

## CONSTITUTIONAL SELF-GOVERNMENT AND NATIONALISM: HOBBS, LOCKE AND GEORGE LAWSON

*Ethan Alexander-Davey<sup>1,2</sup>*

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**Abstract:** The emphasis in contemporary democratic theory and in the history of political thought on the peculiarly abstract theory of popular sovereignty of Locke and his twentieth-century intellectual descendants obscures a crucial relationship between constitutional self-government and nationalism. Through a Hobbesian and Filmerian critique of Locke and an examination of the political writings of George Lawson (a seventeenth-century critic of Hobbes), the article shows the necessary connections between popular sovereignty, constitutionalism and a form of national consciousness that renders concrete the otherwise abstract and airy notion of the pre-political community to which government is to be held accountable, and, through a myth of national origin, memories of native traditions of self-government, and stories of heroic ancestors who successfully defended those traditions against usurpers and tyrants, gives substance to theories of constitutional government.

**Keywords:** George Lawson, Locke, Hobbes, Filmer, nationalism, constitutionalism, popular sovereignty, English Civil War, the ancient constitution.

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### Introduction

The tradition of political theory that begins with Hobbes and Locke, and continues today with Rawls and Habermas and their innumerable followers, has a blind spot, to which several theorists drew attention in the 1990s. That blind spot is the question of nationhood and nationalism. The fact that ‘the nation’ is ignored by so many twentieth- and twenty-first century democratic theorists very likely has something to do with the way prominent scholars of the history of political thought have presented the development of modern political thought, as a process that leads teleologically to John Locke’s natural rights based theory of constitutional government. In this article I argue that the political writings of George Lawson provide the key to understanding the importance of national feelings, national memory and nationalist rhetoric in making arguments for popular sovereignty tenable and in engendering popular attachment to particular constitutional forms.

As several scholars have shown, there is a logical and historical relationship between constitutionalism and popular sovereignty on the one hand, and nationalism on the other. I will illustrate this complex relationship through an examination of the absolutist arguments of James I, Filmer and Hobbes, and the English theory of constitutional self-government which George Lawson,

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<sup>1</sup> Dept. of Political Science, Washington University in St Louis, Campus Box 1063, One Brookings Drive, St Louis, MO 63130-4899. Email: [ealexand@artsci.wustl.edu](mailto:ealexand@artsci.wustl.edu)

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following the example of such parliamentarians as Sir Edward Coke and John Selden, formulated in response.<sup>3</sup> In the literature, Lawson is typically regarded as a sort of bridge ‘between Hobbes and Locke’ for he penned a lengthy refutation of the work of the former and is said to have influenced the latter.<sup>4</sup> I find it useful to place Lawson between these two thinkers, but I do so not to elucidate some aspect of their thought, but rather to show how Lawson’s answer to Hobbes and other absolutists is more coherent than Locke’s, precisely because he buttresses his arguments for popular sovereignty and constitutionalism with a well formulated concept of nationhood and with appeals to England’s national past.<sup>5</sup> The defenders of absolutism could easily demolish arguments for constitutionalism and popular sovereignty based on the presumptive natural rights of individuals. But the appeal to England’s national past was worrisome, especially to Hobbes, because this past contained evocative memories of ‘courageous’ and ‘free’ ancestors, who, thanks to their national solidarity and their virtue, exercised a legislative power through Parliament and jealously guarded their rights and liberties. In short, Lawson successfully answers the challenge posed by Hobbes, and provides a corrective to the subsequent flawed formulations of Locke.

What I believe this examination demonstrates, more broadly, is that just as popular sovereignty requires recourse to the nation as an historic community, so does constitutionalism depend on reference to ancestral institutions. Both are in a necessary relationship with the nation as an ‘inheritance’ shared by members of the political community, a ‘heritage compounded of ethnic, political, cultural and other elements’.<sup>6</sup> To purify the people of particular national attributes, to purify the institutions of their particular roots in historical memory, as Habermas and his disciples would have us do, risks dissolving those bonds of national solidarity and constitutional discipline.

<sup>3</sup> I do so for brevity and convenience. One would observe the same basic patterns in an examination of the rise of constitutional self-government in the Netherlands, France or even the United States. See Francois Hotman’s *Francogallia* for an early French argument for popular sovereignty and constitutionalism and Hugo Grotius’ *Antiquity of the Batavian Republic* for a Dutch exemplar. The founding of the United States owed much to the colonists’ memories of England’s national past. See T. Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (Indianapolis, 1998).

<sup>4</sup> See C. Condren, *George Lawson’s Politica and the English Revolution* (Cambridge, 1989), pp. 173–95; J. Franklin, *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution* (Cambridge, 1978), pp. 53–130; A.H. Maclean, ‘George Lawson and John Locke’, *Cambridge Historical Journal*, 9 (1) (1947), pp. 69–77.

<sup>5</sup> That is, England’s national past as he and other defenders of the ‘ancient liberties of Englishmen’ understood it. The Whig version of history suffers very considerably under the scrutiny of twentieth-century historiographical methods. See G. Sayles, *The King’s Parliament of England* (New York, 1974).

<sup>6</sup> M. Canovan, *Nationhood and Political Theory* (Cheltenham, 1996), p. 72.

In Section I, I explain my use of the terms nationalism and constitutional self-government in reference to the seventeenth century and briefly consider the literature on the relationship between these two phenomena. In Section II, I highlight the vulnerability of Locke's formulation of the doctrine of popular sovereignty to the critiques of Filmer, Hobbes and other absolutists. In Section III, I discuss the nationalist 'liberty' narrative that worried Hobbes and other absolutists, and served as a powerful rhetorical weapon in the hands of proponents of constitutional self-government. In Section IV, I show how Lawson's theory of popular sovereignty overcomes the vulnerability of the Lockean formulation, and answers the challenge of Filmer and Hobbes, by appealing to the nation, a pre-political ethnic and religious community, as the tie that binds individuals together in a polity. In Section V, I show how Lawson strengthened his case for a particular constitutional settlement with nationalist rhetoric and reference to landmarks from England's past.

## I

### Nationalism and Constitutional Self-Government: Past and Present

It will perhaps be objected that the terms 'nationalism' and 'self-government' are not suitable for a discussion of the realities of seventeenth-century English politics in general, or the political theory of George Lawson in particular. I maintain that they are. Although the term 'nationalism' was coined in the nineteenth century, many scholars argue that the phenomenon itself is much older, that the general thesis advanced by Hobsbawm, Gellner and Anderson is in fact a 'modernist fallacy'.<sup>7</sup> Others attempt to draw historical and normative distinctions between patriotism, or 'civic nationalism', and ethnic nationalism, but reality is generally messier than such typologies would suggest.<sup>8</sup> What is more, many scholars make the case, *pace* Anderson, that England should be regarded as the first modern nation, having emerged by the fifteenth or the sixteenth century, and that nationalism was an especially potent force in

<sup>7</sup> The chief works of the 'modernists' are E. Hobsbawm, *Nations and Nationalism since 1780* (Cambridge, 2012); E. Gellner, *Nations and Nationalism* (Ithaca NY, 1983); B. Anderson, *Imagined Communities* (London, 2006). The 'modernist fallacy' is refuted in several studies by Anthony D. Smith, especially *The Ethnic Origins of Nations* (Oxford, 1988), *Nations and Nationalism in a Global Era* (Cambridge, 1995), and *The Cultural Foundations of Nations* (Oxford, 2008); and by A. Hastings in *The Construction of Nationhood* (Cambridge, 2006).

<sup>8</sup> For attempts to disaggregate 'patriotism' and 'nationalism', see Maurizio Viroli, *For Love of Country: An Essay on Patriotism and Nationalism* (Oxford, 1995); J.H. Schaar, 'The Case for Patriotism', in J.H. Schaar, *Legitimacy in the Modern State* (New Brunswick, 1981). The flaws in this approach are discussed in Canovan, *Nationhood and Political Theory*; Smith, *The Ethnic Origins of Nations*; Rogers Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge, 1999); Bernard Yack, 'Popular Sovereignty and Nationalism', *Political Theory*, 29 (4) (2001).

the broils of seventeenth-century English politics.<sup>9</sup> Smith's definition of nationalism as 'an ideological movement for attaining and maintaining autonomy, unity, and identity on behalf of a population' is, as I will demonstrate, certainly consistent with George Lawson's aspirations, though it does not fully encompass them.<sup>10</sup> Lawson appeals for national unity and loyalty to a particular Protestant and English order against those who would impose foreign constitutional models in church and state, specifically, those of the papacy and continental European states.

If one wishes to speak of political reality in any century, even our own, 'self-government' is, admittedly, a problematic term. In a representative form of government, the people, by definition, do not rule. Thus, some democratic theorists have said that it is more accurate to call countries such as the UK or US 'polyarchies' since political power is in fact shared by a small portion of the population controlling different parts of government, and the degree of accountability of government to each citizen is never truly equal.<sup>11</sup> In fact, Lawson often uses the term 'polyarchy' in the *Politica*, and, of the various terms in his lexicon, it is this one that best fits his description of England's traditional form of government in which power is vested conjointly in King, Peers and Commons.<sup>12</sup> This is not to say that England's seventeenth-century polyarchy and modern polyarchies are the same, but they are different merely in degree, not in kind.<sup>13</sup> Lawson was one of many seventeenth-century thinkers who believed that England's 'ancient' constitution was compatible with the principle of self-rule. For, in his view, no law could be made or altered without the consent of the House of Commons, which was understood — limitations on the franchise notwithstanding — to represent the people.<sup>14</sup>

<sup>9</sup> On England as the first modern nation, see Hastings, *Construction of Nationhood*; and L. Greenfeld, *Nationalism: Five Roads to Modernity* (Cambridge, MA, 1993). On seventeenth-century English nationalism see, for instance, Smith, *Cultural Foundations of Nations*, especially pp. 130–4; and A. Marx, *Faith in Nation* (New York, 2003).

<sup>10</sup> Smith, *Cultural Foundations of Nations*, p. 15.

<sup>11</sup> See, for instance, Robert Dahl, *A Preface to Democratic Theory: Expanded Edition* (Chicago, 2006).

<sup>12</sup> See Condren, *Lawson's Politica*, p. 128. In Lawson's depiction, he says, the government of England has the shape of a 'polyarchal trinity'.

<sup>13</sup> As a variety of social scientists have argued, the advent of universal suffrage and the decline of old aristocracies notwithstanding, wealthy and powerful classes continue to have a vastly disproportionate influence on politics in modern polyarchies. For instance, see C.W. Mills, *The Power Elite* (New York, 2000); J. McCormick, *Machiavelian Democracy* (Cambridge, 2011); J. Green, *Liberalism and the Problem of Plutocracy*, unpublished paper presented at the UW-Madison Political Theory Workshop, February, 2013.

<sup>14</sup> Condren argues, *contra* Franklin, that Lawson can in no way be considered 'democratic', for in his theory of representation, government is not directly accountable to its 'virtual' members, that is, women, children, servants, strangers, tenants or vassals, or to

The relationship between nationalism and constitutional self-government tends to be underplayed in the work of prominent democratic theorists and historians of political thought. As critics of the Rawlsian and Habermasian schools have argued, constitutional self-government depends on many conditions that only nationhood can provide, to wit: a sense of the extent of the political community, a source of unity, solidarity and continuity transcending common territory and shared procedures, and a clear image of the pre-political community to which governments are accountable, and to which power reverts when governments betray their trust.<sup>15</sup> When one considers the historical scholarship, one finds, at least in the more popular works of Skinner, Tuck and Franklin, that George Lawson and other writers who made similar historically-minded arguments dripping with nationalist rhetoric, are treated, in the main, as precursors to John Locke and his universalist theory of human rights and constitutional government based on rational consent to abstract principles.<sup>16</sup>

My claim is that the national-historical arguments of thinkers such as George Lawson provided something fundamentally different, and something more fundamentally important for the development of modern constitutional other 'irrational' persons, that is, rebels and traitors, who might otherwise qualify as 'full' members of the polity. See C. Condren, 'Resistance and Sovereignty in Lawson's *Politica*', *The Historical Journal*, 24 (3) (1981), pp. 675–8. However, twentieth- and seventeenth-century notions of 'self-government' are, properly speaking, different in degree, not in kind. Modern democracies, after all, still exclude irrational or untrustworthy members such as children, convicts and foreigners from the franchise. In Lawson's theory 'full' and 'eminent' members of the community, that is, freeholders and peers of the realm, have an active role in governing the nation. Lawson writes 'in the capacity and habitude of a Parliament, they are no subjects, but in the name of the people have a Legislative power, and exercise the highest acts of Government, excepting those of the Constitution' (*Examination*, p. 59). Similarly, he asserts that whereas lords vote in person, freeholders 'virtually give their suffrage in that assembly [parliament] by their representatives' (*Politica*, p. 29). This order, according to Lawson, conforms to the model of a 'free-state'. Even the radical Algernon Sidney argues that the English constitution, according to which the king may not introduce or alter any law without the assent of the lords and commons, is as consistent with the principle of self-government as the direct self-rule he imagines to have taken place in the first Saxon communities that settled in England. See A. Sidney, *Discourses Concerning Government* (Indianapolis, 1996), pp. 478–93.

<sup>15</sup> See Canovan, *Nationhood and Political Theory*; Y. Tamir, *Liberal Nationalism* (Princeton, 1993); B. Yack, 'Popular Sovereignty and Nationalism', *Political Theory*, 29 (4) (2001); B. Yack, 'The Myth of the Civic Nation', *Critical Review*, 10 (2) (1996).

<sup>16</sup> Q. Skinner, *Foundations of Modern Political Thought*, Vol. 2 (Cambridge, 1978), pp. 239–40, 318, 338; Franklin, *John Locke and the Theory of Sovereignty*, pp. 71–9, 94–7; Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1982). Tuck does discuss Grotius' use of the Batavian myth, as well as Selden and Nathaniel Bacon's use of the Anglo-Saxon myth in R. Tuck, *Philosophy and Government 1572–1651* (Cambridge, 1993), but even there these discourses are stops along the way to the 'great natural law theories of the mid-century'. Selden's nationalism is most visible in *The English Janus* (1610) as a whole, in the chapters on England in his more famous *Titles of Honor* (1614), and in many of his speeches in the Commons.

self-government. They did not merely provide better thinkers such as Locke with material to construct their abstract theories. Nor did they endow individuals with abstract human rights. In a sense, the texts of Lawson and others like him rhetorically reconstituted mere ‘multitudes’ as ‘nations’. They were written from the point of view of one ‘reminding’ his own people of something ‘forgotten’, that they were the descendants of ancestors who had possessed a coherent political community, who had loved liberty and tolerated kings only to the extent that the latter procured the common good and protected their liberty as a people. Our ancestors constituted themselves as a people, and then delegated certain authorities to kings and other magistrates. They had a settled way of sharing the sovereign power of the nation among its various estates, and they guaranteed their fellow subjects certain rights, which were understood to inhere in them not as human beings, but as members of a particular national community of common place, blood and custom.

## II

### The Problem with Locke

In the *Second Treatise* Locke makes a prodigious leap from the sovereign rights of individuals in a state of nature to the sovereign right of a political community. For him, a community is defined by the self-interest of its individual members. It is created only for the protection of each individual’s life and property. Its basis is an agreement of members to transfer their individual right to execute the laws of nature to the group as a whole.<sup>17</sup> According to Locke, any multitude of individuals can form a community: ‘that, which begins and actually *constitutes 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>18</sup> By defining a community in this way, Locke seems to be thoughtlessly reopening the Pandora’s Box of cancerous factionalism that Hobbes had sought to seal shut forever. According to this definition of political society, or community, not even a minor interest group or faction may be legitimately denied the right to form its own commonwealth. Any voluntary association, capable of ‘concluding’ its members by a majority vote on measures for the protection of their several lives and properties, can be said to possess popular sovereignty.

<sup>17</sup> Locke, *Two Treatises of Government* (Cambridge, 1994), Second Treatise, p. 325, §89.

<sup>18</sup> *Ibid.*, p. 333, §99. James Tully treats the ‘political individualism’ of Locke and the ‘political holism’ or ‘collectivism’ of George Lawson as the most essential difference between the two thinkers. He regards the former as an advance in the theory of popular sovereignty, but does not consider the potential weaknesses of Locke’s individualism. See J. Tully, ‘Current Thinking on Sixteenth and Seventeenth Century Political Theory’, *Historical Journal*, 24 (2) (1981), pp. 480–3; ‘Locke’, in *The Cambridge History of Political Thought 1450–1700*, ed. J.H. Burns with the assistance of M. Goldie (Cambridge, 1991), p. 622.

As if anticipating Locke, Filmer, in *The Anarchy of Mixed or Limited Monarchy* (1648) writes:

Since nature hath not distinguished the habitable world into kingdoms, nor determined what part of the people shall belong to one kingdom, and what to another, it follows that the original freedom of mankind being supposed, everyman is at liberty to be of what kingdom he please, and so every petty company hath a right to make a kingdom by itself; and not only every city, but every village, every family, nay, and every particular man, at liberty to choose himself to be his own King if he please; and he were a madman that being by nature free, would choose any man but himself to be his own governor. Thus to avoid the having but of one King of the whole world, we shall run into a liberty of having as many Kings as there be men in the world, which upon the matter, is to have no King at all, but to leave all men to their natural liberty, which is the mischief the pleaders for natural liberty do pretend they would most avoid.<sup>19</sup>

As Filmer indicates, there is nothing in the doctrine of natural rights to define the extent of the political community. Before one speaks of popular sovereignty, the question of demarcation must be answered. If one insists on starting with a random multitude of completely independent and historically unencumbered individuals, one has in fact a recipe for anarchy. Why should this individual, that family or that city participate in any larger community, submit to any larger constitutional discipline at all? Any 'petty company' may declare itself sovereign at any time.

As Jeremy Rabkin notes in *Law without Nations?*, Locke shows at least a vague awareness of this problem.<sup>20</sup> In his reflections on the origin of government in the *Second Treatise* he acknowledges 'since then those, who liked one another so well as to joyn into Society, cannot but be supposed to have some Acquaintance and Friendship together, and some Trust one in another; they could not but have greater Apprehensions of others, than of one another: and therefore their first care and thought cannot but be supposed to be, how to

<sup>19</sup> Sir Robert Filmer, *Patriarcha and Other Political Works* (Oxford, 1949), p. 286. Filmer was in fact responding to Philip Hunton's *Treatise of Monarchy* (1643). It is perhaps an unfair critique of that work, for Hunton actually grounds his argument for popular sovereignty and constitutionalism on the assumption, which he proceeds to demonstrate, that England is a distinct nation, and that it has a long history as a constitutionally limited monarchy. He begins the second (historical) part of his treatise thus: 'Having thus far proceeded in generall, before we can bring home this to a stating of the great controversie . . . wee must first looke into the Frame and Composure of *our Monarchy*' (italics added). See Hunton, *A Treatise of Monarchy* (Bristol, 2000), pp. 47 ff. But in response to Locke the critique seems entirely justified.

<sup>20</sup> According to Rabkin: 'Revolution, in Locke's account, is an act of the whole people, or at least of most people, who must retain some coherence to establish a new government. So Locke says that political communities arise, in the first place, among those with special affinities.' J. Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton, 2005), p. 59.

secure themselves against foreign Force'.<sup>21</sup> Locke assumes that before there can be government, there must be a multitude that is drawn together by ties of acquaintance, friendship and mutual trust, which are internal to members of the group, and opposed to the force of outsiders. But Locke and succeeding generations of liberal theorists, buttressing their arguments as they do on universalist claims about human beings and human groups as such fail to tell us anything substantive about the sources of friendship and mutual trust among the members of particular polities or the factors that make one group of human beings a polity distinct from other polities.

Hobbes well understood that if one could disprove the possibility of a coherent pre-political community, the doctrine of popular sovereignty could be eviscerated. In his various writings, he asserts that an entity such as 'the people' can have no existence outside an instituted commonwealth. Before there is a sovereign, or a state, there is no society, there is no people; there is only a multitude of individuals. As Hobbes writes in *On the Citizen*, 'prior to the formation of a commonwealth a *People* does not exist, since it was not then a person, but a crowd of individual persons'.<sup>22</sup> For a people to exist as a coherent whole, with common interests and common sentiments, the many wills of the multitude, which lead each individual in a thousand different directions, and mostly against one another, must be reduced to one will, that of the sovereign. As Hobbes puts it in *Leviathan*: 'A Multitude of men, are made *One Person*, when they are by one man, or one Person, Represented . . . For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*'.<sup>23</sup> It is by their common obedience to one man, the Sovereign, that the individuals of an otherwise chaotic, formless multitude are constituted as a people. Without a Sovereign to forge their unity by substituting his will for all of their individual wills, they can have no common existence. Hobbes's formulation of the theory of absolute monarchy is without doubt the most radical in its reduction of the subjects of a kingdom to individual atoms who, before the establishment of a state, have no community at all with others of their kind. Without the notion of a coherent pre-political community to support it, the doctrine of popular sovereignty can be turned upon its head, and transformed into an argument for absolute monarchy. This is indeed what Hobbes does in Chapter 18 of *Leviathan*, in which he explains the origins of 'commonwealths by institution'.

The Hobbesian formulation of absolutism is a late one. The older justifications of absolute monarchy deny not the existence, but the relevance of a pre-political English community. The historical narrative offered by supporters of the King throughout the seventeenth century refer to a single event, the

<sup>21</sup> Locke, *Two Treatises*, p. 339, §107.

<sup>22</sup> Thomas Hobbes, *On the Citizen* (Cambridge, 2007), p. 95.

<sup>23</sup> Thomas Hobbes, *Leviathan* (Cambridge, 1994), p. 114.



conquest of England in 1066 by William of Normandy.<sup>24</sup> In the late sixteenth century royalists begin to make use of the Norman Conquest in arguments justifying absolute monarchy. Rev. Dr. Adam Blackwood argues in his *Apologia pro Regibus* (1581) that ‘William’s power after the Conquest was absolute, and that any right which his conquered subjects retained in their property thereafter was by his grace’. Blackwood compares the position of the English to that of the American Indians after the Spanish conquest.<sup>25</sup> King James I himself writes in *The Trew Law of Free Monarchies* (1598):

For when the Bastard of *Normandie* [William I] came into *England*, and made himself king, was it not by force, and with a mighty army? Where he gave the Law, and tooke none, changed the Lawes, inverted the order of government, set downe the strangers his followers in many of the old possessours rooms, as at this day well appeareth a great part of the Gentlemen of England being come of the *Norman* blood, and their old laws, which to this day they are ruled by, are written in his language, and not in theirs: and yet his successours have with great happinesse enjoyed the Crowne to this day.<sup>26</sup>

In this view, then, William the Conqueror had acquired absolute power over the English by his conquest, and the descendants of William all inherited this absolute power. Supporters of the monarchy, such as Nicholas Ferrar, would accept this theory, adding that the Anglo-Saxons had been dissolute, and that the imposition of absolute rule upon them had been to their benefit.<sup>27</sup>

According to Foucault, Hobbes created his radical new formulation of the theory of absolute monarchy primarily with a view to replacing earlier history-based arguments that he thought were more vulnerable to critique.<sup>28</sup> In Hobbes’s view existing historical arguments are not only susceptible to attack, they are also needlessly provocative. In the final chapter of *Leviathan*, Hobbes criticizes those monarchs who use historical arguments to justify their authority. It is unwise, he says, for them to

justifie the War, by which their Power was at first gotten, and whereon (as they think) their Right dependeth, and not on the Possession. As if, for example, the Right of Kings of England did depend on the goodnesse of the cause of *William* the Conquerour, and upon their lineall, and directest

<sup>24</sup> This, of course, was not the only justification of absolute monarchy. There were also ‘designation theory’ and ‘patriarchalism’. See J. Sommerville, *Politics and Ideology in England, 1603–1640* (London, 1986). These theories too necessarily denied the relevance of a pre-political English community.

<sup>25</sup> C. Hill, ‘The Norman Yoke’, in *Puritanism and Revolution* (New York, 1970), p. 61.

<sup>26</sup> King James VI & I, *Political Writings* (Cambridge, 2006), p. 74.

<sup>27</sup> Hill, ‘The Norman Yoke’, p. 62.

<sup>28</sup> M. Foucault, *Society Must Be Defended: Lectures at the College de France 1975–1976*, trans. David Macey (New York, 2003), pp. 99, 111. Foucault surely overstates his case when he claims that this was the *chief impetus* behind Hobbes’s formulation of an original argument in favour of absolutism.

Descent from him; by which means, there would perhaps be no tie of the Subjects obedience to their Sovereign at this day in all the world: wherein whilst they needlessly think to justify themselves, they justify all the successfull Rebellions that Ambition shall at any time after raise against them and their Successors. Therefore I put down for one of the most effectuall seeds of the Death of any State, that the Conquerors require not onely a Submission of mens actions to them for the future, but also an Approbation of all their actions past; when there is scarce a Commonwealth in the world, whose beginnings can in conscience be justified.<sup>29</sup>

Historical arguments, Hobbes well understood, are dangerous for monarchs. In the English case, to assert the monarch's right on the basis of a conquest only reminds individuals that the power that now protects them was originally established by the violent subjugation of their ancestors. Such a reminder challenges all rebels to appeal to the lost honour of conquered ancestors and to speak of a restoration of ancient rights lost at the time of the conquest. So as not to provoke such dangerous imaginings, the monarch should emphasize that his right to rule is based on his present possession of the power to protect. The Hobbesian argument rejects history, viewing it as a Pandora's box, and appeals to the isolated individual's present interest in enjoying the material benefits of peace.

### III

#### Tacitus, St Edward's Laws and the Liberties of the English Nation

The Stuart kings themselves in their parleys with Parliament were never so incautious as to assert their prerogative powers on the grounds of the right of conquest. But they resorted of necessity to arguments that denied any particular rights and privileges to the English as a distinct nation. For instance, in 1610 James I declared before the House of Commons:

First therefore in the matter, all kings Christian as well elective as successive have power to lay impositions. I myself in Scotland before I came hither, Denmark, Sweden that is but newly successive, France, Spain, all have this power. And as Bellarmine abuses me in another sense *solus rex Angliae timet*, so shall *solus rex Angliae* be confined?<sup>30</sup> Besides to call in question that power which all your kings have ever had, which 2 women have had and exercised, I leave it to yourselves to think what dutiful subjects ought to do in it.<sup>31</sup>

Here King James I asserts what he takes to be a general right of European monarchs to tax their subjects without consent of parliament. If other kings

<sup>29</sup> Hobbes, *Leviathan*, p. 486.

<sup>30</sup> The King of England alone fears [to lay impositions without consent of Parliament]. Shall the King of England alone be confined?

<sup>31</sup> E. Foster, *Proceedings in Parliament 1610: Vol. 2, House of Commons* (New Haven, 1966), p. 102.

may do so, why is the King of England forbidden? Is he not like any other Christian monarch? For good measure, James I buttresses his claim by citing what he believes to be a precedent in English law.

Nicholas Fuller, MP for St Mawes, answered King James next day before the whole House:

[T]hough the King were in truth very wise yet is he a stranger to this government. He makes mention of this to be done in the time of 2 Queens. I remember not any such thing, but that by a statute of tonnage and poundage they had that they had . . . The King speaks of France and Spain what they may do, I pray let us be true to the King and true to ourselves and let him know what by the laws of England he may do.<sup>32</sup>

In this reply, Fuller grounds his argument on the distinctiveness of English law, which James I, being a 'stranger' from Scotland, evidently does not understand. The laws of Scotland, Spain, France and other nations are of no consequence in this debate. According to the ancestral customs of England, the *only* customs that matter *here*, the King may not lay impositions without consent of Parliament. His Majesty misunderstands the precedent he cites, for tonnage and poundage were collected by former kings of England only when authorized by statute, that is, by an Act of Parliament. If the Common Law of England is not taught up in Scotland, whence His Majesty hails, then we, the elected representatives of the counties of England, are duty-bound to instruct him on this point. Fuller's reply to King James might be viewed as an opening salvo in the seventeenth-century battle for sovereignty in England. The nativist tone of the challenge is no accident.

Nicholas Fuller's reply to King James contains at least a hint of a wider narrative about the liberties of the English nation told in various forms by Sir Edward Coke, John Selden and other parliamentarians of their time, and by many other supporters of parliament throughout the century. The narrative was that Englishmen were the descendants of Anglo-Saxon tribes from Germany, whose courage, love of freedom, and tradition of self-government by means of general assemblies had been noted by Tacitus in the *Germania*. In England the government of this nation of Anglo-Saxons had evolved into a mixed monarchy, in which King, Lords Temporal and Spiritual, and Commons ruled the nation conjointly. This 'ancient constitution', in existence for centuries, was codified by the last legitimate Saxon King, St Edward the Confessor. In spite of various accounts asserting the contrary, William of Normandy did not 'conquer' England, but rather accepted the English throne on the condition that he rule in accordance with St Edward's Laws. According to many versions, the failure of William and his successors to keep this oath occasioned many Saxon revolts, at the conclusion of which St Edward's Laws were restored. With their vigilance and, when necessary, their courage, many

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<sup>32</sup> *Ibid.*, p. 109.

generations of Englishmen had preserved St Edward's Laws, the frame of government prescribed by them, and the rights and privileges of subjects codified in Magna Charta until the present time.<sup>33</sup>

This is the narrative that worried Hobbes, and other absolutists such as Robert Brady, who, in his *Complete History of England* (1685), complains that

we find nothing in our Common *Histories* of these Times, but the *Brave Feats* performed by the *English* for their Fundamental Rights and Liberties . . . Nothing in *Sir Edward Coke, Mr Selden, Mr Prynne*, and all late Writers when they chop upon these Times, and mention anything relating to them, but the *Magnanimity* of the *English* in Appearing for their *Birth-rights*, and the great *Privileges* they had formerly enjoyed.<sup>34</sup>

Such a telling of English history was dangerous because it made the defence of liberty and self-government a matter of English national pride and duty to ancestors. Present absolutist pretensions are thus an affront to all generations of Englishmen. Throwing off that yoke is a duty owed not only to the present generation, but also to ancestors and to posterity. In this way, says Foucault, 'the justification for rebellion becomes a sort of historical necessity, once national phenomena become part of the discourse'.<sup>35</sup> Not only does the justification for rebellion become a historical necessity, but also the preservation of a particular form of government, and the protection of particular national rights.

All of the above is missing from Locke's account of popular sovereignty and constitutionalism. Locke is unique among seventeenth-century English political writers in making no appeal to the English national past.<sup>36</sup> Moreover, as I have shown, he formulates no clear concept of nationhood. George Lawson, on the other hand, posits nationhood as such, and a historically rooted tradition of constitutional self-government — such as he believed generations of Englishmen had struggled to preserve — as necessary preconditions for popular sovereignty and constitutionalism. His works, moreover, take for granted the nationalist narrative I describe above, and use it to good effect. This is indeed what makes his argument coherent and persuasive. Lawson's argumentation

<sup>33</sup> To gain a sense of the pervasiveness of this narrative and its various permutations see Janelle Greenberg, *The Radical Face of the Ancient Constitution: St. Edward's 'Laws' in Early Modern Political Thought* (Cambridge, 2001); J. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the 17th Century, a Reissue with a Retrospect* (Cambridge, 1987); *The Roots of Liberty: Magna Charta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law*, ed. E. Sandoz (Indianapolis, 1993); C. Weston, 'England: Ancient Constitutional and Common Law', in *The Cambridge History of Political Thought*, ed. Burns, pp. 374–411.

<sup>34</sup> Quoted in J. Reid, 'The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries', in *The Roots of Liberty*, ed. Sandoz, p. 270.

<sup>35</sup> Foucault, *Society Must Be Defended*, p. 110.

<sup>36</sup> Pocock, *The Ancient Constitution and the Feudal Law*, p. 237.

shows with great clarity the necessary relationship between constitutional self-government and nationalism.

#### IV

#### George Lawson on Nationhood and Popular Sovereignty

Locke cannot help us understand the sources of mutual trust and friendship that bind the pre-political community together. George Lawson can, for he defines 'community' very differently from Locke, and he does so very likely because of his engagement with Hobbes. The notion of a pre-political community is present in both of Lawson's political works, the *Examination* and the *Politica*, but it is given a more substantial formulation in the latter.<sup>37</sup> According to Condren, Lawson's move away from a simple contract theory and his increased emphasis on the substantive bonds of the pre-political union in the later work may well have been elicited by 'Hobbes's devastating treatment of the logic of contract in *Leviathan*'.<sup>38</sup> To preserve the notion of political accountability, the pre-political community needed shoring up, both as a concept and as a concrete historical and political reality.

Thus, in defining a 'community' Lawson gives an abstract definition, borrowed from the continental sources he knew, but then provides a concrete definition for the particular case he wishes to address, that is, the case of England. He quotes approvingly Johannes Forsterus' definition of the Hebrew word '*am*': 'a multitude of people or society, which being joined together have the same name, language, laws, religion, polity'.<sup>39</sup> The definition is not perfect for his purposes, Lawson himself notes, for a pre-political community, by definition, is not yet a 'polity'. The essential point is that the pre-political community is not just an aggregate of individuals inhabiting the same space. *Pace* Hobbes, a multitude of individuals does not miraculously become a community when its members agree to establish a sovereign over them. As Lawson says in the *Examination* '[t]his community must be associated and united not only in vicinity of place, which is convenient, but also in some stricter bond'.<sup>40</sup> A common name, language, laws and religion may form a multitude into a community, or it may not. But these are the sorts of things that, when held in common, generally distinguish communities from mere multitudes. For a genuine community capable of establishing its own government to

<sup>37</sup> The editions of the two Lawson texts used here are as follows: G. Lawson, *Politica Sacra et Civilis*, ed. C. Condren (Cambridge, 2006) (hereafter *Politica*); G. Lawson, 'An Examination of the Political Part of Mr. Hobbes his Leviathan', in *Leviathan: Contemporary Responses to the Political Theory of Thomas Hobbes*, ed. G.A.J. Rogers (Bristol, 1995) (hereafter *Examination*).

<sup>38</sup> C. Condren, 'Confronting the Monster; George Lawson's Reactions to Hobbes's *Leviathan*', *Political Science*, 40 (1) (1988), p. 73.

<sup>39</sup> *Politica*, p. 23.

<sup>40</sup> *Examination*, p. 18.

exist, the members 'must associate and be united together; for they make up this body, not severally considered, but as joined together in one; for *Genus* is a society. This society first pressupposeth union, and is a communion, whereby they communicate in something common to the whole; as in an organical body, there are many members.'<sup>41</sup> Lawson should perhaps not be faulted for being rather vague here. In reality, it is hard to specify what it is that makes a community a community. For Lawson, only a community whose members have a sense of belonging to things common to them all, who have cares that transcend the particular interests that concern each of them severally, has potential to establish its own government. The description of the community as an 'organical body', that is, of one 'Genus', is suggestive of the idea of a common ethnic origin. The language of communion suggests a religious bond. Indeed, in his remarks on England, Lawson says that his national community has two focal points: the English interest and the Protestant Christian interest. Englishness and Protestantism, attachment of all members to the 'substance' of these things, are what make the inhabitants of England a community. The pre-political community thus has two guises: it is a community of blood and custom, and a community of faith. This is the foundation. Those other elements that one finds in Lawson's conception of community that Locke later privileges, to the exclusion of all others, to wit 'propriety of goods, liberty of persons, equality of the members' are for Lawson the 'adjuncts of a community'.<sup>42</sup> Members of a community acknowledge the rights of fellow members to these things, but such rights are not the foundation of the community as Locke would have us believe.

It may be possible for almost any diverse or barbarous multitude to have some sort of government, but the nearer affection of members of the same community for each other is essential if a people is to enjoy *self*-government, if it is to govern itself as what Lawson calls a 'free state'. Lawson reiterates, the 'fitness, capacity, and immediate disposition to a form of civil government doth not arise so much from the multitude of the persons, or extent and goodness of the place of their habitation, but from their good affections one towards another'.<sup>43</sup> Where these affections, this union and communion are lacking, a free state is not possible. In his Epistle to the reader, Lawson notes the divisions among the English nation: 'Men of English blood, and of the same Protestant profession continue obstinate in their errors, rigid and high in their opinions, resolved in their different designs, admire their own models of government in church and state'.<sup>44</sup> Writing as he was in the final years of the Protectorate, he finds the interests, affections and judgments of Englishmen so disparate 'that the same language, laws, religion, common country cannot

<sup>41</sup> *Politica*, p. 24.

<sup>42</sup> *Ibid.*, p. 29.

<sup>43</sup> *Ibid.*, p. 25.

<sup>44</sup> *Ibid.*, p. 4.

firmly unite us together; but we are ready every moment to fly asunder and break in pieces, if we were not kept together rather by the sword of an army, than by any civil power and policy, or good affection'.<sup>45</sup> The concept that Lawson is grappling with here, homogeneity, is a tricky one, and he clearly understands the difficulties of it. The fact of common blood, laws, religion and country, supposing it could be objectively verified, is no guarantor of unity. The people have to acknowledge and value such commonalities; to perceive themselves as one nation, and desire cooperation with their fellow countrymen. If they cannot acknowledge and make a priority of the things they share, then they cannot rule themselves through a 'civil policy and good affection'. The only answer for a community that has lost its spirit of 'union and communion', or a mere multitude that has no internal sources of union, is rule by the sword. This, of course, was Hobbes's answer to the problem of disunity, which he thought endemic to all human populations.

For a community to be prior to the state, and to demand that the state serve the common good, said community must be a nation, whose members have care for one another and for the community they share, care based on perceived ties of kinship, language, religion, customs and laws. It is this sort of 'community civil considered abstractively and antecedently to a form of government not yet introduced, or upon a dissolution of a former model, or upon a failure of succession in a time doth virtually contain a supreme power, and hath liberty and right to determine upon what form they please, so that it be good'.<sup>46</sup> Lawson's theory of sovereignty grants the community supreme power to determine the form of government it prefers. But the theory can make sense only if it can indeed be asserted that, of the two entities, community and government, only the former is a permanent body. Regardless of the state of the government, 'any community . . . retains the nature of a community, as the matter and subject of the commonwealth, wherein every subject must be considered, first as a *civis*, a member of the community, before he can be conceived, as *subditus*, a member of the commonwealth'.<sup>47</sup> The community is antecedent to the state, and it continues to exist with its own bonds of membership, regardless of the condition of the state, whether it has grown despotic or is in abeyance. Membership in the community (the nation) is permanent, whereas membership in the state, which we today call citizenship, is a contingent membership, which may be dissolved.

When Lawson applies his concepts to England, it becomes clear that by 'community' he means the English nation.<sup>48</sup> He establishes the sovereignty of

<sup>45</sup> *Ibid.*, p. 26.

<sup>46</sup> *Ibid.*, p. 30.

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

<sup>48</sup> He sometimes uses other terms, such as 'country', 'native country' or 'community', instead of nation, but the underlying notion is the same. Lawson uses the terms country, community, nation as interchangeably as do modern journalists and politicians.

the English people, independent of kings and parliaments, by looking back to the time before these organs of government were instituted. But this 'time before' is neither a Hobbesian nor a Lockean state of nature. In his refutation of *Leviathan*, Lawson dismisses Hobbes's 'covenant of every one with every one for to design a Sovereign' as 'but an Utopian fancy' and 'a chimera'.<sup>49</sup> He probably would have regarded Locke's abstract theory of the social contract with similar contempt. A multitude of individual atoms with nothing in common other than a generic capacity to reason and a desire for 'peace and plenty' would not have sufficient unity to join together for the establishment of a national government.<sup>50</sup> However, a multitude of men of the same 'genus', who share ancestral customs, who see themselves as one nation, would; and this, he asserts, was indeed the case: 'there was indeed a time, even after the Saxons were settled in this nation, when there was no king, but forty lords, who at length chose a king which should have no peer . . . And after that we find one king and parliaments, and this before the Conquest'.<sup>51</sup> Here stands the pre-political English community, the English nation, a distinct body of men of common blood and custom, whose existence was denied by Hobbes and strangely forgotten by Locke: forty Anglo-Saxon lords representing forty counties of *Angle-land*, who had sufficient unity of purpose to elect a king and to govern jointly with him in parliaments. Modern historiography may tell us it is mythical, but it did not seem so in Lawson's time. In any event, a pleasing myth about one's ancestors, for which some scraps of evidence can be produced, is always better than a dull philosophical abstraction.

This idea of a coherent pre-political body of men united by blood and custom before the establishment of a civil government is analogous to the body of Christian believers united by common doctrine and worship before the establishment of an ecclesiastical government. Brian Tierney has shown that for Lawson, as for many of the political thinkers who precede him, church and state are 'analogous' institutions. Lawson combines secular and religious ideas in his conceptualization of civil and ecclesiastical constitutions. It is also certainly true that in Lawson's conception the nation and the *ecclesia* are

<sup>49</sup> *Examination*, pp. 24, 29. According to Condren, Lawson 'naively' misreads Hobbes's contract theory 'as an empirical one'. Condren, 'Confronting the Monster', p. 72. However, one could just as well credit Lawson for having the good sense to dismiss a political theory based on a mere thought experiment.

<sup>50</sup> Lawson begins his refutation of Hobbes with this statement: 'To think that the sole or principal Cause of the constitution of a civil State is the consent of men, or that it aims no further than peace and plenty, is too mean a conceit of so noble an effect', *Examination*, p. 16.

<sup>51</sup> *Politica*, p. 99. See also the *Examination*, p. 42, for a more explicitly contractarian account of the founding of the English state by the forty Saxon lords. Lawson's source for this was the *Mirror of Justices*, considered by some seventeenth-century antiquaries to be late medieval forgery, which indeed it was, but was embraced as historical truth by Sir Edward Coke.



analogous pre-political communities.<sup>52</sup> Lawson writes: ‘Many of the primitive Christians, after their conversion continued for a certain time without any set form of external government, or perfect rules of New Testament worship, except to word and prayer, was settled. Hence those words of the Apostle, “the rest will I set in order when I come” (1 Cor. 11. 34).’<sup>53</sup> The first body of Christian believers existed as a coherent community before any institutional structure had been erected. This historical fact confirms Lawson’s theoretical claim that a Christian community is, properly speaking, prior to any ecclesiastical government, for ‘the matter is before the form’.<sup>54</sup> The same may be said, Lawson tells us, of England as a whole, for England is a Christian nation: ‘A community of Christians may be said to be national . . . in several respects: As when all the Christians of one and the same nation, do associate and unite in one body; when these Christians are the major part of the people; when the whole nation, or the generality thereof have received and do profess the same Christian faith.’<sup>55</sup> This ‘same Christian faith’ which the ‘major part’ or the ‘generality’ of Englishmen profess is ‘the substance of the Protestant religion’ which consists not ‘merely in a separation from the church of Rome . . . (for this is but negative); but in certain positives of doctrine, worship and discipline clearly agreeable to the gospel’.<sup>56</sup>

The existence of a concrete, historical pre-political community is the foundation of Lawson’s argument that governments, both civil and ecclesiastical, are held in trust. Regarding England’s civil government, he can assert: ‘That form of government was first constituted by the community of England, not

<sup>52</sup> B. Tierney, *Religion, Law, and the Growth of Constitutional Thought* (Cambridge, 1982), pp. 97–102.

<sup>53</sup> *Politica*, p. 205.

<sup>54</sup> *Ibid.*, pp. 36–7. Condren argues that Lawson’s reflections on the church as a ‘matter’ existing before ‘form’ are the source of his theory of the nation as a continuous community existing prior to the state and after its dissolution, suggesting that the ecclesiological analogy is more coherent than the idea of a Saxon nation existing prior to the English civil constitution. See C. Condren, ‘Sacra before Civilis’, *Journal of Religious History*, 11 (2) (1981), pp. 528–9. It is worth noting, however, that the notion of an Anglo-Saxon nation existing prior to the state was already a well-worn trope by Lawson’s time. John Selden in his *Jani Anglorum* (1610) speaks of the Germanic tribes who peopled England as a single ‘Saxon’ nation. Philip Hunton (1643) and Nathaniel Bacon (1647) also speak of a secular self-governing Saxon nation which accepted the rule of kings on trust and deposed them for tyranny. See *Tracts Written by John Selden of the Inner-Temple, Esquire* (London, 1683), p. 29; Hunton, *Treatise of Monarchy*, pp. 52 ff.; Nathaniel Bacon, *An Historical Discourse of the Uniformity of the Government of England* (London, 1647), pp. 47–50. It is safe to say in any case that Lawson’s religious and secular notions of pre-political communities are mutually reinforcing, and that it is thanks to his ability to draw these analogies that his formulations are clearer and more thoughtful than those of earlier and later writers (such as Locke) who did not.

<sup>55</sup> *Politica*, p. 203.

<sup>56</sup> *Ibid.*, p. 217.

by a parliament, much less by a sovereign king. For the community and people of England gave both king and parliament their being.<sup>57</sup> Since the community of England is the original source of sovereignty, reasons Lawson, the nation alone has the right to alter the constitution: 'if they [king and parliament] meddle with the constitution to alter it, they destroy themselves, because they destroy that whereby they subsist'.<sup>58</sup> The English nation thus possesses what would later be called 'constituent power', the power to establish a constitution by which it may be governed. This is the sense of Lawson's assertion that only the community of England has 'real majesty' or sovereignty. Personal majesty is given by the people to King and Parliament in trust:

Personal majesty [is] fixed in some persons, who are trusted with the exercise of it, and may, and many times do forfeit to God, and in some cases forfeit it to the community or the people . . . The person or persons trusted with the majesty and power are bound to seek the good of the whole people, and for that end they are trusted with it, and no otherwise.<sup>59</sup>

King and Parliament exercise the power of the nation in trust. If the King and Parliament fail to keep their trust, they forfeit their power to the nation, the ultimate repository of sovereignty. Similarly, England's ecclesiastical government is held in trust from the community of Protestant believers, which proposition Lawson asserts by way of an analogy to the state. Just as the 'chief power' is reserved in the 'whole community' so that 'if the trustees do abuse their power, they may remove them or reform them: so it should be done in the church'.<sup>60</sup>

One of Lawson's chief aims in writing *Politica Sacra et Civilis* was to establish on philosophical and historical grounds the power and the right of the people to appoint a *Concilium sapientum* or Convention Parliament to restore the English constitution that had been so badly marred as a consequence of the Civil War.<sup>61</sup> Unlike Locke, however, he understood implicitly that such a power could have no reality in the absence of an established community, to which the power could indeed revert. To ground his argument Lawson could provide 'evidence' from national history, and by analogy to the history of the church, that the English were a nation whose members had in ancient times coalesced of their own accord to form a government. This community, with these racial, cultural and spiritual bonds, and these ancient traditions of government may reframe its civil and ecclesiastical constitutions for the common benefit, as it has done before. But as his more general reflections on the nature of the communal bond suggest, such a demonstration would not

<sup>57</sup> *Ibid.*, p. 108.

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

<sup>59</sup> *Ibid.*, p. 49.

<sup>60</sup> *Ibid.*, p. 175.

<sup>61</sup> This is the main focus of Franklin's discussion of Lawson in *John Locke and the Theory of Sovereignty*.

be sufficient by itself. For the people must actually care about and be prepared to make a priority of the fundamental ‘matter’ or ‘substance’ of their union. Thus, Lawson’s argument is also grounded in a moral appeal for national unity for the sake of those collective interests. He writes:

In all our sad divisions which happened from first to last, and are not wholly yet ended to this day, two things are worthy the serious consideration of wiser men than I am: What party for time past hath been most faithful to the English interest; and what course is to be taken for to settle us more firmly for time to come. For the first, we must understand what the English interest is. The English interest is twofold, civil and ecclesiastical; for we are Englishmen and Christians. The civil interest is *salus populi Anglicani* . . . The interest ecclesiastical is the Protestant religion and the preservation of the substance thereof.<sup>62</sup>

A community that is to resolve its internal differences and reframe its constitution for the benefit of all must be able to unite around a common English and Protestant interest that trumps all factional and denominational interests. Reinforcing this point he says: ‘Let no man think that the public interest, either ecclesiastical or civil, of England is the interest of any one person or family, or any few persons or family, much less any sect, party, faction.’<sup>63</sup> Individual and factional differences must be overcome by shared nationhood, rooted in a shared history, both civil and ecclesiastical.

Thus, on Lawson’s account, the concept of popular sovereignty is senseless without a concept of nationhood. According to Locke’s theory of sovereignty, the constituent power could be claimed by any of the factions with pretensions to forming their own community. Both Filmer and Hobbes identify the problem with this argument. Locke never addresses their valid objections; and, indeed, his theory of popular sovereignty makes it impossible for him to answer them. Lawson, however, can answer Filmer and Hobbes. In his conception, popular sovereignty is firmly rooted in attachments men feel to their native country. As Lawson expresses it ‘every subject is first bound to be faithful to their Country, then unto their King, who swears to maintain the Laws, Liberty and Religion by Law established’.<sup>64</sup> When one makes such a concept foundational, one assumes ‘a higher obligation of fidelity, not only to God, but *their own native country*, to which they are to be faithful under any form of government or personal sovereign whatever’.<sup>65</sup> Where there is no genuinely felt national community to which individuals and factions are willing to sacrifice their particular interests, one must turn to Hobbes for a solution, or let the factions go their separate ways.

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<sup>62</sup> *Politica*, p. 112.

<sup>63</sup> *Ibid.*, p. 123.

<sup>64</sup> *Examination*, p. 26.

<sup>65</sup> *Politica*, p. 64.

## V

**Lawson on Constitutionalism and the Liberties of Englishmen**

One cannot argue for popular sovereignty without appealing to the nation as an established community with certain civil and sacred interests. Similarly, one cannot advocate a particular form of constitutional discipline, and particular rights to be protected by that constitution, on the basis of mere abstract principles as Locke attempts to do in *The Second Treatise*. In this case too, Lawson, like most defenders of English liberty of his time, appeals to landmarks in the nation's past, and to the sacred memory of heroic ancestors who fought for English liberties. For Lawson, 'modern' principles such as government by the consent of the governed, protection of individual rights, the division of sovereign power, all have their origin in England's ancient past, all are components of 'this model of ours [which] began in the time of the Saxon kings, and was brought to perfection, some say before; some say, in Edward the Confessor's time'.<sup>66</sup>

The fundamental cause of conflict in the Civil War was, as Lawson saw it, disagreement concerning the form of civil and ecclesiastical government in England. Lawson does not attempt in his work to sort out all the particulars,<sup>67</sup> but he does endeavour to re-establish a consensus on the fundamentals of England's 'ancient constitution'. There are significant differences between the *Examination* and the *Politica* owing to the different circumstances in which they were written.<sup>68</sup> In the first, Lawson's task is to repudiate absolutism, in the second, to encourage his countrymen to put aside partisanship and seek national reconciliation. Yet, the same spirited, and sometimes intemperate advocacy of English liberty prevails in both. In making this case, he employs a very familiar narrative and form of rhetoric. On the liberties of the subject, and the constitutional limits on the power of King and Parliament, Lawson admits no compromise. In the *Examination*, he states bluntly: 'For the English alwaies desired to be governed as men, not as Asses.'<sup>69</sup> In the *Politica*, he frequently condemns advocates of any form of absolutism as 'ignorant', 'foreign' or both — such opinions contrary to English liberty, he says, 'we Englishmen cannot well brook'.<sup>70</sup>

Unlike Locke, Lawson defends not the rights of individuals, but the rights of Englishmen. Lawson's Englishman looks backward to his heroic ancestors, and sees in them, and in their example, the best protection of his

<sup>66</sup> *Ibid.*, p. 99.

<sup>67</sup> He had done so in another work which he was prepared to release after gauging the reception of the *Politica*, but the Restoration beat him to it. That work is now lost. See Condren, *Lawson's Politica*.

<sup>68</sup> Condren catalogues the differences in 'Confronting the Monster', pp. 71–4 and *Lawson's Politica*, pp. 95–116.

<sup>69</sup> *Examination*, p. 42.

<sup>70</sup> *Politica*, p. 103.

freedoms. 'English liberty', he says, 'is their birthright'. 'We do not learn it out of the Greek and Roman Histories, nor from the Athenians or Romans, but from our own laws, which are far different from theirs, and far more agreeable to the written laws of God.'<sup>71</sup> It has been the Englishman's understanding of his own native laws, agreeable to God and derived to him by right of birth, that has enabled him to preserve his own rights as a subject, and the right of his nation as a collective to rule itself. This, Lawson asserts, has been the case throughout English history. He says 'most of those who have controlled the just acts of sovereigns, never read, much less understood, those [Greek or Roman] authors'.<sup>72</sup> Englishmen know their rights from 'the original constitution of the state, Magna Charta, the Laws, and the Petition of Right'.<sup>73</sup> Throughout English history, Englishmen have been a people zealous for liberty, and have fought to preserve the rights won for them by their ancestors: 'much more the English liberty is to be valued, and ever was by our ancestors, who obtained it, recovered it, kept it, though with the blood of many thousands'.<sup>74</sup>

Lawson thus describes Englishmen as a nation apart, favoured by God and distinguished from others precisely by the special powers, rights and privileges they have inherited from their ancestors:

The liberty of the subjects of this Nation is very great, and such . . . [that] the ordinary and common subjects of other Nations are but slaves unto them. Our Freeholders have the choice of their Knights and Burgesses for the Parliament, so that neither any Laws can be made, nor moneys imposed upon them, without their verbal consent, given by their Representatives. In all causes, civil, criminal, capital, no Judgement can pass against them but by the verdict of a jury made up of their neighbours, which in itself is an excellent privilege.<sup>75</sup>

Compared to English freeholders, the common subjects of other nations are little better than 'slaves'. England's ancient constitution provides members of the nation with the power to participate in lawmaking through their representatives in Parliament and protects their freedom as individuals through the institution of trial by jury of one's peers.

The ancient constitution of England not only empowers the common people and guarantees their individual liberties, it also limits the power of the three estates that compose the government. The power of the Kings of England is strictly limited by the constitution, and has been so since the beginning. In the *Examination*, Lawson declares with gusto that any King of England who claims absolute power by right of conquest may be deposed by

<sup>71</sup> *Ibid.*, p. 60.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, p. 58.

<sup>74</sup> *Ibid.*, p. 55.

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

force. Following other writers who made much of the right of conquest, Lawson insists that English law does not recognize such a right, and that Englishmen have never before suffered any ruler to treat them as a vanquished nation:

What William the Conqueror here in England did, it matters not much. For if he did derive his title from Edward the Confessor . . . then he was no Sovereign. If he did act as Conqueror, then all compact and right upon covenant is void, as his successors, who insist upon that title of conquest, give full liberty to the English to fight against them, and depose them if they can and deal with them as enemies.<sup>76</sup>

In the *Politica*, Lawson avoids any direct assertion of a right of resistance, but he emphasizes the constitutional limits on the power of the king, and offers the phenomenon of Englishmen curbing tyrannical kings as a fact of English history. An English king, he says, has 'no power of the purse'. He is sworn to 'corroborate the just laws and customs, which the people had chosen'. In the parliament, he is the third party, and 'neither in acts of laws or judgement' can 'he do anything without the peers and commons . . . As kings have sometimes curbed parliaments, so parliaments have kings, and disposed of the militia, the navy, the ports, the chief offices. Nay, sometimes they have judged kings, accusing them of acting against the fundamental constitution, and challenging such power as tended to the dissolution of the same, and have deposed them.'<sup>77</sup>

The English Parliament, composed of Commons and Peers, though it possesses very great authority, is also limited by the fundamental laws of the nation, and always has been so. For instance, no parliament can forbid future parliaments to repeal its acts and judgments. What is more, no mere parliament can alter the constitution of the kingdom, for the constitution prescribes parliament's powers as well as those of the king. 'They cannot alter the government, nor take away divers things belonging to the crown, because they did not give the prerogatives of the crown at first.'<sup>78</sup> Both King and Parliament may overstep their bounds, in which case the obedience of the subjects of the realm is no longer due them:

The personal majesty of a king with us, whilst he lives, and governeth according to law, requires subjection, but . . . upon tyranny in exercise, or acting to the fundamental dissolution of the constitution, he ceaseth to be a sovereign, and the obligation as to him ceaseth. A parliament turning into a faction, acting above their sphere, wronging king or people, cannot justly require, nor rationally expect for subjection.<sup>79</sup>

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<sup>76</sup> *Ibid.*, p. 70.

<sup>77</sup> *Ibid.*, p. 57.

<sup>78</sup> *Ibid.*, p. 107.

<sup>79</sup> *Ibid.*, p. 226.

An English king who rules tyrannically, without regard to law or the constitution, ceases to be a king. Likewise, a Parliament that oversteps its constitutional authority, or becomes a faction that does not genuinely represent the interests of the nation as a whole, also loses the authority to demand obedience to its laws. Lawson says that such a Parliament as this may be called to account and judged by later Parliaments.

In the *Politica* Lawson propounds the coordination thesis, which he sometimes calls ‘polyarchical sovereignty’.<sup>80</sup> According to the ancient constitution, such powers as the three estates of the realm have, they possess jointly, and only on condition that they, as representatives of the nation, pursue the common good. Says Lawson: ‘The personal majesty primary was in king, peers, and commons jointly: in the whole assembly as one body.’<sup>81</sup> This is confirmed by the traditional manner of enacting legislation in England: ‘Be it therefore enacted by the King’s most excellent Majesty, by and with the assent and consent of the Lords spiritual and temporal, and by the Commons in this present Parliament assembled, and by authority of the same.’<sup>82</sup> The particular genius of this arrangement, according to many English writers who precede and follow Lawson, is that, as no law could be passed without the consent of all three estates, King, Peers and Commons, the interests of the whole realm must be taken into account, and the exorbitances of one portion of the nation could be checked and moderated by the others.<sup>83</sup> On the authority of Sir Edward Coke, the antiquary Henry Spelman and the *Modus tenendi Parliamentum*, Lawson affirms that this coordinated legislative power of the estates can be traced back to the Saxons.

Unlike the papacy, which Lawson characterizes variously as absolutist, foreign and even Satanic, England’s ancient ecclesiastical government resembles its civil government in that it, too, is polyarchical, disposing power to different authorities to be exercised jointly by them all.<sup>84</sup> Lawson begins by drawing upon secular theories of the state and the history of the church to justify this claim. Christ said ‘tell the church’, thus, the power of the keys is not ‘in it monarchically, nor aristocratically, nor democratically, or any pure way

<sup>80</sup> The English constitution fits Lawson’s category of ‘polyarchical sovereigns who are many physically, but considered as one person morally, as jointly invested with one power sovereign’ (*Politica*, p. 54). On the coordination thesis, see C.C. Weston and J.R. Greenberg, *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England* (Cambridge, 1981).

<sup>81</sup> *Politica*, p. 108.

<sup>82</sup> *Ibid.*, p. 110.

<sup>83</sup> See Hunton, *A Treatise of Monarchy*, pp. 42–3. Hunton emphasizes the theme of checks and balances, which he argues was one of the advantages of England’s mixed monarchy.

<sup>84</sup> On the absolutist, foreign and Satanic character of the papacy, see Chapter 9 of the *Politica*. See also Condren, *Lawson’s Politica*, p. 82.

of disposition; but in the whole, after the manner of a free state or polity'.<sup>85</sup> Bishops of the primitive church, he says, did not act without the assent of presbyters and people. Considering the history of the church more broadly, bishops in many nations were advised by presbyters, but not bound by their advice, yet 'the English bishop is something different from all these'.<sup>86</sup> Thus, Lawson also points to an authentically English ecclesiastical order, quite unlike the episcopal absolutism that had arisen in foreign nations. The English episcopacy he describes as 'singular', unique in two respects: its power of ordination was shared with presbyters, and it made canons with the assent not only of presbyters, but also of king and parliament, which represented the people.<sup>87</sup> Says Lawson, 'the canons and injunctions made by the clergy, though confirmed by royal assent, without the parliament have been judged of no force'.<sup>88</sup> The best form of government for the national church is thus a combination of primitive Christian and peculiarly English elements, that is a division of power between, on the one hand, a convocation of bishops, presbyters and people — like the ancient convocations of Israel or the 'Wittena Gemot', the civil government of the Saxons — and king and the two houses of Parliament on the other.<sup>89</sup> To Lawson, this type of constitutional arrangement is as necessary to the preservation of the church as it is to the state. For 'if the church once make any party the primary subject of this power, then they cannot use it to reduce them'.<sup>90</sup> That is, if any part of the church, for instance, the bishops, be vested with absolute sovereignty, then the other parts cannot check their exorbitances. Dividing the power of governing the church between different authorities is the only way to ensure that no authority may become absolute and tyrannize over the community as a whole.

All of the civil constitutional forms that Lawson defends are found to have their origin in the historical English community, and even the ecclesiastical constitution is seen as one peculiarly suitable to the English national character. This points to another crucial difference between Lawson and Locke, or at least Franklin's interpretation of Locke. Although Lawson considers the nation to have a right to make and remake its government, he does not recommend that the English nation seek constitutional innovation. For Lawson it was precisely innovation that led to the Civil War, and the troubles of the interregnum. James and Charles had been wrong to alter the doctrine and discipline of the national church, not only because the alterations introduced by

<sup>85</sup> *Politica*, pp. 167, 175.

<sup>86</sup> *Ibid.*, p. 138.

<sup>87</sup> *Ibid.*, pp. 146–7.

<sup>88</sup> *Ibid.*, p. 134.

<sup>89</sup> *Ibid.*, p. 210. On the respective powers of the church government in episcopacy, presbytery and people, and the civil government in king and parliament concerning religion, see *ibid.*, p. 133.

<sup>90</sup> *Ibid.*, p. 175.



King and bishops were ‘abuses, innovation, superstitions’, as some adjudged them to be, but also because the alterations were imposed ‘without law and authority of parliament’.<sup>91</sup> Just as the innovations in the church were illegal, so were the forced loans and other alleged sovereign acts of those kings in civil government that bypassed parliament. After King Charles had been deposed, parliament, and later Cromwell, introduced other innovations in church and state. In Lawson’s words ‘to pull down one arbitrary power to erect another . . . to erect new models of their own brain can be no act of fidelity’.<sup>92</sup> Indeed, none of the three new constitutional models attempted by parliament during the interregnum were able to acquire legitimacy in the eyes of the nation.

A lasting settlement of the nation would require two things. First, the people of England must remember that they are a nation, and that they thus owe their first loyalty to the nation as a whole, and not to a faction, for ‘without unity of the whole, or at least of the major part, the business will hardly be effected’. Second, ‘the foundation to be laid is to find out the ancient constitution before it was corrupted too much, and understand the great wisdom of our ancestors, gained by long experience in the constitution of our state’. This ‘finding out’ of the authentic ancient constitution of the realm would be the work of ‘experienced statesmen, and antiquaries in law’. In Lawson’s view, then, the foundations of a settlement for a nation accustomed to constitutional self-government are united popular will *and* the accumulated wisdom of ancestors. The ancient constitution would not only be the most efficacious in its operation, once recovered, but it would also have more authority. A new constitution constructed out of whole cloth on the basis of the judgments of the present generation will not have as much legitimacy, will not elicit necessary feelings of loyalty. If those charged with ruling the kingdom are not anchored by an authoritative constitutional tradition, they will ‘spend their time of every several parliament in moulding their government anew’.<sup>93</sup>

Franklin sees Lawson granting to representatives of the counties of England a right to remodel the constitution in a national convention and presents this account as a precursor to the Lockean theory, which permits a convention parliament representing the whole people to ‘new-model’ the constitution however it pleases.<sup>94</sup> He acknowledges, however, that this sort of constitutional convention most likely would have been a bridge too far for Lawson. My point is that here, once again, Lawson’s argument makes more sense, and is closer to historical reality, than that of Locke. Acts of popular sovereignty

<sup>91</sup> *Ibid.*, p. 258.

<sup>92</sup> *Ibid.*, p. 121.

<sup>93</sup> *Ibid.*, p. 123. In the last quotation in the paragraph, Lawson has in mind the recent experience of the Commonwealth and Protectorate parliaments, all of which insisted on remodelling the constitution in one way or another.

<sup>94</sup> Franklin, *John Locke and the Theory of Sovereignty*, pp. 74–5, 121.

need a firm grounding in the particular historical experience of a nation.<sup>95</sup> This is confirmed by Lawson's understanding of the problem of achieving a constitutional settlement for England. What is important for the legitimacy of a constitutional settlement is not merely that it be made by a convention parliament representing the whole nation, rather than an ordinary parliament. The sanction of the 'real majesty' of the people represented in one convention at one moment in time is not by itself a sufficient source of legitimacy for a constitutional order. The wisdom of ancestors, the old laws, the old forms, these are no less important, perhaps more so, for legitimacy. As far as Lawson was concerned, a convention parliament would be duty bound to study the ancient constitution with the help of 'antiquaries in law', and ground their formulations firmly in the national tradition. Indeed, he warned against the 'vain and presumptuous' conceit that the present generation, without understanding 'the great wisdom of our ancestors, gained by long experience in the constitution of this our state,' might be clever enough to produce something better.<sup>96</sup> One might say that, from his point of view, not only the consent of the present generation, but also the consent of ancestors would be required for a lasting settlement.<sup>97</sup> Indeed, one finds that it was in this spirit that the English people received Charles II at the Restoration, and rejected James II in favour of William of Orange in 1689.<sup>98</sup>

### Conclusion

The works of George Lawson provide a powerful illustration of the relationship between popular sovereignty, constitutionalism and nationalism. Popular sovereignty requires a pre-political community, which, if it is to have real substance, must be identified with concrete memories of the nation. Otherwise, one is left with the formlessness and anarchy of Lockean volitional associations. Locke himself understood that members of a pre-political community must have some special sources of mutual trust and friendship. But he

<sup>95</sup> Even according to Renan, it is not just the 'daily plebiscite' that holds a nation together, but also 'the possession in common of a rich legacy of memories. See Yack, 'The Myth of the Civic Nation', p. 198.

<sup>96</sup> *Politica*, p. 123.

<sup>97</sup> Cf. Edmund Burke, who wrote a century and a half later that in all acts of government, 'the temporary possessors and life-renters . . . [of a commonwealth must not], unmindful of what they have received from their ancestors, or what is due to their posterity . . . act as though they were the entire masters', and described the social contract as a 'partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born' (*Select Works of Edmund Burke: A New Imprint of the Payne Edition, Vol. 2*, ed. E.J. Payne (Indianapolis, 1999), pp. 191, 193).

<sup>98</sup> Lawson's *Politica* 'displays those attitudes which facilitated the traumatic but relatively bloodless shifts from Commonwealth to Stuart Restoration and to Williamite regime' (Condren, *Lawson's Politica*, p. 37).

was unable or unwilling to say what those sources were. George Lawson identified the pre-political community squarely with the nation, whose members were bound together by affective ties based on a recognition of common ancestry, language, religion and custom. The constitutional principles Lawson defended were also derived from English historical memory and the sacred history of the church. In his account, the national community and the civil constitution acquire a 'sacral' character, just as the community of Protestant believers and the ecclesiastical constitution take on the 'organical' character of the national historical community. Lawson is a particularly striking example of those seventeenth-century proponents of constitutional self-government who responded to the Hobbesian claim that a pre-political community could not exist by injecting concrete and evocative nationalist content into that notion of the pre-political community. Thus, it may be said that Lawson successfully answers Hobbes, and plugs the holes in Locke's theory. If George Lawson and twenty-first century liberal nationalists are right, then constitutional self-government depends on a common national cultural legacy both for solidarity among its citizens and attachment to a particular constitutional discipline. The attempt to purify the nation of these particularistic attachments risks weakening the bonds of citizenship and the constitutional order.

It is noteworthy, moreover, that Hobbes and twentieth-century liberals and post-nationalists are alike in their fear of the evocative power of nationalism. In the concluding pages of *Leviathan*, Hobbes attempts to dissuade others from making evocative appeals to history. That all but a very few political writers and actors in England completely ignored Hobbes and went on appealing, as Lawson did, to England's special inheritance of liberty and to the memory of heroic ancestors who had shed their blood to preserve that inheritance, speaks volumes. If one likes the result — constitutional self-government — then one should be glad that Englishmen and political writers of other nations were not afraid to use the emotive power of nationalism to this end. Those of the Rawlsian and Habermasian schools would like political discourse in liberal democracies to be framed solely in terms of principles and reasons that can be justified from the standpoint of all human beings. But this is an unrealistic expectation. It seems a near certainty in any event that, the prescriptions of liberal political philosophers notwithstanding, in competitive democratic politics, politicians and political writers of all ideological stripes will go on using the evocative power of nationalism whenever it suits them. Those who defend constitutional democracy would be very unwise to opt out of this game.

*Ethan Alexander-Davey*

WASHINGTON UNIVERSITY IN ST LOUIS