realm that can be credited with the law's repeal.

Accompanying the repeal of the Stamp Act was the Declaratory Act, which sought to answer, with a degree of finality, the constitutional questions raised by the crisis. The Declaratory Act held that the English Parliament had the right to, "make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever." By 1776 the American Patriots went to war on the principle that the English Parliament had no right to this claim. Those who stayed Loyal to the Crown, though less audacious, would insist upon attachment to the British imperium and the colonial freedoms they were accustomed to.

#### **Part VI. Ties That Bind: Joseph Galloway and Union**

Joseph Galloway, the speaker of the Pennsylvania assembly and colonial loyalist, believed he had located the precise point of controversy between the colonies and Britain. Furthermore he believed he had a solution. In 1774 Galloway claimed, "It is a dispute between the supreme authority of the state, and a number of its members, respecting its supremacy, and their constitutional rights."<sup>104</sup> Galloway was correct. The doctrine being developed by the patriots rejected the settlement of 1688-89, or rather radicalized its principle. Whereas the Lockean component of 1688-89 had granted supremacy to Parliament, the American appropriation of this principle would grant supremacy to a new political symbol, "the people."<sup>105</sup> The American innovation would result, in large part,

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<sup>104</sup> Jensen, Merrill. *Tracts of the American Revolution, 1763-1776* (Indianapolis, IN: Hackett Publishing, 2003), 353.

<sup>105</sup> Bailyn, Bernard. *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1992), 202. Bailyn writes: "...there is no more fascinating spectacle in the

according to a tension that hinged on the understandings of representation, consent and subordination, as colonies of the realm.<sup>106</sup>

A key question for Galloway, and for all others during the debates leading up to independence, was locating the source of colonial liberty. The answer to this question, would play a large part in how colonists responded to British encroachments. Galloway firmly rejected the notion that colonial rights derived from natural law; rather, the colonies were political societies, born of charters, though by heritage and birthright they were British.

Seeing the that the colonies have, ever since their existence, considered themselves, and acted as perfect members of the British state, obedient to its laws until the year 1765: there must, one would imagine, be something lately discovered which as convinced them of their mistake, and that they have a right to cast off their allegiance to the British government. We can look for this in in no place so properly as in the late declaration of American rights...to suppose therefore, that a right can thence be derived to violate the most solemn and sacred of all covenants; those upon which the existence of societies and the welfare of millions depend; *is, in the highest degree, absurd.*<sup>107</sup>

On that basis Galloway could see no constitutional right that counseled or permitted independence. Galloway stated, “it cannot be difficult to determine from whence the rights of America are derived. They can be traced to no other foundation, but that wherein they were original established. This was in the constitution of the British state.

Protection from all manner of unjust violence, is the great object which men have in

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history of American political thought than the efforts that were made – starting in the struggle with England over the extent of Parliament’s power and continuing into the debates on the ratification of the Federal Constitution.”

<sup>106</sup> See Robert Calhoun’s “‘I Have Deduced Your Rights’: Joseph Galloway’s Concept of his Role, 1774-1775.” *Pennsylvania History* 35 (1968): 356-378.

<sup>107</sup> Jensen, Merrill. *Tracts of the American Revolution, 1763-1776* (Indianapolis, IN: Hackett Publishing, 2003), 365-366.

view, when they surrender up their natural rights, and enter into society.”<sup>108</sup> As such, their British liberty was grounded in, and depended upon protection of the property they can rightly claim as their own. Liberty is grounded in the protection of property, and therefore, the grievances of the colonists are at once legitimate and with a precedent for redress in British constitutionalism:

That this power of legislation in the people, derived from the share they held in the lands, was originally, and yet is, of the essence of the English government; and ever was, and still continues to be, the only check upon encroachments of power, the great security against oppression, and the main support of the freedom and liberty of the English subjects. And its excellence consists in affording, to every delegate, at all times, their true circumstances, their wants, their necessities, and their danger, to which the supreme authority of the nation, without a knowledge of which it is impossible to form just or adequate laws; and when representative, to consult, advise, and decide upon such provisions, as are proposed for their relief, or safety; giving their negative to such as are mischievous or improper, and their assent to those which remove the mischief, or afford a remedy. Here we have a perfect idea of civil liberty, and free government, such as is enjoyed by the subject in Great Britain.<sup>109</sup>

The very basis of liberty then was property that comprised a visible share or representation in the legislative body. This, according to Galloway afforded grounded government responsiveness to their relationship with law, for without this grounding, “their true circumstances, their wants, their necessities, and their danger, to which the supreme authority of the nation, without a knowledge of which it is impossible to form just or adequate laws.”<sup>110</sup> Galloway, in Parliament, saw a means of recourse for the colonial grievances; he believed in the responsiveness of Parliament as elemental to the

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<sup>108</sup> *Ibid.* Pg. 377.

<sup>109</sup> Jensen, Merrill. *Tracts of the American Revolution, 1763-1776* (Indianapolis, IN: Hackett Publishing, 2003), 378. Galloway notes the historical basis of English liberty stating: “All historians agree that the present form of government was settled in Britain, by our ancestors, the Anglo-Saxons; and so far as we have any knowledge of their government in their own country, we know that the proprietors of land, gave their personal attendance in the legislative council, and share the power of making their laws.”

<sup>110</sup> *Ibid.* Pg. 381.

British constitution and the legal and binding course of the colonies. The problem for American colonists, he understood, was an absence of representation in the legislative body. That Galloway understood politics historically, that is, determined by liberties circumscribed and won as a political patrimony, rather than as a bequest of natural law, informed Galloway's understanding that the colony's stake in government had never been absolute and had developed in a subordinate role. Nevertheless, according to the colonies development and its current maturity, they possessed a full claim upon their liberties as Englishmen. This subordinate role, or rather the level of subordination, existed as historical fact. Galloway writes:

In the infant state of their societies, they were incapable of exercising this right of participating in the legislative authority in any mode. ...But now they are arrived at a degree of opulence, and circumstances so respectable, as not only to be capable of enjoying this right, but from necessity, and for the security of both countries to require it.<sup>111</sup>

Galloway then is well aware of the need for imperial reform in regards to the colonies. His method of redress however depends upon his understanding of the American colonies as part of a larger organism whose political bonds cannot be broken without forsaking the benefits of their heritage and the bonds of honor that unite them.

While Galloway's approach to the question of reform or revolution was considered according to constitutionalism, his understanding of political power is rooted in the Lockean understanding of representation and in the 1688-89 expression of Parliamentary Supremacy. Galloway states, "there must be in every state a supreme legislative authority, universal in its extent, over every member...the legislative authority in every government must of necessity be equally supreme over all its members. That to

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<sup>111</sup> *Ibid.* 381.

divide this supremacy by allowing it to exist in some cases, and not in all...is to weaken and confound the operations of the system, and to subvert the very end and purpose for which it was formed; in as much as the vigour and strength of every machine, whether mechanical or political, must depend upon the consistency of its parts, and their corresponding obedience to the supreme acting power.”<sup>112</sup>

Galloway did not accept the symbol of “the people” as representative of a political truth. Subjects and sovereign existed in a relation of reciprocity. Galloway understood English supremacy as existing in Parliament, as an institution apart from those who were its subjects; it functioned according to mutual duties and obligations one owed to the other. Parliament, then was emphatically, was not “of the people.” Rather, government was in relation to people, and the people, or subjects had representation and participation in it. “Protection for the state demands, and entitles it to receive, obedience and submission to its laws from the subject; And obedience to the will of the state, communicated in its laws, entitles the subject to its protection.”<sup>113</sup> Herein then is an insistence by Galloway on the sanctity of covenant between ruler and ruled that, in its rejection of individual authority, claims a greater and more essential relationship between subject and sovereign. Either they could forfeit their oath and then remove themselves from the stability their relationship, yet the political, in this sense was determined and understood as a *relationship* as much as it was a grant on the part of the citizen to be ruled. This relationship between subject and government then, wherein the people have a share in the supremacy, is permanent in its foundations.

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<sup>112</sup> *Ibid.* 353-355.

<sup>113</sup> *Ibid.* 365.

Much therefore depends on the particular form, or constitution of the society...in a free government of the mixt form, where the people have a right to a share, and compose a part of the supreme authority its foundation will be solid, and its continuance permanent; because the people themselves, who are interested in its preservation, partake of the power which is necessary to defend it.<sup>114</sup>

Galloway held to the belief in remedy and reform over a break with the supreme authority of Parliament. The right of British subjects to participate in the supreme authority has never been lost, but must simply be redressed by and through the British Parliament. For it is in the British connection that there has been consensus. A break with Great Britain signifies to Galloway a break in the consensus and a rupture in the stability they have enjoyed. Abandoning their “Britishness,” constitutes a loss of identity and prior consensus that would make themselves vulnerable to a, “diversity of interests, inclinations, judgements, and conduct, that it will ever be impossible for them to unite in any general measure whatever, either to avoid any general mischief, or to promote any general good.”<sup>115</sup>

What Galloway proposed instead of independence was a relationship with the Crown that resembled what would eventually be achieved in Canada. Galloway’s plan was equally a call for imperial reorganization. Under his plan Galloway proposed a joint British and American legislature, “for regulating the administration of the general affairs of America...under which government, each colony shall retain its present constitution.” This government would be administered by a royally appointed “President General” and a “Grand Council” chosen every three years by representatives of the different colonies. This President-General, “holds his office at the pleasure of the King,” and by the consent

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<sup>114</sup> *Ibid.* 377.

<sup>115</sup> *Ibid.* 384.

of the Grant-Council, “hold[s] and exercise[s] all the legislative rights, powers, and authorities necessary for regulating and administering all the general police and affairs of the colonies.” The plan, in keeping with the need for supremacy, noted that it was “an inferior and distinct branch of the British legislature, united and incorporated with it,” one which retained autonomy in colonial affairs. Galloway’s proposal then asserted that the colonies could continue to enjoy their traditional autonomy of their colonial governments, that the Grand Council maintained jurisdiction of the general concerns of the colonies. An Act of Parliament meanwhile that concerned the colonies required the consent of the Grand Council. According to the language of the proposal, “that any of the said general regulations may originate, and be formed and digested, either in the Parliament of Great Britain or in the said Grand Council; and being prepared, transmitted to the other for their approbation or dissent; and that the assent of both shall be requisite to the validity of all such general Acts and Statutes.”<sup>116</sup> At the core of Galloway’s compromise was an understanding that the Parliamentary freedoms were territorially subscribed through representation. Furthermore, Galloway was steadfast in his insistence on the unifying consensus afforded by British constitutionalism and ultimate supremacy resting in a political union with Great Britain. Galloway’s plan then sought to create representation in the colonies, a share in the supremacy of the legislative branch where they would have autonomy over domestic matters but be united in the great consensus of English constitutionalism through their political union with Great Britain.

An approximate realization of Galloway’s vision would be eventually achieved in Canada – a continuing symbol of the unbroken covenant that Galloway held to be so

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<sup>116</sup> *Ibid.* All quotes from the *Proposal from Union* taken from 390-393, Jensen.

central for mixed constitutions and their capacity to reform themselves. The Pennsylvania Assembly had the last word on Galloway's loyalism:

That by an Act of Assembly of this Commonwealth for that purpose lately made and provided the said Joseph Galloway is declared attainted of High Treason and all the real and personal Estate which he had and held in the said Commonwealth declared forfeited...<sup>117</sup>

## **Part VI. Conclusion: British Liberty and Canadian Sentiments**

This dissertation attempted to articulate principles of the Canadian liberal ethos according to political philosophy as articulated through its historical development. Approaching a "Canadian liberal ethos" is more difficult than most – some would claim that no such "ethos" exists. Canada understands, to a large degree, according to difference, it understands itself as multicultural, both as a descriptive fact, but also as it is enshrined in the Canadian Charter of Rights and Freedoms, section 27, wherein it states, "this Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."<sup>118</sup> To philosophically approach then the problem requires looking at the "liberal ethos" according to one particular representation of it – British liberty. The question of political liberty, ultimately relates to the question of authority and its source – what is being submitted to. For this reason an examination of a philosophical structures, the Voegelinian philosophical anthropology, and its expressions and deformations in Western Europe, finally its further articulations in Great Britain illustrate how liberty and authority were grounded in constitutionalism, natural law, and in nationalism itself. The encounter of the British liberal ethos with its

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<sup>117</sup> Lynch, Thomas, Ed., *Pennsylvania Archives, Sixth Series. Vol. XII* (Harrisburg, PA: Harrisburg Publishing Co., 1907), 668.

<sup>118</sup> Hogg, Peter W. *Constitutional Law of Canada. 2010, Student Edition* (Eagan, MN: Thomson Reuters Press, 2010), Appendix III.



imperial conquest serves to illustrate the limits and potentials of what the British claim as their own political heritage.

Conquest and force typically give birth to endow a people with a strong sense of historical identity. This was the case for the British, in their insistence on continuity post-conquest. This has been the case for Acadians and Quebec. It has been the case for Aboriginal tribes. It has equally been the case for Loyalists. Its effects can be mixed. On the one hand it is an insistence on the dignity and ownership of one's person – understood as a political identity. On the other hand, it can create a culture of grievance if these identities are not recognized and attended to according to a political recognition that they demand. History proves that neither the dominant majority nor the minority ignores questions of political identity. In other words, political values are social values, including advocating for Parliamentary supremacy over constitutional right. Political philosophy insists that a care of the whole, especially in its practical and prudential forms, is a noble pursuit. To the degree that Parliamentary Supremacy seeks to accommodate the whole is questionable by its very design and claims to supremacy. Yet the success of its foil, the Charter of Rights and Freedoms, in creating a strong national sentiment is equally questionable. For example, the Charter did not lessen the sovereignty movements in Quebec, and the greater Constitution Act, 1982 had led to its own controversies regarding what “supremacy” means, as well as Quebec's ratification of it. A lesson from the English experience, and even from the *sacrum imperium*, is that strong nationalizing programs, while anathema to classical liberalism serve an important though leveling function in strengthening the bonds of community. Yet countervailing claims demand to know what constitutes these bonds?

To the degree that Parliamentary Supremacy seeks to accommodate the whole is questionable is to the degree that operates on a majority principle, which admits an exclusion not always conducive to social order; constitutional right is the other option, and was adopted by Canada with its Charter of Rights and Freedoms in 1982. That did not seem to lessen the sovereignty movements in Quebec. The lesson from the English experience, and even from the *sacrum imperium*, seems to be that strong nationalizing programs, while anathema to classical liberalism serve an important though leveling function in strengthening the bonds of community. They are either permanent or temporary substitutes for *homonoia*.

The substance of the British liberal ethos is reflected in the parliamentary settlement of 1688-89. The substance of it however is the experience of the English themselves and the political values that sustained it. That the British liberal ethos is not universal is a matter of fact. Yet, inherent in this ethos, perhaps is a wisdom that can comprehend a vision of the whole only by ceasing to be British, and bend to particular understandings of authority and liberty consonant with more general truths about human nature and the nature, necessity, and ultimate limits of authority. Traditional British constitutionalism maintained a specific orientation regarding power and its spheres of jurisdiction. These jurisdictions, and the problem of them are evident in the collapse of Christendom and the rise of national states. Jurisdictions of authority characterize the conversation began at Runnymede and continued through 1688-89. The British encounter with French and Indigenous populations exposed the limits of their claim. Yet their ability to ultimately adapt, and the insistence of those who were conquered on a share in the public authority, suggests that the line of particular and universal in relation to British

liberty exists though it is necessary to be crossed and explored. This results in relinquishing claims upon what might have been called one's own ancestral authority and choosing or embracing new histories. Herein the America patriots offer a world-historical example of this in giving up their British identity for an American one. And the loyalists offer an example of something instructive as well – counsel regarding covenant, restraint, stability, prudence, and reform. The loyalists have been unfairly understood as Stuart apologists. Rather they are defenders of Parliamentary supremacy, of 1688-89. American patriots broke with that promise and articulated a differentiated colonial symbol in “the people.”

In 1775 John Martin published a dialogue between “Americus” and Britanicus.” The dialogue, though work of patriot propaganda, effectively articulates a representative sketch of sentiments and the overall character of the British sentiment that informed the Canadian liberal ethos. Amerius asks Britanicus:

When such wicked and oppressive acts really do exist, ought they not to be immediately resisted?’ Britanicus observed, that this question was not likely to be so decisive, or the answer to be so satisfactory as his friend had supposed. However, continued he, a previous question appears absolutely necessary. What is that?” cried Americus. The question which I think should be put previous to yours replied Britanicus, is this, Who are to judge whether any act which has the genuine stamp of legal authority, be unwise, oppressive, or unjust? Who! fired with political rage) Who are to judge in this matter? Why, every man, said Americus, is to judge for himself. The right of private judgment, continued the animated Patriot, the right of private judgment, Sir is inalienable. It cannot be transferred to another; nor ought it to be suppressed by any power on earth. It is of heavenly original. Heaven will protect it, and frown upon those pusillanimous mortals who do not, or who dare not exercise it. The right of private judgment is beyond a doubt, Sir, the native right of every peasant in Great-Britain: why do I say Great-Britain? when I might at once have said, The GREAT GLOBE ITSELF! In this respect the prince and the peasant are on equal terms.<sup>119</sup>

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<sup>119</sup> Martin, John. *Familiar Dialogues between Americus and Britannicus; in which The Right of Private Judgment; the exploded Doctrines of Infallibility, Passive Obedience, and Non-Resistance; with*

Britanicus is characterized as having forsaken the exercise of private conscience and more easily will yield to authority. In reality though the British experience and trust in institutions is its own form of keeping conscience; it is more cautious and prudential than that of Americus, though no less informed. The problems of private conscience in liberal democracies, Canada and all others, is when private conscience assumes force against the community itself and seeks thicker bonds than the community is capable of providing. Then, the problem of community and private conscience become one of opposition, without regard for the wisdom of experience. It is in the experience of freedom that one can recognize its goods.

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