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# II. LEGAL SOVEREIGNTY IN THE BRADY CONTROVERSY*

By CORINNE COMSTOCK WESTON
*Lehman College, City University of New York*

## I

A MAJOR source of difficulty in interpreting the political thought of Dr Robert Brady, the high tory historian who imparted a new dimension to the political quarrels of late Stuart England, arises out of a limitation that he imposed upon himself in writing history. He deliberately included very little political reflection in his writings, observing that he would not 'inlarge further upon the great Use and Advantage Those that read Old Historians may make of these Discourses, but leave that to the Judgment of Understanding Readers'.[1] This limitation may be offset, it is suggested here, by placing Brady securely within the intellectual framework created by the contemporary theories of legal sovereignty that had originated during the English civil war and were fast becoming tradition by the late years of Charles II. When Brady made his researches public, almost all the elements were present that were required for fashioning a theory of legal sovereignty on the lines made famous in Blackstone. Englishmen were reading Sir Thomas Smith and Sir Edward Coke on the uncontrollable authority that resided in parliament for making, confirming, repealing, and expounding laws; and many of them were by this time accustomed to associating the legislative power, itself a new expression, with sovereignty in the state. They had also learned during the civil war years to recognize law-making as the characteristic function of their high court of parliament.[2] All that remained for the whole to fall

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[1] 'The Epistle to the Reader', *An Introduction to the Old English History* (London, 1684), no pagination. This tract and other Brady writings are discussed by J. G. A. Pocock, 'Robert Brady, 1627–1700: A Cambridge Historian of the Restoration', *Cambridge Historical Journal*, X, No. 2 (1951), pp. 193–6, 199, and ch. VIII 'The Brady Controversy', *The Ancient Constitution and the Feudal Law* (Cambridge, 1957), pp. 182–228. The *Ancient Constitution* was reprinted in the Norton Library in 1967. The reader interested in a fuller account of the Brady controversy than this article supplies should consult Pocock.

[2] Bulstrode Whitelocke, *Notes Uppon the Kings Writt . . . Being Disquisitions on the Government by King, Lords and Commons*, ed. Charles Morton (London, 1766), II, 333–5. Whitelocke was writing shortly after the restoration of Charles II. Henry Care, *English Liberties* (London, 4th ed., 1719), pp. 120–5. John Brydall, *Speculum Juris Anglicani, Or, A View of the Laws of England* (London, 1683), pp. 7–8. Nathaniel Johnston, *Excellency of Monarchical Government* (London, 1686), p. 247. See also J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford, 1961), p. 80ff. and C. C. Weston, 'Concepts of Estates in Stuart Political Thought', in *Representative Institutions in Theory and Practice*, Brussels, 1970, pp. 87–130. This is vol. XXXIX of

in place was reaching agreement on the identity of the law-maker in parliament, a consummation that became possible with the success of the Glorious Revolution.

Until then, there was this main question to be answered. Did the king alone make law in parliament, the royal consent acting as an elixir by which the parliamentary measure was transformed into law, or did king, lords, and commons share the law-making power on the basis of equality? It was a question of the first importance, and a royalist such as Peter Heylyn deemed only one answer possible. 'The Legislative power as we phrase it now', he wrote in 1644, 'is wholly and solely in the King; although restrained in the exercise and use thereof by constant custome, unto the counsel and consent of the Lords and Commons. *Le Roy Veult*, or the King will have it so, is the imperative phrase by which the Propositions of the Lords and Commons are made Acts of Parliament.'[3] Heylyn was writing at Oxford in the early years of the civil war, but the republication of his tract in 1681 makes evident its meaning for Brady's generation. Nor was this a viewpoint peculiar to a conservative royalist like Heylyn, or his great friend, Sir Robert Filmer. It was also enunciated in the writings of a constitutional royalist such as Sir John Spelman,[4] son of the legal and ecclesiastical scholar, and in the comments of Lord Chief Justice Matthew Hale writing in the reign of Charles II. Hale asserted of the king: 'In him resides the Power of makeing Lawes. The Laws are his Laws enacted by him.' Yet the law-making power was exercised in parliament. 'Though the Legislative Power be in the King, So that none but he can make Laws oblidgeing the Subjects of this Realme,' wrote Hale, 'yett there is a Certaine Solemnitie and Qualification of that Power, namely with the advice and assent of the two houses of Parliament, without which no Law can be made'.[5]

At the other extreme were Englishmen who accepted a principle of co-ordination in law-making by which king, lords, and commons either shared the legal sovereignty or exercised it jointly as equal partners or companions in the law-making process. Drawn from the ranks of the parliamentarians in the civil war period or at a later date from the whigs of Charles II's reign, they advocated

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*Studies presented to the International Commission for the History of Representative and Parliamentary Institutions*. The changing views of parliament's functions can be seen easily by comparing William Prynne's comment in a tract published in 1654 with that of Sir Robert Atkyns in *The Power, Jurisdiction and Priviledges of Parliament and the Antiquity of the House of Commons Asserted* (London, 1689), pp. 36–40. Prynne's comment is discussed in an illuminating way by Charles Howard McIlwain, *The High Court of Parliament and Its Supremacy* (New Haven, 1910), p. 158, note 2.

[3] *Stumbling-block of Disobedience and Rebellion* (London, 1658), p. 273. This tract written in 1644 was published for the first time in 1658. It was republished in 1681 as part of a collection of Heylyn's tracts.

[4] *Case of our Affaires in Law, Religion and Other Circumstances briefly Examined* (Oxford, 1643), pp. 1–9.

[5] 'Reflections by the Lord Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe', printed in W. S. Holdsworth, *History of English Law* (London, 1903–38), v, 508.

a theory of mixed monarchy, based on the principle of a co-ordination in the legislative power, that parliamentarian writers such as Charles Herle, Philip Hunton, and William Prynne had formulated in the civil-war years from Charles I's highly influential Answer to the Nineteen Propositions. This theory ran a prosperous course in the seventeenth century. According to its tenets king, lords, and commons, often denominated the three estates, were co-ordinate partners in law-making; and it was usually added that the source of the law-making power was the community, an idea also nourished by Charles I's Answer. The law-making power had originated in one of two ways, either as the result of a social contract between king and people, sealed by the coronation oath, as Herle argued, or else as the result of an historical experience dating from Anglo-Saxon England. At that time, it was said, the monarchy was virtually elective and the two houses dominant. The latter argument imparted a distinctive tone to Nathaniel Bacon's *Historical and Political Discourse of the Laws and Government of England.* Appearing in two parts, published respectively in 1647 and 1651, it was much reprinted in the years after the restoration and was known in the eighteenth century to men as diverse as Bolingbroke and Chatham.[6] The advocates of mixed monarchy were divided on one point: they were not agreed as to whether the king, as one of three estates, possessed a veto on legislation. According to George Lawson, a clergyman writing during the interregnum, the party accepting mixed monarchy believed ' the King, Peers and Commons to be three co-ordinate powers, yet so that some of them grant three Negatives, some only two '.[7] The issue remained alive after the restoration in the mind of a high tory like Brady although by his day the maxims of mixed monarchy were seemingly on the defensive. Still there was more than one sign in the chilly political climate of the early 1680s that many Englishmen, perhaps even a majority of the political nation, continued to accept the civil-war principle of a co-ordination in the legislative power and the accompanying theory of mixed monarchy. Not least of these signs was the willingness to refer publicly to the law-making power as ' shared ' by king, lords, and commons. But it is high time to examine the Brady controversy with a view towards learning whether its arguments reflected in actuality the contending theories of legal sovereignty that had emerged during the civil war years, their emergence signalling a new age of definition in English political thought and constitutional experience.

## II

The leading figures in the Brady controversy should be briefly noted. On the tory side loomed the formidable Dr Brady, court physician, master of Caius College,

[6] Consult the article on Nathaniel Bacon in the DNB. Bolingbroke, *A Dissertation upon Parties* (London, 1749), pp. 251, 253. See also the comments on mixed monarchy in C. C. Weston, *English Constitutional Theory and the House of Lords* (London, 1965), pp. 24–43. The principle of co-ordination is discussed at length in Weston, ' Concepts of Estates ', op. cit. pp. 87–130.

[7] *An Examination of the Political Part of Mr Hobbs his Leviathan* (London, 1657), p. 31.

Cambridge, from 1660 to 1700, and staunch defender of a high royal prerogative in the years before the Revolution. He was the leader of a group of court historians that included the aged Fabian Philipps and the Yorkshire physician, Dr Nathaniel Johnston. Their whig counterparts were William Petyt, who replaced Brady in the Tower records office at the Revolution, his friend, William Atwood, for a time chief justice of New York, and the more obscure Edward Cooke, whose *Argumentum Anti-Normanicum or An Argument proving ... that William Duke of Normandy made no absolute conquest of England by the Sword in the sense of our Modern Writers* (1682) expressed a cherished tenet of whiggism. They subsequently received support from James Tyrrell, perhaps best known for his friendship with John Locke, and Sir Robert Atkyns, a whig lawyer notable for defiance of the court in the years before the Glorious Revolution. It will be seen that the whig historians were advocates of the theory of mixed monarchy; but for the moment it may be noted that as writers of history they were present-minded in their interpretation of the past, refusing to accept the implications of the Norman conquest for the shaping of early English history lest it have political implications for their own day. To them it was no more than a change of rulers as they stressed the continuance of the Anglo-Saxon constitution after 1066 and sought confirmation for this viewpoint in the willingness of William I and his successors to accept the laws of Edward the Confessor by issuing great charters and later confirming them.

At first sight the tory historians seem much more historically minded, their high prerogative ideas facilitating the acceptance of the fact of conquest and its implications for society and government. Working with the aid of Sir Henry Spelman's *Glossary*, which had been compiled earlier in the century, Brady called attention to changes in social structure and in legal and constitutional institutions after the introduction of Norman law and feudal tenures. The result had been a powerful king who governed with the aid of a class of Norman military men, its members automatically subordinate to him as tenants in chief. Dismissing any notion of a large number of Anglo-Saxon freeholders surviving the conquest since the bulk of Englishmen were serfs, Brady depicted early parliaments as little more than tenurial councils composed of tenants in chief, to which elements of the future house of commons were late arrivals, coming only in 1265 (49 Hen. 3) and then in dubious circumstances at the summons of the usurper, Simon de Montfort. Even though they continued to be summoned after the return of the monarchy in 1266, the lords and commons were unimportant in law-making, their role being confined to giving advice and counsel. Brady's researches effectively conveyed that the two houses of parliament to all intents and purposes dated from the 49th year of Henry III and that even afterwards the king and his council determined whether and when burgesses might come to parliament. Whig anguish was patent in Atwood's complaint of the tory historian's intention ' to trample on the best Constitution, our Government itself, under Colour of its being New in the 49th of Hen. 3 when it arose out of the indigested Matter

of Tumults and Rebellion, and so not having a Legitimate Birth, as not born in Wedlock between the King and his People, it may be turn'd out of Doors, by the Help of that Maxim '.[8]

Since Brady made so incisive a use of feudalism to establish the subordination of the two houses of parliament to the king in this period of English history, it comes as some surprise to realize that his view of the kingship as a legal and constitutional institution in the same centuries owed very little indeed to feudalism. The modern scholar, J. G. A. Pocock, recognized this to be the case when he pointed out that Brady was no man to subject the monarchy to the same scrutiny as he gave parliament. The tory historian left the historical role of the monarchy unexamined and unstated, thus allowing the reader to infer an unchanging absolutism. Yet Pocock is not always consistent on this point. Much impressed by the quality of Brady's historical achievement, especially when compared with most contemporaries, Pocock proceeded at other times on the assumption that feudalism had shaped the tory historian's account of the early English monarchy. Brady, it was said, ' desired to show that the monarch in a feudal society had been [an] unchallenged sovereign and found it easy to do so by emphasizing the purely feudal nature of that monarch's authority, as recipient of every freeholder's homage for the lands that he held '.[9] In point of fact, Brady's early English monarch is best described, not as a feudal ruler, but rather as a Bodinian law-giver of the type admired by conservative political thinkers in Stuart England.

Assuming for the moment that the tory historian was motivated more by political partisanship than an interest in historiography centring on feudal tenures and their implications for post-conquest institutions, it is here suggested that Brady set out purposefully to justify a legal sovereignty in the king on the lines developed earlier by the French political thinker, Jean Bodin, writing during the religious wars of the late sixteenth century. The latter's writings, known to Tudor England, entered upon a new career during the English civil war as problems of authority and allegiance preoccupied the minds of leading polemicists. In the fast-changing political situation some of them turned to Bodin, of whom a modern editor wrote that ' unlike previous theorists [he] made authority the central

[8] ' Preface ', *Jus Anglorum ab Antiquo, Or, A Confutation of an Impotent Libel against the Government by King, Lords, and Commons* (London, 1681), no pagination. William Petyt, *The Pillars of Parliament Struck at by the Hands of a Cambridge Doctor* (London, 1681), pp. 7–8. After noting the comparative rarity of this tract, Pocock stated that the writings of Petyt's friends and enemies alike make no reference to it. Known only through the learning of bibliographers, it apparently survives in the form of but two copies, one in the Bodleian, the other in the Advocates Library, Edinburgh. It may be that the government seized the tract while it was in the press since the two surviving copies are incomplete.

[9] Pocock, *Ancient Constitution*, pp. 220–1. There are similar statements in ibid. p. 218 and in *Cambridge Historical Journal*, pp. 200–1. See also ibid. p. 199.

feature of his entire system of politics'.[10] A glance at the French thinker's remarks on sovereignty supports the generalization. Defining sovereignty as the most high, absolute and perpetual power over the citizens and subjects of a commonwealth, Bodin emphasized as the first and chief mark of sovereignty the power to give laws and command to all in general and to everyone in particular. Moreover, whoever made law possessed the further powers of abrogating, declaring and correcting it. Was, then, the English king, who lacked the power to repeal a law without the two houses of parliament, a Bodinian lawgiver? The answer was affirmative. Despite the two houses' role in legislation, Bodin believed the English king to be an absolute sovereign, and he was firm that the king's law-making power could not be communicated to his subjects since sovereignty admitted no companion or companions. After all, the life of parliament was dependent upon the royal powers of summons and dissolution; and the role of the two houses, though they seemed to have great liberty, was even limited in law-making. They proceeded by way of supplication and request to the king, and the latter's power of veto was complete. He received or rejected measures at his discretion, disposing of them at his pleasure and acting in a manner contrary to the will of the estates. Nor was the royal power of law-making diminished by the necessity of its being exercised within parliament. To the contrary, the king was much greater in such assemblages where all of his people acknowledged him as their sovereign, this holding true even if the ruler under such circumstances, unwilling to offend his subjects, made many concessions that he would otherwise have denied. That the law-making power thus resided in the king was a matter of much consequence for the relationship between king and people. To Bodin, despite his recognition of other marks of sovereignty, law-making was of surpassing importance. He declared: 'Under this same soveraignty of power for the giving and abrogating of the law, are comprised all the other rights and marks of soveraignty: so that... a man may say, that there is but this only mark of soveraigne power considering that all other the rights thereof are contained in this, viz. to have power to give laws unto all and every one of the subjects, and to receive none from them.'[11]

Legal sovereignty of this type had cogency for royalist writers beset with the forcible parliamentarian claim of a co-ordination among king, lords, and commons in law-making; and royalists such as Sir John Spelman, Heylyn, Filmer, and the anonymous author of the *Freeholders Grand Inquest* (1648), made extensive use of the French thinker's arguments. Likewise possessed of a Bodinian outlook, by which he asserted a legal sovereignty in the king and denied, accordingly,

[10] *Jean Bodin, The Six Books of a Commonweale: A Facsimile reprint of the English translation of 1606*, ed. Kenneth Douglas McRae (Cambridge, Mass., 1962), Introduction, A14. The editor of the English translation of 1606 was Richard Knowles.

[11] *Six Books of a Commonweale*, pp. 84, 96, 98, 155, 162. J. H. M. Salmon, *The French Religious Wars in English Political Thought* (Oxford, 1959), pp. 22–3, 58, 88–96.

a co-ordination in the legislative power,[12] Brady went well beyond his fellow conservatives when, writing from suggestions in Heylyn, he added a conquest theory of royal power by which English law and the constitutional system, on the whole, were dated from the events of 1066.[13] These events revealed that William the Conqueror was the source of the law in the late eleventh century; and the implications of feudalism, which the tory historian was well-equipped to develop, were that neither he nor his successors had companions in the law-making power. Another related theme, subsumed by the conquest theory, was the denial that the Stuart government was traceable either to Anglo-Saxon foundations or to a social contract as the exponents of mixed monarchy claimed. These theorists, in Brady's view, had infused 'Dangerous Notions of Soveraignty and Power into the Peoples Heads, which they never had, or enjoyed, nor can be capable of managing in any Government in the World.' He had written his *Introduction to the Old English History* (1684) 'to undeceive the People, and to shew them, That really they were not possessed of these Pieces of Soveraignty and Empire antiently,

[12] Ibid. pp. 90–6. Filmer's *Necessity of the Absolute Power of all Kings: And in Particular, of the King of England* (published 1648, reprinted 1680) was taken almost entirely from Bodin, *Six Books of a Commonweale*, Introduction, A64. This tract of Filmer's appeared a few months after the *Freeholders Grand Inquest*, which has in recent years been attributed to Filmer. Whether the latter wrote it or not, Brady borrowed from it directly. Filmer and Heylyn were friends, and the latter's *Stumbling-block of Disobedience* has a number of explicit references to Bodin. Ibid. pp. 233, 259, 266, 278. Brady recommended this tract to his readers, citing in particular chs. 2, 3, 4 and 6. Ch. 6 of *Stumbling-block of Disobedience* discusses such subjects as 'the King of England always accounted heretofore for an absolute Monarch', 'no part of Soveraignitie invested legally in the English Parliaments', 'the three Estates assembled in the Parliament of England, subordinate unto the King, not co-ordinate with him', and 'the Legislative power of Parliaments is properly and legally in the King alone'. The republication of Heylyn's tract in 1681 reveals deep concern on the part of the court, or at the least its supporters, at the spread of the principle of co-ordination. As first published, the tract had this title: *The Stumbling-block of Disobedience and Rebellion cunningly laid by Calvin in the subjects way, discovered, censured and removed*. When reprinted, the title read: *The Stumbling-Block of Disobedience and Rebellion, proving the Kingly Power to be neither Co-ordinate with nor subordinate to any other upon Earth*. The point that was being made must surely have been apparent to Brady's understanding readers. Brady's recommendation is in his *True and Exact History of the Succession of the Crown of England*, which was printed in a second edition in the *Introduction to the Old English History*. Ibid. p. 343. Brady also expressed admiration for another civil war tract hostile to the principle of co-ordination. This was John Maxwell's *Sacro-Sancta Regum Majestas*, published at Oxford in 1644 and reprinted in 1680. Ibid. p. 349. In an 'Epistle dedicatory' addressed to the earl of Ormonde, Maxwell condemned the activity of parliamentarian writers who were attempting to erect 'a co-ordinate, a coequall, a corrivall power with Soveraignitie' so as to create a 'Regnum in regno, two Soveraignes, a thing incompatible with Supremacie and Monarchie'. After Brady attributed this tract to Archbishop James Ussher, he was corrected by Sir William Dugdale, *Life and Correspondence of . . . Dugdale*, ed. William Hamper (London, 1827), pp. 436–7. Bodin's influence went beyond the royalist writers. For his influence on Prynne, see *Six Books of a Commonweale*, Introduction, A63.

[13] *Stumbling-block of Disobedience*, pp. 267–71. Heylyn's pattern of argument much resembled that of Brady writing at a later date.

nor of such share in the Government, as these Unquiet, Tumultuous Men endeavour to make them believe they had, and still ought to have '.[14] Brady's theory of a legal sovereignty in the king, based ultimately on the sword, posed so formidable a threat to the principle of a co-ordination in the legislative power as to elicit from the whig writers a language new to their political vocabulary. The English king was ' not an absolute Despotick Monarch ' nor did he have ' a despotical right to make or change laws '.[15]

Undeniably, a frightening new dimension had been added to the struggle over legal sovereignty that had raged since the civil war. If the Norman conquest had unmistakably placed a Bodinian sovereignty in the English king and if the historical study of feudalism in the hands of a Brady demonstrated that the two Houses of Parliament had arrived on the historical scene at a time much later than the kingship and under circumstances rendering self-evident their subordination to the king, the theory of mixed monarchy already tainted with civil-war violence and handicapped by the bitter hostility of tory writers must lose all credibility. How was it possible to assign an equal share in law-making – the recognized sovereign power in the state – to three such unequal members? With the destruction of co-ordination must go the idea of a legal sovereignty in king, lords, and commons. The intellectual climate had altered dramatically. No longer could the whig writers pitch their polemics solely in terms of a co-ordination in the parliament. They must now either fly to early English history to prove that king, lords, and commons were both co-ordinate and coeval members of the law-

[14] ' Epistle to the Reader ', *An Introduction to the Old English History*. James Tyrrell, ' Introduction ', *The General History of England both Ecclesiastical and Civil, from the Beginning of the Reign of King William I. (Commonly called the Conqueror) to the end of the Reign of King Henry the Third* (London, 1700), II, xxx. Brady was writing about the human source of the law or laws.

[15] The whig references to ' despotick ' monarch and ' despotical ' right to make or change laws seem to be new. Petyt, ' Preface ', *The Antient Right of the Commons of England Asserted* (London, 1680), p. 54. Tyrrell, *Bibliotheca Politica : Or, An Enquiry into the Antient Constitution of the English Government* (London, 2nd ed., 1727), p. 499. Tyrrell was well aware that he was dealing with arguments drawn from Bodin on the part of Brady and his fellow Tory historians. He has a spokesman for his ideas state in a dialogue: ' I have already proved . . . that our King is not an Absolute Despotick Monarch, but is limited and tied up by the Fundamental Laws of the Kingdom, from making of Laws, or raising Taxes without the consent of his People in Parliament; and that our Government is mixed, and made up of Monarchy, with an Allay of Aristocracy, and Democracy in the Constitution; the former in the House of Lords, the latter in the House of Commons, as K. Charles the First himself confesses, in his Answer to the Parliaments 19 Propositions. And I have farther enforced this from divers Authorities out of our Antient as well as Modern Lawyers; viz. Glanvill, Bracton, Fortescue, and Sir Edward Coke. So that since we have such clear Proof for our Constitution from our own Histories and Authors, nay from the King himself, besides the whole Purport and Style of the very Laws and Statutes of the Kingdom, I do not value the authority of Bodin, a foreigner, whose Business it is to set up the Authority of the French Kings to the highest Pitch he could; and therefore being sensible that antiently the Government of France and England were much the same, he could not with any Face make his own an Absolute Despotick Monarchy, unless he had made ours so too. . .' Ibid. Pocock has described the close relationship between Petyt and Tyrrell. *Ancient Constitution*, pp. 187–8, 238. Tyrrell's ideas on government owed much to Philip Hunton's *Treatise of Monarchie* (1643).

making trinity or else admit that no such trinity existed.[16] The whig writers plainly preferred to build a case on Anglo-Saxon England, but at the least they felt obliged to establish that the two houses were immemorial in legal terms, that is, older than the coronation of Richard I (3 September 1189) the date at the common law when legal memory began.[17]

## III

It is necessary now to consider evidence that the Brady controversy is best viewed as a struggle between tory ideas of sovereignty based on Bodin's teachings and the whig theory of a co-ordination and a coevality in parliament by which king, lords, and commons shared equally in law-making. The place to begin is with Brady's desire to present William the Conqueror as a legally sovereign prince who had imposed law by fiat upon his subjugated people. The tory historian's argument took this form. Legal sovereignty resided in William because he was visibly the source of the laws – ' the original of the laws ', as Brady put it – at the conquest. After winning England by the sword the new king had imposed the Norman law, which happened to be feudal, upon his subjects as a means of establishing his mastery over the defeated country and providing unmistakable evidence of its subjugation; and Brady pointed to some laws imposed deliberately

[16] Petyt, *The Pillars of Parliament*, p. 12; ' Discourse ', *Antient Right of the Commons . . . Asserted*, p. 22. Tyrrell, ' Preface to the Appendix ', *General History of England . . . containing the reign of Richard II* (London, 1704), III, pt. II, v. Tyrrell thought it not possible ' to have that real value and esteem for an Institution [the House of Commons] which (as some affirm) proceeded but a few centuries ago from the pure Bounty and free-will of our Kings, as they must have for the same Constitution, if proved to be as antient as Kingly Government itself '.

[17] Tyrrell, ' General Introduction to the Whole Work ', *The General History of England* (London, 1696), I, xcix. Petyt, ' Discourse ', *Antient Right of the Commons . . . Asserted*, pp. 42–4. Atkyns, *Power, Jurisdiction and Priviledges of Parliament*, pp. 23, 34. Pocock wrote of Petyt and his fellow whig historians as unwilling to date the beginnings of parliament lest its existence be due to the royal will. He wrote: ' Petyt and Atwood were concerned only to deny the king's sovereignty and smuggle in that of parliament under a thin disguise, and consequently they expressed the problem in the simplest possible terms. If parliament has a known beginning, it must be in someone's will and therefore the king will be sovereign; but parliament is immemorial (and therefore it is sovereign).' *Ancient Constitution*, p. 235. But Pocock's generalization – which is important to his conceptualization of the process by which the idea of parliamentary sovereignty grew in England – becomes suspect when it is noticed that Petyt was in fact quite willing to discuss possible dates for the beginnings of parliament. The whig historian's concern was to establish that these beginnings were prior to the coronation of Richard I. For Petyt's attempts at dating the beginnings of parliament, consult ' Discourse ', *Antient Right of the Commons . . . Asserted*, pp. 67–9. In reaching this conclusion Pocock appears to have given undue weight to the influence of Sir Edward Coke, who earlier in the century had gone further than most commentators in pressing the antiquity of parliament. The chroniclers of early Stuart England often cited as the first parliament Henry I's great council at Salisbury in 1116, their chronicles typically carrying the statement ' First Parliament, 1116 '. The subject is discussed in E. Evans, ' Of the Antiquity of Parliaments in England: Some Elizabethan and Early Stuart Opinions ', *History*, XXII (December 1938), 206–21. Under these circumstances it is unlikely that there was a widespread reluctance to date the beginnings of parliament. One of Prynne's comments suggests that the practice was widespread. ' To the Ingenuous Reader ', *Plea for the Lords* (London, 1658), no pagination.

at this time by the Conqueror.[18] Nor had William and his successors subsequently relinquished their legal power. It had passed intact to their descendants including presumably Charles II, who as a consequence was in a position in Brady's own time to put forward a powerful claim to being the sole law-maker, possessed of this great power as a result of a situation that had taken shape long before Richard I's coronation. Though Brady seems seldom to have made reference as such to the concept of legal memory, his whig adversaries, with their common-law training, frequently did so in their insistent reply that the law-making power of English kings before the time of legal memory was best defined in terms of the Anglo-Saxon kingship and not those of a conqueror. Brady, in their view, was seeking to justify an immemorial right of law-making in the king alone.[19]

That the tory historian wrote early English history with this purpose in mind may be seen in a number of ways. A good beginning may be made by glancing at the title of Brady's major work, the *Complete History*, which reads

> A Complete History of England from the first entrance of the Romans . . . unto the end of the reign of Henry III, comprehending the Roman, Saxon, Danish and Norman Affairs and Transactions in this Nation during that Time. *Wherein is Shewed the Original of Our English Laws* [italics added] . . .

By 'original' the seventeenth century understood the 'source' of the English law or laws, and to Brady that source was none other than William the Conqueror. The attribution was by no means unique with the tory historian, although his utilization of the conquest as a basis of royal power in law-making was more effective and thorough-going than his predecessors. Heylyn had written that when the Conqueror first entered England, he had governed by his power. 'His sword', he noted, 'was then the scepter, and his will the law'.[20] Earlier

[18] *An Introduction to the Old English History*, p. 237. Brady expressed a similar view when he translated Gervase of Tilbury, apparently with approval, writing: 'When the Famous Subduer of England King William had subjected to his Empire the utmost part of the Island, and by terrible examples had brought to perfect obedience the minds of Rebels, That they might not have liberty of falling into the same errors for the future, he resolved to govern the People subjected to him by written Right and Law. Therefore the English laws being propounded according to their Three-fold distinction, that is, the Mercian-Law, Dane-Law, and West-Saxon Law, he rejected some, and approved others, and added such Transmarine Norman Laws, as seemed most efficacious for to defend the peace of the Kingdom; and as to Matter of Fact, the Reader is referred to the Preface of the Norman History [published soon afterwards in *Complete History* (1685)], where he will find it fully proved, that the Law used in this Nation after the Conquest, especially as to the Method and Practice of it, was the Norman Law, and so remains to this day in very many things.' Ibid. p. 252. In another place the tory historian described the laws that the Conqueror had added to those of the Confessor. Ibid. pp. 254–8.

[19] Tyrrell, 'Preface to the Appendix', *General History of England*, III, pt. II, ii. Also, 'General Introduction to the Whole Work', *General History of England*, I, xcix. 'Introduction', *General History of England*, II, xxx, xxxi. Brady's references to legal memory, expressed in terms of prescription, are in his 'Epistle to the Reader', *An Introduction to the Old English History* and in his preface to his *Historical Treatise of Cities, and Burghs or Boroughs* (London, 1690). Neither is paged. In the former see the reference to two sorts of turbulent men contending in Brady's day for popular liberty.

[20] *Stumbling-block of Disobedience*, p. 267.

in the century Sir John Hayward had discussed the origin of laws in similar terms, writing that 'another Original of Laws was... occasioned when any People were subdued by Arms'. Another passage referred to laws being 'laid like Logs upon their necks, to keep them in more sure subjection'.[21] These ideas quickened with the advent of civil war when royalist writers like Heylyn were compelled to seek new sanctions for royal power in the face of the parliamentarian challenge. According to Bulstrode Whitelocke, a respected witness writing about the time of Charles II's restoration, opinion about the Norman conquest had waxed more general and confident in his age than in former times, the argument being 'that our parlements, lawes and government were brought into England by duke William of Normandy' and that 'consequently the originall of them to be from him'.[22] Brady was only enlarging upon these earlier views in stating his intention to demonstrate that William had 'governed the Nation as a Conqueror, and did so live, and did so take, and repute himself to be'. How could this be seen? The tory historian's answer was both pointed and illuminating. It appeared, first of all, from 'his [William's] bringing in a New Law and imposing it upon the People'. Brady wrote: ''Tis clear he did so.'[23]

This theme permeated the 'Preface to the Norman History', a portion of the *Complete History* that may appropriately be described as a brilliant analysis 'studding a waste of annalistic narrative'.[24] The lengthy Preface of approximately fifty pages has the musty smell of an old law office, conveying overwhelmingly a sense of the tory historian's preoccupation with the introduction of new law at the conquest. Much evidence was assembled for the theme: it could be seen from the dominant position held by Norman law after 1066, the adoption of Norman legal practices such as ordeal by battle and writs of right, the influx of Norman military men into high legal and political offices as justiciars, lord chancellors and lord keepers of the seal, and the subsequent use of Norman French in pleadings and judgements that continued without abatement until Edward III's reign. Even more remarkable is Brady's use of a medieval French law book that is known as the *Grand Coutumier*, which he viewed as a code of Norman laws and customs that had been transported wholesale to England at the conquest. Recognizing that the Normans at that time possessed no written laws, he treated customs as equivalent to laws, and he was firm in insisting that those in

[21] Quoted in Francis Wormuth, *The Royal Prerogative* (Ithaca, New York, 1939), p. 23.

[22] *Notes Uppon the Kings Writt*, I, 182. John M. Wallace, *Destiny his Choice: The Loyalism of Andrew Marvell* (Cambridge, 1968), pp. 23–7. Samuel Kliger, *The Goths in England* (Cambridge, Mass., 1952), pp. 137–41.

[23] *Introduction to the Old English History*, pp. 13–14. See also Nathaniel Johnston, *Excellency of Monarchical Government*, p. 200 for his view of what Brady had accomplished. Presumably he was one of Brady's understanding readers. Johnston wrote: 'What changes William the Conqueror made in the Government, how he brought in the Feudal Laws of Normandy, and many other alterations, Doctor Brady hath proved at large in his *Argument Anti-Normanicum* [written in answer to Cooke] and the Preface to his *Complete History*.'

[24] Pocock, *Cambridge Historical Journal*, p. 201.

the *Grand Coutumier* ' were imposed upon his Subjects of England by William called the Conqueror '.[25] Brady wrote as if it were normal practice for rulers to give laws by fiat to their subjects, and his comments left no room for an organic process after 1066 by which laws were adapted to changing social and economic conditions in the sense that a modern historian would postulate.[26] Indeed the view that the king was the original of the laws precluded Brady's reasoning on these historical lines, and faced with the possibility he would have denounced it. Any notion of a law developing independently of the royal will was abhorrent to him. On the contrary, Brady wrote as if Norman law were portable and transplantable, brought into England simultaneously with the new tenures and imposed by the Conqueror in a series of ruthless strokes, thereby replacing abruptly much of the law that had existed in Anglo-Saxon England.[27] In calling attention to the similarities between the law in England and that of Normandy after the conquest Brady had in fact travelled a path already well-trodden. Earlier Sir Edward Coke had reached a similar conclusion but his explanation was very different. He believed that the English law had been exported into Normandy, the very reverse of the process that Brady had in mind. The tory's viewpoint about law-making was implicit in his response to Coke's theory. He rejected it out of hand with the tart comment that the task of imposing English laws upon the stubborn Normans would have been more difficult than the conquest of England.[28]

The bulk of England's law after 1066 was, then, the product of the Conqueror, although the displacement was admittedly incomplete; and it was within this framework that Brady viewed feudal tenures, their importance to him being in direct ratio to their validity as evidence that William the Conqueror was the source of English law as a result of conquest. That this kind of reasoning was uppermost in his mind may be seen from the references to the law that prefaced

[25] ' Preface to the Norman History ', *A Complete History of England from the First Entrance of the Romans under the Conduct of Julius Caesar, unto the End of the Reign of King Henry III* (London, 1685), p. 181. ' General Preface ', ibid. p. xlvii. Brady wrote that ' the whole Feudal Law consisted in customs ', including ' Laws of Fees '.

[26] The account of Brady's political thought and historiography in this article differs in important respects from that in Pocock. The latter considered the Norman conquest important to Brady primarily as the means by which feudal tenures entered England. The essence of Brady's achievement as an historian, according to Pocock, lay in perceiving the vital links between the new tenures and the changed social and political situation after 1066. ' His willingness to treat feudal tenures as the fundamental reality of Norman and Angevin England and to generalize from it about the nature of law, parliament, and the duties of the subject in the whole of that epoch ' meant that Brady had even exceeded Spelman in some ways as an historian though it was admittedly the latter who had recognized the feudal character of the great council. As for Brady's frequent allusions to the fact of conquest, these were explicable as taunts at his whig adversaries. Pocock, *Ancient Constitution*, pp. 195–7; *Cambridge Historical Journal*, p. 194.

[27] The language is borrowed from Sir Frederick Pollock and Frederic William Maitland, *The History of English Law* (Cambridge, 2nd ed., reissued 1968), 1, 79. In their view the Normans possessed no law capable of being brought into England in this fashion.

[28] ' Preface to the Norman History ', *Complete History*, p. 180.

his remarks on the introduction of land tenures. Having discussed the use of Norman French in the law courts, he would now examine, he said, the idea that England's laws – except those introduced by kings and great councils or by act of parliament – were for the most part Norman laws, brought in by the Conqueror. This could be seen from the presence after 1066 of land tenures that were governed by Norman law. The tory historian was explicit:

> That the bulk and main of our Laws . . . were brought hither from Normandy by the Conqueror, such as were in use and practice here for some Ages after the Conquest is without question; for from whence we received our Tenures, and the Manner of holding of Estates in every respect, from thence we also received the Customs incident to those Estates, as Reliefs, Aids, Fines, Rents, or Cens, Services, etc. and likewise the quality of them, being most of them Feudal, and injoyed under several Military Conditions and Services, and of necessary Consequence from thence, we must receive the Laws also, by which these Tenures, and the Customs incident to them were regulated, and by which every mans right in such Estates was secured, according to the Nature of them.[29]

That Brady's mind was more preoccupied with the appearance of a new law in England as the direct result of the Conqueror's activity than with the new methods of landholding *per se* may also be seen from his comment bringing forward the subject of fees and tenures. He would briefly describe the introduction of manors at this point, he explained, because such an account would ' give some light to the knowledge from whence we received our Laws '.[30]

After making his case for a legal sovereignty in William I, Brady undertook to demonstrate that the Conqueror and his successors had successfully retained their high power despite the existence of the great charters. His argument was on these lines. No claim was possible that the people (the two Houses of Parliament) were at this time ' Law-Makers ', as some troublesome men claimed, since the social and political conditions revealed in Domesday Book precluded any companions in the law-making power. For one thing, no counterpart existed to the freeholders of the seventeenth century.[31] The land on the whole was controlled by Norman military men, who owed military service for their tenures and from whom large numbers of dependant tenants held lands by base and servile tenure. This was the condition of most Englishmen; and, despite the erosion of manorial institutions in the course of time, it was not these men who contended in the interval for the liberties provided in the royal charters.[32] No, indeed. The *liberi homines*, who

[29] Ibid. pp. 155–6. For a contemporary view as to what Brady had demonstrated, see Johnston's comment, op. cit. p. 203. He wrote: ' The Author of *Jus Anglorum ab Antiquo*, and the *Argumentum Anti-Normanicum*, and Mr Petyt, in his *Rights of the Commons Asserted*, have written largely, to prove, That the Conqueror made little Innovation in our Laws; and on the contrary, the profoundly learned Doctor Brady hath from undeniable Records proved, that he brought in the Feudal Law of Tenures, and much of the Norman Laws. . .'

[30] ' Preface to the Norman History ', *Complete History*, p. 157.

[31] ' General Preface ', *Complete History*, p. lxviii.

[32] Ibid. pp. xxiv–xxviii.

received charters from Henry I, King John, and Henry III, were Norman military men and their subvassals; and the liberties for which they contended were best understood in terms of feudal law. It should be stressed, however, that the tory historian's interest in the feudal quality of these liberties was rooted in his obsession with the source of the law and the nature of the law-making process at this stage of English history. Brady's discussion dealt with the liberties in the great charters as abatements in the feudal law, these having but a single source, the royal authority. As the sole law-maker the early English king had the responsibility for adjusting or correcting feudal law, if it proved, for example, too severe for the military men who held land of him. The liberties amounted, then, only to ' the Relaxation of . . . Laws and Tenures ', these in turn being related to the ' Fees and Estates . . . which at first their Ancestors had received from the Conqueror, without those Easie Terms, and that Abatement of the Strictness of the Law they required '.[33] That Brady was thinking in terms of legal sovereignty was also evident from his acidulous attack on the subvassals at Runnymede, who were the heroes of the whig writers of his own day. They were only followers in the rebellion for Magna Carta – ' no Law-Makers, as this Gentleman [William Petyt] fondly imagines '. It was impossible that the men who ruled the nation would permit men of small reputation to share with them in law-making. Indeed, the situation was the reverse. ' Those that had the power of this and other Nations de facto ', Brady continued, ' always did give Laws, and tax the People. And so did the Tenents in capite tax themselves; and all other Tenents and Freemen of England in those times we are writing of '.[34]

Further light is shed on the Bodinian character of Brady's political thought by noting his findings regarding the legal aspects of the great royal charters, which he treated as statutes. Magna Carta provided the prime illustration. John was the sole legislator when the King, deserted by his friends, granted the laws and liberties desired by the Norman military men and their ecclesiastical allies. ' What was determined by King and Council in that Age, and Confirmed by his Seal ', it was explained, ' had without doubt the force of law '.[35] Like Bodin, Brady assigned the interpretation of the law to its maker, his comment in this context providing another reminder that legal sovereignty in his view resided in the king alone. Turning to a controversy in the reign of Henry III that had centred, so he said, on the meaning and interpretation of Magna Carta, he stressed the royal role. If obscure passages were capable of a double meaning, it was the king who must decide between them. Whoever made the law interpreted it.[36] But what about the tory historian's earlier statement that what was determined by king

33 ' Preface to the Reader ', *Complete History. Introduction to the Old English History*, pp. 252, 255, 266.

34 ' Glossary ', *Introduction to the Old English History*, p. 51. Petyt, *Pillars of Parliament*, pp. 4–5.

35 ' General Preface ', *A Complete History of England*, p. xxxiv.

36 ' Preface to the Reader ', *A Complete History of England*.

and council in that age and confirmed by his seal, had without doubt the force of law? Did this passage allow a shared law-making power? Did the great council, composed of tenants-in-chief, the institution most closely approximating a parliament in this period, actually share the law-making power with the king? This question received an answer when Brady discussed the idea that the community of the kingdom had made these charters. The expression ' community of the kingdom ' denoted the barons and the whole body of tenants-in-chief generally, a definition that takes one back to the great council. The tory historian would admit participation by the great council to a limited degree in law-making in that its members made the charters at the stage when these were still only petitions and requests, a description reminiscent of Bodin's comment that the two houses of the English parliament participated in law-making to the extent that they prepared supplications and requests. Brady was specific about the procedure used at Runnymede. At that time the barons had offered a schedule of terms to King John, which the latter was compelled to accept. Yet the point to be noticed was not the element of compulsion operative in the situation. Much more important was the fact that Magna Carta, once granted, owed its legal validity and authority to its being a royal grant confirmed by the presence of the royal seal. The king's assent provided the only legal sanction required by the rebellious barons. No other security was needed. Accordingly, the tenor of all royal charters ran thus: ' We Grant, We Confirm, We Give for Us and Our Heirs, to Them and their Heirs, etc.' [37]

This view – replete with implications for Brady's own time – differed markedly from that taken by mixed monarchists in late Stuart England. While Brady did not single out the theory by name, his target was unmistakable in his strenuous criticism of a particular phrase, used in enacting clauses, that had long formed a staple in the argument over legal sovereignty and mixed monarchy. The phrase ' By Authority of Parliament ', to which he took strong exception, was one that contemporaries firmly associated with the principle of a co-ordination in the legislative power.[38] No such phrase appeared in the charters that Brady was discussing, and he was explicit that its absence in no way affected their legal

[37] ' General Preface ', *A Complete History of England*, p. xli. See *Bibliotheca Politica*, p. 237, for the incompatibility of this account with any idea that the two houses were copartners with the king ' in the Supreme Power '.

[38] Tyrrell noted the link between the phrases ' By the Authority of this present Parliament ' and ' Be it Enacted by the King, Lords, and Commons ' and the idea that king, lords, and commons were ' three co-ordinate Estates '. Ibid. pp. 232, 236. Heylyn, *Stumbling-block of Disobedience*, pp. 270–2. *The Freeholders Grand Inquest Touching Our Sovereign Lord the King, and His Parliament* (London, 1648), pp. 40–6. This whole tract is most usefully read as a response to the principle of co-ordination and its implications for a shared legal sovereignty in king, lords, and commons. The argument over co-ordination in law-making laid much stress on the evidence provided in the enacting clauses of statutes. Weston, ' Concepts of Estates ', op. cit. pp. 90–1. Heylyn was an avid student of statutes or so it appears from the biographical statement attached to his *Historical and Miscellaneous Tracts* (1681).

validity.[39] That his contemporaries in Stuart England thought otherwise was due, so Brady reasoned, to misinterpretation by Coke. The latter had concluded that old statutes with such phrases as 'The King Ordains' or 'The King Wills' when entered in the parliament rolls and always allowed for an act of parliament, were to be viewed as 'By Authority of Parliament.' Brady was indignant. 'How such Entry, and such Allowance, without any Words in the Statutes to that purpose, can make them to be by Authority of Parliament,' he would not inquire. But he was positive that 'those words, *The King Ordains*, the *King Wills* being pronounced in Parliament, and Recorded in the Rolls thereof, for the security of the People, and owned by them, do clearly prove his Authority and Power in making Laws, to be far greater than many men would allow him, or have him to enjoy'.[40] Brady also disliked a practice, likewise attributable to Coke, of ignoring the entrance of a new and foreign law at the conquest and writing as if the common law had grown up with the first trees and grass in England. Coke's great fault lay in failing to recognize that the original of the law was England's ancient kings and their successors, who had acted with the advice of their great councils in all ages, as they found it expedient. They had acted either of their own authority or as the result of their people's request and petition.[41] Curiously, Brady's refutation of Coke was supported by an appeal to Edward II's coronation oath.[42]

The tory historian had insisted, then, on a legal sovereignty in the king, which had been derived from the Norman conquest. That this was the contemporary view may be seen in an account left by James Tyrrell, who entered the Brady controversy at a later date on the side of Petyt and Atwood. Unmistakably Tyrrell attributed a conquest theory to Brady as well as an attack upon the Whig use of the concept of legal memory. The former's views are to be found not only in his *Bibliotheca Politica* (1694) but also in three stout volumes of early English history written after the Glorious Revolution, which contained a lengthy appendix on the vexed question of the antiquity of the House of Commons. An explanatory preface to the appendix gave Tyrrell's reasons for delving into this question even after the Revolution had made it less relevant. The whig found such a treatise vital because there existed in his own day what he called men of modern and arbitrary principles who wrote 'highly against the Antiquity of Parliaments, and especially of the House of Commons'. They urged that the legislative authority of the nation was vested solely in the king 'against whose Prerogative, as no Time can prescribe, so no inferior Power can limit or controul'. Restrictions laid upon the king in the past could be abandoned at will, whenever the king thought this desirable for the peace and safety of the kingdom. The consequence of the new principles was to place an uncontrollable authority in the king, which would permit

[39] 'General Preface', *A Complete History of England*, pp. xli–xlii.
[40] Ibid. pp. xlvii–xlviii.
[41] Ibid. p. xlvii.
[42] Tyrrell, 'Introduction', *General History of England*, II, xxx–xxxi.

the substitution of a despotism for the existing mixed monarchy. He could make what laws and raise what money he pleased without the people's consent, and he could omit calling parliament whenever he wished. Tyrrell's own work would demonstrate that the ancient English government was a limited monarchy from its first institution, parliament having either existed before kings or else at the same time with them. After all, the wittenagemot or parliament had elected Anglo-Saxon kings.[43]

These remarks, coupled with the writings of Petyt, whose close relationship with Tyrrell is indisputable,[44] provide impressive evidence that the Brady controversy centred on opposing theories of legal sovereignty. This impression is heightened when the tory historian's remarks about the opposition writers are recalled. Yet Petyt made no explicit use of the term ' mixed monarchy ', and the possibility should be mentioned that he was guarded in expressing his views. After all, he was writing before the Glorious Revolution in defence of a cause to which the court was hostile. The radical Henry Neville struck a realistic note in praising Petyt's and Atwood's willingness to put aside their legal activity so as to demonstrate the antiquity of Englishmen's rights – ' that in a time, when neither profit nor countenance can be hop'd for, from so ingenious an undertaking '.[45] Yet Petyt seems reckless at times since he must surely have recognized the danger in writing of a shared law-making power. His *Antient Right of the Commons of England Asserted* (1680), the work that brought Brady into the field, is replete with references to a house of commons that had long shared the law-making power, at the least before the coronation of Richard I but certainly long before 49 Hen. 3, these references linking him inextricably to the principle of co-ordination that was at the heart of the theory of mixed monarchy. Once more a comment from Tyrrell is helpful. He has a participant in a political dialogue, who was upholding a legal sovereignty in the king, declare: ' I cannot comprehend how the Two Houses can have any share (properly speaking) in the Legislative Power, without falling into that old Error of making the King one of three Estates, and so co-ordinate with the other Two '.[46] The key phrase is ' share in the Legislative Power '; and if any idea stands out in Petyt's tract, it is this.

In asserting an immemorial right to a share in the law-making power for the House of Commons the whig writer had not forgotten the House of Lords. Both houses shared the legislative power, and his principal design, so he stated, was impartially to vindicate the just honour of the English parliament, a term

[43] Tyrrell, ' Preface to the Appendix ', *General History of England*, III, pt. II, i–ii.

[44] Pocock, *Ancient Constitution*, p. 238.

[45] *Plato Redivivus* (London, 2nd ed., 1681), pp. 108–9.

[46] *Bibliotheca Politica*, p. 237. Petyt made at least one explicit reference to co-ordination when he sarcastically expressed bewilderment as to why the barons if they usurped in 49 Hen. 3 ' the soveraign power . . . should so easily and speedily divide and share it with the Commons, constitute a new Court of Parliament, and make them [the Commons] essential and coordinate with themselves in the Legislative Power. . .' ' A Discourse ', *Antient Right of the Commons . . . Asserted*, pp. 61–2.

frequently used by this time to denote the two houses.[47] But in particular he would establish that the freemen or commons of England were part and parcel of ancient parliaments in whatever form these appeared. A few passages convey the flavour of Petyt's views. Although the records of earlier parliaments were admittedly gone, he believed the English people to have possessed a share in their public councils from the beginning of their history. Thus the Britons had called their parliament 'Kyfr-y-then' because their laws were ordained there.[48] But much more was known about the Saxons, and to them the whig writer gave more attention. They had brought their laws and government from Germany, and Tacitus was authority for the fact that the commons formed part of their wittenagemots. After the country was reunited under a Christian monarchy, Englishmen had kept their ancient wittenagemots or parliaments. What was their function? It was there that the Saxons made laws and managed the great affairs of the king and kingdom. Petyt would supply authorities from which it was 'apparent and past all contradiction that the Commons in those Ages were an essential part of the Legislative power, in making and ordaining laws, by which themselves and their posterity were to be governed'. Nor would he grant any drastic alteration of this picture as a result of 1066. Notwithstanding William's great power, parliaments had persisted; and the commons had a share in making laws. After all, 'what could the promised restitution of the Laws of Edward the Confessor signifie', Petyt wondered, 'if their Wittena Gemot, or Parliament . . . was destroyed and broken?' The same could be said of the Conqueror's successors. William Rufus had neither claimed the crown by the power of the sword nor affirmed that he had a despotical right to make or change laws. The latter assertion had only been made by a Richard II, who compared unfavourably on this point with other monarchs such as Edward III, James I, and Charles I.[49] Petyt's conclusion may be simply stated. All his authorities and reasons proved conclusively that the commons had possessed votes and a share in law-making in the governments of the British, the Saxons, and the Normans. They were an essential part of the government before and after the Norman conquest,[50] and the same generalization applied to the House of Lords.[51]

These repeated statements about a shared law-making power reveal that Petyt and his fellow whigs accepted the principle of a co-ordination in the legislative power and the theory of mixed monarchy, to which it was central. Petyt also believed that an unlimited law-making power resided in parliament, and he was in the habit of quoting with approval the far-reaching statements on parliamentary authority found in the writings of the Elizabethan statesman, Sir Thomas

47 'Preface', *Antient Right of the Commons . . . Asserted*, pp. 1–2.

48 Ibid. pp. 3–6.

49 Ibid. pp. 6–12, 40, 54.

50 Ibid. pp. 73–4.

51 'The Epistle Dedicatory', ibid. no pagination. Atwood, 'Preface', *Jus Anglorum ab Antiquo*, and also pp. 45–6.

Smith, these being well-known in Petyt's day. After quoting Smith, the whig added this sentence: 'By this we may sufficiently be informed what entire, plenary, and absolute Authority, Preheminence and Jurisdiction were inseparably annexed, united, and belonging to Parliaments.'[52] Another passage implied that an unlimited power to make laws resided in the joint consent of king, lords, and commons, even as Petyt denied that the judges at Westminster could determine the acts of parliament that were binding and those that were void. On the latter point he left no doubt of his modern outlook, writing: 'When any Doubts and Differences of Opinions arose amongst Lawyers, concerning what the Common Law was in Points of Great and Weighty Importance, such Doubts and Differences were by the ancient Course and Practice declared and settled, not by the Judges of Westminster Hall, but by the Law-making Power of the Kingdom.'[53]

The choice between the two competing theories of legal sovereignty was made at the Revolution when parliament took control of two prerogative powers closely akin to the legislative power, that is, the dispensing and suspending powers that James II had so freely exercised. The appropriate clauses are in the Bill of Rights; but a new coronation oath, provided for by statute, also reflected the changed situation. Whereas English kings had earlier sworn to observe the laws and customs emanating from their royal predecessors, especially those granted by Edward the Confessor to the clergy, the new rulers, William and Mary, were to promise to govern according to 'the statutes in parliament agreed upon, and the laws and customs of the same'.[54] And a clause saving the royal prerogative was dropped. The Act of Settlement subsequently made provision for administering the new coronation oath to the Hanoverians. To David Ogg, a modern authority on this period, these changes meant that 'the king is no longer the sole lawgiver ... thenceforward he is only a part of the legislative body', a conclusion that he deemed obvious and non-controversial.[55] But this was by no means the outlook of such contemporaries as Brady and Petyt. They could have accepted Ogg's assessment of the outcome of the Revolution, but hardly his dismissal of the

[52] Petyt, 'Discourse', *Antient Right of the Commons ... Asserted*, pp. 146–7. *Jus Parliamentarium, Or, The Ancient Power, Jurisdiction, Rights and Liberties of the Most High Court of Parliament* (London, 1739), pp. 10–12. For a different view of Petyt, see Pocock, *Ancient Constitution*, pp. 191–2, 229–31.

[53] *Jus Parliamentarium*, pp. 45, 67.

[54] David Ogg, *England in the Reigns of James II and William III* (Oxford, 1966), p. 235. E. Neville Williams, *The Eighteenth-Century Constitution* (Cambridge, 1960), pp. 36–8. Prominent in the committee of the House of Commons that changed the coronation oath were parliamentarians familiar with Charles I's Answer to the Nineteen Propositions. Weston, *English Constitutional Theory*, pp. 87–123. *Journals of the House of Commons*, x, 35.

[55] Ogg, op. cit. p. 236. This is also the viewpoint of John Dunn. See his comments on Locke's 'conventional constitutionalism'. *Political Thought of John Locke* (Cambridge, 1969), pp. 51–7. Dunn assumed that the nature of the legislative power was a closed issue in the early 1680s when Locke was writing. But it could hardly have been that. In this connexion, see the interesting comment attributed to William Sacheverell during the Glorious Revolution. J. H. Plumb, *Growth of Political Stability in England 1675–1725* (London, 1967), p. 66.

changed position of the king in law-making as obvious and non-controversial. Whatever it was, it was not that. To Brady and Petyt it was the quintessence of the controversy in which they had been engaged as well as the major legal and constitutional issue that had been settled at the Revolution.

## IV

A brief comment on the historical background of the new coronation oath concludes this account of legal sovereignty in the Brady controversy. For the moment it is desirable to violate chronological limits to notice a position taken publicly in October 1693 by the former Sir Robert Atkyns, now lord chief baron of the court of exchequer and speaker of the House of Lords. At the swearing in of the lord mayor-elect of London, Atkyns recalled certain changes in the coronation oath that had taken place at the beginning of Charles I's reign. The expression ' that the King should consent to such laws as the People should chuse ' had been struck out, he asserted, at the instance of Archbishop Laud, who had inserted another phrase, this one ' saving the King's Prerogative-Royal '. Atkyns deemed the latter phrase very unusual. Granted that there was a large prerogative in the king, it was only one for doing good to his subjects. An eminent part of the law, it was by no means ' above the law '.[56]

These sentiments are consonant with Ogg's interpretation of the new coronation oath, but what is striking is Atkyns' choice of a public occasion to imply that ' the king should consent to such laws as the People should chuse '. The expression, which wore a genuinely revolutionary countenance, had had a long career dating from the war of manifestoes that marked the beginning of the civil war. At that time it played a conspicuous role in political thought and argument. The two houses and their supporters had invoked the Latin phrase in the earlier coronation oath *Justas Leges & Consuetudines quas vulgas elegerit* to deny a veto on legislation to Charles I. Parliamentarians translated *vulgus* to denote the two houses of parliament and *elegerit* as ' shall choose ' or ' should choose ' so as to reach a conclusion like that of Atkyns; namely, ' the King should consent to such laws as the People should chuse ', and a famous declaration of 2 November 1642, stated clearly the position of the two houses to the world at large.[57] The two houses also asserted that changes in the coronation oath should take place only by parliamentary act, a point established at the Revolution.[58] This aspect of the

[56] *The Lord Chief Baron Atkyns Speech to Sir William Ashurst, Lord Mayor Elect of the City of London . . . 13th October, 1693*, p. 4.

[57] Edward Husband, *An Exact Collection of the Remonstrances . . . and other Memorable Passages between the Kings most Excellent Majesty and His High Court of Parliament* (London, 1643), p. 715.

[58] Ibid. p. 712. The coronation oath was also discussed in a declaration of the two houses of 26 May 1642. Ibid. pp. 268–70. See also Perez Zagorin, *The Court and the Country : The Beginning of the English Revolution* (London, 1969), p. 310. One of the charges against Laud in his impeachment was that he had altered the coronation oath of Charles I in the manner that Atkyns later described. Prynne was responsible for adding this charge.

coronation oath, commonly referred to by the briefer expression *quas vulgus elegerit*, passed into popular currency but not before the parliamentarian interpretation met with challenge. A royal declaration of 1642 translated *elegerit* as 'hath chosen', a conclusion imparting an altogether different ring to the royal promise. The difference should be noted. The parliamentarian version placed a legislative sovereignty in the two houses at the expense of the king; the royalist made provision for the royal execution of laws that had already been made. It was left to Prynne to state the differing interpretations succinctly. The king had to accept such measures, the parliamentarian wrote, as 'the Lords and Commons in Parliament (not the king himself) shall make choice of'. The expression referred to 'future new laws, to be chosen and made by the Peoples consent, not to Laws formerly enacted'.[59]

Thereafter *quas vulgus elegerit* was omnipresent in Stuart political literature despite an implicit condemnation in the Treasons Act of 1661. A few examples may suffice. It appeared in Bacon's *Historical and Political Discourse*, a work singled out by Brady for attack that enjoyed much popularity. It was reprinted in 1665, 1672, 1677, 1682, 1689 and 1695, and on the last occasion was said to have excited 'great respect'.[60] Whitelocke noted that the expression had received a thorough discussion in the declarations of 1642,[61] and after the Restoration it appeared in the writings of such radical whigs as Neville [62] and Algernon Sidney.[63] Nor did the royalists neglect it. Judge David Jenkins considered it in a tract published initially in 1647 and reprinted during the exclusion crisis,[64] as did the author of the *Freeholders Grand Inquest*. Invariably, Prynne's comments were at issue. Thus the *Freeholders Grand Inquest* called attention to the presence of the word *Justas* before *Leges & Consuetudines quas vulgus elegerit* as opening the way for the king to judge whether measures presented for his approval were 'just' and so deserving of acceptance, but its author was also positive that *quas vulgus elegerit* could not be taken as meaning 'assenting unto, or granting any new Laws'.[65]

Since the links were close between the expression *quas vulgus elegerit* in the coronation oath and the exercise of the law-making power, it occasions no sur-

[59] *Soveraigne Power of Parliaments and Kingdomes* (London, 1643), pt. II, pp. 66–7. This tract when first published was known as *Treachery and Disloyalty of Papists to their Soveraigns*, and Brady referred to it under this title. An attempt to trace the relationship between this tract and the acceptance of parliamentary sovereignty in early Hanoverian England might well be profitable. It was certainly remembered in the early 1680s, and it was used by Giles Jacob in his *Lex Constitutionis: Or, The Gentleman's Law* (London, 1719). See ibid. pp. xiii–xiv for a very interesting list of the books consulted by Jacob and used in his treatise.

[60] William Nicolson, *The English Historical Library* (London, 1699), pt. III, pp. 23–8, 56–7. Also consult the 1739 edition of Bacon's work.

[61] *Whitelocke Notes Uppon the Kings Writt*, II, 341.

[62] *Plato Redivivus*, pp. 126–7.

[63] Algernon Sidney, *Discourses concerning Government* (London, 1698), pp. 458–9, 461.

[64] *Lex Terrae* (London, 1647), pp. 25–6.

[65] *Freeholders Grand Inquest*, pp. 60–5.

prise that the subject came under discussion in the Brady controversy. Its appearance suggests that a basically radical version of a legal sovereignty in parliament, one reminiscent of Prynne, was prominent in the controversy but at the least that legal sovereignty was at issue. Both Petyt and Brady discussed the coronation oath within the context of early English history, the discussion folowing the lines set by their respective party biases. Petyt, for example, used *quas vulgus elegerit* to substantiate his view that the House of Commons was an active part of the legislative power long before legal memory began. The expression implied that law-making had a popular sanction, and how else was this to be achieved? ' The word *elegerit* ', Petyt explained, ' being admitted to be of the praeterperfect tense, it certainly shews, that the peoples Election [choice] had been the foundation and ground of Antient Law and Customs '. Also, the expression *justas leges* conveyed that provision had to be made in these years for a liberty of debate and argument, an outcome possible only if the commons met in parliament.[66] Brady also dealt with the subject, though in reference to Prynne, under the headings *Communitas Regni* and *Elegerit* in his *Glossary*. Despite his recognition that parliament contained its modern elements by the early fourteenth century, he confined the ' community of the Kingdom ', referred to in Edward II's coronation oath, to the military men who held knights' fees or parts of them and paid scutage. Above all, they were not ordinary freemen, freeholders, the multitudes, or the rabble. Nor did the parliamentarian translation of key phrases in the coronation oath have any validity. ' 'Tis impossible ', Brady wrote, ' that Mr Pryn's sense of *Elegerit* can ever be allowed.' High Tory conclusions followed. The coronation oath only signified that the community had received the laws which they sought from their ancient kings and asked the latter to keep and observe. No more was meant or intended. As for customs, these were irrelevant unless presented to the king. If they had been presented ' and received his Fiat ', Brady added, ' they had been Laws, by his Concession, and no Customs '.[67]

These comments on the coronation oath, reflecting current issues of controversy, make Brady's *Glossary* seem more political than historical in nature. They reveal above all that he was a vigorous polemicist in a continuing struggle over legal sovereignty that had been under way since the civil war. It may not be amiss to summarize his views. Like Heylyn and the author of the *Freeholders Grand Inquest*, with whom he was in complete sympathy, Brady was thoroughly hostile to the spread of the principle of a co-ordination in the legislative power and all that its acceptance implied with regard to a legal sovereignty in king, lords, and commons. His response was not only a resounding denial of its tenets in his published researches, which represented in the aggregate a massive assault written in historical terms on the bitterly disliked principle of co-ordination,[68] but also a

[66] ' Discourse ', *Antient Right of the Commons . . . Asserted*, pp. 59–61.

[67] ' Glossary ', *Introduction to the Old English History*, pp. 34–6.

[68] Tyrrell saw Brady's work as a unit. ' Preface to the Appendix ', *General History of England*, III, pt. II, ii–iii.

promulgation of a counter theory of legal sovereignty by which the Stuart kings were the legatees of William the Conqueror, their most prized possession the undivided legislative power that had descended to them intact. To Brady, the Norman conquest was above all useful in making William the source of English law while at the same time creating the great divide that destroyed the validity of any rival theory of legal sovereignty relying for its sanction on the social contract or the political liberties of Anglo-Saxon England. It also provided an important means of demonstrating by way of the new feudal law and land tenures that the king had no companions in the law-making power. The great power had passed unshared and undivided to the successors of the Conqueror despite the well-known royal charters on the lines adumbrated in the Bodinian phrase that ' sovereignty admitteth no companion '. All this had happened in the span of time before legal memory began; and the king accordingly had an immemorial right of law-making, which he held independently of the Houses of Parliament. These points provided the very text from which Brady wrote early English history; and even if his historical writings are superior to those of his whig rivals, a conclusion not to be denied, still it would be easy to overstate the margin of superiority. Every bit as rigid in his own way as the whig historians, Brady likewise was guilty of present-mindedness and hence anachronism in his account of the English past though his skilful and rigorous use of Spelman's *Glossary* made this less obvious in his case. In sum, Brady's examination of early English history was always subservient to the larger cause of placing a legal sovereignty based on the sword in the Stuart kingship. Recognition that this was so makes possible a more balanced appraisal of the contending schools of historiography in the 1680s [69] as well as a truer appreciation of the meaning that the Glorious Revolution held for the tory historian and his contemporaries.

[69] Pocock noted that Brady had ' a controversialist's, not a rationalist's approach to history ', but the failure to recognize the Bodinian quality of the tory historian's political thought imposed formidable barriers in the way of appraising the extent of Brady's present-mindedness in his study of the past. See Pocock's appraisal in the *Cambridge Historical Review*, pp. 194–5, 198–9; *Ancient Constitution*, p. 196 ff. See also David Douglas, *English Scholars* (London, 2nd ed., 1951), pp. 124–31. Douglas praised Brady's scholarship, which he believed to have been underestimated by modern historians because of the tory's partisan zeal, but he made no attempt to deal with the important strand of political thought discussed in this article. Had he done so, he might have hesitated to state about Brady that he was ' impatient of abstract theories which could not be justified by the detailed evidence '. Ibid., p. 125.