

“Constructing a Juridical Memory: The Antiquarian
Response to the Union of Kingdoms”
By Brett Parker

Four years after James VI of Scotland ascended to the English throne and raised the political, legal, as well as intellectual problem of a united England and Scotland—his “union of the crowns”—the historian Edward Ayscu tried to ameliorate opinion against the Union by weaving the English and Scots into a common history. “Are we not all (for the most part) the broode and off-spring of the same parents, the auntient English Saxons,” he asked, following it up with one of the most delicate questions of the Union debate—“what preheminance then shall wee give to the one Nation above the other?”¹ For Ayscu, “this blessed Union” was the work of both history and God, and only now, through his servant King James, had God decided that such a union should be eternal. Since the English and Scots were lawful subjects of the sovereign, both had a duty to join in one civil government. Accordingly, Ayscu concluded, it was not England that had a special charge but instead the entire “happy island.”²

What Ayscu was responding to in 1607 was what may be called a second English identity crisis of the early modern period. Like the creation of a distinctly English church under Queen Elizabeth, the Union debate revealed a kaleidoscope of cultural and intellectual challenges to being English. In the case of James’s proposed union, the problem was much more complicated than an alteration of the external form and style of government. It raised real problems, from the English point of view, about the matrices and boundaries of national identification; for union would mean, so it was thought,

¹ Edward Ayscu, *A historie containyng the warres, treaties, marriages, and other occurrents between England and Scotland, from King William the Conqueror, untill the happy union of them both in our gracious King James*. (London, 1607) STC 1022, sig., A6v.

significant alteration to England's juridical, constitutional, and cultural heritage.³ These problems were most fully and poignantly articulated by the antiquarian scholars who conceptualized the proposed change in state as a devaluation, in one form or another, of an "English" tradition and historical personality. This is largely so because James employed the language of conquest to prop up the union, and this prompted antiquarians to not only parade the ancient constitution but, more significantly for early Stuart political thought, emphasize its legitimizing authority in evaluating contemporary social and cultural practices.

But the union debate was about much more than the political and historical significance of the Conquest. What it propelled was a fusion of antiquarianism, ancient constitutionalism, and Gothicism for the dual purpose of defining English identity by pointing to and remembering a specific legal heritage and, by default, defending English rights and liberties against royal encroachments. Antiquarianism, in this context, employed the past in an effort to marginalize (in the name of Englishness) both the ancient Britons and, to a lesser extent, the Scots, both of whom represented what the English suggested they were not. This was specifically done via a delineation of the history of English law, a law portrayed as unique because it was the product of custom and as such perfectly agreeable to the nature and values of the English people.

Within this broad framework, however, differences among antiquarians did occur, mainly over the historicity of the law and the degree to which it had survived unaltered into the seventeenth century. The range of positions on the origin of the law of England, the so-called ancient constitution, included the "immutable" theory, famously proffered

² Ibid, sig., A7.

by Sir Edward Coke (Cook), that placed the law outside of time since it was understood to be so old as to predate any memory; the Saxon or Gothic position, articulated by leading antiquarians from William Lambarde to William Camden, that located the founding and essence of English law in the Saxon era; and finally a more nuanced vision of the law as a product of various conquests, one in which a number of common and civil lawyers, surprisingly enough, found common ground.⁴ It is now generally accepted that the ancient constitution provided a less “insular” mode of thought than once believed, and that the divide among lawyers over the continuity of custom was less a gap than a variant shade. It is therefore less apropos to speak of the English frame of mind in the early seventeenth century as idiosyncratic, especially since continental scholarship increasingly influenced the thinking of English scholars and lawyers. Despite these qualifications there was something significant and to some degree novel about English historical thought and it revolved around the broad conception that the ancient constitution, whatever its origin and makeup, was a central fabric of English identity.

Consequently, antiquarian scholarship took on a new importance in the context of union and the resulting fear that it would dissolve English law; and to lose one’s law was to efface one’s identity. As the historian J. G. A. Pocock recently suggested, the prospect

³ See Bruce Galloway, *The Union of England and Scotland, 1603-1608* (Edinburgh: John Donald, 1986), 1-2.

⁴ Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (University Park, Pennsylvania: Pennsylvania State University, 1992), 58. Burgess emphasizes the differences between Sir Edward Coke and John Selden concerning the origin and evolution of the English constitution. Coke was generally committed to the view of the constitution as immemorial and unchanging (although he did admit that custom could and did change). Selden believed that while the Saxons had established continuity of the law but that there was continued alteration through the middle ages. For Selden see Paul Christianson, *Discourse on History, Law and Governance in the Public Career of John Selden, 1610-1635* (Toronto: University of Toronto Press, 1996). The classic study of ancient constitutionalism is J.G.A. Pocock, *The Ancient Constitution. And the Feudal Law* (Cambridge: Cambridge University Press, 1957). Pocock was the first to develop the “common law mind” thesis, which argued that seventeenth century common layers viewed their law as unique in that it was essentially the same in their

of a Great Britain was a crucial episode in tweaking ancient constitutional thought because it “raised the fear that the king intended to dissolve the laws that were the ligaments of both his kingdoms, in order to reduce two mystical bodies to one and be no longer the husband of two wives.”⁵ In this crisis, the antiquarians showed a willingness to stake the political nation on constructed versions of the past. These various conceptualizations of England’s past point to problems of national identification and the role of historical memory in its construction.

What I want to suggest today is that under the strain of a new “British” state, an English consciousness crystallized, and did so in large measure through the historical writing of the Society of Antiquaries, a learned circle of some of the nation’s leading lawyers and scholars whose discourses turned increasingly political between 1603-1607 (the same years James’s union plan took priority in the nation’s political conversation). What the Society’s debates suggest is that Englishmen were compelled to undertake the most difficult task of verbalizing who they were, and this meant constructing a national memory that played to the cultural and political conventions of the early seventeenth century. I will argue here that, ironically, as they gave increasing precision to self-expression, they became more anxious and uncertain about what constituted England’s national character. For while it was easy enough to say that the old law was unique because it had come to embody the habits and practices of the English people, it was much more difficult (because less obvious) to say how and to know when the ancient constitution took on this characterization. As a result, the antiquarian response charted

day as it had always been. This point is developed by Donald R. Kelley. See Donald R. Kelley, “History, English Law and the Renaissance.” *Past and Present* No. 65 (Nov. 1975), 25.

⁵ J.G.A. Pocock, “A Discourse of Sovereignty” in *Political Discourse in Early Modern Britain*, eds. Nicholas Phillipson and Quentin Skinner (Cambridge: Cambridge University Press, 1993), 385.

here does not represent a single voice or cultural programme. Instead, it reveals a variety of positions about the exact meaning and character of the juridical thread of their identity. This meant, of course, that identity depended on the careful negotiation between memory, understood here as the remembrance of a specific yet completed moment in the past, and tradition, or the unreflective living of a continuous past.⁶ English antiquarian thought, then, revealed the tensions inherent in appropriating memory not in the name of claiming lost rights but to legitimize and sanction contemporary political and cultural practices. Commemorating the past, through the writing of “England,” was tantamount to commending the present.

One of the most contentious parts of James’s “Great Britain” was his hope for a perfect amalgamation of the two nations’ laws. The degree of English trepidation over this move may, in fact, have been exaggerated, considering that James’s proposal for legal union was limited to the repeal of hostile laws and the settlement of border administration and criminal statutes. In 1604 James preferred to remain as nonspecific as possible, hoping, in general, for a uniformity in customs. It was not until 1607 that James clarified his intentions (however vaguely), insisting in a speech to Parliament that by a union of laws he did not mean ridding the two kingdoms of their particular customs but only “that as they live already under one monarch, so they may all be governed by one law.” Furthermore, he hoped to allay English fears of losing their law by appealing to the value of having the common law made “cleare and full” for the benefit of all subjects. “For I desire not the abolishing of the Lawes,” James declared, “but onely the clearing off

⁶ This differs from the French *lieux de memoire*, in which memory implies the loss of tradition. See Stefan Collini, *English Pasts: Essays in History and Culture* (Oxford: Oxford University Press, 1999), 53-58. See also Susannah Radstone, ed., *Memory and Methodology* (Oxford & New York: Berg, 2000), 14-15.

the rust of them.”⁷ Despite these efforts to mitigate reaction against James’s Great Britain, fears persisted that a union with Scotland would adulterate the common law by mixing it with the civil law, and would only work to strengthen the royal prerogative.

It is not clear when exactly the Society of Antiquaries decided to take up the question of “the antiquity of the laws of England,” although evidence suggest that it was at least as late as November 1604.⁸ The debate revealed a variety of opinions about the origins and history of the law of England. There were deafening voices of ancient constitutionalism, especially from Sir John Dodderidge, a respected antiquarian and Solicitor-General under James who, in a tentative but supportive tract on the Union, warned that “lawes were never in any kingdome totallie altered without great danger of the evercion of the whole state.” Like his fellow antiquarians, Dodderidge saw the alteration of a nation’s law dangerous because it refashioned for the worse the character of a people. Common and civil lawyers agreed that laws embodied the very nature of those for whom they were given. Consequently, when two nations under one monarch are governed by “the selfsame lawes,” difficulty arose because (as Dodderidge noted) “no nacion willingelie dothe alter their lawes, to which they have been [endured and under which they have been] borne and brought upp.” Since laws gave nations their form and personality, it was presumed that they must grow naturally and continuously, “lest the

⁷ King James VI and I, *Political Writings*, ed. Johann P. Sommerville. Cambridge Texts in the History of Political Thought. (Cambridge: Cambridge University Press, 1994), 162-163.

⁸ I have based this on the fact that the first member to address the question was William Hakewill, who did not join the society until 29 November 1604. For Hakewill’s membership see Kevin Sharpe, *Sir Robert Cotton 1586-1631: History and Politics in Early Modern England* (Oxford: Oxford University Press, 1979), 29-30.

shipwreck of the common wealth and total evercion of all be occasioned by such innovacion.”⁹

Dodderidge’s dire prediction about the outcome of legal change reflected his unwillingness to admit great change in the history of English law. Part of his reluctance to see the kind of transmuted constitution favored by many civil lawyers was his equating legal change with conquest. The ancient Britons, he conceded, had lost part of their law to the Romans, “who, with their people brought their Lawes;” but the essential character of the old law remained. “The ancient Lawes of the Brittaines, which to the honour of our Common Lawes, have their use to this daye,” he insisted.¹⁰ If acknowledging change was tantamount to admitting England had been conquered, then it followed that England had not always maintained a set of laws that governed the king—a point Dodderidge was not about to suggest. For him, the law of a particular people originated from their history and thus it was an inextricable part of their national character and personality.

Others, however, pointed out that it was for the very reason that the laws of England were well suited to its people, that “they can neither be divine in their operation, nor eternall in their continuence.”¹¹ Constitutions, like a people’s character, evolved over time, since of all the things history altered, a people’s laws were foremost. This latter argument is much closer to the position sketched by the antiquarian William Hakewill, a young lawyer trained at Lincoln’s Inn who joined the Society in November of 1604.¹² In a lengthy discourse on the ancient constitution, Hakewill crafted an image of the common

⁹ John Dodderidge, *A Breif Consideration of the Unyon* in Galloway and Levack, eds. *Jacobean Union*, 146-148.

¹⁰ BL, Harleian, HI 305, fol. 232.

¹¹ Sir William Cornwallis, *The Miraculous and Happie Union, of England and Scotland* (London and Edinburgh, 1604), STC 5782, sig., D3.

law as a patchwork of Saxon, Dane, and Norman custom and contended that it was not only the Norman conquest that ruptured English history but also the Danish conquest of the Saxons. Hakewill began his polemic by dutifully noting that longevity was indeed a quality of the ancient constitution and added that this was so because England's laws generally agreed "with the written law of God, law of primary reason, and the old laws of Greece." But longevity and continuity were not the same, and Hakewill specifically attacked the idea that *Regnum Angliae* had continued unaltered since the ancient Britons.¹³ Disputing that there was no proof for this position, other than "*ipse dixit*," Hakewill insisted that there were "many and sound reasons which prove the contrarie." And having explained that there were many who, because of their high standing in the legal profession, unsurprisingly favored the idea of antiquity and continuity in the laws, he then reasoned that "for my part I do not see any way maintainable, but am rather of the opinion, that the laws of the Brittaines were utterly extinct by the Romans; their laws again by the Saxons; and lastly, theirs by the Danes and Normans much altered."¹⁴

Hakewill's iconoclasm did not end there. He argued that the civil law once held sway in England, noting that the Romans trained British kings in Rome "for no other purpose than to instruct them in their laws and civil life." To further the Roman goal of extending the civil law to England, Hakewill, following the civilian John Hayward, pointed out that the "great lawyer Papinian" was sent to England "to reform the laws here;" and, in an effort to delineate similarities with Scotland, reminded Society members that their northern neighbors also had the Roman law introduced to them and possessed

¹² See Wilfrid R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640*. Oxford Studies in Social History. (Oxford: Oxford University Press, 1986), 196-197.

¹³ Thomas Hearne, ed., *A Collection of Curious Discourses*, vol 1 (London, 1771), 1-2.

¹⁴ *Ibid.*, 2.

much of it today. This too may have been the fate of England (one not overly lamented by Hakewill) had it not been for the Saxons and their absolute victory over the Island. Again, England had been conquered and the change in the historical and cultural landscape was significant. Not only did the Saxons alter the religion and language of the Romans, they also wrought “a perfect consumation of their conquest” by changing the name of part of the island. Most importantly for Hakewill, the Saxon conquest brought the absolute extinction of former laws, especially the old British laws, which earlier he had noted were razed by the Romans. As he declared, “I make no doubt, but the Roman law, whereof without doubt much remained to the time of the Saxons, but much mingled with the British, as also with the British law itself, were by the Saxons as utterly abolished, as if none such had been planted.”¹⁵

The polar views of the ancient constitution posited by Dodderidge and Hakewill fit well with the two models of the ancient constitution prevalent in early Stuart thought—one, as we have seen, was associated with Coke and Dodderidge, and based on the denial of any historical alteration in the common law, which, of course, meant discounting the Norman Conquest as no conquest at all; the other, whose chief representative was Hakewill (as well as Sir Henry Spelman), recognized that historical change had occurred and that the laws of England were not, therefore, immemorial.¹⁶ Historians have pointed out, however, that the divide between these two models was not very large since most agreed that the Saxons, if not responsible for new law, certainly left a deep impression on the English constitution. But Hakewill’s historical thought should

¹⁵ Ibid., 3-5.

¹⁶ Glenn Burgess, *Ancient Constitution*, 69-72. Of course Burgess is intent on showing that Coke’s view was anything but typical and that there was a larger sense of agreement among common lawyers (and to

alert us to the contrary. His position on the Danes and Normans cannot be so easily assimilated into the Gothic paradigm.¹⁷ It is true that Hakewill saw the Saxon conquest as day one in contemporary English law, and he suggested that only then could one rightfully speak of some continuity in the English customs. But this should not belie the fact that Danish law and Norman customs fundamentally modified Saxon law. As Hakewill noted concerning the Danes, “surely they also did much alter the Saxon laws, and brought into this land many of the laws of Denmark, which even at this day remain amongst us.” Furthermore, he was also convinced “that the Danes made a great alteration of our laws here,” because there was “great agreement of our present laws with the laws and customs of the Normans at this day.”¹⁸ More disturbing for those rummaging the past for continuity concerning English liberties was Hakewill’s position that the Normans radically altered existing laws pertaining to criminal trial, tenures, wardships, and even the customary one-third dowry, all of which existed, he said, before the Conquest. Saxon footprints, therefore, ran only as deep as their conquerors allowed.

The upshot of Hakewill’s spirited rebuke of the ancient British and Saxon constitutions was that rather than identifying the “fundamental laws” of England with a specific people, he painted it as a mishmash of customs formed out of the Saxons, Danes, and Normans—a view in some ways more agreeable with the civil lawyer John Cowell, who in *The Interpreter* noted simply enough that “the law of this land hath been

some extent with civil lawyers) not on the law’s continuity but that custom was understood to be evolutionary in nature.

¹⁷ *Ibid.*, 71. Burgess argues that Hakewill viewed the change in Saxon law as less significant than earlier conquests because before the laws were abrogated rather than altered.

¹⁸ Hearne, ed., *Curious Discourses*, vol. 1, 6. Hakewill reasoned this because all authorities agreed that the Danes and Normans originated from the same country.

variable.”¹⁹ This was also the position staked out by an anonymous member of the Society of the Antiquaries who questioned the historicity of the constitution, noting that neither ancient British positive (*statuta munipalia*) nor common laws (*leges judicariae*) had survived into the present, except in Wales.²⁰ It was true that the Saxons had altered or even obliterated the old law, but this, according to the anonymous member, did not necessarily mean that current customs could be traced to their Saxon forefathers. Recognizing earlier efforts to clarify much mystery concerning Saxon laws, the member was not convinced of their significance. “Many of them, in my opinion, are very difficult to understand,” he declared, noting that in matters of tenure and punishment the Saxon laws remained obscure and in other areas simply differed from present customs.²¹

Ironically, the widely circulated opinion that the ancient constitution may not be as ancient as some thought, concurred in one way with Coke’s view that no beginning date could be fixed to English law. There was congruence in the view that the law, as custom, stood outside particular time and thus less susceptible to historical criticism. This gave credence to the idea that a nation’s law was very much a part of its people’s unique historical development and that, whatever the law’s origins, it must be well suited since self-created. But these were not two related meditations on time thought to derive from an early modern English “philosophy of custom.”²² Rather they were various positions on

¹⁹ John Cowell, *The Interpreter* (Amsterdam and New York: Theatrum Orbis Terrarum & Da Capo, 1970), sig. Rr2.

²⁰ Hearne, ed., *Curious Discourses*, vol. 1, 8-9. For perceptions of Wales see Sir John Dodderidge, *The History of the Ancient and Modern Estate of the Principality of Wales, Dutchy of Cornwall, and Earledome of Chester* (London, 1630). Wales was perceived by many Englishmen to be culturally inferior before the Act of Union in 1536 since they stood outside the purview of English law; although Dodderidge notes that Welshmen were not specifically enemies of the English.

²¹ Hearne, *Curious Discourses*, vol. 1, 9.

²² J.G.A. Pocock, “Modes of Political and Historical Time in Early Eighteenth Century England,” in *Studies in Eighteenth-Century Culture*, Vol. 5, ed. Ronald C. Rosbottom (Madison, WI: University of Wisconsin Press, 1976), 90-91.

the question of *which* past was authoritative. For some, English law originated in a murky and unrecorded past, which, according to the meaning of custom, no man could historically pinpoint. There were others who, following Elizabethan antiquarians, articulated a Gothic vision of English law, one that not only reiterated the notion that each people had their own peculiar customs, but firmly located them in the Saxon period. And then there were those, (historiographically seen as more “modern,”) who, like Hakewill, were even sceptical of strict continuity from the Saxons. For them, the history of the English constitution was one replete with juridical mutation. Change was the universal quality of the English constitution, a quality attributable to Danish and Norman practices as well Saxon ones. In light of this view, post-Saxon conquests of England may not be rightfully labeled a “yoke” but instead a deliverance.

In conclusion, the purpose in offering a legitimizing history of the English constitution in the context of the Union debate was to authorize a version of the past that would, for political purposes, repudiate or validate a British tradition. Regardless of where that past was located and what values and meaning it was given, the antiquarians operated from the fundamental principle that a nation’s laws were enmeshed in its particular historical development. This, we might note, limited how the past could be construed and remembered since the performance of a juridical identity was rooted in the political mien of early Stuart England. Consequently, the antiquarians contributed to an organic view of the law and history—a proto-Burkean view contrary to James’s hope for a legislated and expedited union. But there was a contested terrain in which the antiquarians’ discourses circulated, and that revolved around the construction of a historical narrative that best spoke to the nation’s historical imagination. The trick for

antiquarians (and even James and his supporters) then was to align the nation's memory with their own political and cultural values. Competing versions of the past, therefore, meant multi-variant identities. The only safe ground for all was that the past was not really the past, since in some form or fashion it never ended. Writing the law of England then became a dual performance in creating and confirming what was contemporaneously deemed the proper historical tradition.