

Revolutionary amnesia and the nature of prerogative power

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What is the nature and source of prerogative power? Where does it come from and how was it created? British constitutional law makes several assumptions in these regards. It assumes that these powers are inherent in or intrinsic to the Crown and it assumes that these powers are common law powers, meaning that they are constituted or conferred by the common law. This article takes issue with these conceptions of the nature of prerogative power. It shows that the idea that prerogative powers are sourced in the common law is derived from the seventeenth century's theory of the ancient constitution; a theory famously advocated by Sir Edward Coke and embodied in his observation that "the King hath no prerogative but that which the law of the land allows him." However, as the article shows, this theory of the ancient constitution was not an accepted theory of law in the seventeenth century, but rather an intensely contested political theory. It occupied a battlefield of constitutional ideas along with theories of kingly power sourced in conquest and the divine. Moreover, although these theories disagreed about the source and extent of prerogative power, they all posited a protocorporate Crown wedded to dynastic succession. The article shows that, from the perspective of a corporate Crown, the Glorious Revolution of 1689 resulted in the effective dissolution or dormancy of the kingly corporation embodied in James II, requiring that the Crown and kingly power be remade anew in the United Kingdom's last "historically first" constitutional event. Through a close reading of the Bill of Rights and the proceedings of the Convention Parliament of 1689, the article evidences the statutory remaking of the Crown and prerogative powers and shows how from 1689 to today prerogative powers should be understood as a grander form of statutorily delegated power.

1. Introduction

In England, constitutional crisis is invariably connected to an exercise of the monarch's prerogative powers. This is as true in the twenty-first century as it was in

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the seventeenth, even if the United Kingdom’s modern political civil war crystallized around a minor, essentially administrative prerogative power, the power to prorogue Parliament. The exercise of this power proroguing Parliament on September 10, 2019 for five weeks gave rise to a passionate legal debate about the extent to which prerogative powers are capable of being subject to judicial review. In *R (on the application of Miller) v. The Prime Minister*,¹ the UK’s Supreme Court decided, without dissent, that the exercise of the power was unlawful. The Supreme Court held that prerogative powers are powers which are recognized by the common law and cannot, without “reasonable justification,” be used to “impede or frustrate” the constitutional principles of parliamentary sovereignty and parliamentary accountability.² For the Divisional Court,³ whose unanimous decision the Supreme Court overruled, this exercise of the prerogative power of prorogation was not justiciable because the decision to exercise this power involved a quintessential political judgment.

Miller II has split the academy as it split the judiciary. For several leading constitutional law scholars, the Supreme Court’s decision is an example of unconstitutional judicial activism;⁴ for other, equally eminent, scholars, it reflects merely a more explicit recognition of ideas long embedded in British constitutional law.⁵ The focus of this article, however, is not on *Miller II* or on the judicial and academic differences which it has spawned. Rather, it is concerned with the foundational assumptions about the source and nature of prerogative power, which all sides in this polarized debate share and which, historically situated, the article argues are untenable.

For all sides in this debate, prerogative powers—whether exercised by the Queen on the advice of her ministers, or directly by the Privy Council (in the form of an Order in Council) or by government ministers—are intrinsic to the Crown; they are inherent and original powers which are independent of, and not derived from, the power of the Crown in Parliament.⁶ As there is no “external originator”⁷ of these powers, the ends of the powers—the purposes for which they are to be used—are determined solely by the monarch, or the minister who in modern practice directly or indirectly exercises them for her. Such an inherent, original power contrasts with a delegated power which, whether delegated to the executive through a statute or an Order in Council, is delegated for a particular purpose—to be used for, and whose scope is limited by, the ends identified by, or which are intrinsic to, the delegation.

Our conception of prerogative power matters; it is not merely an academic concern with clanking chains. The conception of a power necessarily structures the

¹ [2019] UKSC 41; see also *Cherry v. Advocate General for Scotland* [2019] UKSC 41 (*Cherry*).

² *Id.* [49].

³ [2019] EWHC 2381 (referred to, together with the Supreme Court’s decision *supra* note 1, as *Miller II*).

⁴ MARTIN LOUGHLIN, *THE CASE OF PROROGATION: THE UK CONSTITUTIONAL COUNCIL’S RULING ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT* (2019); JOHN FINNIS, *THE UNCONSTITUTIONALITY OF THE SUPREME COURT’S PROROGATION JUDGMENT* (2019); Timothy Endicott, *Making Constitutional Principles into Law*, 136 L. Q. REV. 175 (2020).

⁵ Paul Craig, *The Supreme Court, Prorogation and Constitutional Principle*, 2020 PUB. L. 248 (2020); Mark Elliott, *Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context*, 16 EUR. CONST. L. REV. 625 (2020).

⁶ These powers are “without parliamentary authority” (*In re A Petition of Right of De Keyser* [1919] 2 Ch. 197 at 216).

⁷ *R (Sandiford) v. Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697, [61].

relationship between the power and other sites of constituent and constituted power. It not only provides an account of the hierarchical structure of powers and its place within that structure, but also explains the effect of an exercise of a superior power on a subordinate power. Modern debates and questions relating, for example, to the power of the executive acting alone to trigger the Brexit process or the effect of abolishing the Fixed-Term Parliaments Act 2011 are, *inter alia*, a product of our conception of prerogative power, and would be very different if carried out through the lens of an alternative conception such as prerogative power as delegated power. Equally, modern approaches to the judicial review of prerogative powers are the product of this conception. Judicial review doctrines in significant part orbit the purpose for which powers have been delegated, from improper purpose to irrationality review. Necessarily, therefore, aspects of these doctrines may not easily be transplanted to powers that are not subject to such ends or purposive constraint. Our conception of prerogative power will, therefore, affect the nature and extent of review, and if we are wrong about conception then we may well be wrong about review. There is no space in this article to explore these issues; I raise them only to highlight that conception, and this inquiry into conception, matters.

Dicey provides the authoritative point of departure for understanding the nature of prerogative power:

The prerogative is the name for the remaining portion of the Crown's *original authority*, and is therefore ... the name for the residue of discretionary power left at any moment in the hands of the Crown. Every act which the executive government can lawfully do *without the authority of the Act of Parliament* is done in virtue of this prerogative.⁸

In the leading case of *Council of Civil Service Unions v. Minister for the Civil Service* (CCSU),⁹ where Dicey's position was cited by several of their Lordships,¹⁰ Lord Diplock refers to the prerogative as being, alongside statute, one of the "ultimate source[s] of power."¹¹ More recently, the Supreme Court in *R (Miller) v. Secretary of State for Exiting the European Union* observed that the prerogative is a "source of power," one which "encompasses the residue of powers which remain vested in the Crown."¹² And it has become commonplace since Lord Denning's judgment in *Blackburn v. Attorney General*¹³ to cite Lord Coleridge's position in *Rustomjee v. The Queen* that prerogative power is the Queen's "*own inherent authority*."¹⁴ The Cabinet Manual echoes this idea, describing prerogative power as the power "*inherent in the Sovereign*."¹⁵ For Professor Loughlin, more recently, prerogative power "*invests intrinsically in the Crown*."¹⁶ Of

⁸ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 282 (8th ed., 1915) (emphasis added).

⁹ [1985] AC 374.

¹⁰ *Id.* at 398, 416 (per Lords Fraser and Roskill).

¹¹ *Id.* at 411.

¹² *R (Miller) v. Department for Exiting the European Union* [2017] UKSC 5, [47].

¹³ [1971] 1 WLR 1037.

¹⁴ (1876) 2 QBD 69 at 74 (emphasis added), a quote which benefits from only one citation prior to *Blackburn*, but twenty-six thereafter, including in both the majority and dissent in *R (Miller) v. Department for Exiting the European Union*, *supra* note 12.

¹⁵ THE CABINET MANUAL: A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT 8 (2011).

¹⁶ LOUGHLIN, *supra* note 4, [10].

course, since the Glorious Revolution in 1689 it has been clear that although prerogative powers are not a product of statute they remain intact only to the extent that Parliament has not acted through legislation to remove or qualify them. Nevertheless, they are understood to be inherent, original powers to the extent that they remain intact.¹⁷

For some courts, this inherent, original power assumption is interlaced with the claim that prerogative power is a “common law power,”¹⁸ meaning not only that its existence is recognized, and its boundaries are delineated, by courts, but also that it is “constituted”¹⁹ by, “entrusted by,”²⁰ or “grounded”²¹ in the common law. For Lord Diplock in *CCSU*, the “ultimate source” of this power is “not a statute but the common law.”²² More recently, in *Miller II*, the Supreme Court observed that prerogative powers are “recognised by the common law” and that public power “is conferred by an Act of Parliament or the common law”²³—a position that forms a component part of the court’s confident assertion that the boundaries of the prerogative are “illuminated” by “common law principles.”²⁴

This assumption that prerogative power is an original, separately constituted power is a central component of our modern understanding of the British political constitution, which is understood to have evolved to find a balanced political accommodation between the Crown as executive (in Council), which “is not a creature of statute,”²⁵ and the Crown in Parliament. This article takes issue with this assumption. It argues that prerogative power is not an inherent, original power, nor is it constituted by the common law; rather, it is a delegated power, formed and delegated by modern Parliament’s foundational ancestor—the Glorious Revolution’s Convention Parliament of 1689—to the Crown, which in its post-1689 incarnation is best understood as a corporate creature of statute.

Through the Declaration of Rights and then the Bill of Rights of 1689, the Convention Parliament delegated prerogative power to a new monarch, William III and Mary II. When it appointed and empowered the monarch, this Convention Parliament had no king or queen “in” it; indeed, it was wholly unauthorized to act

¹⁷ R. v. Secretary of State for Home Department, *ex parte* Fire Bridges Union [1995] 2 AC 513, 552.

¹⁸ Lord Bingham, *in* R. v. Secretary of State for the Home Department, *ex parte* Fire Brigades Union [1985] 2 AC 513 at 523, refers to prerogative powers as “common law powers”; *see also* R. (Bancoult) v. Secretary of State For Foreign and Commonwealth Affairs (No.2) [2008] 3 WLR 955; Laker Airways Ltd. v. Department of Trade [1977] QB 643 at 705.

¹⁹ *Ex parte* MWENYA [1959] 3 WLR 767 at 779 (quoting Lord Parker CJ’s judgment in the Divisional Court).

²⁰ The Attorney General at the Relation of the Whitechapel Board of Works v. Horner (1884) 14 QBD 345 at 238 (per Brett MR). Or exist “by virtue of”; *see* The King v. Superintendent of Vine Street Police Station, *ex parte* Liebman [1916] 1 KB 237 (per counsel). *See also* Entick v. Carrington (1795) 95 ER 807 at 816 (observing that “whatever power [the secretary of state has] is *by the common law*” [emphasis added]).

²¹ Broadfoot’s Case (1743) Fost 154.

²² *CCSU*, *supra* note 9, at 411.

²³ [2019] UKSC 41, [30], [33], summarizing *Entick v. Carrington* (emphasis added).

²⁴ *Id.* [38].

²⁵ R. (Shrewsbury and Atcham Borough Council) v. Secretary of State for Communities and Local Government [2008] EWCA (Civ) 148, [16].

within the then prevailing constitutional arrangements; and in acting, it remade the institutions of the British state, even if the structures of lawmaking and government, the names and titles given to the actors, and the geography and architecture associated with lawmaking and government had much in common with those of the former regime. This was a—and, in the United Kingdom, the last—foundational, “historical first”²⁶ constitutional event, an event that formed and structured the powers of the executive exercised today and around which the nature and institutions of government and constitutional conventions have subsequently evolved.

Of central importance for understanding the “historical first” nature of the Glorious Revolution, as well as the delegated nature of post-1689 prerogative power, is the protocorporate conception of the “royal dignity.” As the article shows, modern constitutional law’s failure to understand the nature of prerogative power and the statutory foundations of the Crown is in no small part due to its failure to understand that the royal dignity in 1688 did not refer merely to its limited modern connotations of position, respect, and honour, but also encapsulated authority, regal power, and prerogative, and provided for the corporate transfer of such authority and power between kings.²⁷ As of 1688, on any of the prevailing understandings of the nature and source of kingly power, this protocorporation was fused with the kingly dynasty and the rules of royal succession. When the Convention Parliament of 1689 “eradicated the succession”²⁸ in appointing William III as King, the dignity, and the regal powers contained within its umbrella, was effectively dissolved. It was, *and had to be*, made anew by the Declaration and the Bill of Rights.

This article is not the first to note the radical constitutional implications of this event and also the tendency of both the participants in the Glorious Revolution, as well as modern constitutional law, to turn a blind eye to it. Maitland, for example, having asserted the revolutionary nature of the Revolution, observed that “we cannot work it into our constitutional law”;²⁹ Howard Nenner described the event as “a patently unconstitutional act”;³⁰ and, more recently, Richard Kay observed that the Convention Parliament “crammed irregular decisions into the regular forms; they described illegal actions with legal terminology. In short, they faked it.”³¹ This article is, however, the first article which takes seriously the fact that the nature of modern prerogative power is built on this “unconstitutional” event. The Crown’s prerogative powers today are not the prerogative powers exercised by kings and queens prior to 1689. The former were sourced over time through an amalgam of conquest, god, custom, and community;

²⁶ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 115 (1945) (“If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly”).

²⁷ DICEY, for example, in his *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, *supra* note 8, does not refer to this idea at all.

²⁸ *Infra* text accompanying note 134.

²⁹ FREDERIC W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 285 (1908).

³⁰ HOWARD NENNER, *BY COLOUR OR LAW: LEGAL CULTURE AND CONSTITUTIONAL POLITICS IN ENGLAND, 1660–1689*, at 173 (1977).

³¹ RICHARD KAY, *THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW* 17 (2014).

the latter comprise delegated authority from a constituted, newly formed (as of 1689) parliamentary sovereign.

2. Kingly power before the Revolution: Divine right and the ancient constitution

The “prerogative” in the United Kingdom is a label for a set of executive powers located within and exercised by, or on behalf of, the Crown.³² In the century prior to the watershed constitutional event known as the Glorious Revolution in 1689, when William III and Mary II took the throne, the extent of the King’s prerogative powers was ferociously and violently contested. Theories about the source of these powers as well as the constitutional distribution of power were similarly subject to intense contestation.

For the deposed James II and his Stuart ancestors, as sovereign and as God’s viceroy on earth, all earthly public power in England originated in him.³³ As Chief Barron Fleming observed in the *Bates Case*, “to the King is committed the Government of the Realm ... [and] for his discharge of his office, God had given him power, the act of government and the power to govern.”³⁴ Similarly, as counsel for the King in the infamous *Ship Money* case put it, “he is an absolute monarch and holdeth his kingdom under no one but God himself.”³⁵ James I had previously warned, “encroach not upon the prerogative of the crown for they are transcendent matters.”³⁶ Accordingly, for royalists in the seventeenth century the dominant constitutional idea was that original public power was inherent in the sovereign and could only be exercised by or through the king. It passed “by right hereditary”³⁷ to his heirs and successors and could not be divorced or taken from him and his successors. Laws and governmental and judicial structures were, therefore, the product of an exercise of the king’s, and his ancestor’s, kingly power.³⁸

It followed that the extent to which kingly power was limited by law, rights, and liberties, such limitations were granted by kingly power. Accordingly, the Coronation Oath prior to 1689 referred to the laws “granted” to the people “by the ancient kings your *rightly godly* predecessors” and, when asked to observe those laws, the king replied, “I grant and promise”;³⁹ the rights and limitations contained in Magna Carta

³² Prerogative power is exercised in three different ways, depending on the prerogative power being exercised: first, by the sovereign on the advice of her ministers in relation to, for example, the prorogation of Parliament; second, by the executive “in their own right” (CABINET MANUEL, *supra* note 15, [23]) without any actual involvement of the monarch, for example in relation to the prerogative of mercy; and third, by the executive exercising power delegated to it by an Order in Council exercising a prerogative power.

³³ Corinne Weston, *England: Ancient Constitution and Common Law*, in THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450–1700, at 375 (J.H. Burns ed., 1991).

³⁴ The Case of Impositions (1606) State Trials, 4 James I 371 at 389 [hereinafter *Bates Case*].

³⁵ The King against John Hampden, Esq. (1637) 13 Ch [1065] [hereinafter *Ship Money*].

³⁶ Quoted in MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW loc. 2068 [Kindle ed.] (2010).

³⁷ ERNST KANTOROWICZ, THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY 381 (1957).

³⁸ See THOMAS POOLE, REASON OF STATE: LAW, PREROGATIVE AND EMPIRE 24 (2015). See also THE CASE OF SIR EDWARD HALES, BARONET (1689) (emphasis added).

³⁹ Quoted in Janelle Greenberg, *The Confessor’s Laws and the Radical Face of the Ancient Constitution*, 104 ENG. HIST. REV. 611, 615 (1989) (emphasis added).

were understood to have been granted by King John, even if he acted under baronial duress;⁴⁰ and Parliament's existence, rights, and privileges were in the king's gift. As Maitland observed in relation to the first half of the seventeenth century:

[Parliament] comes when he calls, it disappears when he bids it go ... [I]s this body not but an emanation of the kingly power? The king does well to consult Parliament but is this more than a moral obligation, a dictate of sound policy?⁴¹

However, throughout the seventeenth century, in opposition to this divine, inherent, and absolute understanding of prerogative power, there arose a set of powerful constitutional ideas which came to be grouped under the notion of the "ancient constitution."⁴² Central to the production of this theory of the ancient constitution were several of the period's most renowned jurists and historians, including, most importantly, Sir Edward Coke⁴³ and William Petyt.⁴⁴

This theory was rooted in pre-1066 notions of Anglo-Saxon constitutional governance, which, it was claimed, were not abolished on conquest, as William I affirmed the Confessor's laws in the fourth year of his reign, as did Henry I thereafter.⁴⁵ Indeed, for ancient constitutionalists, Magna Carta itself was merely an affirmation of the ancient common law.⁴⁶ The theory had two component parts: a theory about the source of public power and an account of the institutional and individual rights protected by this constitution. Public power in this theory, of both King and Parliament, emanated from ancient tradition and custom, which provided a compact between King and community.⁴⁷ Custom thereby constituted and delineated the king's powers. In his influential *Rights of the Kingdom and Peoples*, John Sadler observed, for example, that "the laws and customs of our ancestors' defined the rights of kings and parliament."⁴⁸ For John Davies, a renowned ancient constitutionalist, "neither did the king make his own prerogative"; rather, it was sourced in the "long experience, and many trails of what was best for the common good [which] did make the common law."⁴⁹

The ancient constitution's right-defining customs were found either in Edward the Confessor's laws (or rather an account thereof set forth in *Legis Edwardi Confessori*, considered by Maitland to be "bad and untrustworthy")⁵⁰ and confirmed by kings

⁴⁰ See Weston, *supra* note 33, at 409 (detailing Robert Brady's account of why Magna Carta was a statute, "the king [its] only maker," and that "the authority of Magna Carta was due to its being a royal grant confirmed by royal seal").

⁴¹ *Supra* note 29, at 298 (emphasis added). See also *Ship Money*, *supra* note 35, at 1101 (Berkley, J., expressing the same sentiment).

⁴² See generally J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1957).

⁴³ Weston, *supra* note 33, at 375.

⁴⁴ Greenberg, *supra* note 39, at 619.

⁴⁵ *Id.* at 614.

⁴⁶ WILLIAM PETYT, *ANTIEN RIGHT OF THE COMMONS OF ENGLAND ASSERTED* 25 (1680).

⁴⁷ Bacon observed, for example, that the title of English kings was the product of "compact and agreement"; see NATHANIEL BACON, *AN HISTORICAL DISCOURSE ON THE UNIFORMITY OF THE GOVERNMENT OF ENGLAND* 118–20 (1647).

⁴⁸ Greenberg, *supra* note 39, at 625 (quoting JOHN SADLER, *THE RIGHTS OF THE KINGDOM AND PEOPLES* [1649]).

⁴⁹ John Davies, Preface to *Irish Reports* (1615), cited in Pocock, *supra* note 42, at 41.

⁵⁰ 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* 103 (2d ed., 1898).

thereafter, or had otherwise been confirmed by prescription,⁵¹ having been in place since “time immemorial” or “time out of mind”—that is, in place at least prior to 1169 and the coronation of Richard II—and continually affirmed or claimed thereafter.⁵² As the above quote from Davies indicates, this ancient custom was coextensive with the common law. The common law or “the law of the land” contained those rights, liberties, and powers which were part of the Confessor’s laws or by prescription had become part of the ancient constitution. As Corinne Weston observed, “if the conditions [for prescription] were met, a customary usage was established that demonstrated tacit consent and the rights and liberties involved were allowed by the common law.”⁵³

These ideas underpin Coke’s holding in the *Case of Proclamations* in 1611 that “the King hath no prerogative, but that which the law of the land *allows* him”;⁵⁴ which can be read both as an assertion of the power of courts to act as the final arbiter on the extent of a prerogative power,⁵⁵ but also as an assertion of the theory that ancient customs established rights and constituted kingly power. These two positions were symbiotic. For Coke, and the theory of the ancient constitution, if the source of a power was in custom, as recognized by the common law courts, then common law courts were naturally tasked with identifying the boundaries of such customary constituent power. It is in this sense that proponents of the ancient constitution could have referred to prerogative powers as common law powers.

There were three component parts of the theory’s distribution of power and rights, although the precise contours of each part were somewhat protean and dependent on the political affiliations of the commentators:⁵⁶ first, that kingship was a contractual office;⁵⁷ second, that Parliament was the king’s constitutional equal, not a subordinate emanation of kingly power; and third, a set of immutable rights of Englishmen.

As earthly kingly power was derived from the community, the office of the king was understood as a contractual office, which could be lost on failing to perform the role. Bracton and *Legis Edwardi Confessori* were central to this contractual theory. The “Office of a King,” which was one of the Confessor’s laws, provided that although the king is “the vicar of the highest king,” he “loseth the name of a king” if he fails

⁵¹ On prescription, see Neil Duxbury, *Acquisitive Prescription and Fundamental Rights*, 66 U. TORONTO L.J. 472 (2016).

⁵² See Weston, *supra* note 33, at 376–78.

⁵³ *Id.* at 377.

⁵⁴ (1611) 12 Co. Rep. 74 at 76 (emphasis added).

⁵⁵ A position also assumed in the *Bates Case*, *supra* note 34. But also note in this regard the *Case of Commendam* in 1616, where eleven of the twelve judges (Coke excluded) “engaged not to allow any other view than that which [the King] had adopted and promised to silence any lawyer that presumed to call the prerogative [to grant a commendam] into question” (see 2 SAMUEL R. GARDINER, *HISTORY OF ENGLAND: FROM THE ACCESSION OF JAMES I TO THE DISGRACE OF CHIEF JUSTICE COKE 1603–1616*, at 278–79 [1863]). We see in the context of this case James I’s attempt to instantiate a consultative process in relation to the boundaries of prerogative power, rather than a legal process (*id.* at 272–79). In this regard, note that Poole observes, in relation to *Proclamations*, that it was “more of a legal consultation than a judgment”; see *supra* note 38, at 23.

⁵⁶ See Weston, *supra* note 33, at 374 (describing the list of rights and liberties as “surprisingly protean”).

⁵⁷ On the concept of the office, see Joshua Getzler, *Personality and Capacity: Lessons from Legal History*, in *FINN’S LAW: AN AUSTRALIAN JUSTICE 147* (Tim Bonyhady ed., 2017).

to perform the role.⁵⁸ And for Bracton, “a king is a king as long as he rules well.”⁵⁹ For some, this idea provided a basis for identifying the foundations of government in popular sovereignty.⁶⁰ For example, John Maynard, a member of the Convention Parliament, argued that “our government has had its beginning from the people,”⁶¹ and that “all government had at first its foundation from a pact with the people.”⁶² However, prominent late-seventeenth-century ancient constitutionalists, most notably William Petyt,⁶³ were more hesitant and carefully contained the radical potential of this idea, aware of the specter of “popular sovereignty” which it raised and “which it was no part of the Whigs intention to allow, lest they return to the days of the commonwealth.”⁶⁴ These radical implications were contained by focusing on the coronation oath: the breach of contract arose from breaking this oath. However, this meant that this contractual theory of kingship still operated within the rules of hereditary succession and, accordingly, that loss of office arising from breaking the oath would then result in the crown passing to the next in line. As Coke, the leading seventeenth-century proponent of the theory of the ancient constitution, observed in *Calvin's Case*, the “King holdeth the Kingdom of England by birth-right inherent, by descent from the blood Royal ... [rendering] coronation ... but a royal ornament and solemnization of the Royal descent.”⁶⁵ The theory of the ancient constitution therefore provided an account of the source of kingly power and the conditions in which it could be lost, but it did not⁶⁶ challenge hereditary succession and the transfer of kingly power pursuant to the line of descent.

With regard to the position, role, and rights of Parliament, the theory of the ancient constitution presented Parliament as separately constituted by custom and as the king's constitutional equal. For example, Lambarde's *Acheion*, “the tract par excellence of the ancient constitution,”⁶⁷ identified an immemorial House of Commons with prescriptive constitutional status, and a prescriptive right for the commons to send members to the House of Commons.⁶⁸

However, although the theory and the idea of the ancient constitution were central elements of the seventeenth century's constitutional battleground, as well as being

⁵⁸ Greenberg, *supra* note 39, at 617.

⁵⁹ *Id.* at 618.

⁶⁰ On the variation in how this idea was understood, see John Miller, *The Glorious Revolution: “Contract” and “Abdication” Reconsidered*, 25 *HIST. J.* 541 (1982).

⁶¹ 9 DEBATES OF THE HOUSE OF COMMONS FROM THE YEAR 1667 TO THE YEAR 1694, at 12 (1763) [hereinafter DEBATES].

⁶² Lois Schwoerer, *A Journal of the Convention at Westminster begun the 22 of January 1688/9* 49 *BULL. INST. HIST. RES.* 258 (1976).

⁶³ See *supra* note 46. Petyt was appointed Keeper of the Records of the Tower of London by William III in July 1689.

⁶⁴ Pocock, *supra* note 42, at 230 (quoting William Petyt, *Historical Manuscript Commission*, XII Report, app. 6, at 14ff., and detailing his role in using the coronation oath to justify the deposition of James II.

⁶⁵ (1608) 7 Co. Rep. 377 at 389.

⁶⁶ There were more radical versions suggesting that, on breaching his contract, power was returned from James to the people, who could then transfer it to another—positions which Pocock attributes to “extremist pamphleteers” and which were based on a concept that “cannot be found in English law”; see *supra* note 42, at 51.

⁶⁷ Weston, *supra* note 33, at 393.

⁶⁸ *Id.* at 394. A later, but similar and very influential, idea was articulated in the “co-ordination principle” articulated by CHARLES HERLE in FULLER ANSWER TO A TREATISE WRITTEN BY DOCTOR FERNE (1642).

profoundly influential in the 1689 settlement, it was less a historically grounded theory of law and public power and more a political theory/ideology formed and conscripted in the service of both resisting claims to absolute kingly power and radical constitution change. For this reason, Corinne Weston, a preeminent scholar of the ancient constitution, refers to the “astonishing common law *cult* of holy Edward’s laws.”⁶⁹ The theory’s core weakness was that its historical grounding in relation to its central claims—particularly an immemorial House of Commons—was inferential and speculative; and in relation to the events of 1066, delusional. Royalist scholars, in particular the high Tory historian Robert Brady,⁷⁰ comprehensively challenged the theory in the years shortly prior to the Revolution. For Brady, the foundation of laws was not in immemorial custom, but in the Norman laws and feudalism transplanted in the conquest. Disparaging Coke, Brady observed:

Yet perhaps some men may think that they came by the knowledge of the English law Sir Edward Coke’s way, by *Revelation*, who galled with an argument (that he could not answer) that our English laws were the Norman Laws, tells us the English laws cannot be said to be written in the Norman Tongue, for the Laws of England are Laws not written, but divinely cast into the hearts of man.⁷¹

For Brady, 1066 unequivocally involved a conquest and new legal beginning, the authority for which rested on the fact of conquest, military power, and the remaking of England in the Norman image of the conqueror.⁷² For Pocock, the theory was continually exposed to the problem of conquest in 1066, although in his view it was only in the late 1680s when opponents of the theory such as Brady deployed it.⁷³ For Weston, the “superior [historical] scholarship” of the late seventeenth-century royalist antiquaries made a compelling case that there was no legal continuity after 1066, that there was no immemorial House of Commons, and that the rights and liberties found in foundational constitutional documents such as Magna Carta were granted by the King and did not “suggest that law making was a shared power.”⁷⁴

Understanding that prior to the Revolution the theory of the ancient constitution was a contested political theory is of significance for the modern claim that prerogative powers are common law powers which are constituted by, or whose “ultimate source is,”⁷⁵ the common law. Although this modern assumption is in almost all cases merely stated and assumed, and not historicized or theorized, fragmentary connection to the theory of the ancient constitution can be found in the post-Revolution law

⁶⁹ *Supra* note 33, at 381 (emphasis added).

⁷⁰ Brady was Petyt’s predecessor as Keeper of Records in the Tower of London.

⁷¹ ROBERT BRADY, A FULL AND CLEAR ANSWER TO A BOOK, WRITTEN BY WILLIAM PETIT ESQ. 30 (1680) (emphasis in original).

⁷² *Id.* at 31–33 (observing, for example, it “must [be] acknowledge[d] that William did claim no otherwise than by the sword and made an actual conquest. The pretence that he claimed from *Edward, jure hereditario*, is idle” (*id.* at 35). For a brief account of the nature, and profound and violent effects, of the conquest, see ROBERT TOMBS, THE ENGLISH AND THEIR HISTORY: THE FIRST THIRTEEN CENTURIES 43–46 (2014).

⁷³ *Supra* note 42, at 53–54.

⁷⁴ Weston, *supra* note 33, at 409, also 406–11; Greenberg, *supra* note 39, at 621 (observing that “bogus and propagandist that version may have been, wrong it certainly was, but nevertheless it was not a complete fabrication”).

⁷⁵ CCSU, *supra* note 9, at 411. On this assumption in the case law, see *supra* text accompanying notes 19–36.

reports. Consider, for example, *Broadfoot's Case* in 1743, which, alongside the position that the prerogative “is inherent in the Crown and grounded upon the common law,” observed also that it was “grounded upon general immemorial usage.”⁷⁶ Or Lord Kenyon’s observation in *Entick v. Carrington* that prerogative power was “by the common law” and that the Revolution had “repaired and revived ... the ancient constitution.”⁷⁷ Or counsel’s observations in *King v. Superintendent of Vine Street Police Station, ex parte Liebman* in 1916 that “the term prerogative should be limited to the ancient customary powers of the Crown.”⁷⁸ Moreover, an implicit connection to the theory is maintained through modern courts’ reliance on Blackstone and Coke. Courts refer to Blackstone’s idea of the prerogative coming “out of the ordinary course of the common law,”⁷⁹ which clearly connects to the theory, as do other references in his *Commentaries* to “ancient law vest[ing]” the prerogative “in the Crown.”⁸⁰ And, of course, Sir Edward Coke’s “law of the land” position in *Proclamations* has experienced a contemporary renaissance.⁸¹ Modern courts treat Coke’s position “as the most respected of our authorities”⁸²—although it took 366 years to obtain its first citation—which establishes both the position that the common law constitutes the prerogative and that it is in some respects subject to judicial control.⁸³ And yet, as we have seen, as of 1611 the claim that “the King hath no prerogative, but that which the law of the land allows him” was a highly contested legal and political claim—contested as to whether the courts could play a role in delineating the extent of the prerogative⁸⁴ and contested as a claim about the source and constitution of prerogative power. Historically situated, Coke’s position in *Proclamations* did not have the status of a legal authority,⁸⁵ was widely ignored by the King thereafter,⁸⁶ and is best understood as the product of a judicial politician who himself was one of the seventeenth century’s foremost theorists of the ancient constitution.⁸⁷

Clearly, for many today it will seem like an extraordinary claim to argue that prerogative powers are not common law powers. Be that as it may, as of 1689 the legal and constitutional authority, as well as the historical support, for the claim was weak. Moreover, as we shall see below, whereas the events of 1688–89 did result in a structure of public power between Parliament and King which reflected the power and institutional preferences of many of the ancient constitutionalists, it did nothing to

⁷⁶ (1743) Fost. 154. See also *The Attorney General and Humber Conservancy Commissioners v. Constable* (1879) 4 Ex. D. 172 at 174.

⁷⁷ *Entick, supra* note 20 (Lord Chief Justice referring to the Revolution as having “repaired and revived ... the ancient constitution”).

⁷⁸ [1961] KB 268 (per counsel).

⁷⁹ 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 252 (8th ed, 1778), quoted in *Laker Airways Ltd. v. Department of Trade* [1977] 2 All ER 182 at 192.

⁸⁰ *Id.* at 181 (on weights and measures).

⁸¹ *Supra* note 54.

⁸² *Laker Airways Ltd v. Department of Trade* [1977] 2 All ER 182 at 192.

⁸³ *R. (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [149]; *R. v. The Prime Minister* [2019] UKSC 41, [32].

⁸⁴ See note 55.

⁸⁵ See POOLE, *supra* note 38, at 23.

⁸⁶ *Id.*

⁸⁷ See Weston, *supra* note 33, at 375.

provide or to infer that prerogative powers became common law powers in the sense provided by the theory of the ancient constitution—that they were grounded in custom and community, time out of mind, recognized by the common law.

3. The Glorious Revolution as a constitutional beginning

The longstanding view of the Glorious Revolution is that it was not really a revolution at all. In the traditional account of the event, James II implicitly abdicated the throne when William, Prince of Orange, landed 20,000⁸⁸ soldiers in the West Country and many of James's soldiers deserted his cause. The throne was then offered to William and Mary jointly, although William III alone was to exercise kingly power on behalf of both himself and Queen Mary II.

The orthodox historical position combines ideas of Dutch invasion with English aristocratic coup and invitation. For Israel, for example, “the armies, not the people” were determinative of the outcome.⁸⁹ For Trevelyan, the Revolution was the product of “aristocratic and squirearchical leadership.”⁹⁰ The result was a transition to a new monarch without war or violence and with a large amount of political agreement. Modern scholarship has, however, cast doubt on these orthodoxies. Steven Pincus's work, in particular, marshals original sources to show that “the evidence overwhelmingly suggests that the events of 1688–89 were not the result of a Dutch invasion,”⁹¹ more a “joint Anglo-Dutch venture against James II regime”⁹²—a position which, importantly, was taken by William's prominent supporters at the time,⁹³ as well as by the clear sense within the Convention Parliament of 1689, discussed below, that the Throne was within their gift following James's flight. Pincus also forcefully destabilizes the orthodox bloodless and cohesive history of the period. His work demonstrates that, on the contrary, the Revolution was violent, popular, and divisive; a majoritarian and contentious rejection of catholic influence, constitutional absolutism, and James II's approach to state modernisation; a revolution in fact, not in name only.⁹⁴

But whether the Glorious Revolution should be understood as a “revolution” similar in nature to the French or American revolutions, which took place a century later, is of limited consequence for this inquiry into the prerogative. This is because, from a constitutional perspective, it was unquestionably a constitutional revolution. It was a revolution which—whichever seventeenth-century side one could have taken on kingly and parliamentary power—took place completely outside the prevailing pre-Civil War and post-Restoration structures of seventeenth-century public power, and which created a new structure, hierarchy, and distribution of public power, even

⁸⁸ Troop estimates range from 15,000 to 40,000; see KAY, *supra* note 31, at 13.

⁸⁹ Jonathan Israel, *Introduction*, in *THE ANGLO-DUTCH MOMENT: ESSAYS IN THE GLORIOUS REVOLUTION AND ITS WORLD IMPACT* (Jonathan Israel ed., 1991).

⁹⁰ G.M. TREVELYAN, *THE ENGLISH REVOLUTION 1688–1689*, at 7 (1938).

⁹¹ STEVEN PINCUS, *1688: THE FIRST MODERN REVOLUTION* loc. 3876 [Kindle ed.] (2009).

⁹² *Id.* loc. 3536.

⁹³ See LORD DELAMER, *Reasons Why King James Ran Away from Salisbury; In a Letter to a Friend*, in *THE WORKS OF THE RIGHT HONOURABLE HENRY LATE L. DELAMER, AND EARL OF WARRINGTON* 56, 61 (1694).

⁹⁴ PINCUS, *supra* note 91.

though this distribution, along with the institutional nomenclature it deployed and the geographical sites at which it occurred, had much in common with, or were the same as, the pre-revolutionary settlement.

It is an article of faith in British constitutional law that there is an unbroken link between the nature of pre-1689 prerogative powers and the modern prerogative powers of the Crown. William and Mary replaced James II and took possession of the Crown and its powers—the same powers which James II exercised; the same powers which Henry VII took from Richard III or Henry IV took from Richard II. But this claim is only tenable if, “the constitution [remained] intact” and the monarch was “changed [and power transferred] according to [the constitution’s] own terms.”⁹⁵

Any state, corporation, or association has a set of constitutional rules according to which power is distributed and transferred. If a claim is made to lead a state, corporation, or association and to exercise its powers and control its people or assets, that claim must be asserted within the applicable constitutional arrangements. Alternatively, either the individuals making the claim must have usurped control over those people and assets through force, or the members of that state, association, or corporation must have acquiesced to their taking of control outside of those constitutional arrangements.⁹⁶ But in these two cases the power that is exercised over those citizens and assets is not, and cannot be, the power that was the product of the prior constitutional arrangements. If, for example, citizens revolt and take control over all corporate assets and their representatives proceed to make all major decisions in relation to those assets, those representatives do not exercise the powers of the applicable corporations; although they may still exist in the prior legal ether, the corporations are to all intents and purposes dissolved. The power that is now exercised over those assets, as well as the rules governing the exercise and transfer of such power, is a new power and constitutional formation. Moreover, it is juristically immaterial whether those new power holders think they are exercising the same powers as exercised by former directors of the corporation or did not intend to change the nature of the corporation in expropriating the means of production. Their actions generate those changes.

This section shows that the Glorious Revolution took place wholly outside of the terms of the prior constitutional settlement and, as a result, it effectively dissolved the kingly powers located within and exercised by James II. William and Mary’s powers were, and had to be, made anew through a statutory delegation of constituted parliamentary power. Following Kelsen, the Glorious Revolution created a new constitutional settlement outside of the prior structures of constitutional authority; it founded a new, “historically first” constitution, whose power structures can only be made sense of in accordance with this event and not by reference to what came before it.⁹⁷

⁹⁵ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 368 (1945). See also *supra* note 26; *infra* note 155 (dealing with objections to this position raised in JOHN FINNIS, *PHILOSOPHY OF LAW: COLLECTED ESSAYS VOL. IV* (2013)).

⁹⁶ THOMAS HOBBS, *LEVIATHAN* 114–15 (1996).

⁹⁷ *Id.*; see also HANS KELSEN, *PURE THEORY OF LAW* 200 (1960).

3.1. As if it were a parliament

As Maitland observed in his *Constitutional History of England*, prior to 1689 Parliament could be called only by the king, and could be prorogued and dissolved by the king. James II had, however, dissolved Parliament in July 1687 and had not recalled it. According to the then prevailing constitutional order, therefore, as of December 1688, when James had fled to France and William had arrived in London, there was no Parliament in session capable of exercising any power to deem the Crown vacated or to settle the succession.⁹⁸ At the time William landed in England, of the King, the House of Lords, and the House of Commons, the only public power holder in England which was capable of acting at all was James II himself.

Once James had fled to France, William invited the lords, counties, and boroughs to form a convention: an assembly of “representatives” who met in Westminster Hall as a “House of Commons” and as a “House of Lords,” but, according to the pre-1689 constitutional arrangements, were not, and could not be, Parliament or a House of Parliament. From the vantage point of the pre-1689 constitutional order, they were merely a group of people claiming authority to act on behalf of the kingdom, assembled to determine the future constitutional structure of the country outside of the prior constitutional arrangements (a wholly illegal, indeed treasonous,⁹⁹ act from the perspective of those prior arrangements). Architecture, pomp, and ceremony allow us to softball the constitutional nature of this assembly. Had the identical actions and events taken place in a town hall in a “Philadelphia” in the northeast of England, it would be easier for us to place this assembly within the orbit of a constitutional convention.

Although the Convention Parliamentarians acted as if they were Parliament, and followed procedures adopted previously in Parliament,¹⁰⁰ its members were acutely aware that it was not a parliament. The Convention self-identified as being “tantamount to a legal parliament.”¹⁰¹ This tension between the unauthorized nature of the Convention Parliament and its assumption and exercise of public power is particularly evident in the debates on the king’s speech following the proclamation of William III as King. As the raising of money for military activity in Ireland required parliamentary approval, several Convention Parliamentarians called for a new parliament to be called into session by the King’s writ. Others moved “to turn this convention into a parliament”¹⁰² because the funding was required urgently, which meant that there was no time to wait for the calling of a new parliament. “If we have not the power of a parliament, we can go upon nothing,”

⁹⁸ According to the dominant view of the constitutional order and prior historical practice, even a duly summoned parliament did not, acting alone, have such power. See *infra* text accompanying notes 115–23.

⁹⁹ MAITLAND, *supra* note 29, at 284.

¹⁰⁰ DEBATES, *supra* note 61, at 2. The note to the opening of the Convention of January 22, 1689 observes that “both Houses had their clerks, and several officers as in a regular Parliament” (emphasis added).

¹⁰¹ *Id.* at 15 (per Clarges).

¹⁰² *Id.* at 84 (per Medlycott).

observed Serjeant Maynard. After all, “what is a parliament but King, Lords and Commons”?¹⁰³ Other Convention Parliamentarians responded angrily. Sir Edward Seymour, for example, observed that “you declare yourself a parliament, and the law says, you are not a parliament.”¹⁰⁴ Thomas Clarges observed that “if this convention be turned into a parliament ’tis the greatest disservice you can to the King.”¹⁰⁵ Maitland agreed:

Grant that Parliament may depose a king, James was not deposed by Parliament; grant that Parliament may elect a king, William and Mary were not elected by Parliament. If when the convention met it was no parliament, its own act could not turn it into a parliament.¹⁰⁶

Both these positions on the status of the Convention Parliament were correct. Clarges and Seymour were correct that it was not a parliament under the old constitutional order. It seems clear from the debates that all Convention Parliamentarians were aware of that. But that order was no more. The king had been removed and replaced with an elective monarch¹⁰⁷ by a body that had no formal constitutional authority. This, then, was a new constitutional order, the rules of which were there to be written. Accordingly, if this body wished to call itself “a parliament,” to turn itself into “a parliament,” and award the funding requested in the king’s speech, then it could do so—which it did by resolving that “the Lords Spiritual, and the Commons, now sitting at Westminster, are a Parliament.”¹⁰⁸ Of course, whether its decision would command the legitimacy required to ensure compliance with the funding commitment in the nation as a whole was not answered by the pure assertion of authority contained within the decision.

This uncertainty continued even following the dissolution of the prior (Convention) parliament and the formal opening of a new parliament a year later, on April 9, 1690. The House of Lords thereafter moved a bill to, *inter alia*, confirm the acts of the prior (Convention) parliament as “laws.”¹⁰⁹ This was a proposal born of the anxiety about the constitutional authority of the Convention Parliament and the parliament which it became—anxiety that suggested that the Bill of Rights was not a lawful statute. What the proposing members of Parliament could not see, or perhaps not accept, was that a newly called parliament and its assertions of legality did nothing to alleviate this anxiety. As John Somers insightfully observed, “this parliament depends entirely on the foundation of the last, and if they want confirmation, neither this nor the last parliament can confirm it.”¹¹⁰ That is, the authority of this parliament rested on the authority of the Convention Parliament, and its authority was not sourced under the

¹⁰³ *Id.* at 92 (per Falkland).

¹⁰⁴ *Id.* at 94.

¹⁰⁵ *Id.* at 100.

¹⁰⁶ *Supra* note 29, at 285.

¹⁰⁷ Discussed further in Section 3.2 below.

¹⁰⁸ *DEBATES, supra* note 61, at 106.

¹⁰⁹ See *KAY, supra* note 31, for an illuminating discussion of this issue. The bill provided that: “It is enacted by the authority of this present Parliament that all, and singular, the Acts made in the last Parliament were laws” (10 *DEBATES OF THE HOUSE OF COMMONS FROM THE YEAR 1667 TO THE YEAR 1694* 52 [1763] [hereinafter *DEBATES*]).

¹¹⁰ *Id.* at 50.

prior constitutional regime but in the combination of its assertion of authority and in the acquiescence “in their authority [by] the whole nation.”¹¹¹

Today, we continue to refer to the idea of the King or the Crown in Parliament. For several leading constitutional theorists this idea is at the heart of the formation of the British political constitution,¹¹² but we forget that the basic structure of the United Kingdom’s constitution was formed by an event involving no parliament and where there was no king to be in that non-parliament at the time it appointed him and set forth the conditions of his appointment.

3.2. An elective monarchy

Under the pre-1689 constitution—whether through a Jacobite or ancient constitutionalist lens—the monarch was a hereditary monarch and kingly power transferred automatically and instantaneously to the king’s heir on his death pursuant to the rules of succession. The hereditary claim was an “‘indefeasible right’ and an incontestable, if unwritten, law of the realm.”¹¹³ The king as an individual died, but the king as a separate legal person or capacity never died. Kantorowicz’s seminal *The King’s Two Bodies* details meticulously how the concepts of the Crown, royal dignity, and the king as a body politic or corporation sole interacted to form this separation idea. “The King is dead; long live the King” evidenced the unbroken continuity of hereditary kingly power. As Coke observed in *Calvin’s Case*, the “King holdeth the Kingdom of England by birth-right inherent, by descent from the blood Royal ... [rendering] coronation ... but a royal ornament and solemnization of the Royal descent.”¹¹⁴ Accordingly, “by Queen Elizabeth’s death the Crown and Kingdom of England descended to His Majesty and he was fully and absolutely thereby King.”¹¹⁵

Of course, as Stubbs observed, “the law of royal succession, except where it has been settled by parliament, has never been very certain.”¹¹⁶ Succession claims, therefore, were often not clear-cut¹¹⁷ and were regularly contested. Moreover, the succession was often manipulated by might, most infamously when Richard III illegitimized and (may have) murdered his nephews to establish his hereditary right to the Crown.¹¹⁸ Parliament was periodically deployed to legitimate a succession claim or to settle and alter the future line of succession, for example: in 1405, Parliament provided for the succession of Henry IV’s children; it supported Richard III’s claim through a declaration of allegiance in Parliament by the “three estates”;¹¹⁹ and it affirmed Henry

¹¹¹ *Id.* at 48 (per Lowther: “I am satisfied with what the last parliament did: I acquiesce in their authority, as the whole Nation has done”).

¹¹² See generally LOUGHLIN, *supra* note 36.

¹¹³ KANTOROWICZ, *supra* note 37 (quoting S.B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 333 [1936]).

¹¹⁴ (1608) 7 Co. Rep. 377 at 389.

¹¹⁵ *Id.*

¹¹⁶ WILLIAM STUBBS, SEVENTEEN LECTURES ON THE STUDY OF MEDIEVAL AND MODERN HISTORY AND KINDRED SUBJECTS 394 (1887).

¹¹⁷ Kingly depositions are discussed further in Section 3.4.

¹¹⁸ William H. Dunham and Charles T. Wood, *The Right to Rule England: Depositions and the Kingdom’s Authority, 1327–1485*, 81 AM. HIST. REV. 738, 756 (1976).

¹¹⁹ *Id.* at 759.

VII's claim in an Act of Parliament.¹²⁰ Moreover, during the reigns of Henry VIII and Elizabeth I the succession was settled and resettled with the assistance of Acts of Parliament.¹²¹ Cavanagh observes in this regard that “during the reign of Elizabeth” it became “entrenched constitutional practice in England that the amendment of the laws of succession required the agreement of Monarch, Lords and Commons in Parliament.”¹²² However, prior to 1689, Parliament had never before acted alone without the involvement (albeit the sometimes coerced involvement) of an incumbent “rightful” monarch to determine the line of succession.¹²³ Under the pre-1689 constitutional order, therefore, Parliament had no power to act, nor was there any historical precedent for it acting alone to remove or appoint the king or to determine the succession. And, as noted, the Convention Parliament was no parliament, nor did it view itself as a parliament.

Once James II had fled to France on William's entering London, the first question for the Convention Parliament was whether James II could be deemed to have abdicated and therefore to have vacated the throne. Although a few parliamentarians “owned” the idea of “driving King James out,”¹²⁴ most settled on a self-deluding notion of voluntary abdication and vacation of the Crown.¹²⁵ However, even if abdication was possible and deemed to have happened, it did not follow that there could be an election by a parliament of an alternative monarch. Under prevailing succession principles, on its vacation the Crown would pass to James II's son, the Prince of Wales, who, as he was only a baby at the time, would have taken the throne subject to a regency arrangement.¹²⁶ More problematic for the Convention Parliament than the infancy of the Prince was the fact that he also, like his father, was a “papist,”¹²⁷ and James II's pro-Catholic actions were one of the central causes of the Revolution.¹²⁸

The Convention Parliament debates reveal the tension and difficulty experienced around this point. To decide that the Crown had been vacated and then to ignore

¹²⁰ Act for the Confirmation of Henry VII (1884) ROT. PARL. VI 270.

¹²¹ See Third Act of Succession 1544, 35 Hen. VIII, c. 1, 3 S.R. 855. See generally NENNER, *supra* note 30, at 179 (noting also that Henry VIII's attempts to bypass hereditary succession of the Stuarts in his will of 1546 failed).

¹²² Edward Cavanagh, *Monarchy*, in CONSTITUTIONAL HISTORY OF THE UNITED KINGDOM (P. Cane ed., 2021).

¹²³ See Dunham and Wood, *supra* note 118. Of note in this regard is the attempt by Parliament in 1679 to exclude James II from the line of succession because he was a Catholic—a process that Charles II put an abrupt stop to by proroguing Parliament; see Carolyn A. Edie, *Succession and Monarchy: The Controversy of 1679–1681*, 70 AM. HIST. REV. 350 (1965).

¹²⁴ DEBATES, *supra* note 61, at 64 (per Wharton).

¹²⁵ This is contrasted with the actions of the Scottish Convention. On April 4, 1689, the Scottish Convention Parliament removed the King by vote, with only five dissenters.

¹²⁶ One argument made in objection to the Prince of Wales's succession was that he was illegitimate, in relation to which see WALTER BAGEHOT, THE ENGLISH CONSTITUTION 37 (1867) (“The pretender, it was said, was not legitimate, though the birth was proved by evidence which any Court of Justice would have accepted”).

¹²⁷ Richard Temple observed that “you have a pretended Brat beyond sea, whom you cannot set aside... but if Parliament have no authority to make it otherwise, you have no way to prevent it falling under a popish successor” (emphasis added); see DEBATES, *supra* note 61, at 62. See also NENNER, *supra* note 30, at 188 (referring to the Convention's conscious refusal to even discuss the young pretender's hereditary claim as the fiction of the “non-existent child”).

¹²⁸ See generally PINCUS, *supra* note 91.

the succession amounted to creating an elective monarchy. As one member of the Convention Parliament observed:

Whatever is said, whether the Kingdom is elective or not, if you adhere to this conclusion [that the throne was vacant], you conclude that the Government is an elective monarchy.¹²⁹

But to follow the prevailing hereditary principle and to recognize the Prince of Wales's claim would have meant that William would “be gone,”¹³⁰ and it would all have largely been for nothing, with, in the opinion of many parliamentarians, catastrophic consequences both for the nation and for the would-be “traitors.”¹³¹ Given this irresolvable difficulty, some members of the Convention Parliament were willing to treat the monarchy as an elective monarchy:

To say “that the Crown is void” is a consequence of extraordinary nature. The consequence must be, we have power to fill it, and make it from a successive monarchy an elective.¹³²

Others held onto fragments of the hereditary principle by suggesting it would be roughly maintained if Princess Mary, James II's first daughter and a protestant, were crowned,¹³³ with William acting as her regent. But for these Convention Parliamentarians, to pass the Crown to William as King rather than as consort and regent would be to “eradicate the succession.”¹³⁴ Sir Robert Sawyer, former attorney general and MP for Cambridge University, in rejecting William as King, observed that “no man can question that the Kingdom of England is successive ... at all times in history you found the succession did prevail.”¹³⁵

It is noteworthy in this regard that although William was fourth in line to the English throne at the time (assuming neither twenty-seven-year-old Mary nor twenty-four-year-old Princess Anne had any surviving children), this remote claim was not close enough for members of the Convention Parliament to even refer to William's claim in adjusted succession terms. There was no Convention Parliamentary pretence that he had a plausible succession claim according to the English law of royal succession. As Nenner has observed in this regard, “there was no way to seat William on the throne without undermining the principle of hereditary monarchy.”¹³⁶ Nevertheless, just over a week after this debate, on February 13, 1689, the Lords and Commons of the Convention Parliament (not Parliament) “eradicated” the succession by agreeing

¹²⁹ DEBATES, *supra* note 61, at 61 (per Mr. Finch). For references to other statements made by members of the Convention Parliament in this regard, see David Kershaw, *Revolutionary Amnesia and the Nature of Prerogative Power* (LSE Legal Studies Working Paper 9/2020, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3640590.

¹³⁰ DEBATES, *supra* note 61, at 62 (per Howard remarking, “if you use the hand that delivered you thus, you invite him to be gone”).

¹³¹ *Id.* (“if we neglect this opportunity put into our hands 'tis probable we may be no more a people”). On treason, see MAITLAND, *supra* note 29.

¹³² DEBATES, *supra* note 61, at 15 (per Clarges).

¹³³ *Id.* at 56 (per Tredenham, who opposed making William king because “the crown was always successive never elective” (*id.* at 55)).

¹³⁴ *Id.* at 56 (per Tredenham).

¹³⁵ DEBATES, *supra* note 61, at 58.

¹³⁶ NENNER, *supra* note 30, at 189.

that “the Prince and Princess of England should be proclaimed King and Queen of England,” with William King in his own right.

3.3. The protocorporate Crown: The dignity does die

Prior to 1689, regal power was held by the king and passed automatically according to the line of succession, which was why the king never died. As noted above, this idea of the kingly body and its powers took a protocorporate form—a form contained in the constitutional concepts of Crown, royal dignity, body politic, and corporation sole.¹³⁷ Central to the formation of the idea of kingly power as a separate legal person was the concept of “royal dignity.” Today, we understand dignity as a positive personal quality which garners respect; derived from *dignitas*, a dignitary is a person holding a high office. The term dignity has an ancient, broader, and constitutional significance, however. It is, as Kantorowicz observed, a “mistake ... to understand the word ... only in its moral or ethical qualifications, that is, as something contrary to ‘undignified conduct.’”¹³⁸

Dignity in its constitutional sense encapsulates notions of position and office, authority and power, combined with its more modern signification of honor and due respect associated with position. Maitland, in his *The Constitutional History of England*, refers to the term only twice: in relation to Richard II’s removal/resignation in 1377, “who was deposed of all royal dignity”; and in relation to the powers of the Lord High Steward to appoint a Court of the Lord High Steward, “merged in the royal dignity” of Henry IV.¹³⁹ Earlier references to the royal dignity encapsulated, *inter alia*, the kings’ prerogative. Edward I, for example, sent a letter to the Bishop of Coutance claiming both his right to the temporalities of the Abbot of Marmoutier and that such a right could not lapse for failure to assert it, in which he noted that “in such cases time does not run against the king ... in accordance with the prerogative of his royal dignity,”¹⁴⁰ where prerogative refers to these rights and the status of the right. The connection of “royal dignity” to exercised power is also present in the 1539 Act “for the placing of the Lords,” which appointed Thomas Cromwell as Henry VIII’s vicegerent for “the good exercise of the said most Royal Dignity.”¹⁴¹ Blackstone explained royal dignity in similar terms:

First, then, of the royal dignity.... *The law therefore ascribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine.*¹⁴²

¹³⁷ Scholars and judges have long bemoaned the amorphous and protean nature of these corporatist ideas. See Jason G. Allen, *The Office of the Crown*, 77 CAMBRIDGE L.J. 298 (2018).

¹³⁸ *Supra* note 37, at 383.

¹³⁹ *Supra* note 29, at 192, 170.

¹⁴⁰ Ann Deeley, *Papal Provision and Royal Rights of Patronage in the Early Fourteenth Century*, 43 ENG. HIST. REV. 498, 513 (1928) (emphasis added). See also George Garnett, *The Origins of the Crown*, 89 PROC. BRIT. ACAD. 171, 174, 175, 183, 191 (1996).

¹⁴¹ Anno. 31 Hen. VIII and Anno Dom 1539 (emphasis added).

¹⁴² Ch. 7, *Of the King’s Prerogative*, in COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note 79, at 249 (emphasis added).

As part of the “several branches of royal dignity,” Blackstone proceeds to consider, *inter alia*, sovereignty, perpetuity, and prerogative power, and later observes “having, in the proceeding chapter, considered at large those branches of the King’s prerogative, which contribute to his royal dignity, and constitute the executive power of the government.”¹⁴³

Kantorowicz provides the most comprehensive account of the term’s medieval foundations. For Kantorowicz, the notion of royal dignity “referred chiefly to the singularity of the royal office, to the sovereignty vested in the king by the people, and resting individually in the King alone.”¹⁴⁴ He shows how the term is central to the idea of the king’s two bodies and to the notion of the Crown as a corporate body politic.¹⁴⁵ It is through the dignity, as an emerging “corporation by succession,”¹⁴⁶ that in medieval constitutional law the office and power of the monarch is transferred on the death of the monarch to his or her rightful successor, which was why it was said that the “dignity does not die.”¹⁴⁷ The “dignity” then was an embryonic legal person fused with the line of succession, which enabled the transfer of regal office and power on the death of the monarch.¹⁴⁸ We see an early articulation of this protocorporate idea of the dignity in *The Case against the Prior of Kirkham* in 1313, quoted by Kantorowicz, where Justice Inge observed:

Abbot and Prior are names of Dignity: and in virtue of the Dignity the right that was in the predecessor will so wholly vest itself in the person of the successor after his creation that none other than he can defend the rights of his church.¹⁴⁹

As an embryonic corporation, enabling the holding and transfer of executive power, one might think that the abdication and vacation of the Crown by James II resulted in the detachment of Crown, kingly body, and royal dignity, and that on the subsequent appointment of William as King and Mary as Queen this same kingly body politic then attached to their individual bodies, providing for the continuity of the kingly power exercised by James II to William III. This is the Glorious Revolution as a takeover of this corporate right-holder and then its transfer to William; just as when a successful hostile bidder in a contested takeover replaces the incumbent directors, there is no effect on the assets and powers of the corporation. This understanding is, in significant part, the presumptive theory of prerogative power of modern constitutional lawyers. But it is an implausible one.

¹⁴³ Ch. 8, *On the King’s Revenue*, in COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note 79, at 282 (emphasis added).

¹⁴⁴ *Supra* note 37, at 384.

¹⁴⁵ *Id.* at 406–08.

¹⁴⁶ *Id.* at 385, 387. Kantorowicz observed that the “principles ... of continuous succession of individuals and that of corporate perpetuity of the collective ... seem to have coincided in a third notion without which the speculations about the king’s ‘two bodies’ would remain almost incomprehensible: the *Dignitas*” (*id.* at 383) (emphasis in original).

¹⁴⁷ *Id.* at 386.

¹⁴⁸ Note that although Kantorowicz acknowledges Maitland’s “parson-ification” of the Crown (in Frederic W. Maitland, *The Crown as Corporation*, 17 L.Q. REV 131 [1901]), he attributes the corporate characteristics of the parson and the Crown to the dignity (*id.* at 449).

¹⁴⁹ *Id.* at 402 (citing YB 6–7 Edward II [1313]).

To modern observers, the change in the head of a corporate body is straightforward: One power/office-holder is replaced with another, leaving in place, untouched, the corporate body and all the powers and assets of that body. However, all such modern observers would also clearly understand that the change of office-holder must take place within the constitutional rules of the separate legal person in order for there to be effective continuity and transfer of power. This is just as true of a corporation sole as it is of a corporation aggregate. A person who is appointed by a group of nonshareholders to be a director and chair of Shell plc is not a director and chair of Shell plc. That person has the powers delegated by the group of nonshareholders, but, quite obviously, *no matter what the nonshareholder group claim they have done*, does not exercise any corporate power which has been delegated to the directors by the general meeting of shareholders of Shell plc in accordance with the constitution of Shell plc. Building on this analogy, the transfer of power to William did not take place within the constitutional rules that provided for the transfer of the Crown and the royal dignity possessed by James II. There are three reasons for this. First, pursuant to the prevailing constitutional position, although the king had two bodies, they were inseparable other than on the death of the king as an individual, when his kingly body and the royal dignity instantaneously passed to and fused with the king's rightful successor. As Bacon observed "with great emphasis,"¹⁵⁰ the king's individual personhood and the Crown "were *inseparable* though distinct."¹⁵¹ The king's protocorporate official body fused "the perpetuity of the dynasty, the corporate character of the crown and the immortality of the royal dignity."¹⁵² The law of royal succession, then, was an elemental component of the pre-1688 kingly corporate body, compliance with which was an inescapable precondition for the transfer of the powers contained within dignity. This is why Hobbes referred to an "artificial eternity ... which men call the right of succession."¹⁵³ It followed, therefore, as Kantorowicz observed, that "no theory ... had any chance to prevail in England which attempted to isolate the Crown from its components."¹⁵⁴ Second, prior to 1689 Parliament, acting alone, did not have the power to alter the succession or to transfer existing protocorporate regal power and the royal dignity to a designated person. And third, the Convention Parliament was "not a parliament" and was precisely analogous to the nonshareholder group above.¹⁵⁵

¹⁵⁰ Cited in KANTOROWICZ, *supra* note 37, at 365.

¹⁵¹ *Id.* (emphasis added); from this period and making a similar argument, see also EDWARD BAGSHAW, *THE RIGHTS OF THE CROWN OF ENGLAND IS ESTABLISHED BY LAW* (1660).

¹⁵² KANTOROWICZ, *supra* note 37, at 316.

¹⁵³ HOBBS, *supra* note 96, at 129.

¹⁵⁴ KANTOROWICZ, *supra* note 37, at 364.

¹⁵⁵ One potential rebuttal to this position comes from John Finnis's argument about the effects of a "rule of identification" and a "principle of continuity" in *Revolution and Continuity in Law*, in JOHN FINNIS, *PHILOSOPHY OF LAW: COLLECTED ESSAYS VOL. IV* (2013). However, in the context of the dignity and prerogative powers, Finnis's claims founder on the failure to take account of the corporate nature of kingly power. Assuming that Finnis is correct about the continuity of (parts of) the legal system following a revolution though a "rule of identification" (*id.* at 419), which involves the "official acceptance" of the prior legal order (the product of a prior rule of recognition), this is not an idea that can make sense of legal continuity in relation to the prerogative powers of the royal dignity contained within James II's corporate legal body. These corporate powers were fused with the rules of the royal succession. The alteration of the succession outside of the then prevailing rules which provided for their alteration (what Finnis calls

Accordingly, when the Convention Parliament, an unauthorized body, acted to appoint a king who had no credible claim within the existing royal dynasty, its actions had no effect on James II's kingly body and the royal dignity which he occupied and had fused with him on the death of Charles II. When the nation implicitly consented to the authority and legitimacy of the Convention Parliament, James II's royal body and his royal dignity did in effect die, at least until he or his successor by force or acquiescence could take back the throne. As a protocorporation, the Crown and royal dignity which were embodied within and exercised by him were effectively dissolved. It followed, therefore, that to operate as King and Queen, William and Mary had to be empowered outside of the pre-1689 constitutional structures; regal power contained within a corporate royal dignity had to be fashioned anew. Many in the Convention Parliament understood this and, as shown in Section 4 below, provided for it. But even if the Convention Parliament had not understood this, its actions effectively dissolved the dignity, which meant that the dignity had to be remade by *its* actions.

3.4. The problem of kingly deposition and the *de facto* king

An important objection to the position that a hereditary kingly principle was an intrinsic component of the pre-1688 protocorporate English Crown is that prior to 1688 there had been multiple kingly depositions,¹⁵⁶ some of which involved suspect hereditary claims, and yet the Crown and the nature of its powers were taken to be unaltered by such depositions, even if the extent of kingly power was subject to intermittent contestation. It is around these depositions that the distinction between *de jure* and *de facto* kingship arose, which sought to explain the lawfulness both of the actions of kings who took the throne outside of the lawful (*de jure*) succession hierarchy and of the allegiance given to such kings.

the rules of succession of rules (*id.* at 411)—consent of King and Parliament—placed that corporate form and its powers in abeyance (the form's effective dissolution). Any subsequent, full or partial, “official acceptance” of such a power structure and the means of power transfer necessarily involves their recreation (both the powers and a corporate form), not their continuity—a recreation that is the product of the exercise of power by the body which has the constituted power to provide for such “official acceptance.” Taking the Shell nonshareholder body example in the text, if such a nonshareholder body by force obtained control over all of Shell's assets and the state impliedly accepted this and its courts recognized their actions as corporate actions, although it may (subject to the new shareholder body) look the same, although they may act according to the same rules used prior to the Shell usurpation, and although it may appear to be exercising the “same” powers, it is not the same corporate body and they are not the same powers exercised by the then Shell plc, but rather it is a new corporate body brought into existence by the state's recognition (“official acceptance”) of it, exercising *its* corporate powers. Finnis's principle of identification cannot, as with a law, validate it *eo nomine* (*id.* at 419), because the corporate form is hermetically sealed within the constitutional rules that provide for its existence, which, in the case of the dignity and the Crown prior to 1688, was a corporate form wedded to the succession, alterable only by King and Parliament. Accordingly, assuming that Finnis's argument as it applies to pre-Revolution laws is correct (there is no space to take issue with it here), it cannot extend constitutionally to the pre-1688 prerogative powers contained within the protocorporate royal dignity.

¹⁵⁶ Of course, deposition alone is unproblematic for a protocorporate Crown fused to the dynasty, as resignation, abdication, or removal can be treated as a public or civil death. As Maitland observed in relation to these depositions, “the idea of an heir inheriting whilst his father is physically alive was not unfamiliar to our medieval law” (*supra* note 29, at 191 n.1).

However, to explain a transfer of existing regal power to the *de facto* king from the deposed *de jure* king, there must have been embedded within the protocorporate English Crown and dignity the means to manage nonhereditary kingly transition without the disintegration of the Crown and the remaking of kingly powers in an historical first constitutional moment. Implicitly, for such a transfer to be possible, one must presume that the five kingly depositions between 1327 and 1461—to the extent that they cannot be explained in accordance with the law of succession—generated a rule that rendered the protocorporate English Crown and dignity, and its associated regal powers, only conditionally hereditary. That is, regal power would be transferred through the kingly body within a line of succession, but only if the hereditary pathway was not altered by conquest or “popular” deposition by the governing class of prelates, earls, barons, and knights, or, later, with the imprimatur of Parliament called by the usurper. If this is correct, the protocorporate royal dignity and its prerogative powers must be understood as being detachable from the body of the king and not fused with the perpetuity of an incumbent dynasty. In effect, this would be a constitutional legal order providing for its supersession, or more precisely for its substitution.¹⁵⁷ Although this, as Honoré observed, would be “perverse indeed,” to what extent can the case be made for it?

Although this position is immanent in the orthodox assumption of the continuity of regal power, it faces several theoretical and historical difficulties. First, early attempts by barons in 1308, in the reign of Edward II, to separate Crown and King, claiming that their allegiance was to the former,¹⁵⁸ unequivocally failed. By the seventeenth century, Coke, in *Calvin’s Case*, referred to the Barons’ declaration as a “damnable and damned opinion” and noted the rejection of it by parliaments in the reigns of Edward II and Edward III.¹⁵⁹ Second, as outlined above, as of 1688, few questioned that the monarchy was hereditary or that the perpetuity of the dynasty was an elemental component of the English constitution. This view was shared by James II and his supporters, as well as by prominent ancient constitutionalists from Edward Coke in the early seventeenth century to William Petyt at the end of the century. Moreover, as discussed above, the members of the Convention Parliament were clearly of the view that appointing William—whether they were in favor or against—was not consistent with the constitution as they understood it, because his claim to the throne was too remote from the line of succession. As Robert Sawyer put it, “no man can question that the Kingdom of England is successive.”¹⁶⁰ Accordingly, to claim that the hereditary perpetuity of the dynasty was not the basis of the protocorporate English Crown in 1688 is to posit a constitutional rule that would have found close to no support amongst advocates or opponents of seventeenth-century kings—a very steep claim of legal false consciousness.

¹⁵⁷ Anthony M. Honoré, *Allegiance and Usurper*, 25 CAMBRIDGE L.J. 214, 215 (1967).

¹⁵⁸ Declaration of 1308: “Homage and oath of allegiance are more by reason of the Crown than by reason of the King’s person.” See JAMES C. DAVIES, *THE BARONIAL OPPOSITION TO EDWARD II* (1918).

¹⁵⁹ *Supra* note 114 at 390.

¹⁶⁰ See *supra* text accompanying note 135.

Close attention to the prior kingly depositions also problematizes this contingent hereditary idea, because succession claims (more and less plausible) were a central component of the justification given for deposition. As noted above, William Stubbs observed that the law of succession, “except where it has been settled by parliament, has never been very certain.”¹⁶¹ These rules, although fused with the notion of the king’s two bodies and the protocorporate transfer of the dignity, were contested and indeterminate. However, such indeterminacy in itself is not problematic for a corporate transfer of power, provided that authorized means exist to determine whether or not the constitutional rules have been complied with. The rules of any corporate person necessarily incorporate reliance on an arbiter of whether or not the rules have been complied with. They are deemed to be complied with, and the transfer or exercise of power is deemed to be effective, even in conditions of uncertainty, where the designated arbiter so provides. In England, one way of viewing the role of a duly convened parliament in these dispositions is as performing such a judicial role.¹⁶²

Consider, first, the cases of Edward II in 1327 and Richard II in 1399. Edward II was deposed by his fourteen-year-old son, Edward III.¹⁶³ The deposition combined a direct succession claim by “his rightful heir” with (coerced) resignation/consent of the deposed monarch and broader approbation by the “estates of the realm” in a parliament called by Edward II.¹⁶⁴ Henry IV’s disposition of Richard II in 1399 also involved a similar combination of Richard II’s coerced resignation and consent, a strong and direct succession claim (“by right line of the blood”¹⁶⁵ as the son of John of Gaunt, Edward III’s third son), and parliamentary approbation pursuant to a parliament called by a writ attested by Richard.¹⁶⁶ The family of Edmund Mortimer, Earl of March, although eight years old in 1399, claimed that he was Richard II’s presumptive heir—as the great-grandson, through his grandmother Philippa of Antwerp, of Edward III’s second son, Lionel of Antwerp—and violently and unsuccessfully contested Henry IV’s reign. But, as Maitland clarified, it was not established at the time that a claim to the throne could pass through a woman.¹⁶⁷ Edward IV deposed Henry VI in battle in 1461, but he also asserted a strong succession claim, the claim his father, Richard, third Duke of York, asserted through the same line as Edmund Mortimer, namely through his great-great-grandmother Philippa, daughter of Lionel of Antwerp—a succession claim that Henry VI himself, prior to his deposition, had accepted when in

¹⁶¹ STUBBS, *supra* note 116, at 394.

¹⁶² The Parliament of 1484 addressed the “people’s” “doubt and question” about Richard III’s claim, acting as “the court of parliament” (translation of the proceedings of the 1484 Parliament, <https://www.british-history.ac.uk/no-series/parliament-rolls-medieval/january-1484>). Circularity inevitably envelops this process where there is uncertainty about the succession claim, when, in contrast to the dispositions of Edward II and Richard II, the “usurper” calls Parliament to affirm the succession claim—where calling an authorized parliament into session can only be carried out by a *de jure* king.

¹⁶³ See generally Dunham and Wood *supra* note 118, at 739–41.

¹⁶⁴ MAITLAND, *supra* note 29, at 190.

¹⁶⁵ ROT. PARL. III 422–23, cited in Dunham and Wood *supra* note 118, at 748.

¹⁶⁶ MAITLAND, *supra* note 29, at 191.

¹⁶⁷ *Id.* at 193.

October 1461 he contracted with the Duke of York that he should be his heir and successor, a “superior” claim that was affirmed by Parliament.¹⁶⁸

Richard III’s deposition of the uncrowned Edward V in 1482 and his deposition by Henry VII in 1485 are more problematic, however both can be understood through a succession lens. Richard imprisoned Edward in the Tower of London and may have ordered his death, which affirmed his kingship by right. However, prior to Edward V’s unlawful or natural death, Richard claimed his right to his throne through an elaborate account of Edward’s illegitimacy arising from both the illegitimacy of his father, Edward IV, and the claim that Edward IV had entered into a precontract of matrimony with another woman prior to marrying Edward V’s mother.¹⁶⁹ His claim was also affirmed by Parliament.¹⁷⁰ In succession terms, Henry VII’s claim to the throne is the arguably the weakest of all. Although he claimed that “he had come to the crown by just right of inheritance”¹⁷¹—a claim affirmed by a parliament which he called—Wolfe observed that “his hereditary claim was as weak as any put forward since the conquest.”¹⁷² However, others such as Stubbs have argued that according to the understanding of the succession rules at the time, “it is quite possible to maintain that he was King of England by hereditary right.”¹⁷³

Accordingly, in all these depositions the succession claim was a component part of the deposition. If the transfer of the dignity and regal power is contingent on a *de jure* valid succession claim, in each of these depositions a case can be made that there was a *de jure* transfer of regal power. None of these depositions, with the exception perhaps of Henry VII’s deposition of Richard III, offer support for a notion of a protocorporate regal power that is not fused with the line of succession and which is transferable to a person who holds the title of king outside of the prior succession hierarchy.

The doctrine of *de facto* kingship was formed to take account of the succession uncertainties associated with these depositions. The doctrine provided an acknowledgment that kingship could be occupied by a usurper outside of the succession hierarchy, but it did not provide that the usurping *de facto* king exercised the powers of the Crown, which were retained by the *de jure* king.¹⁷⁴ The main proponents of *de facto* kingship in the seventeenth century, such as Matthew Hale,¹⁷⁵ considered in detail the validity of the exercise of a *de facto* king’s powers, which in certain instances were not deemed to be effective against a rightful *de jure* king. This implied that the *de facto*

¹⁶⁸ Dunham and Wood, *supra* note 118, at 748.

¹⁶⁹ *Id.* at 755, 757.

¹⁷⁰ *Supra* note 162.

¹⁷¹ WILLIAM STUBBS, SEVENTEEN LECTURES ON THE STUDY OF MEDIEVAL AND MODERN HISTORY AND KINDRED SUBJECTS 394 (1887).

¹⁷² B.P. Wolfe, *Henry VII’s Land Revenues and Chamber Finance*, 79 *ENG. HIST. REV.* 225, 230 (1964).

¹⁷³ STUBBS, *supra* note 171, at 394.

¹⁷⁴ THOMAS BROWNE, *THE CASE OF ALLEGIANCE TO A KING IN POSSESSION 1* (1690) (“By the *King in Possession* may be meant, first, the person who is invested with the Regal Authority. Secondly, the person who has the exercise of the Government in his hands. The *King in Possession* in the former sense, is only the *King de jure*, i.e. he that has the true *right* and *title* to the *Crown*; for he is immediately invested with Regal Authority on the death of his Predecessor; and though he be excluded or deposed from the *exercise* of the Government by a Rebellion or Usurpation, yet he is not thereupon divested of his *Authority*”).

¹⁷⁵ SIR MATTHEW HALE’S PREROGATIVES OF THE KING (D.E.C. Yale ed., 1976).

king was not in fact exercising the *de jure* king's powers. For example, a *de jure* king who reclaimed kingship was bound by "acts that tend to the diminution of the royal power or revenue ... no more than the true lord is bound by the original grants by copy or otherwise of the disseisor."¹⁷⁶ Moreover, although both executed contracts and acquisitions made by the usurper remained binding according to Hale,¹⁷⁷ any grant that was executory at the time of repossession of kingship did not bind the Crown. And they remained unenforceable even if confirmed by an Act of Parliament, because such a "parliament" had been called by the usurper, who did not have the power to call it into session.¹⁷⁸ The assumption that the *de facto* king did not exercise *de jure* power was also implicit in the steps taken by victorious "*de jure*" kings to affirm the statutes produced during the reign of a usurper.¹⁷⁹ If an exercise of *de facto* kingly power involved an exercise of transferred power by a lawfully legitimate holder of that power, then it would require no confirmation and would be binding in all respects on the return of the *de jure* king.

If a *de facto* king did not exercise *de jure* regal power, then what was the source of those *de facto* powers? One option, consistent with ancient constitutionalism, is that custom and the common law provided for such a parallel system of power triggered by claiming the title outside of the line of succession; that is, a common law doctrine of the *de facto* king empowered the king. However, how can we posit the idea of a legal system which provides for two systems of power—one of which it labels lawful, the other *de facto*—when the recognition of the parallel system of *de facto* kingship renders *de jure* kingship effectively legally irrelevant? As D.E.C. Yale put it in his consideration of the *de facto* doctrine, "it is not to be expected that a legal order can provide for the event of its own overthrow and supersession."¹⁸⁰ Moreover, the deposition examples themselves, with their close engagement with the *de jure* succession hierarchy, hardly serve as a basis for a legal system of *de facto* power. Hale observed in this regard that "it is impossible to prescribe certain rules out of former [deposition] examples."¹⁸¹

Another more persuasive way to understand these distinctions about enforceable and unenforceable actions is that they reflect a protounderstanding of apparent regal authority. That is, the doctrine assumed that the *de facto* king was not exercising *de jure* legal power but that transactions made and executed in the name of the Crown as a practical matter had to stand, as such transactions inevitably continued during the usurpation and life could not function if their validity could not be presumed. In other words, they were enforceable as a practical matter "for [the peoples'] own safety

¹⁷⁶ D.E.C. Yale, *Hobbes and Hale on Law: Legislation and the Sovereign*, 31 CLJ 121, 150–51 (1972) (quoting MATTHEW HALE, RIGHTS OF THE CROWN AND PREROGATIVA REGIS). See also Case of John Bagot, YB Pasch. 9 Edw., discussed in KAY, *supra* note 31, at 149.

¹⁷⁷ Although note that the authorities upon which these positions were based were contested. BROWNE, *supra* note 174, at 16–17 observes that the reliance placed on the Case of John Bagot in relation to the doctrine relates not to the judgment of the court but just to plaintiff council's submissions.

¹⁷⁸ *Id.*

¹⁷⁹ *E.g.* ROT. PARL. V 489a, passed during the reign of Edward IV.

¹⁸⁰ *Supra* note 175, at 148.

¹⁸¹ Quoted in KAY, *supra* note 31, at 151.

and advantage, for the good of the community.”¹⁸² As Lord Ellenborough put it in the foundational apparent authority case a century later, “strangers can only look to the acts of the parties [and they may] presume that the apparent authority is the real authority.”¹⁸³ It is in this sense that Hale can be understood when he refers to the usurper as not possessing the body politic of the Crown but “sustaining it.”¹⁸⁴

The problem with this position, however, is that as the *de facto* king’s position and line of succession is solidified, it provides, unsustainably, for the continuous exercise of a power that is not regal power and the continual abeyance of the actual regal power. At some point through this lens one must ask when does *de facto* power become *de jure* power and, at that point, what is the basis and source of this new *de jure* power? The compelling answer to this question is that any such *de facto* king is empowered by the circumstances of the deposition, such as conquest. As the Yearbook of 1485 observed in relation to the effect of Henry VII’s attainders, “he took on himself the royal dignity”¹⁸⁵—his conquest and the circumstances around it fashioned it anew. Should the *de facto* king establish himself and his heirs as king, this understanding of *de facto* kingly power implicitly posits a historically first constitutional moment and the formation of a new set of kingly powers, the source and nature of which are a product of the circumstances of the deposition. Honoré made this point, in similar terms to the thesis of this article, in relation to his consideration of the question of allegiance to a usurper:

It may be asked: what if the King of Poland or Morocco, or an upstart Harold Warbeck, should firmly establish himself in the realm. The answer which Kelsen has taught us to analyse correctly, is that the old legal order should give way to the new, *which might happen to coincide largely in content with the old*.¹⁸⁶

4. Prerogative power as delegated statutory power

As Maitland observed, “[i]t was no honorary president of the republic that the nation wanted, but a real working, governing king—a king with a policy—and such a king the nation got.”¹⁸⁷ The powers provided to enable this “real working, governing king” were very similar to (indeed, in significant part identical to), and bore the same power labels (“prerogative and regal powers” and “royal dignity”) as, James II’s executive powers, but they were the product of 1689’s new constitutional structure; they were not—and, as explained above, could not be—the same powers that were exercised by James.

How, then, are we to understand the empowerment of William and Mary and their successors? Two secular options present themselves. The first, a theory of power created through invasion and conquest, can be quickly discarded. As William’s

¹⁸² BROWNE, *supra* note 174, at 3 (referring to why allegiance was owed).

¹⁸³ *Pickering v. Busk* (1812) 15 East 41.

¹⁸⁴ *Supra* note 176, at 151 n.21.

¹⁸⁵ YB Mich. 1 Hen. 7 (1485).

¹⁸⁶ Honoré, *supra* note 157, at 223 (emphasis added).

¹⁸⁷ *Supra* note 29, at 388.

supporter Lord Delamer put it, a theory of invasion was “lunacy.”¹⁸⁸ The Convention Parliament had a choice; had they refused to support William’s claim or even made him Mary’s regent, he would have left.¹⁸⁹ The second option is that executive authority, although rooted in the authority of the people, was mediated through the Convention Parliament, which delegated power, explicitly and implicitly, to the kingly executive.

The second idea is compelling. It is logical and straightforward: the body that takes it upon itself to act on behalf of the people to appoint the monarch outside of existing constitutional rules and structures empowers the monarch—with appointment comes empowerment. Moreover, the Declaration of Rights and its codification in the Bill of Rights 1689 addressed kingly power in several ways, all of which support an idea of the delegation by the Convention Parliament to the King of the constituted power vested in the Convention Parliament. First, as is well known, the Act sets boundaries on the extent of prerogative power, some of which—such as the prohibition of excessive bail or cruel and unusual punishment¹⁹⁰—reflect certain of the “ancient liberties” of Englishmen, while others—such as the prohibition on the use of the prerogative to suspend laws or its use to dispense with the laws “as it hath been assumed and exercised of late”¹⁹¹—responded to James II’s perceived excesses. Secondly, and for our purposes more importantly, the Act explicitly addresses the positive empowerment of the King and Queen. Indeed, in the Declaration and then the Bill of Rights, and in subsequent legislation in the early 1690s, the distribution of power transferred to the King and the Queen by the Convention Parliament (and Parliament thereafter) was carefully calibrated to empower their majesties and to address the power distribution problems arising from having a dual monarch.

In the Declaration of Rights and then the Bill of Rights, power was transferred to William and Mary in three different ways: first, through the transfer of the “Royal Dignity”; second, through the explicit joint vesting of prerogative powers in both monarchs; and third, by explicitly empowering William to act alone on behalf of William and Mary.

As discussed in Section 3.3 above, the term “royal dignity” as a medieval legal concept referred not only to honor and position but also to authority and prerogative power. The Declaration and the Bill of Rights transferred the “royal dignity” to William and Mary:

The said Lords Spiritual and Temporal and Commons assembled at Westminster *do resolve* that William and Mary, prince and princesses of Orange *be and be declared* king and queen of England ... *to hold the crown and royal dignity* of the said kingdoms and dominiums to them ... and after their deceases the said crown and royal dignity of the said kingdoms and dominiums to be to their heirs.¹⁹²

¹⁸⁸ See PINCUS, *supra* note 91 (citing Delamer’s view that the idea of invasion was “a piece of lunacy”); see also *supra* text accompanying notes 89–94.

¹⁸⁹ See PINCUS, *supra* note 91, loc. 3881, also n.130.

¹⁹⁰ Bill of Rights 1689, art. X.

¹⁹¹ *Id.* art. II.

¹⁹² Bill of Rights 1688, 1 W. & M. Sess. 2, c. 2 (emphasis added).

As we observed above, the royal dignity and regal powers held by James II were the product of a prior constitutional regime, which provided for the protocorporate transfer of power to a hereditary monarch—a protocorporate phenomenon which was umbilically connected to dynastic succession in accordance with the rules of royal succession. There were no means for anybody, including Parliament, to take possession of those rights under that prior order and to provide for their transfer. The effect of the Convention Parliament (at the time a constitutionally unauthorized body) both deeming the throne to be vacated and then eradicating the succession was, as noted, to effectively dissolve this protocorporate bundle of powers, or at the very least to leave them in suspension until James II or his successors were invited back, without conditions, to take the throne. The dignity referred to by the Convention Parliament was necessarily, therefore, a dignity formed by it from its constituted power. Clearly, in not detailing the precise nature of those powers (apart from the limitations referred to above), the Convention Parliament created a structure of power and a royal dignity that, by implication, in large part replicated the royal dignity held by James II.

However, we do not have to rely solely on viewing the royal dignity as being connected to kingly power and prerogative to see that William and Mary were empowered by the Convention Parliament. The Bill of Rights also provides:

[T]heir Majesties having accepted the crown and royal dignity as aforesaid, their said Majesties did become, were, are and of right ought to be by the laws of this realm our sovereign liege lord and lady, King and Queen of England ... in and to whose princely persons the royal state, *crown and dignity* of the said realms with all honours, styles, titles, regalities, *prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining* are most fully, rightfully and entirely *invested and incorporated*, united and annexed.¹⁹³

Here, “prerogatives” and “powers,” which “belong and appertain” to the royal dignity, are “invested” and “incorporated” in the monarch by the statute and, therefore, by the Convention Parliament/Parliament.¹⁹⁴ The etymology of the term “invest” is of particular note. The word stems from the medieval Latin word *investire*, meaning to clothe, and investiture, which involves a ceremony to clothe a person with an office, for example as bishop or abbot.¹⁹⁵ The *Concise Oxford Dictionary of English Etymology* provides that “invest” stems from the notion of the endowment of power;¹⁹⁶ for the Merriam-Webster dictionary, it is “to furnish with power or authority” or to “grant someone control or authority over.”¹⁹⁷ Note also the use of the word “incorporated,” which can be read as providing for the statutory incorporation of the Crown and the dignity—a corporate dignity wedded to a statutory

¹⁹³ *Id.* (emphasis added).

¹⁹⁴ By the time the Bill of Rights was passed, as discussed above, the Convention Parliament had converted itself into a parliament.

¹⁹⁵ The term is most commonly associated with the controversy around a lay and papal investiture, although it is also used in the context of other offices such as a judge. See generally NORMAN CANTOR, *CHURCH, KINGSHIP AND LAW INVESTITURE IN ENGLAND* (1958).

¹⁹⁶ THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (T.F. Hoad ed., 1996): “clothe, spec. with the insignia of office, establish in possession, endow with power.”

¹⁹⁷ Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/invest>.

line of succession. As Coke observed in *Sutton's Hospital* a century earlier, “the words *fundo, erigo, incorporo*, and such other like words are sufficient to make a corporation.”¹⁹⁸ Moreover, the term invites comparison between the role of the Bill of Rights and the corporate nature of the Crown and the incorporation of the Duchy of Lancaster in 1461 by an Act of Parliament during the reign of Edward IV, where the “possessions of the Duchy of Lancaster” were “incorporated” to be held by “the king ... and his heirs King of England”¹⁹⁹—also a statutory corporation wedded to the royal succession.

In a third respect, the Bill of Rights provides for the delegation of power through the concept of “regal power,” which it transferred to the King alone:

... said prince and princesses, during their lives and the lives of the survivor of them, sole and full exercise of the *regal power* be only *in* and executed by the said Prince of Orange in the names of the said prince and princess during their joint lives.²⁰⁰

Note that pursuant to the Declaration and the Bill of Rights, regal power is “in and executed by the said Prince of Orange.” Accordingly, “royal dignity” is transferred to William and Mary, but the “regal power” that is a constituent part of the dignity is to be exercised only by William on their joint behalf. Moreover, the Bill of Rights provided that William and Mary and any of their successors settled by the Act would forfeit that “regal power” if they converted to Catholicism or married a Catholic.²⁰¹ That is, power was transferred and the terms of its maintenance and exercise were rendered conditional *by the Act*.

That the Convention Parliament and parliaments thereafter during the 1690s saw kingly power as the product of parliamentary action is evident from the Convention Parliamentary debates, but also from the debates and resulting statute dealing with the King’s and Queen’s powers when William left for Ireland to fight James II. The Convention debates evidence great conflict and disagreement about the powers and actions of this Convention assembly; there is, therefore, no definitive conclusion about the Convention’s intent that we can draw from these debates. But what we can see is evidence that some parliamentarians were of the view that the transfer and distribution of kingly power were to be determined by Parliament, which, in conjunction with the Declaration of Rights and then the Bill of Rights, provides compelling support for the position that kingly power is delegated parliamentary power. For example,²⁰² on January 29, 1689, in the debate on the state of the nation, the Tory Lord Falkland observed that:

Before the question be put, who shall set upon the Throne, I would consider *what powers we ought to give the Crown*, to satisfy them that sent us hither. ... Therefore, before you fill the throne I would have you resolve, *what power you will give the king* and what not.²⁰³

¹⁹⁸ (1597) Jenkins 270.

¹⁹⁹ THE CHARTERS OF THE DUCHY OF LANCASTER 279 (William Hardy ed., 1845).

²⁰⁰ Bill of Rights 1688, 1 W. & M. Sess. 2, c. 2 (emphasis added).

²⁰¹ Bill of Rights 1689: “Every person [who] ... shall profess the popish religion, or shall marry a papist shall be... incapable ... to have, use or exercise any regal power, authority or jurisdiction.”

²⁰² For further examples, see Kershaw, *supra* 129, at 36–7.

²⁰³ DEBATES, *supra* note 61, at 30 (emphasis added).

In a later debate on February 8, 1689, Sir Thomas Clarges, concerned about the status of administrative power if the Prince was to leave the Kingdom “on military occasion,” observed:

Shall not the administration [etc.] then be in the princess during that time²⁰⁴... [and] consider then whether it may not *be enacted*, that the Queen be *custos* [short for *custos regni*, meaning custodian of royal power] in her own right.²⁰⁵

Clarges’ concern in this regard was largely ignored by the Convention Parliament, but was reignited a year later when William was planning to travel to Ireland to stand alongside his army against James II. Indeed, William himself raised the issue in a speech in Parliament prior to his departure, evidencing that he himself was of the view that he did not have the power to transfer his powers to anyone else, including the Queen, as Parliament had not given him permission to transfer the powers that it had given to him.²⁰⁶

The House of Lords’ initial bill provided for the transfer of “regal government” to “the Queen” in the King’s absence.²⁰⁷ This issue tied the newly convened parliament in regal knots. At the root of the problem were the uncertainties about the nature and effects of a parliamentary distribution of power. Would, for example, all his commissions to justices of the peace lapse and disappear as his power was temporarily removed? At the forefront of the debate was Sir Robert Sawyer. He observed that “the King cannot delegate this power, because the King and Queen must not give this power away, *but by Act of Parliament ... the Crown and Royal authority are vested [by Parliament] in the King and Queen.*”²⁰⁸ In committee, William Whitlock offered a solution, and one that made it clear that regal power is conferred by Parliament:

I find that everybody believes the King intends to go into Ireland, and that it is necessary the *Administrative-power*, in his absence, be in the Queen. The objection made is the danger of the trust in the Queen; but you may trust either, or both *in the power you have conferred upon them. If Parliament have trusted them with the powers you may trust them with the administration of them ... the King may by Act of Parliament exercise regal power in Ireland, and the Queen in England, and when the King returns he returns to former Administration. If he die there is an end to the whole.*²⁰⁹

The Act for the Exercise of the Government by her Majesty during his Majesty’s Absence of 1689 provided for the solution which Whitlock described. It provided that whenever “and so often as it shall happen that his majesty shall be absent out of this Realm of England it shall and may be lawful for the Queen Majesty to exercise and administer the regal power and government of the Kingdom of England.” On William’s return, “the sole administration of the regal power and government ... shall be in his majesty only as if this Act had never been made.”²¹⁰

²⁰⁴ *Id.* at 77.

²⁰⁵ *Id.* at 78.

²⁰⁶ DEBATES, *supra* note 109, at 3.

²⁰⁷ *Id.* at 99 (per Tremaine).

²⁰⁸ *Id.* at 105 (emphasis added); *see also* Putney’s speech, *id.* at 104.

²⁰⁹ *Id.* at 114.

²¹⁰ 1 W. & M. Sess. 2, c. 2.

5. Conclusion

The assumption that the Crown's remaining prerogative powers are intrinsic to or inherent in the Crown and represent a residue of ancient kingly power, along with the assumption that such powers are part of, and constituted by, the common law, is firmly embedded within British constitutional discourse and case law. And yet, these ideas rest upon minimalist legal foundations. As of 1688, the idea that prerogative powers were constituted by the common law was a powerful, but contentious, political idea. Moreover, whether we elevate this idea or its seventeenth-century alternative— inherent kingly power as the opaque product of conquest and divinity—both were wedded to a protocorporate Crown and dignity which were inseparably dependent on dynastic succession. How, then, were the kingly powers contained within James's corporate body transferred from James to William—a transfer that unequivocally ignored the rules of hereditary succession; involved acting in ways that no parliament had acted before; and was effected by a body that was not, pursuant to the existing constitutional rules, a parliament?

To understand the Revolution as involving such a power transfer can only be maintained through recourse to a Burkean veneration of the unexplained,²¹¹ the idea of a flexible, functional, and pragmatic British constitution which offers a magical—“it just did it”—account of the transfer. But why would we embrace an unexplainable transfer, if there is an account of the dissolution and remaking of kingly power that makes plausible and persuasive legal sense?

This article offers such an account. There was no transfer of kingly power from James II to William III; a transfer cannot be made sense of according to any of the then prevailing understandings of the constitutional transfer of power between kings, nor can it be made sense of through the unformed doctrine of the *de facto* king. The events of the Revolution placed the corporate personality that James II embodied in abeyance, where it remains as a dormant corporation. And as the Crown, dignity, and prerogative powers could not be transferred, they had to be remade, and they were remade through the actions of the Convention Parliament and the Declaration and Bill of Rights. These actions created and empowered a new corporate dignity and Crown embodied in the monarch as a corporation sole, with a succession hierarchy determined by Parliament at its core. It did so by replicating much of what came before it, from titles and concepts to procedures and powers. It did not enumerate the prerogative powers of the king or specify their scope or ends. It thereby co-opted the types of powers and the ways in which they had been used prior to 1688. In this sense, one might say that the Convention Parliament legislated for continuity. But in a fundamental and conceptual sense it provided for a new constitutional beginning—our last historical first constitutional event. Prerogative powers became, as they remain today, delegated powers from a parliamentary sovereign.

²¹¹ 6 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 265 (1808) (“We ought to understand [‘this admired constitution of England’] according to our measure; and to venerate where we are not able presently to comprehend”).