

ROBERT PERSONS, POPULAR SOVEREIGNTY, AND THE LATE ELIZABETHAN SUCCESSION DEBATE*

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ABSTRACT. *This article explores how, and why, Robert Persons's A conference about the next succession to the crowne of England (1594) scandalized late Elizabethan England. By invoking the spectres of popular sovereignty and political resistance, Persons, as is well known, threatened to disrupt the succession of James VI of Scotland to Elizabeth I's throne. In doing so, however, he also undermined the very notion that the English crown passed by succession at all. After discussing Persons's political thought, this article examines the responses to it by such writers as John Hayward, Henry Constable, Peter Wentworth, and James VI himself. Their turn towards natural law as a basis for James's title was, it is argued, a direct consequence of the Conference's argument. As well as shining long-overdue light on Hayward's political thought, the article thus argues that the reception of Persons's Conference was a significant influence on the development of English political thought in the early seventeenth century.*

The fictional frame narrative of the *Conference about the next succession to the crowne of England* reports that, in April 1593, a group of gentlemen 'of divers nations, qualities, and affections, as wel in religion as otherwise', met to discuss the vexed question of the succession to Elizabeth I. News was brought to them that an attempt to have parliament settle the matter, namely the meetings led by Peter Wentworth and Henry Bromley, had failed.¹ At this point, a civil lawyer

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¹ See J. E. Neale, 'Peter Wentworth', *English Historical Review*, 39 (1924), pp. 36–54, 175–205, at pp. 187–95; and Paulina Kewes, 'The Puritan, the Jesuit and the Jacobean succession', in Susan Doran and Paulina Kewes, eds., *Doubtful and dangerous: the question of succession in late Elizabethan England* (Manchester, 2014), pp. 56–7.

and a common lawyer among them argued that this failure was fortunate for the realm, and that nominating a successor during Elizabeth's lifetime would imperil the queen and the kingdom. Each offered reasons to think that there were too many candidates, with too little to distinguish them. The common lawyer outlined the difficulties in discerning the identity of the heir-presumptive, which revolved around whether dynastic lines might be excluded from the succession, either through attainder or bastardy. The different ways in which the relevant statutes might be interpreted left, he said, ten or eleven plausible pretenders to the throne. The civil lawyer further complicated matters with his argument that the heir-presumptive, even if his (or her) identity were known, might be barred from succession under certain circumstances, such as 'if he should be taken by Turkes or Moores in his infancy and brought up in their religion, and would mayntayne the same in your countrey without al his forces'.² After the common lawyer signalled his disquiet, the two agreed to set forth their arguments at greater length. These two speeches, that of the civil lawyer followed by that of the common lawyer, form the two parts of the *Conference*.

The *Conference*, the work of the Jesuit Robert Persons (1546–1610), intervened in a succession debate which has begun to receive sustained scholarly attention only recently.³ Historians have challenged Mortimer Levine's view that, with regard to the succession, '[t]he remainder of Elizabeth's reign [after 1571] is, for our purposes, an epilogue', that there was in fact no other viable candidate to succeed Elizabeth, and that Robert Cecil 'stage-managed'

² R. Doleman [pseud. for Robert Persons], *A conference about the next succession to the crowne of England* (Antwerp, 1594), preface to part 1, sigs. B4v–B5r. Below, I cite the *Conference* by part and chapter, in the form '1.2'. According to its somewhat mischievous preface to the earl of Essex, the *Conference* was completed at the very end of December 1593. Its frame narrative was foreshadowed by Persons's *Newes from Spayne and Holland* (Antwerp, 1593). The *Conference* was only distributed in 1595, for which, and for a convincing case for Persons's authorship, see Peter Holmes, 'The authorship and early reception of *A conference about the next succession to the crown of England*', *Historical Journal*, 23 (1980), pp. 415–29. Persons's surname is also occasionally given as 'Parsons' in the historiography. Throughout this article, I amend i/j and u/v in English and French, and u/v in Latin.

³ Persons, an Oxford MA and former dean of Balliol College, converted to Catholicism in the mid-1570s, joined the Society of Jesus in July 1575, and was ordained in July 1578. With Edmund Campion, he returned to England in April 1580 as a missionary and religious apologist. After Campion's capture and execution, Persons fled England. From the continent, closely associated with Cardinal William Allen, he promoted England's reconversion with his pen, and collaborated with the duke of Guise. Between 1589 and 1596, when the *Conference* was written, he represented the interests of the Jesuits and of the English Catholics in Spain. In 1596, he became rector of the English College at Rome, a position which he held until his death. See Victor Houliston, 'Persons [Parsons], Robert (1546–1610)', *Oxford dictionary of national biography*. On Persons's links with the Guise and the Catholic League, see Francis Edwards, *Robert Persons: the biography of an Elizabethan Jesuit* (St Louis, MO, 2005), pp. 69, 72; Victor Houliston, *Catholic resistance in Elizabethan England: Robert Persons's Jesuit polemic, 1580–1610* (Aldershot, 2007), pp. 4–5. For Persons's time in Spain, see Edwards, *Robert Persons*, chs. 11–12.

the succession.⁴ Susan Doran, in particular, has stressed the extent to which it seemed far from certain during the 1590s that James VI of Scotland would become James I of England.⁵ Persons's *Conference*, with its message of uncertainty, is widely recognized to have been one of the most provocative interventions in the succession debate; Blair Worden's afterword to a volume edited by Susan Doran and Paulina Kewes remarks that Persons 'might almost be called the presiding spirit' to the preceding pages.⁶

The *Conference* has, for some time, also attracted the attention of historians of political thought, primarily for its contribution to 'resistance theory': its argument that every commonwealth has the right to resist or depose its ruler, if the latter rules tyrannically.⁷ Peter Holmes describes the *Conference* as 'the best expression of sixteenth-century monarchomach ideas in English'.⁸ While, as the term 'monarchomach' implies, the *Conference* may be compared with works of 'Calvinist resistance theory', such as the *Vindiciae, contra tyrannos* or George Buchanan's *De iure regni apud Scotos* (both 1579), there is broad agreement that the *Conference*'s intellectual influences were exclusively, or at least primarily, Catholic, and more specifically drawn from neo-Thomist thought. Harro Höpfl, for instance, argues that 'the Jesuit Persons reproduced the scholastic account of political authority without citing a single scholastic', while both Michael Carafiello and Victor Houlston have pointed to a particular link between Persons and the Jesuits Francisco Suárez and Luis de Molina.⁹ Peter Lake, in an important article, suggests that James VI and I's *The true lawe of free monarchies* was, in addition to being a refutation of Buchanan, also intended as an attack on Persons's *Conference*.¹⁰

⁴ Mortimer Levine, *Tudor dynastic problems, 1460–1571* (London, 1973), p. 120. Recent revisionism of this verdict began with Howard Nenner, *The right to be king: the succession to the crown of England, 1603–1714* (Basingstoke, 1995). On this, see Jean-Christophe Mayer, 'Introduction', in Jean-Christophe Mayer, ed., *The struggle for the succession in late Elizabethan England* (Montpellier, 2004), p. 10.

⁵ For the negotiations surrounding the succession, see Susan Doran, 'James VI and the English succession', in Ralph Houlbrooke, ed., *James VI and I: ideas, authority, and government* (Aldershot, 2006), pp. 25–42. See also Rei Kanemura, 'Kingship by descent or kingship by election? The contested title of James VI and I', *Journal of British Studies*, 52 (2013), pp. 317–42.

⁶ Blair Worden, 'Afterword', in Doran and Kewes, eds., *Doubtful and dangerous*, pp. 297–8.

⁷ See especially J. H. M. Salmon, 'Catholic resistance theory, ultramontaniam, and the royalism response, 1580–1620', in J. H. Burns, ed., *The Cambridge history of political thought, 1450–1700* (Cambridge, 1991), pp. 218–53.

⁸ Peter Holmes, 'The political thought of the Elizabethan Catholics' (Ph.D. thesis, Cambridge, 1976), p. 208. See also his *Resistance and compromise: the political thought of the Elizabethan Catholics* (Cambridge, 1982).

⁹ Harro Höpfl, *Jesuit political thought: the Society of Jesus and the state, c. 1540–1630* (Cambridge, 2004), p. 234; Michael Carafiello, *Robert Parsons and English Catholicism, 1580–1610* (Selinsgrove, PA, and London, 1998), p. 54; Houlston, *Catholic resistance*, p. 83.

¹⁰ Peter Lake, 'The king (the queen), and the Jesuit', *Transactions of the Royal Historical Society*, 14 (2004), pp. 243–60. For the earlier period, see Peter Lake, *Bad Queen Bess?* (Oxford, 2016).

Within the historiography of the *Conference*, Persons's theory of royal succession has received significantly less attention than his theory of political resistance. Royal succession is a relatively neglected topic in intellectual history, but although it was of only intermittently pressing relevance, it raised questions which were no less important than those prompted by the subject of resistance and obedience theory.¹¹ The central question for any theory of royal succession to answer, namely how anyone acquired a right to be king, could only make sense in the light of a wider theory of the relationship between king and kingdom.¹² It was a dangerous business; a theory of succession might be used to imply that a reigning monarch lacked just title, and was thus a tyrant by usurpation. Early modern political thinkers found it rather easier to countenance resistance to a usurper, after all, than to a tyrant by exercise.¹³ This article, following in the footsteps of Howard Nenner's *The right to be king*, argues that the *Conference's* impact in the politics of the succession was matched by that of its attack on the idea of an indefeasible right of succession.¹⁴ In the wake of Tudor constitutional legislation, Persons put forward the position that statutes could alter the royal succession precisely because kings were always subject to parliament. In short, an argument for quasi-elective monarchy became a manifesto for popular sovereignty.

This article is as concerned with the reception of Persons's theory of succession as with the theory itself. It suggests that an appreciation of the *Conference's* theory of succession, and of its practical political implications, may further our understanding of its impact in English and Scottish political thought at the turn of the seventeenth century. While there is a great deal still to be said about which works influenced the *Conference's* political thought, that topic, for reasons of concision, is not considered here.¹⁵ Instead, after outlining the foundation of Persons's argument, as put forward in the printed version of the *Conference*, this article discusses both the practical and theoretical elements of

¹¹ The same is true for royal succession more generally. The key text for royal succession in civil, canon, and common law remains Ernst Kantorowicz, *The king's two bodies* (new edn, Princeton, NJ, 1997). For France, see R. E. Giesey, 'The juristic basis of dynastic right to the French throne', *Transactions of the American Philosophical Society*, 51 (1961), pp. 3–47; and idem, *Le rôle méconnu de la loi Salique: la succession royale, XIVe–XVIe siècles* (Paris, 2007).

¹² I use 'king' partly to avoid the ungainliness of 'king or queen' and partly because female rule was, as is mentioned, a contentious issue in France.

¹³ See e.g. Robert Kingdom, 'Calvinism and resistance theory', in Burns, ed., *The Cambridge history of political thought, 1450–1700*, p. 213. The distinction between tyranny by usurpation and exercise dates back to Bartolus of Sassoferrato.

¹⁴ The term 'indefeasible hereditary succession' is Nenner's, and refers to the way in which the heir's right of succession cannot be denied him (or her).

¹⁵ The extent, in particular, to which Persons's political thought emerged from the contemporary French political arena has not been explored as much as it might have been. For this, however, see e.g. Holmes, 'Elizabethan Catholics', p. 203; Lake, 'The king (the queen), and the Jesuit', p. 258; Höpfl, *Jesuit political thought*, p. 235. I hope to discuss the subject more fully in the future.

its intervention into the Elizabethan succession debate.¹⁶ The second part of the article then considers the public impact of the *Conference* by studying some of the earliest printed responses to it.¹⁷ The authors of all but one are known: the puritan parliamentarian Peter Wentworth, imprisoned in the Tower for his earlier attempt to have Elizabeth nominate a successor; Henry Constable, an English Catholic convert writing from Paris; James VI and I himself; and John Hayward, an English civil lawyer and historian.¹⁸ Hayward's *Answer* to the first part of the *Conference* is particularly worthy of greater attention than it has hitherto received, and not just because it was the only response to Persons which Robert Filmer was to mention at the beginning of his *Patriarcha*.¹⁹ It is argued here that Hayward was alert to the implications of Persons's argument, particularly in the light of Jean Bodin's concept of sovereignty, and also that he extended several of the points made by Persons's other respondents. By turning towards natural rather than positive law or custom as a basis of royal succession, it is suggested, Hayward tacitly acknowledged that Persons had made it unthinkable to voice propositions which, a short while before, had been uncontroversial.

I

Although the *Conference* claims to be the orations of two lawyers, Persons's political thought had a distinctly Aristotelian colouring. The 'civil lawyer' makes

¹⁶ A manuscript Latin translation of the *Conference* was made in Rome for presentation to Pope Clement VIII, possibly by Persons himself. This summarized the first part cursorily, and added to the second part a chapter outlining the pope's right to intervene in the succession. On this, see Holmes, 'Authorship and early reception', p. 423, and idem, *Resistance and compromise*, pp. 152–7. He gives its shelf mark as 'Vatican Archives, Borghese III, 103, fos. 128v ff'. Stefania Tutino analyses this manuscript version in some detail, and argues that it must be understood in terms of the politics of the Roman Curia. 'The political thought of Robert Persons's *Conference* in continental context', *Historical Journal*, 52 (2009), pp. 43–63. The Biblioteca Nacional de España possesses a copy at MS 6449, which has been digitized.

¹⁷ There exist two manuscript responses to Persons, one by the Scottish jurist Sir Thomas Craig of Riccarton and another by the courtier Sir John Harington. Craig's was printed as *The right of succession to the kingdom of England* (London, 1703), while Harington's may be found in Clements R. Markham, ed., *A tract on the succession to the crown, A.D. 1602* (London, 1880).

¹⁸ Peter Wentworth, *A treatise containing Mr Wentworths judgement concerning the person of the true and lawful successor*, printed with *A pithie exhortation* (Edinburgh, 1598); [Henry Constable], *Discoverye of a counterfeit conference* (Paris, 1600); John Hayward, *An answer to the first part of a certaine conference concerning succession* (London, 1603); Philodikaios [pseud.], *A treatise declaring and confirming against all objections the just title and right of the most excellent and worthe Prince James the Sixt* (Edinburgh, 1599); James VI and I, 'The trew law of free monarchies', in Johann Sommerville, ed., *King James VI and I: political writings* (Cambridge, 1994), pp. 62–84.

¹⁹ Robert Filmer, 'Patriarcha', in Johann Sommerville, ed., *Patriarcha and other writings* (Cambridge, 1991), p. 3. Although this article is not directly concerned with Filmer's political thought, its findings help to explain Filmer's comment that Hayward, 'when [he] come[s] to the Argument drawn from the Natural Liberty and Equality of Mankind, do[es] with one consent admit it for a Truth unquestionable, not so much as once denying or opposing it'.

only a smattering of references to the *Corpus iuris civilis* and to the work of jurists; rather surprisingly, it is in the ‘common lawyer’s’ speech that we find, in relation to the well-worn debate over the relative rights of succession of a nephew and his uncle, the densest gathering of legal citations.²⁰ For all intents and purposes, then, the *Conference* is in the tradition of the arts faculties, not those of law. As such, in chapter 1, *Persons* begins with two uncontroversial premises. First, political society exists according to God’s will as it is manifest in nature: ‘sociability in mankind, or inclination to live in company, is by nature, and consequently ordeyned by God’.²¹ Second, ‘government also...is likewise of nature, for that it followeth of the former [proposition]’, and that otherwise ‘it is impossible for men to live together with help and commodity of the one to the other’.²² Government is thus natural to the extent that it benefits the governed ‘for the common benefit of al’.²³ Not all polities are governed alike precisely because government must be for the benefit of the governed, and because of ‘the diversity of mens natures, customes, educations and other such causes’, a fact that ‘Aristotle proveth throughout al the second and fourth books of his politiques’.²⁴ It was with his third premise that *Persons* moved to rockier ground. Since the ‘formes of government’, which refers both to the number of rulers and to the manner of choosing them, ‘are not determyned by God or nature, as the other two poyntes before’, therefore ‘thes particuler formes are left unto every nation and countrey, to chuse that forme of goverment which they shal like best’.²⁵ Although *Persons* expresses a preference for monarchy which, with significant exceptions, passes by succession rather than election, this is not to say that it is any more natural than democratic or aristocratic government.²⁶ While, then, it is natural for humans to live in political society, nature is indifferent to the constitutional forms in which they do so.

In chapter 1, *Persons* might seem to have provided little more than a mildly heterodox iteration of the Thomist account of the origins of political authority. His insistence that all constitutional forms were equally natural might have raised a reader’s eyebrow, but thus far the *Conference*’s argument said little about England as it existed in 1593. What made the *Conference* so radical an intervention in the succession crisis of the 1590s was the way in which *Persons*’s concept of the ‘commonwealth’ allowed him to connect the self-constitution described in chapter 1 to the kingdoms of the present day. Rather revealingly, he both defines the term as ‘the good goverment of a multitude gathered together to live in one’ and also uses it as shorthand for his first

²⁰ For part 1’s civil law references, see 1.1, sig. C1v, 1.4, sig. F7r, 1.4, sig. G4r, 1.9, sigs. P6r–v and P7v. For the uncle against the nephew, see 1.4, sig. Y2v–3r.

²¹ *Ibid.*, 1.1, sig. B7r.

²² *Ibid.*, 1.1, sig. C1r.

²³ *Ibid.*, 1.1, sig. B7r–v.

²⁴ *Ibid.*, 1.1, sig. C2r–v.

²⁵ *Ibid.*, 1.1, sig. C2r.

²⁶ *Ibid.*, 1.1, sigs. C5r–C7r.

premise, that ‘sociability in mankind, or inclination to live in company, is by nature’.²⁷ At the same time, Persons uses ‘commonwealth’ in the sense of ‘polity’, as when he states that, from natural sociability, there ‘do proceede first al private houses, then villages, then townes, then cities, then kingdomes and commonwealthes’.²⁸ Persons’s ‘commonwealth’ thus carries much of the meaning of the Latin *respublica*, and it should come as no surprise that, in the Latin edition, it was translated as such.²⁹ The commonwealth is, for Persons, both a concrete constitutional entity and a product of nature.

Accordingly, it is the political authority of the commonwealth that Persons extols in the *Conference*, as when he states that ‘every king and kings sonne hath his dignity and preheminece above other men by authority only of the common wealth’.³⁰ As for what, or who, constitutes the commonwealth, Persons proves somewhat unclear; this, as Peter Lake has argued, was surely deliberate, allowing him to move breezily from commonwealths’ hazy pre-history to their more recent interventions in politics.³¹ The term might seem little more than a synonym for ‘the people’: we are told both that ‘the election and consent of the people had made their first Princes’ and also that ‘every king and kings sonne, hath his dignity and preheminece above other men, by authority only of the common wealth’.³² Examination of Persons’s historical examples, however, makes it clear that Persons takes acts of England’s parliament, and of its alleged equivalents abroad, to have been acts of the commonwealth; Richard II was, for instance, ‘deposed by act of parlament holden in London, the yeare of our Lord 1399, and condemned to perpetual prison in the castel of Pomfret’.³³ What matters here is that the commonwealth can be represented, or perhaps embodied, by a group of individuals; it moves away from being an abstract entity towards playing a very real part in present politics. Moreover, while Persons is happy to think of it as a body, a common enough metaphor for a kingdom, he denies that it is beholden to its head, for commonwealths may ‘cutt of their heades if they infest the rest, seing that a body civil may have divers heades by succession and is not bound ever to one, as a body natural is’.³⁴

We have now arrived at one of the most well-known parts of the *Conference*’s political thought, its foray into ‘resistance theory’. Since it is so familiar to historians, Persons’s argument here can be summarized briefly. In the third and fourth chapters of part I, he argues that ‘Princes are subject to law and order,

²⁷ *Ibid.*, I.1, sig. B7v, I.1, sig. C2r, referring to sig. B7r.

²⁸ *Ibid.*, I.1, sig. B7v.

²⁹ Biblioteca Nacional de España, MS 6449, fos. 3r–4v.

³⁰ Persons, *Conference*, I.5, sig. G6v, and I.9, sig. P1r.

³¹ See Lake, ‘The king (the queen), and the Jesuit’, p. 251.

³² Persons, *Conference*, I.5, sig. G6v, and I.9, sig. P1r.

³³ *Ibid.*, I.3, sig. F3r. For other depositions, see I.3, sigs. E7r, F1r, F2v–F3r. See also Houliston, *Catholic resistance*, p. 85.

³⁴ Persons, *Conference*, I.3, sig. D8v.

and...the common wealth which gave them their authority, for the common good of al, may also restrayne or take the same away agayne if they abuse it to the common evel.³⁵ Indeed, this has happened: 'common wealthes have chastised somtymes lawfully ther lawful Princes', and 'God approved and prospered the same, by the good successe and successors that enseed thereof.'³⁶ Persons supports this with a strongly providential interpretation of historical example: first, the Israelites' replacement of Saul and Amon with David and Josias; second, various Roman assassinations, including those of Romulus in favour of Numa Pompilius, of Tarquin the Proud in favour of consular government, and of Caesar for Augustus; third, of depositions in France, Spain, and England.³⁷

What is important here is that the *Conference's* support for political resistance was itself part of its theory of royal succession. If the commonwealth had this right of deposition over 'kings lawfully set in possession', Persons writes, 'then much more hath the said common wealth power and authority to alter the succession of such as do but yet pretend to that dignity, if ther be dew reason and causes for the same'.³⁸ For Persons, if the commonwealth acts prudently, it could use its authority to exclude an heir-apparent, or heir-presumptive, who would harm it so as to prevent the tyranny which was, itself, the justification for the commonwealth's authority in this matter. Persons thus holds that 'heyres apparent are not true kings until ther coronation, how just soever ther title of succession otherwise be'.³⁹ If, then, the commonwealth of England decided that James VI of Scotland were not 'whosoever [were] most likely to defend, preserve, and benefite most his realme and subjects', it might justly refuse to make him James I of England, because 'succession...includeth also an election or approbation of the common wealth', and at the coronation 'the people are demaunded agayne, if they be content to accept such a man for their King'.⁴⁰

On the subject of what constitutes 'dew reason' for a deposition or exclusion, Persons is somewhat inconsistent. In chapter 9, he first argues that it is a matter for each commonwealth to decide, since 'he who is judge and hath to give the sentence in the thing itself is also to judge of the cause'.⁴¹ As with his imprecision as to what counts as a commonwealth, this seems deliberate; it lets him avoid having to establish criteria which might reduce in number his stock of examples of just depositions. When the commonwealth's will is unclear,

³⁵ *Ibid.*, 1.4, sig. G1v.

³⁶ *Ibid.*, 1.3, sig. D8r-v.

³⁷ On Persons's use of historical example, see Houliston, *Catholic resistance*, p. 77.

³⁸ Persons, *Conference*, 1.3, sig. F4v.

³⁹ *Ibid.*, 1.6, sig. K8v. This attacked the idea, current in England and France, that the 'King never dies'. For England, see Kantorowicz, *The king's two bodies*, pp. 408–9; for France, R. E. Giesey, *The royal funeral ceremony in Renaissance France* (Geneva, 1960), p. 177.

⁴⁰ Persons, *Conference*, 1.9, sig. P2r; preface to part 1, sig. B4r.

⁴¹ *Ibid.*, 1.9, sig. O8v.

Persons writes, as in the case of civil war, 'it is enough for every particuler man to...obey simply without any further inquisition, except he should see that open injustice were done therein'.⁴² If, for instance, 'a Turke or Moore...or some other notorious wicked man or tyrant should be offred by succession', then 'every man...is bound to resist what he can, for that the very end and intent for which al government was first ordeyned is herein manifestly impugned'.⁴³ Persons goes on to argue that the main criterion in this case must be the 'weal publique', but it is at this point that he shows his religious sympathies, for he argues that 'the first, cheefest, and highest ende that God and nature appointed to every common wealth was not so much the temporal felicity of the body as the supernatural and everlasting of the soule'.⁴⁴ Since the commonwealth exists primarily for its members' spiritual benefit, 'nothing in the world can so justly exclude an heyre apparent from his succession as want of religion'.⁴⁵ Indeed, for any individual 'to give his helpe, consent or assistance towards the making of a king whom he judgeth or beleveth to be faultie in religion' is not just 'a most grevous and damnable sinne', but also 'great folly'.⁴⁶ In practice, then, Persons's civil lawyer is setting Catholic, Anglican, and Puritan against one another.⁴⁷ Chapter 9's language of private conscience undercuts the possibility of the commonwealth arriving at a collective decision, and in this Persons's desire to unsettle the Elizabethan succession debate is quite evident. Allowing for this divergence, however, it may be said that the majority of the *Conference* operates according to the assumption that the commonwealth can do whatever the common good is.

What gives the commonwealth this perpetual authority to protect its interests is its foundation in the natural law of human sociability. It must, again, be conceded that Persons is not entirely clear on this point. When discussing why depositions are justified, he 'slip[s] into contractual vocabulary', to use Harro Höpfl's phrase.⁴⁸ Later, Persons uses the rather similar vocabulary of marriage: 'this agreement, bargayne and contract betweene the king and his common wealth, at his first admission, is as certayne and firme...as any contract or marriage in the world can be', but only 'when it is solemnized by wordes *de praesenti*...betweene parties espoused before by wordes *de futuro*'.⁴⁹ Elsewhere, however, Persons states that the relationship between commonwealth and king is not that of broadly equal contracting parties but of superior and

⁴² *Ibid.*, l.9, sig. P1r.

⁴³ *Ibid.*, l.9, sig. P1v.

⁴⁴ *Ibid.*, l.9, sigs. P2r and P3v.

⁴⁵ *Ibid.*, l.9, sig. P7v.

⁴⁶ *Ibid.*, l.9, sigs. Q1v–Q2r.

⁴⁷ At the end of part II, Persons expands on this by discussing the three religious factions and their likely conflict. *Ibid.*, II.10, sigs. HH3r–II1v.

⁴⁸ Höpfl, *Jesuit political thought*, p. 236.

⁴⁹ Persons, *Conference*, l.5, sig. K1r–v. This permits him to make the reassuring point that, ordinarily, the heir-apparent or heir-presumptive will not be rejected by the commonwealth.

subordinate. Thus, ‘the whole body, though it be governed by the Prince as by the head, yet is not inferior but superior to the Prince, neither so giveth the common wealth her authority and power up to any Prince, that she depriveth her selfe utterly of the same’.⁵⁰ He goes on to describe the king as little more than an appointed officer: ‘the power and authority which the Prince hath from the common wealth is in very truth, not absolute, but *potestas vicaria or delegata* [sic], as we Civilians cal it, that is to say a power delegate, or power by commission from the common wealth’.⁵¹ In the light of how Persons considers the commonwealth as an instrument for securing the common good, it makes a great deal of sense to suggest that Persons’s commonwealth has an inalienable right to pursue its own good. This interpretation certainly fits the civil lawyer’s opening statement, that it is ‘manifestly against al reason, and conscience, and against the very first end and purpose of institution of common wealthes and magestrates’, for the admission as king of ‘a madd or furious heyre apparent, or of one by education a Turke or a Moore in religion, or by nature deprived of his witt or senses’.⁵²

The first part of the *Conference*, then, makes the argument that the commonwealth of England has the right to prevent James VI’s succession. It clearly complements the work’s second part, the common lawyer’s speech. In the voice of his common lawyer, Persons assesses the claims of a long list of pretenders, categorized into five noble houses: those of Scotland, Suffolk, Clarence, Brittany, and Portugal. With studied, or at least pretended, indifference, Persons presents the arguments for and against each candidate without coming to any explicit conclusions.⁵³ Alarminglly uncertain as this might make the matter of the succession, the civil lawyer’s argument comes to the rescue; rather than worrying about which candidate should be considered heir-presumptive, he suggests, it is more important to consider which candidate will serve the common good of the realm. Given Persons’s history of collaboration with Spain, it is perhaps unsurprising that many historians have taken the *Conference* as a covert argument for the Infanta Isabella, whose claim is treated as part of the House of Portugal.⁵⁴

II

The *Conference*’s contribution to the succession was not, however, confined to this. It is the contention of the rest of this article that Persons’s argument

⁵⁰ *Ibid.*, l.4, sig. G1v; see also l.2, sig. D7v.

⁵¹ *Ibid.*, l.4, sig. G2r. The distinction between *potestas absoluta* and *potestas vicaria/delegata* was, in fact, alien to the tradition of medieval civil law. Canon law distinguished between papal *potestas ordinaria* and *potestas absoluta*, but that is of no relevance to Persons’s point; one must take this as further evidence of Persons’s shaky grasp of law. I am grateful to Magnus Ryan for his advice on this point.

⁵² *Ibid.*, l.1, sig. B6r–v.

⁵³ On Persons’s ‘indifference’, see Houliston, *Catholic resistance*, p. 79.

⁵⁴ See e.g. Thomas Clancy, *Papist pamphleteers* (Chicago, IL, 1964) p. 70; and Holmes, *Resistance and compromise*, p. 135.

offered an interesting and provocative theory of royal succession. As before, this began with his concept of the commonwealth; in particular, the fact that, since there is no one natural form of government, it is 'left unto every nation and cuntry to chuse that forme of government, which they shal like best'.⁵⁵ The 'forme of government' amounts to a constitution, at least as defined broadly, such that the commonwealth may be said to possess a right to settle its own constitutional affairs, just as it has a right to pursue its interests.⁵⁶ This right of constitutional self-establishment is no mere artefact of history, something to be used and discarded. In fact, Persons argues that not only has the commonwealth 'power to chuse their own fassion of government', it also may 'change the same uppon resonable causes'.⁵⁷ His most telling historical example was that of Rome: '[T]he Romans first had Kings and, after rejecting them for their evil government, they chose Consuls...and thes mens power was restrayned also by adding tribunes of the people, and some tyme dictators, and finally they came to be governed last of al by Emperors.'⁵⁸ He also offers the example of Switzerland, 'which once was one common wealth only under the dukes and Marqueses of Austria and now are devided into thirtene Cantons or common wealthes under populer Magestrates of their own'.⁵⁹ Persons relates this general right of constitutional self-establishment and modification to the particular practice of succession, for 'divers kingdomes have divers lawes and customes in the matter of succession'.⁶⁰ This implies that the commonwealth of England, in the form of parliament, ought to modify the succession; after all, 'who made thes lawes but the common wealth it selfe?'

Persons's point was a compelling one, not least because it corresponded, at least superficially, to a great deal of Tudor constitutional precedent.⁶¹ This began with Henry VIII's three succession acts. The first two altered the order of succession by excluding, respectively, Mary and Elizabeth, but this was not so much a change to the law of succession as two declarations of illegitimacy.⁶² The Second Succession Act also, however, declared that Henry VIII had the right, apparently *ex officio*, to determine the succession if he lacked legitimate heirs.⁶³ The act

⁵⁵ Persons, *Conference*, l.1, sig. C2r.

⁵⁶ As stated above, this is not to say that Persons was entirely clear on the latter point.

⁵⁷ Persons, *Conference*, l.1, sig. C3v.

⁵⁸ *Ibid.*, l.1, sig. C3r.

⁵⁹ *Ibid.*, l.1, sig. C4v.

⁶⁰ *Ibid.*, l.2, sig. D5v.

⁶¹ On this, see E. W. Ives, 'Tudor dynastic problems revisited', *Historical Research*, 81 (2008), pp. 255–79. See also Mortimer Levine, 'A parliamentary title to the crown in Tudor England', *Huntington Library Quarterly*, 25 (1962), pp. 121–7; and J. H. Baker, *The Oxford history of the laws of England*, vi (Oxford, 2003), pp. 60–3.

⁶² 25 Henry VIII, c. 22, and 28 Henry VIII, c. 7, in *Statutes of the realm* (11 vols., London, 1810–28), iii, pp. 471–4 and 655–62.

⁶³ Ives, 'Tudor dynastic problems', p. 258.

most humbly beseech[es] your Highness...that your Highness shall have full and plenary power and authority to give, dispose, appoint, assign, declare, and limit by your letters patents under your great seal, or else by your last will made in writing...at your only pleasure, from time to time, hereafter the imperial crown of this realm.

The Third Succession Act of 1544 reinstated Mary and Elizabeth in the order of succession without legitimizing them, and passed over the Stuart line of succession. Edward VI's 'Devise for the succession', which initially sought to ensure a male succession before, in a later version, settling on Lady Jane Grey as the preferred successor, would almost certainly have been put through parliament if Edward had lived longer.⁶⁴ Under Elizabeth, there passed two acts of 1571 and 1585 which both outlawed discussion of the succession and insisted that it was treason to deny that Elizabeth, or rather Elizabeth-in-parliament, could settle it.⁶⁵ Persons's interpretation of the succession was, on the face of it, similar, but he approached the matter from the opposite direction. Instead of the authority of king-in-parliament, Persons was concerned with parliament alone; for him, the king's authority was parliament's, or rather the commonwealth's, and not the other way around. His argument was all the more dangerous in the wake of a number of Protestant suggestions that the succession should be settled in parliament, such as Peter Wentworth's *Pithie exhortation* of c. 1587.⁶⁶ Thanks to Persons, any such suggestion now seemed tantamount to an attack on the queen's authority.

The *Conference* thus makes the case for an essentially elective form of kingship which derives its authority from a sovereign commonwealth.⁶⁷ While Persons writes that 'priority and propinquity of blood in succession is greatly to be honored, regarded, and preferred in al affaires of dignity', and that by 'adding...election, consent, and approbation of the realme to succession, we remedy the inconveniences of bare succession alone', this can only be called succession in a qualified sense.⁶⁸ At every king's death, the commonwealth has to decide which pretender it will appoint as king; the only fixed order of succession is one decreed by the commonwealth itself, and even this is only, really, an order of consideration. Persons, in other words, denies the possibility of there being a positive law governing the succession so strict that, when

⁶⁴ Paulina Kewes, 'The 1553 succession crisis reconsidered', *Historical Research*, 90 (2017), pp. 465–85, at p. 475.

⁶⁵ 13 Elizabeth, c. 1, in *Statutes of the realm*, iv, pp. 526–8. This prohibition was repeated in 1585, 27 Elizabeth, c. 1, pp. 704–5.

⁶⁶ Susan Doran and Paulina Kewes, 'The earlier Elizabethan succession question revisited', in Doran and Kewes, eds., *Doubtful and dangerous*, p. 38; and Kewes's forthcoming chapter, 'Parliament and the principle of elective succession in Elizabethan England', in Paul Cavill and Alexandra Gajda, eds., *Writing the history of parliament in Tudor and early Stuart England* (Manchester, 2018).

⁶⁷ On this point, see also Lake, 'The king (the queen), and the Jesuit', p. 250.

⁶⁸ Persons, *Conference*, l.6, sig. K6r–v.

circumstances demanded it, it might not be changed. Moreover, such a law of succession might, itself, be altered or abolished by the commonwealth if it were found inconvenient. England's laws of succession were entirely statutory, and testified to the independent authority of parliament. Reflection on the Elizabethan succession had prompted Persons, then, to put forward a theory of popular, parliamentary, sovereignty.

III

By the end of 1595, James VI of Scotland had a copy of the *Conference*, which caught his attention so much that it was reported that 'the king keeps [the *Conference*] so charily that it cannot be wanting from its keeper above one night'.⁶⁹ What with the ban on discussing the succession in England, the printed replies to the *Conference* came from abroad: Peter Wentworth's *Judgement concerning the person of the true and lawfull successor to these realmes of England and Ireland* was printed in 1598 in Edinburgh by Robert Waldegrave, two years after it had been written; and John Constable's *Discoverye of a counterfecte conference* was printed in Paris, in 1600.⁷⁰ Wentworth was a Puritan imprisoned for a previous attempt to have Elizabeth I declare a successor, whereas Constable was an English Catholic convert. To these explicit replies, we may add two others, both also printed by Waldegrave: Irenicus Philodikaios's *Treatise declaring and confirming against all objections the just title and right of the most excellent and worthie Prince James the Sixt* of 1599, which mentions the *Conference*, finally, James VI's own *The true lawe* of 1598 was likely intended as a reply to Persons. The most thorough response came from England in 1603, shortly after Elizabeth's death, that of Dr John Hayward. Far more than the other replies, it recognized Persons's particular assault on succession law, and for that it deserves attention.

Although these refutations of Persons focused on defending the strength of James's title in terms of common law, they touched upon the broader question of royal authority at several points. Much of this derived from the grounds upon which the second part of the *Conference* questioned that claim. First, Persons's common lawyer argues that James 'is excluded by the common lawes of England from succession to the crowne, for that the said lawes do bar al strangers borne out of the realme'.⁷¹ Second, he alludes to the 1585 Act for the Queen's Surety, which declared that traitors would forfeit their rights of succession to the crown; 'seeing that afterward the lady Mary late Queene of Scotland, mother of the king, was condemned and executed by the authority of the said parliament, it

⁶⁹ John Carey to Burghley, 1 Feb. 1596, in Joseph Bain, ed., *Calendar of border papers* (2 vols., Edinburgh, 1896), II, pp. 102–4. On the relationship between James's *The true lawe*, Buchanan, and Persons, see Lake, 'The king (the queen), and the Jesuit'.

⁷⁰ For Wentworth, see Kewes, 'The Puritan, the Jesuit and the Jacobean succession'.

⁷¹ Persons, *Conference*, II.5, sig. Z5r–v. The statute in question (which made an explicit exception for the king's children) was 25 Edward III, c. 1, in *Statutes of the realm*, I, p. 310.

seemeth evident...that this king who pretendeth al his right to the crowne of England by his said mother can have none at al'.⁷² For Persons, as has been seen, parliament was the natural institution to oversee the succession; not just these statutes, but also the Tudor changes to the succession, could all be justified as acts of the commonwealth. His opponents, repeating points which dated back to the 1560s, had to deny parliament's authority in the matter.⁷³ Philodikaïos thus denies that Henry VIII had been allowed the right to dispose of the crown at will, for 'it is not credible that King Henrie would against lawe and justice disherite the line of his eldest sister', and he concludes that his examples show 'of how little force is the authoritie of Parliament to exclude a Prince from the right due to him by inheritance'. He and Wentworth, formerly a champion of parliament's authority over the succession, argue that James 'is not heire or successor because the parliament declareth him to be so, but because hee is so'.⁷⁴

The early attacks on the *Conference* do not, in general, approach directly the question of succession laws. This is not to say that they do not see the force of Persons's argument; if the king, Constable writes, 'holdeth his Crowne as tenant of at wil of the common wealthe...consequently he hath no state of inheritance nor succession'.⁷⁵ Their preferred strategy is rather to attack Persons's theory of royal authority and thus, indirectly, to undermine his theory of succession. James begins with the argument that writers like Persons, whom he does not name, had confused illegal rebellion with just resistance: 'the smiling succeste that unlawfull rebellions haue oftentimes had against Princes in aages past...hath byway of practise strengthened many in their error'.⁷⁶ He moves to the example of the mythical conqueror of Scotland, King Fergus, in order to show that in Scotland 'the kings were the authors and makers of the Lawes, and not the Lawes of the kings'.⁷⁷ Wentworth makes the distinct but similar point that the people had formerly alienated their political authority in appointing kings, and thus 'by consequence this posterity, thus dispossessed of the power and interest of bestowing the right, cannot make voide the act of their ancestors'.⁷⁸ While this was a perfectly reasonable way to go about refuting Persons's understanding of popular sovereignty, it brought these writers no closer to an explanation of why there existed one particular order of succession in England. Philodikaïos at least offers two examples, the accession of Henri of Navarre in France, and the failure of Lady Jane Grey in England, to support his

⁷² Persons, *Conference*, II.5, sig. Z7r.

⁷³ Susan Doran, 'Polemic and prejudice: a Scottish king for an English throne', in Doran and Kewes, eds., *Doubtful and dangerous*, pp. 215–36.

⁷⁴ Philodikaïos, *Just title and right*, sig. B4r; Wentworth, *True and lawful successor*, p. 55.

⁷⁵ [Constable], *Discoverye*, sigs. K3v–K4r.

⁷⁶ James VI and I, 'The trew law', p. 63. James clearly also had in mind his old tutor George Buchanan's *De iure regni apud Scotos*.

⁷⁷ *Ibid.*, p. 73.

⁷⁸ Wentworth, *True and lawful successor*, p. 50.

case that ‘this right of succession by blood is accounted among all nations, subject to this kinde of Monarchie, a thing sacred, and in no wise to be violated’.⁷⁹ Yet the French order of succession was quite different from the English, thanks to the so-called ‘Salic Law’.⁸⁰ James merely states that ‘at the very moment of the expiring of the king reigning, the nearest and lawful heire entreth in his place: And so to refuse him, or intrude another, is not to holde out uncomming in, but to expell and put out their righteous King.’⁸¹ These four writers failed to explain, in short, why the English crown passed by succession at all, let alone its particular order of succession.⁸² It was left to Dr John Hayward to provide at least partial answers to these questions.

IV

Although Hayward came to similar conclusions about English royal authority as his predecessors in the battle against Persons, his was the only printed treatise to discuss royal succession per se in any detail.⁸³ His *Answer* of 1603, dedicated to ‘the Kings Most Excellent Majestie’, and avoiding the sensitive matter of genealogy by replying only to part 1 of the *Conference*, was an attempt to repair his reputation following the disastrous publication of his *The first part of the life and raigne of King Henrie IV* in 1599.⁸⁴ It was more than flattery, however, and sought to explain precisely why James’s title to the English throne had been unassailable. Hayward’s *Answer* expands both on the early arguments against Persons and also upon their governing assumptions about succession.

For Hayward, as for Persons, royal succession could only make sense in the context of a wider theory of political authority. Much of his political thought revolved around the concept of sovereignty; indeed, the way he explained it resembled closely that of Jean Bodin, who defined sovereignty as ‘puissance absolue et perpétuelle’ or ‘summa perpetuaque potestas’.⁸⁵ Hayward writes that ‘all states take denomination from that part wherin the supreme power is

⁷⁹ Philodikaios, *Just title and right*, sig. C3v.

⁸⁰ See James Collins, ‘Dynastic instability, the emergence of the French monarchical commonwealth and the coming of the rhetoric of “l’état”, 1360s to 1650s’, in Robert von Friedeburg and John Morrill, eds., *Monarchy transformed: princes and their élites in early modern Europe* (Cambridge, 2017), pp. 87–126; and especially Giesey, *Le rôle méconnu*, passim.

⁸¹ James VI and I, ‘The trew law’, pp. 81–2.

⁸² As Nenner points out, the rules of common-law succession could not be applied to the crown without complication, since common law did not extend primogeniture to female heirs. In 1553, it would have divided the kingdom between Mary and Elizabeth. Nenner, *The right to be king*, p. 27.

⁸³ As opposed to election. For what Hayward meant by ‘succession’, see below.

⁸⁴ On the *Life and raigne*, see S. L. Goldberg, ‘Sir John Hayward, “politic” historian’, *Review of English Studies*, 6 (1955), pp. 233–44. For Hayward’s historical writing, see Lisa Richardson, ‘Sir John Hayward and early Stuart historiography’ (Ph.D. thesis, Cambridge, 1999).

⁸⁵ Jean Bodin, *Six livres de la république* (Paris, 1576), 1.9, sig. L3r; *De republica libri sex* (Paris, 1586), 1.8, sig. G4r.

settled', whether monarchical, aristocratic, or democratic.⁸⁶ In other words, sovereignty can belong to the king, aristocracy, or people. Sovereignty for Hayward is not the same as government, for he explains that a sovereign people may appoint a king without losing its sovereignty; there have, he writes, 'beene divers states wherein one hath borne the name and title of king, without power of Majestie'.⁸⁷ In states such as Lycurgus's Sparta, the Gaul of Caesar's age, and seventeenth-century Venice, 'the Prince is not souveraigne, but subject to that part of the common wealth which retaineth the royaltie and majestie of state'. This whole passage is taken almost verbatim from Hayward's *Life and raigne*, but the section which Hayward had written four years before was little more than a reworking of part of Bodin's *République*.⁸⁸ A further link with Bodin appears when Hayward argues that Persons's aim is to allow kings 'to be deposed...upon pleasure and at will' by the commonwealth, because 'they who have given authoritie by commission doe alwaies retaine more then they graunt'.⁸⁹ Bodin had made a similar point, namely that the sovereign 'n'en donne jamais tant qu'il n'en retienne tousjours davantage', which was justified with exactly the same citation of canon law.⁹⁰ Such a view of sovereignty necessarily conceded that the political authority of Persons's commonwealth was theoretically possible. Hayward denied only that it applied to England, for 'our laws do acknowledge supreme authority in the prince within the realme and dominions of england, neither can subjects beare themselves either superior or equall to their souveraigne'.⁹¹ The other side of this position is, of course, that Hayward's popular sovereignty looked very like the authority held by Persons's commonwealth.

Hayward's concept of sovereignty was inherently legislative. Bodin reduced the 'marks of sovereignty' to one, 'la puissance de donner loy à tous en general, et à chacun en particulier...sans le consentement de plus grand, ny de pareil, ny de moindre que soy'.⁹² This was a broad definition, because '[s]oubs ceste mesme

⁸⁶ Hayward, *Answer*, ch. 4, sig. L1v.

⁸⁷ *Ibid.*, ch. 3, sig. H2r.

⁸⁸ Hayward gives the speech to the bishop of Carlisle, in *Life and raigne*, pp. 101–6. This, in turn, strongly resembles Bodin, *République*, II.5, sigs. y2v–y4r; *Republica*, pp. 209–13, sigs. S3r–S5r. For Hayward's admission of plagiarism, see Margaret Dowling, 'Sir John Hayward's troubles over his *Life of Henry IV*', *The Library*, 11 (1930), pp. 212–24; for the link with Bodin, see Edward B. Benjamin, 'Sir John Hayward and Tacitus', *Review of English Studies*, 8 (1957), pp. 275–6, at p. 275.

⁸⁹ Hayward, *Answer*, ch. 4, sig. L1r.

⁹⁰ Bodin, *République*, I.9, sig. L3r. Aside from the 1577 re-edition of the 1576, this chapter was thereafter 1.8 in later editions. The equivalent Latin is 'quantumcunque sit imperium quod alteri tribuitur, minus tamen sit eo quod iure maiestatis sibi reservavit', in *Republica*, I.8, p. 79, sig. G4r. The canon in question, *Liber Sextus* 3.4.14, detailed a dispute between one granted a benefice by a papal legate, and another granted the same benefice by the pope, and concluded that the pope reserved authority to settle the matter. *Corpus iuris canonici emendatum et notis illustratum* (4 vols., Rome, 1582), IV, sig. O8v.

⁹¹ Hayward, *Answer*, ch. 4, sig. L2r.

⁹² Bodin, *République*, I.11, sig. R3r.

puissance de donner et casser la loy, sont compris tous les autres droicts et marques de souveraineté'.⁹³ For Bodin, making law was not limited to promulgating and withdrawing legislation, and was better understood as 'le commandement du souverain touchant tous les sugets en general'.⁹⁴ Bodin's sovereign was one who could command all of his subjects and whose commands could not be challenged. It is significant, then, that Hayward argues that 'the verie sinewes of government doe consist in commaunding and in obeying, but obedience cannot bee performed where the commaundementes are either repugnant or uncertaine'.⁹⁵ For Hayward, this explained the superiority of monarchy, but what is important is that his understanding of good government precludes the possibility of the ruler's commands being challenged. Second, Hayward's enthusiasm for the total authority of a sovereign king over the people is such that he repeats one of *The true lawe's* arguments, namely that in some states laws had only ever been made by kings. '[I]n the first heroicall ages', he writes, 'the people were not governed by anie positive lawe, but their kings did both judge and commaund, by their word, by their will, by their absolute power'. This, moreover, continues, for 'in manie, yea in most, if not in all countries, the people have received libertie, either from graunt or permission of the victorious Prince, and not the prince authoritie from the vanquished people'.⁹⁶

The total exclusion of a non-sovereign people from political authority was not just an attack on the *Conference's* ideas of political resistance, inflammatory as they were. In the first place, by attacking Persons's theory of royal authority, following other replies to the *Conference*, Hayward undermined his theory of succession; if the commonwealth of England could make no law, it could have no authority over the succession. This was a satisfactory, if entirely negative, response to the *Conference*, and is quite consonant with the tone of the other print refutations surveyed above. Moreover, Persons had asserted the popular credentials of succession laws so effectively that they too would fall victim to Hayward's sovereignty. The *Conference*, it will be recalled, had linked laws which could exclude candidates from the succession, such as the Salic Law, with laws which could limit the king's authority. Again, 'who made thes lawes but the common wealth it selfe?'.⁹⁷ Since Hayward thought that no positive law could limit a sovereign king, a succession law so defined was impossible. The logic of sovereignty, then, demanded a form of succession subject only to the sovereign's oversight.

Just as Persons's sense of succession law would always be compromised by the possibility of the commonwealth's intervention, so too did Hayward's thought tend towards giving oversight to his sovereign king. While the *Conference's*

⁹³ *Ibid.*, I.11, sig. R4r.

⁹⁴ *Ibid.*, I.11, sig. R1r.

⁹⁵ Hayward, *Answer*, ch. 1, sig. B3v.

⁹⁶ *Ibid.*, ch. 2, sig. E4r.

⁹⁷ Persons, *Conference*, I.2, sig. D5v.

succession was always, in a sense, elective, Hayward's ought always to be testamentary. He never admitted this in the *Answer*, but he later accepted the principle of testamentary succession; in his history of the Norman Conquest, he wrote that 'the kingdome [of England] at that time could not be settled in any certaine forme of succession by blood, as it hath been since; but was held for the most part in absolute dominion' and did 'often passe by transaction or gift'.⁹⁸ Despite this, and the glaring precedent set by the Tudor legislation on the succession, Hayward sought to uphold succession 'by proximity', for he had no desire to suggest that Elizabeth, or Elizabeth-in-parliament, might ever have had the right to disinherit his new king.⁹⁹

As R. Malcolm Smuts has observed, Hayward turned to natural law as the basis of his royal succession.¹⁰⁰ More specifically, Hayward argues that monarchy descending by hereditary succession is alone natural in response to Persons's third major argument, that it is left to the commonwealth's 'particuler positive lawes' to determine whether 'to have many governors, few, or one', and whether this authority should be 'by succession or election'.¹⁰¹ Persons's claim was based on constitutional variation both in his age and as seen through history; Hayward's response is to exclude the examples favourable to Persons with a restrictive definition of natural law. He argues that the law of nature has prelapsarian and postlapsarian forms, primary and secondary. The 'primarie lawe of Nature' came about because 'God in the creation of man imprinted certaine rules within his soule to direct him in all the actions of his life'; these rules constitute the primary law of nature.¹⁰² Humans no longer have access to the primary law of nature, for 'this lawe Thom[as] Aquin[as] affirmeth to be much depraved by the fall of man, and afterwards more by error, evill custome, pertinacie, and other corrupters of the mind'.¹⁰³ What remains is the secondary law of nature, or law of nations: from the precepts of the primary law of nature 'are formed certaine customes, generally observed in all parts of the world: which, because they were not from the beginning, but brought in afterward...are called the secundarie lawe of nature, and by many also the law of nations'.¹⁰⁴ The imperfection has the result that 'in many, not only men, but nations, evill custome hath driven nature out of place, and setteth up it selfe in steade of nature'.¹⁰⁵ The secondary law of nature will always, then, admit exceptions, so 'it to be esteemed the lawe of nations, the

⁹⁸ John Hayward, *Lives of the III Normans* (London, 1613), p. 43.

⁹⁹ The term is Hayward's. What he meant by this is discussed below.

¹⁰⁰ R. Malcolm Smuts, 'States, monarchs, and dynastic transitions', in Doran and Kewes, eds., *Doubtful and dangerous*, p. 288.

¹⁰¹ Persons, *Conference*, 1.1, sig. B7r.

¹⁰² Hayward, *Answer*, ch. 1, sig. A3v.

¹⁰³ *Ibid.*, sig. A4r. Hayward refers to Thomas Aquinas, *Summa theologiae*, I^a II^{ae}, 94.2. Leonine Commission, ed., *Opera omnia* (50 vols., Rome, 1882–), VII (1892), pp. 169–70.

¹⁰⁴ Hayward, *Answer*, ch. 1, sig. A4r.

¹⁰⁵ *Ibid.*, ch. 1, sig. B2v.

common lawe of the whole world, which most nations in the world are found to imbrace'.¹⁰⁶ For Hayward, Persons's argument describes not the secondary law of nature but rather the corrupt exceptions to it: 'wil you rake over al histories for examples of rebellion, and then argue *a facto ad ius*, that every thing is lawful which you finde to have bin done?'.¹⁰⁷

Hayward thus argues that, in fact, succession is the only natural way in which sovereign monarchy can be transferred. He writes that 'at most times in all nations, and at all times in most... the roialtie hath passed by succession, according to propinquitie of blood'.¹⁰⁸ In one important way, he agrees with Persons's claim that if the ideal form of government were 'determynd by God or nature...they should be al one in al nations...seing God and nature are one to al'.¹⁰⁹ Hayward does not defend any particular nation's form of succession, but rather the principle itself, since 'the succession of children is one of the primarie precepts of nature, whereby [a man's] mortalitie is in some sort repaired, and his continuance perpetuated'.¹¹⁰ Indeed, his political thought has little or no room for different models of royal succession. He gives little impression of believing that the order of succession can differ across kingdoms, the only exception being one off-handed comment, in order to explain William the Conqueror's inheritance of Normandy, that France admitted bastards to royal succession until 'in the third race of the kings of France, a law was made'.¹¹¹ The acid test is, of course, the Salic Law; while Hayward does not actually say that it has no legal standing, he does assert that he could 'plainlie prove that there was never anie such lawe made to bind the discent of the crowne in Fraunce, and that it hath bin the custome in most parts of the world not to exclude women from succession in state'.¹¹² It served only as a 'pretence' for why Philip of Valois was chosen instead of Edward III in 1328. At the cost of imposing a slightly artificial uniformity onto succession, Hayward had thus offered a reason to think it natural.

What Hayward never makes entirely clear is precisely how his theory of royal authority interacts with his theory of succession. Hayward may have proven to his own satisfaction that only monarchy descending by proximity was natural, but his interpretation of nature prevented him from claiming that it was the only legitimate form of government. Aristocratic and democratic sovereignty might represent a corruption from the primary law of nature, but Hayward considers it no less possible for that; corruption from nature is a necessary part of

¹⁰⁶ Ibid., ch. 1, sig. A4v.

¹⁰⁷ Ibid., ch. 2, sig. F2r.

¹⁰⁸ Ibid., ch. 1, sig. C3r. Hayward does not define 'propinquitie of blood' in any detail.

¹⁰⁹ Ibid.; Persons, *Conference*, l.1, sig. B7r.

¹¹⁰ Hayward, *Answer*, ch. 1, sig. D1r–v, citing Gratian, *Decretum*, 1, distinction 1, canon 7: 'Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur; ut...liberorum successio...', *Corpus iuris canonici*, 1, sig. A2r.

¹¹¹ Hayward, *Answer*, ch. 8, sig. Q3v.

¹¹² Ibid., ch. 2, sig. F4r.

the landscape because legal right in Hayward's England is necessarily also post-lapsarian. Hayward must, then, accept that certain forms of government may not be natural while remaining valid according to positive law. The same applies to the difference between succession by proximity and by testament; as natural as the former might be, Hayward does not quite prove that Elizabeth could not dispose of the crown at will. What rescues his argument is that the natural quality of succession by proximity has a moral aspect which, presumably, will compel the sovereign to dispose of the crown to the nearest heir in blood. To be sure, this is not a position which Hayward voiced explicitly; it would have been imprudent in the extreme to suggest that Elizabeth might in fact have had some legal, if not strictly natural, right to disinherit James. Yet Hayward's political thought pointed in this direction. Sovereignty left the king or queen free choice, but the moral pull of the law of nations reduced the options to one.

V

All of this shows that Persons's *Conference* was so influential a treatise not merely, or even principally, because it scandalously challenged royal authority, but because its highly astute argument landed blows on several targets at once. The *Conference* found a way to make legal claims without legal content, and in so doing left its adversaries in no little difficulty, and there are few reasons to doubt Peter Holmes's assessment that the *Conference* 'seems almost to have frightened constitutionalism out of fashion', at least for a time.¹¹³ The five responses surveyed here certainly show that the need to refute Persons occasioned a great deal of obedience theory. This obedience theory, however, also served as a defence of royal succession precisely because of how Persons had founded his argument on the commonwealth's legal superiority to the king. John Hayward's *Answer* engaged most closely with the *Conference*'s political thought, but with the paradoxical result that a work devoted to defending monarchical sovereignty also spelled out a coherent vision of popular sovereignty. When Robert Filmer wrote that Hayward 'admit[ted]...for a Truth unquestionable' Persons's 'Argument drawn from the Natural Liberty and Equality of Mankind', then, he had a point; instead of attacking Persons directly, Hayward suggested merely that his argument for the commonwealth's liberty did not apply to England.¹¹⁴ No less paradoxical was Hayward's vision of royal succession, which natural law would make indefeasible, but which sovereignty would make testamentary. That Hayward found himself pushed into this corner was, in no small way, the final result of that fictional conference between two fictional lawyers in Amsterdam.

¹¹³ Peter Holmes, 'Elizabethan Catholics', p. 195.

¹¹⁴ Filmer, 'Patriarcha', p. 3.