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# Acquisitive prescription and fundamental rights

**Article (Accepted version)  
(Refereed)**

**Original citation:**

Duxbury, Neil (2016) Acquisitive prescription and fundamental rights. University of Toronto Law Journal. ISSN 0042-0220

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Available in LSE Research Online: May 2016

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*Various seventeenth-century parliamentarians resorted to the concept of acquisitive prescription when denouncing irresponsible use of the royal prerogative. Often, the concept was invoked to convey nothing more than that a custom had existed since time immemorial. But sometimes the concept was being used in its legal sense: to denote the acquisition of a right (as if someone with the authority to grant that right had done so) by virtue of some instance of long and uninterrupted enjoyment over a period of time. This paper considers the application of acquisitive prescription, a doctrine rooted in the medieval law of land obligations, in Stuart constitutional discourse.*

*Keywords:* fundamental rights, prescription, custom, constitutional history, royal prerogative, Magna Carta

## I Introduction

Describing rights as “fundamental” makes sense when they are protected in a written constitution. But absent such a constitution, what could a fundamental right be? If citizens are governed by a legal system under which ultimate law-making authority is accorded to the legislature, so that there are no rights constitutionally protected against legislative disturbance, is it not simply a mistake to say that, within that system, there are fundamental rights? British parliamentary sovereignty avoids this conclusion. The presumption behind the British system of sovereignty is not only that parliament has unlimited law-making authority but also that parliament will exercise its authority responsibly, which means, among other things, legislators treating certain rights as ones not to be disturbed unless there are very strong reasons – typically, public interest considerations – justifying disturbance. The main examples of these rights are the rights to life, property, bodily integrity, respect for private life, personal liberty, open justice,

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† I owe thanks to Paul Brand, Joshua Getzler, Michael Lobban, Grégoire Webber, and the journal’s referees for comments on earlier versions of this article. When quoting from old texts, I use modern orthography.

silence, legal protection, access to a judicial remedy, freedom of expression, freedom of conscience, freedom of assembly, freedom of movement, freedom of association, and freedom from arbitrary entry, search, and seizure. These rights are deemed fundamental not in the sense that they are unassailable, but rather in the sense that it would be a remarkably unwise parliament that did not consider it imperative that they never be restricted or removed without good cause.<sup>1</sup> Parliament is entitled to repeal statutes and abrogate precedents which make these rights part of the law of the land, but politicians and political parties might suffer at the ballot box if they try to persuade parliament to do so.<sup>2</sup> And although the judiciary cannot invalidate enacted laws, there is judicial dicta stretching back centuries to the effect that if parliament legislated unreasonably to remove or restrict rights of this kind, a court might take it upon itself to refuse to apply the relevant statutes or statutory provisions.<sup>3</sup> Whether or not courts ever would presume to exercise this nuclear option, judges certainly can and do rely on interpretive principles and presumptions which require parliament to use unambiguous statutory language if a right is to be disturbed.<sup>4</sup> The legislature has supreme law-making

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<sup>1</sup> So it is that one sometimes finds British jurists and constitutional theorists depicting an unwise law as legal but unconstitutional: see e.g. Robert Chambers, *A Course of Lectures on the English Law: Delivered at the University of Oxford, 1767-1773*, 2 vols, ed TM Curley (Oxford: Clarendon Press, 1986) I at 141 (“This act though not illegal, for the enactment of the supreme power is the definition of legality, was yet unconstitutional ... contrary to the principles of the English government, and to the faith implicitly given to the[] constituents [of the members of the House of Commons]”); William Paley, *Principles of Moral and Political Philosophy*, 2 vols (London: Faulder, 1791) II at 191 (“An act of parliament in England can never be unconstitutional, in the strict and proper acceptation of the term; [but] in a lower sense it may [be], viz when it militates with the spirit, or defeats the provision of other laws, made to regulate the form of government”); WS Holdsworth, *A History of English Law*, 3<sup>rd</sup> ed, 12 vols (London: Methuen, 1922-48) II (1923) at 441-2 (“[F]undamental ... mean[ing] the supremacy of a law which parliament could change”); IV (1924) at 186-7.

<sup>2</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131 (Lord Hoffmann) (“The constraints upon ... parliament are ultimately political, not legal.... Parliament must squarely confront what it is doing and accept the political cost”).

<sup>3</sup> See e.g. *Bonham’s Case* (1610) 8 Co Rep 107a at 118a (Coke, CJ); *Day v Savadge* (1614) Hob 85 at 87 (Hobart, CJ); *R & R v Knollys* [1694] Skin 517 at 526-7 (Holt, CJ); *City of London v Wood* (1702) 12 Mod 669 at 687 (Holt, CJ); and, in modern times, *R (Jackson and others) v A-G* [2005] UKHL 56 at [102] (Lord Steyn); *AXA Insurance v Lord Advocate* [2011] UKSC 46 at [51] (Lord Steyn) (“It is not entirely unthinkable that a government ... may seek to use it[s] majority] to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise”).

<sup>4</sup> See e.g. *ex p Simms*, supra note 2 at 131 (Lord Hoffmann) (“Fundamental rights cannot be overridden by general or ambiguous words.... In the absence of express language or necessary implication to the contrary, the courts ... presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document”); also *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [45] (Lord Hoffmann).

authority, in short, but abuse of this authority – scant regard for basic rights – could be politically costly and might encounter considerable resistance.

This article is concerned with one particular argument for speaking of rights as fundamental in the absence of a written constitution. The argument, expressed skeletally, is that a supreme law-maker – the argument was devised as a response to royal absolutism – should presume against disturbing unwritten constitutional arrangements, conventions, privileges, and liberties which people have enjoyed continuously throughout a prescription period. Although the argument has not gone unnoticed by historians, it appears to have engaged constitutional lawyers barely at all.<sup>5</sup> This could be because they find the argument unconvincing and insignificant, though it is more likely that they have simply not noted its difference from another, better-known argument concerning the antiquity of the common law constitution.

The argument from prescription is, in fact, distinctive and intriguing. To categorize a right as fundamental because of prescription is not to presume that the right is set down in a text, or that it would be self-evidently contrary to reason to treat the right as anything other than fundamental; the argument is not even that a fundamental right is an expression of tried reason which has stood the test of time. Rather, it is that some rights are fundamental because the people (or their political representatives) have availed themselves of those rights since a time legally identified as that before which the lawful origin of a right cannot be proved, so that lawful origin has to be inferred. Those who advanced this argument – mainly Whig historians in the second half of the seventeenth century – had hardly anything to say about why the existence of a right since a specific date should make that right fundamental. Nor were those making the argument always attentive to the distinction between prescription and custom: sometimes, their point was not that a right is to be treated as fundamental because it has existed throughout a prescription period, but that the persistence of a custom throughout the period made that custom part of the common law. (This conflation of prescription and custom probably explains why the argument from prescription tends not to be distinguished from claims regarding antiquity of the common law constitution.) It is interesting, nevertheless, to reflect – speculative though the reflections sometimes turn out to be – on those instances in which seventeenth

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<sup>5</sup> There are occasional cameo appearances: e.g. Joseph Jaconelli, “Do Constitutional Conventions Bind?” (2005) 64 *Camb LJ* 149 at 162 (“The idea that constitutional conventions could acquire force of law through a process similar to prescription has, at present, no basis in legal authority”).

century constitutional writers appealed to prescription as a concept in its own right, and on why they should have considered it significant that particular rights had (as they saw it) been prescriptively acquired.

In the next section I outline the common law of prescription, not only so that readers not familiar with it might understand it, but also so that readers might come to recognize that certain Stuart constitutional writers turned a refined doctrine of land obligations into a far less refined argument concerning fundamental rights. In section III, I consider the various ways in which prescription was invoked in seventeenth century constitutional discourse before concluding, in section IV, with some reflections on what was an unconvincing but not altogether unenlightening attempt at conceptual transplant.

## II *Prescription*

Most legal systems have rules or conventions whereby, after a period of time, somebody either is stripped of something they had or obtains something they did not have. The case of stripping is called extinctive prescription (or limitation): a right, or more accurately a right of action, prescribes (ceases to exist) because a specific period of time has passed during which someone holding that right of action failed to exercise it.<sup>6</sup> The case of obtaining is called acquisitive prescription: a right prescribes (comes into being) because a specific period of time has passed during which somebody who did not hold that right acted - and was never challenged for acting - as if they did hold it. This article is primarily concerned with prescription as a mode of acquisition.

Acquisitive prescription appears to have been invented to remedy the deficiencies of another concept. According to the Roman law doctrine of *usucapio*, a transferee who in good faith purchased, inherited, or accepted as a gift property which the transferor did not own, would acquire *dominium* over that property by virtue of

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<sup>6</sup> The lapse of a limitation period bars an action but does not necessarily extinguish the right. My failure to act within the period may debar me from bringing an action to recover my property from you, but if, within the limitation period, you have transferred the property to someone else, and if my right to the property is *in rem*, a new limitation period starts on transfer - so that my right survives against the transferee even though I no longer have an action against you. Even if my right to the property is *in personam*, it is still more accurate to think of the passing of the limitation period as bringing an end to my action rather than the right. If, for example, I failed to seek to recover the property within the period but you subsequently returned it to me anyway, you would have no right to reclaim that property, because limitation extinguishes an action to enforce a right to the property rather than the right itself. See Barry Nicholas, *An Introduction to Roman Law*, rev ed (Oxford: Oxford UP, 1975) at 120.

having been in continuous possession of it for a period of time (two years for land, one year for moveables).<sup>7</sup> The most significant limitation of *usucapio* was that it did not apply to possession of provincial lands. In the late second century AD, the praetors supplemented *usucapio* by introducing a defence of *longi temporis praescriptio*, whereby a person with an original entitlement to land, provincial land included, was barred from asserting his rights to that land if the defendant had held it without interruption for ten years (if the parties lived in the same district) or twenty years (if they did not).<sup>8</sup> The defence was originally thought of as extinctive: the defendant who successfully entered this plea saw a claimant's right brought to an end owing to the claimant having failed to exercise his right within the relevant period. But by the fourth century AD, the standard explanation of *longi temporis praescriptio* seems to be not that the claimant lost but that the defendant acquired a right owing to his continuous possession having gone unchallenged.<sup>9</sup>

#### A COMMON LAW ACQUISITIVE PRESCRIPTION

This conception of prescription, whereby a right in land is acquired by virtue of uninterrupted use or enjoyment over a long period of time, makes its way into English law during the high middle ages. As in Roman law, the rules on acquisition have a connection to rules governing extinction. The relationship between the two sets of rules is not easily summarized. Medieval real actions for the recovery of possession of land (seisin) were subject to limitation by past events. In the late twelfth century, a claimant seeking to recover had to trace a right of seisin from ancestors who had held that right since – but not before – the accession of Henry I (5 August 1100). Around 1200, the reference point for establishing rightful seisin was changed to 1 December 1135 (the day of Henry I's death). The Provisions of Merton 1236 changed the date again to the accession of Henry II (19 December 1154), and the first Statute of Westminster (1275) changed it yet again to the year of the coronation of Richard I (3 September 1189).<sup>10</sup>

This last statute provides that:

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<sup>7</sup> Justinian, Inst, 2. 6 pr. (The one-year rule rarely applied, because in Roman law the unauthorized transfer of the personal possessions of another nearly always constituted theft.)

<sup>8</sup> C 7. 31. 1 pr; C 7. 33. 1 pr.

<sup>9</sup> See HF Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law*, 3<sup>rd</sup> ed (Cambridge: Cambridge UP, 1972) at 505-6.

<sup>10</sup> Richard was in France on 6 July 1189 when his father (Henry II) died. Although Richard was entitled to the throne from that date, he did not accede to it until 3 September, the day of his coronation:

in making the count of the descent [from the last ancestor in seisin] in a writ of right, no one shall presume to trace the seisin of his ancestor beyond seisin at the time of King Richard, uncle to [Henry III,] the father of [Edward I,] the king that now is.<sup>11</sup>

These rules regarding recovery of seisin were extinctive rather than acquisitive. A claimant's inability to bring an action within the relevant limitation period either barred his remedy or raised the presumption that he (or an ancestor) had transferred lawful title to the land to the person (or an ancestor of the person) from whom he had hoped to recover. Bracton, who was most likely writing in the 1220s and 1230s, observed that an accession date, besides limiting the period of recovery, also fixed the point of legal memory: a claimant had to "specify a certain time and a certain king of whose time he talks" if he was to recover,<sup>12</sup> and if he could not make his case within the relevant time period, he lost his right "for lack of proof."<sup>13</sup> Limiting an action for recovery to time since a coronation date militated against claimants bringing actions which depended on accounts of accounts: he who vouched for the claimant would be testifying that he saw for himself that the claimant's ancestor had rightful seisin, not that he had known someone (no longer alive) who had said that the claimant's ancestor had rightful seisin. Proof meant proof within living memory, and a coronation date established what exceeded living memory.

The consequence for a claimant who could not bring evidence of rightful seisin since the relevant coronation date was clear enough. The more interesting questions came from the other direction. If someone possessed or enjoyed a plot of land during the prescription period without having been granted a right to do so - perhaps expecting to have to contend with an action for recovery of seisin but that action never having materialized, or having foundered - what, if anything, would he acquire? If he

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*Handbook of British Chronology*, 2<sup>nd</sup> ed F Maurice Powicke & EB Fryde (London: Offices of the Royal Historical Society, 1961) at 33.

<sup>11</sup> Statute of Westminster I 1275 (3 Edw 1), c 39 ("en conte de decente en le bref de dreit qe nul ne seit oy por demaunder la seisine son auncestre de plus lointein seisine qe del tens le rey Richard, oncle le pierre le Roy qe ore est").

<sup>12</sup> Henry de Bracton, *De legibus et consuetudinibus Angliae* (London: Tottellum, 1569 [first printing]) at f 373b. [Bracton, *De legibus*.]

<sup>13</sup> *Ibid* at 438. See also Henry Rolle, *Un abridgment des plusieurs cases et resolutions del common ley* (London: Crooke, 1668) at 269 ("[W]hen by the statute of limitation the seisin in a writ of right was limited to the time of R 1 so that nobody could rely on a more ancient seisin, ... though a man might prove to the contrary whereof the prescription was made ... this should not destroy the prescription if the proof was of a thing before the said time of limitation, ... for it would be hard to put juries to enquire of things so ancient"); also 268 ("a man cannot take advantage of an allegation of a basis for an action or other matter of fact occurring before time of memory, because it cannot be tried").

acquired anything, did acquisition depend on his having enjoyed whatever was acquired since a date fixed in a limitation statute?

Consider, first, the question regarding the date. Bracton had accepted that easements and other incorporeal rights – to use a neighbour’s pathway, to fish in his stream, to mine his land, to take from his trees, and the like – could be acquired “by long use, with peaceful possession, continuous and uninterrupted, ... provided that there has been no force, no stealth, and no permission (*nec vi nec clam nec precario*)” involved in the acquisition.<sup>14</sup> But just how much time he thought had to pass before long use was established is not clear.<sup>15</sup> That it was established because it could be shown to extend to a time beyond the memory of anyone alive is a proposition which he seems to have entertained,<sup>16</sup> but he appears never to have maintained that a coronation date limiting recovery of seisin was to be used to settle whether a right had been prescriptively acquired. A similar observation might be made with regard to judges of the very early year book period. They certainly ruled that the prescriptive acquisition of an incorporeal right depended on nobody alive being able to provide testimony contradicting long and continuous user,<sup>17</sup> and on the claimant’s assertions of user not being reliant on testimony “from time whereof there is no memory” (*du temps dount il ny ad memorie*).<sup>18</sup> But when settling whether incorporeal rights had been prescriptively acquired, these judges treated time beyond memory as a factual question (whether anyone alive can provide relevant testimony) rather than as presumption (that nobody alive can testify to events before a specific date). Like Bracton, they appear to have considered statutory coronation dates relevant only to extinctive prescription.

More significant, for our purposes, is the question of what was acquired through prescription. It would be wrong, Pollock and Maitland observed, to say that a claimant’s

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<sup>14</sup> Bracton, *De legibus*, 223. The statement can be traced to D 43. 19. 1 (Ulpian).

<sup>15</sup> See John W Salmond, *Essays in Jurisprudence and Legal History* (London: Stevens & Haynes, 1891) at 107.

<sup>16</sup> See Bracton, *De legibus*, 230b (“longum tempus et longum usum ... qui excedit memoriam hominum”), where Bracton is relying on D 43. 20. 3. 4 (Pomponius) (“Drawing off of water which goes back beyond memory [*cuius origo memoriam excessit*] is held as if constituted by right”). Bracton’s understanding of long user seems to have been based on *usucapio*. But Roman law had prohibited acquisition of incorporeal rights through *usucapio*: see D 8. 1. 14 pr; D 41. 3. 25 (Licinius Rufinus) (“Without possession, there cannot be *usucapio*”).

<sup>17</sup> See e.g. (1306) YB 205-6; (1305) YB 370-4. Acquisition would be stymied by evidence of interruption: see e.g. (1304) YB 264 (Bereford J) (“they have laid an interruption to your continuance, to which ... you must answer...”).

<sup>18</sup> The expression appears regularly in the year books: from the reigns of Edw. I & Edw. II see e.g. (1305) YB 45 (Bereford J); (1305) YB 431; (1306) YB 206-7; (1308) YB 29 (“du temps dount etc.”); (1308-09) YB 129. It has various equivalents in Roman law: see FC von Savigny, *System des heutigen Römischen Rechts*, 8 vols (Berlin: Veit, 1840-49) IV (1841) at 481.



right to recover expired because a prescription period had run its course, for the period has a fixed beginning but no fixed end, and so a claimant would be entitled to seek out testimony supporting his case for “some new and defeasible title”.<sup>19</sup> But if the claimant could not find such testimony within living memory – a possibility which diminishes with the passing of time – the defendant’s enjoyment of the land would remain undisturbed. If it was impossible for the claimant to bring a fresh writ of right based on new testimony, his right to recover would be at an end, and his loss would be to the defendant’s gain. But what, exactly, did the defendant gain? Bracton wavered between presuming the defendant to have acquired a right binding against the entire world<sup>20</sup> and presuming the right to be inchoate – to be a right which protected the defendant’s enjoyment of the property but which might still be defeated by writ and judgment.<sup>21</sup> His preferred position, John Salmond thought, was that a right acquired through long and continuous enjoyment is to be presumed inchoate and defeasible.<sup>22</sup> English law came to accept the opposite position: that prescriptively acquired rights vest title in the (incorporeal) thing acquired as if legal title to that thing has been expressly granted. The point is not that Bracton made the wrong call, or that he dithered, but that he seemed sensitive to the difficulty of explaining what sort of right vests by prescription. The seventeenth century writers to whom we turn in section III seemed unaware of this difficulty. Through prescription – this appears to have been the sum of their legal thinking – title can be acquired at common law. The significance of this proposition as applied to constitutional matters would remain obscure.

Medieval lawyers writing after Bracton appreciated that there was some ambiguity about exactly how title was prescriptively acquired at common law. Thomas Littleton, writing late in the year book period, identified two conceptions of acquisitive prescription. There was the phenomenon identifiable in the earliest year books: “title of prescription ... at the common law before any statute of limitation of writs ... where[by] a man ... shall say, that ... [a] custom has been used from time whereof ... when [the] a matter is pleaded ... no man then alive had heard any proof of the contrary; nor had no

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<sup>19</sup> Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2<sup>nd</sup> ed, 2 vols (Cambridge: Cambridge University Press, 1968 [1898]) II at 141.

<sup>20</sup> See Bracton, *De legibus*, 229b; also Pollock and Maitland, *supra* note 19 at 142.

<sup>21</sup> See Bracton, *De legibus*, 230b; also *ibid* at 53 (long and uninterrupted use protected so that the user cannot be defeated without writ and judgment (*ita quod taliter utens sine brevi et iudicio eici non poterit*)).

<sup>22</sup> Salmond, *supra* note 15 at 110.

knowledge to the contrary.”<sup>23</sup> But there was also “a title of prescription” understood according to the statutory limitation on recovery of seisin (which, for Littleton, ran “from the time of king Richard the First after the Conquest, as is given by the statute of Westminster the First”<sup>24</sup>), whereby a failed action for recovery was presumed to vest lawful title in the person in possession of the land.

Littleton refers to legal reasoning about testimony within memory and the statute on recovery as “diverse opinions”<sup>25</sup> – things that people “have said”<sup>26</sup> – about prescription. Although the two versions of prescription had evolved as discrete bodies of law – the first concerning the acquisition of incorporeal rights and the second limiting rights to recover land – he did not treat them thus. That he should not have done so is understandable since, certainly by the early 1300s (and possibly earlier), attorneys and judges were quite regularly using the limitation date established in the first Statute of Westminster analogously so as to fix the outer limit of the prescription period for the acquisition of easements and other incorporeal hereditaments.<sup>27</sup> When considering acquisitive prescription claims, judges gradually stopped interpreting “time out of mind” literally, as meaning “beyond the memory of anyone still alive”, and instead took it to mean “before the beginning of the reign of Richard I”.<sup>28</sup>

So the year 1189, which in 1275 had been set to limit the period within which a person could seek a remedy, came to be used to affirm a right: if there was evidence of long and uninterrupted enjoyment of land dating back to 1189 then, since matters before that date were legally beyond memory and could not be proved, it would be presumed that the person asserting enjoyment (typically, an easement) was using the land pursuant to a right recognized by the holder of the freehold before 1189.<sup>29</sup>

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<sup>23</sup> Thomas Littleton, *Tenures*, ed E Wambaugh (Washington, DC: Byrne & Co., 1903) at 81-2 (§ 170). Littleton’s *Tenures* was first published in 1481, though it was written in the 1450s.

<sup>24</sup> *Ibid* at 81.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* at 81, 82.

<sup>27</sup> See e.g. *De La More v Thwing* (1308-09) YB 176 at 178; *The King v Wickham Breaux* (1313) YB 179, 180; also *Bryant v Foot* (1866-7) LR 2 QB 161 at 180 (Cockburn, CJ). It is only around 1300 that the association of a statutory limitation date with the limit of legal memory starts to become particularly evident, Brand observes, though he uncovers one case from 1247 in which a limitation statute is used to fix the outer limit of the prescription period for the acquisition of an easement: Paul Brand, “Lawyers’ Time in England in the later Middle Ages”, in *Time in the Medieval World*, ed C Humphrey & WM Ormrod (York: York Medieval Press, 2001) 73-104 at 103.

<sup>28</sup> See AWB Simpson, *A History of the Land Law* (Oxford: Clarendon Press, 1986) at 109-10.

<sup>29</sup> Whether the presumption was that the freeholder must actually have granted this right, as opposed to having accepted it as a customary right, is not clear: not until the seventeenth century does there appear to be any evidence of judges directing jurors to presume the existence of a lost grant. See *James v Trollop* (1685) Skin 239; and 2 Show KB 439.

Most seventeenth-century constitutional writers who invoked prescription treated Richard I's coronation as the date fixing the acquisitive prescription period (some referred to prescription without mentioning a date). Common lawyers, by contrast, had, by the seventeenth century, become somewhat disenchanted with 1189. Edward Coke reports a case from 1606 in which it was proved that the land right being claimed had not existed since 1189, though it had existed for over three centuries. It would be absurd, Lord Ellesmere thought, to rule that the right therefore could not be prescriptively acquired. "[A]ll shall be presumed to be done, which might make the ancient appropriation good.... God forbid that ancient grants and acts should be drawn in question" because continuous enjoyment over three centuries ("after the death of all the parties, and after so many successions of ages") fell short of what was "necessary to the perfection of the thing".<sup>30</sup>

This was not rebellion. The court, led by Ellesmere, reached its decision "upon consideration of precedents".<sup>31</sup> The use of 1189 as an extinctive prescription date ended in 1540, when Henry VIII introduced a limitation statute requiring that testimony in support of a writ of right be brought in the sixty years before commencement of suit.<sup>32</sup> It would have been an obvious step for the courts thereafter to stop referring to 1189 altogether and to apply the sixty-year limitation rule in cases concerning the prescriptive acquisition of easements and other incorporeal rights as well. But - to the bewilderment of Blackstone and others - this never happened.<sup>33</sup> Nevertheless, from as early as the second half of the fourteenth century, judges had sometimes been circumventing evidentiary problems arising out of the commitment to 1189 by instructing juries that they should presume that long user could be traced back to that year if there was evidence of continuous use for the period of actual living memory.<sup>34</sup> Ellesmere had espied one reason for the drift towards this presumption: generations of uninterrupted

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<sup>30</sup> *Bedle v Beard* (1606) 12 Co Rep 4 at 5.

<sup>31</sup> *Ibid.*

<sup>32</sup> 32 Hen 8, c 2.

<sup>33</sup> See Blackstone, 2 *Commentaries* 31 ("since ... th[e] period (in a writ of right) has been reduced to sixty years, it seems unaccountable, that the date of legal prescription or memory should still continue to be reckoned from an era so very antiquated"); also *Angus v Dalton* (1877) 3 QBD 85 at 104 (Cockburn, CJ) ("[T]he judges ... presumed that the right claimed had existed from time of legal memory, that is to say, from the time of Richard I. This convenient rule having been established, the judges seem not to have thought it worthwhile, when the statute of 31 [*sic*] Hen 8, c 2 was passed, by which in a writ of right the time was limited to sixty years, to apply, by an analogous use of that statute, the time of prescription established by it to actions involving rights to incorporeal hereditaments").

<sup>34</sup> See Salmond, *supra* note 15 at 115-7; also Alan Wharam, "The 1189 Rule: Fact, Fiction or Fraud?" (1972) 1 *Anglo-Am L Rev* 262 at 269.

enjoyment of appurtenant land could be found to be insufficient to establish an easement by prescription if that enjoyment would have been impossible in 1189. But there was another reason: judges were sometimes ruling that a right *had* been prescriptively acquired because there was no evidence of enjoyment being interrupted since 1189, notwithstanding that the mode of enjoyment would have been impossible in the twelfth century!<sup>35</sup> A strict rule that incorporeal rights prescribed if nobody demonstrated interruption to their enjoyment since 1189 produced absurdities, and so the courts gradually began to favour the presumption that a right had existed since 1189, and had therefore prescribed, if uninterrupted enjoyment could be proved within living memory.<sup>36</sup> Seventeenth century constitutional writers never adopted this presumption.

## B PRESCRIPTION AND CUSTOM

In English common law, the coronation of Richard I still divides time beyond and time within legal memory: an incorporeal right cannot be prescriptively acquired (though it is

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<sup>35</sup> See e.g. *The Case of the King's Prerogative in Saltpetre* (1606) 12 Co Rep 12, where Coke treats digging for saltpetre for the manufacture of gunpowder as an immemorial custom of the realm, even though gunpowder production in Britain appears not to have started until around the mid-fourteenth century. There are later cases in the same vein: e.g. *Fitch v Rawling* (1795) 2 H Bl 393, where a customary right to play lawful games, sports and pastimes in a particular place at all seasonable times of the year was held to justify the playing of cricket, even though cricket was unknown during the reign of Richard I and would have been unlawful for some time thereafter.

<sup>36</sup> Prescription was codified by parliament in the 1830s. In the mid-eighteenth century, judges began to direct juries that they should presume enjoyment since 1189 if there was evidence of continuous user for at least twenty years: the first case in which this presumption was used appears to be *Lewis v Price* (1761) 2 Wms Saund 172 (see esp at 175a). The courts, in introducing this presumption, were applying by analogy the period beyond which various possessory actions such as ejectment were barred under the Limitation Act 1623 (21 Jac 1, c 16). Since the presumption of enjoyment could be, and quite often was, rebutted by evidence that a right being claimed could not have existed in 1189, judges started to resort to another presumption: that evidence of continuous user for more than 20 years raised the presumption that the prescriptively acquired right had been granted to someone *since* 1189 but that evidence of the grant had been lost. The courts were unclear whether this presumption was conclusive or rebuttable. In 1799, the court of common pleas held that a claimant could not challenge a grant presumed in favour of the defendant after 23 years' continuous user: *Holcroft v Heel* (1799) 1 Bos & Pull 400. Four years later, the king's bench ruled that there were circumstances in which such a presumption could be displaced: *Campbell v Wilson* (1803) 3 East 294. Two decades later still, Abbot CJ, in the same court, remarked that it is correct to instruct jurors that 20 years' uninterrupted user should (so long as "there is nothing in the usage to contravene the public policy" or that is "against any known rule or principle of law") be treated as "cogent evidence" that the practice has existed since time immemorial: *R v Jolliffe* (1823) 2 B & C 54 at 59. Parliament resolved the uncertainty in 1832. Under s 2 of the Prescription Act 1832, evidence of 20 years' user establishes a strong presumption that, at some point earlier, a (now lost) grant of the prescriptively acquired right was made. The presumption is practically unassailable because it can only be rebutted by proof that the grant could not have been made in the time before the prescription period but after 1189. In any event, once user has run for 40 years, the prescriptively acquired right becomes absolute.

almost inconceivable that anyone would nowadays hope to acquire such a right through the common law) if there is evidence countering presumption of enjoyment stretching back to 1189. The date is also used to define immemorial custom. But immemorial custom is also sometimes described as prescriptive custom. From their inception, the year books contain numerous instances of title being established by prescription because a local custom has existed from time immemorial.<sup>37</sup> Local “custom ... used by title of prescription”, Littleton observed, is custom “from time out of mind.”<sup>38</sup>

If a customary right is a prescriptively acquired right, what distinguishes custom and prescription? Coke, commenting on Littleton, drew a distinction which was already present in the law reports.<sup>39</sup> He conceded that “both ... customs and prescriptions” involve the same “two ... incidents ... viz. possession or usage [which “must be long, continual, and peacable”], and time.”<sup>40</sup> But “in the common law” prescription “is a title which is ... for the most part applied to persons”, whereas “a custom, which is local, is alleged in no person, but laid within some manor or other place.”<sup>41</sup> To determine that title has vested by prescription is to say that a particular person has acquired a right as if that right had been legally granted to him. But to determine that a local custom is legally binding, because it is immemorial and has therefore prescribed, is to establish law applicable to and for the benefit of everyone within the community where that custom operates. The distinction is significant for our purposes, because prescriptive arguments invoked by seventeenth century constitutional writers are sometimes arguments about prescribed customs and at other times about how the king ought not to suspend or dispense with certain rights enjoyed by his subjects because his subjects had acquired those rights by prescription. It is to these arguments that we turn next.

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<sup>37</sup> See e.g. (1292) YB 136; (1294) YB 512; (1304) YB 262; *Coventry v Grauntpie* (1308-09) YB 71 at 73; *Noyers v Colwick* (1312) YB 141 at 142-3.

<sup>38</sup> Littleton, *supra* note 23 at 81. In the seventeenth century, Finch explained immemorial common law in essentially the same way: see Henry Finch, *Law or a Discourse Thereof*, 1759 ed (New York: Kelley, 1969 [1627]) at 77.

<sup>39</sup> See e.g. *Rolles v Mason* (1608) 1 Brownl 132 at 133 (“a prescription goes to one man, and a custom to many”); *Harrison v Rooke* (1625) Palm 420 at 420 (“there is a difference between prescription which goes to the person [*va al person*], & custom, which is local”). For later expressions of the same point, see *Putter v North* (1673) 1 Vent 383 at 386; Samuel Carter, *Lex Custumaria, or, A Treatise of Copyhold Estates* (London: Walthoe, 1696) at 37; *Cock v Vivian* (1734) Kel W 203 at 206; Blackstone, 2 *Commentaries* 263; *Padwick v Knight* (1852) 7 Ex 854 at 857-8; *Mercer v Denne* [1904] 2 Ch 534 at 556; Thomas H Carson, *Prescription and Custom* (London: Sweet & Maxwell, 1907) at 5, 112-3.

<sup>40</sup> Coke, 1 *Commentary upon Littleton* 113b.

<sup>41</sup> *Ibid* at 113a-113b. Prescription sometimes went to entities as well as to individuals. For example, medieval English law did not entirely discount the possibility of corporations prescriptively acquiring title to profitable franchises: see Paul Brand, *The Making of the Common Law* (London: Hambledon Press, 1992) at 403-4, 427-34.

### III *Prescribed fundamentals?*

Modern English constitutional lawyers tend to see the seventeenth century as time of struggle between parliament and the courts, with nobody doubting that law-making authority was eventually confirmed as resting in parliament but with scholars diverging over what the higher judiciary thought it could do if parliament were to legislate against common right and reason. The primary legal power struggle in the seventeenth century was not between parliament and the courts, however, but between parliament and the crown. Although, after the Restoration settlement of 1660, Charles II was less dismissive of parliament than his father had been, events of the following decade – particularly the king’s attempt to extend religious liberties to Catholics and his opposition to efforts to exclude his Catholic brother from succeeding to the throne – reinvigorated parliament’s concerns about monarchs ignoring its will and abrogating its laws. When James II, Charles’s brother, did accede to the throne in 1685, many of his actions – the use of prerogative to dispense with and suspend laws without parliament’s consent, the removal of freeholders’ property rights without due process of law, the efforts to rig parliamentary elections, and so on – made these fears well founded. It is possible to detect, in seventeenth century constitutional discourse, five prescription-based arguments which are essentially pleas to the monarch that he recognize limits to his prerogative.

#### A A PRESCRIBED PARLIAMENT?

“The king has a superior, namely God”, Bracton reputedly remarked; “[a]lso, the law by which he was made king.”<sup>42</sup> In his *Sovereign Power of Parliaments and Kingdomes* (1643), the barrister and polemicist, William Prynne, seized on this remark as support for the argument that “law and parliament” are “above the king” (whose actions “are and must be subject” to the courts).<sup>43</sup> His argument hinted at prescription. Since there

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<sup>42</sup> Bracton, *De Legibus*, 34. (This statement appears not to have been part of Bracton’s original manuscript. It may have been added by Bracton as an afterthought or it could be the work of an anonymous interpolator: see Brian Tierney, “Bracton on Government” (1963) 38 *Speculum* 296 at 310-16.)

<sup>43</sup> William Prynne, *The Sovereign Power of Parliaments and Kingdomes* (London: Sparke, 1643) at 34, and also (for the reference to Bracton) 5. On how a seventeenth century constitutionalist – and Bracton – could assert without contradiction that a king was subject to God *and* law, see Howard Nenner, *By*

were “laws and kingdoms before [there were] kings”, parliament had acquired ultimate law-making authority (“[l]egislative power is more in the parliament than in the king, if not wholly in it”) as if by long and uninterrupted enjoyment.<sup>44</sup> Not only was the Long Parliament within its rights to declare in March 1642, in the absence of Charles I, that its ordinances would be binding laws, Prynne insisted, but the king had *not* been within his rights to absent himself: “[t]he king is bound by all means possible to be present at the parliament” when it is summoned because this has been the convention since “[w]hen parliaments were first begun”.<sup>45</sup>

Prynne’s commitment to this argument was short-lived. The king was not above the law, he maintained in 1648, but neither was parliament sovereign. Rather, law-making power was shared between them. Although he had adopted a new argument, his reasoning was still rooted in prescription. “This right of theirs [parliament and the king] is confirmed by prescription and custom from the very first beginning of parliaments in this kingdom till this present”.<sup>46</sup> The new argument superficially resembled another one: that legislative power was entrusted to the king, lords, and commons as distinct but co-ordinated powers. This argument – which would become Whig orthodoxy<sup>47</sup> – was advanced by a clergyman, Charles Herle, after Charles I rejected parliament’s Nineteen Propositions in June 1642. “England’s is not a simply subordinative, and absolute, but a coordinative, and mixed monarchy”, Herle claimed, “compounded of 3 co-ordinate estates, a king and two houses of parliament”.<sup>48</sup> As with Prynne in 1643, Herle alluded to prescription:

what is meant by ... fundamental laws of this kingdom ... is that original frame of this coordinate government of the 3 estates in parliament consented to, and contrived by the people in its first constitution, and since ... confirmed by ... constant custom time (as we say) out of mind, wherein the rule is [that] ... it cannot be disproved from taking

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*Colour of Law: Legal Culture and Constitutional Politics in England, 1660-1689* (Chicago: University of Chicago Press, 1977) at 55-7.

<sup>44</sup> Prynne, *supra* note 43 at 49.

<sup>45</sup> *Ibid* at 43.

<sup>46</sup> William Prynne, *A Plea for the Lords* (London: Spark, 1648) at 3.

<sup>47</sup> See e.g. W[illiam] D[isney], *Nil dictum quod non dictum prius, or, the Case of the Government of England Established by Law* (London: printed by AB, 1681) at 25-37.

<sup>48</sup> Charles Herle, *A Fuller Answer to a Treatise Written by Dr Ferne* (London: Bartlet, 1642) at 3. Herle was not the first to argue thus. Fortescue made essentially the same claim in the fifteenth century: see John Fortescue (d 1479), “In Praise of the Laws of England” (1<sup>st</sup> publ 1468x71), in Fortescue, *On the Laws and Governance of England*, tr SB Chrimes, ed S Lockwood (Cambridge: Cambridge UP, 1997) 1-80 at 27-8.

place upon all occasions, therefore it is to be presumed to have continued from the beginning, ... even before ... record.<sup>49</sup>

But Herle and Prynne were not of the same mind. Certainly neither accepted royal absolutism, both asserted that parliament shared legislative power with the king, and both sought to make their assertions credible by arguing that parliament had existed since time immemorial. Yet their positions differed in one crucial respect. For Herle, sovereignty lay in the lords and commons with the king because of the antiquity of all three estates. Those who regarded the king's authority to be subordinate only to divine law considered this argument easily derailed, for the establishment of the commons as an independent estate was within living memory: the king's tenured subjects were certainly being summoned to parliament in 1100, at the beginning of Henry I's reign, one royalist writer observed, but the commons was not recognized as a representative body of the kingdom until the mid-thirteenth century.<sup>50</sup> Prynne was a curiosity, for he insisted on the antiquity of parliament but – as the title of his 1648 essay made clear – he was specifically making a plea for the lords.<sup>51</sup> The lords had prescriptively-acquired rights which entitled them to legislate in co-ordination with the king, he argued, but on the matter of the commons he was in agreement with those who insisted on the king's divine right: evidence of the commons' long and uninterrupted enjoyment of law-making powers equal to those of the king simply did not exist.

After the Restoration, Charles II appointed Prynne as keeper of the records in the Tower of London. It was in this capacity that Prynne uncovered bundles of old writs of summons and other parliamentary records which he believed refuted the possibility of an immemorial commons.<sup>52</sup> As early as 1660 he was claiming that his investigations “made good to all the world, by records, precedents, judgements in parliament, law, reason, and divinity too, that the whole House of Commons, in its greatest fullness, freedom and power, never had any lawful right or authority” to make laws in co-ordination with the king and the lords.<sup>53</sup> “[I]t indisputably appears, that

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<sup>49</sup> Herle, *supra* note 48 at 8.

<sup>50</sup> See Robert Filmer, *Free-Holders [sic] Grand Inquest, Touching our Sovereign Lord the King and His Parliament* (London: s.n., 1680 [1648]) at 16-18. (That Filmer was the author is disputed. Others have attributed the tract to Charles I's attorney general, Robert Holbourne.)

<sup>51</sup> See Corinne C Weston & Janelle R Greenberg, *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England* (Cambridge: Cambridge UP, 1981) at 124-148, 318-325.

<sup>52</sup> For details of the writs, see William Prynne, *Brevia Parliamentaria Rediviva* (London: Thomas, 1662) at 4-135.

<sup>53</sup> William Prynne, *The Second part of a Brief Register and Survey of the Several Kinds and Forms of Parliamentary Writs* (London: Childe & Parry, 1660) at 178-9.



parliaments, or general councils, are coeval with the kingdom itself”, Blackstone would observe a century later, but it “has been a matter of great dispute among our learned antiquarians ... whether the commons were summoned at all; or, if summoned, at what period they began to form a distinct assembly.”<sup>54</sup> Blackstone was intent on staying clear of this dispute.<sup>55</sup> But seventeenth century Whig historians, who wanted to establish that the commons as well as the lords shared legislative power with the king in parliament, had to contend with the charge that prescription proved that the commons could not be an equally-ranked, genuinely co-ordinate third estate.

Their principal response to this charge was that prescription in fact established rather than rebutted the case for an immemorial commons. The Revolution confirmed that the commons was subordinate to neither the lords nor the king, James Tyrrell asserted, and the pity was that anyone should have presumed otherwise – for “proof of the constant claim the commons have made before the king and lords in parliament ... is by prescription”.<sup>56</sup> If it is accepted that “time of memory in a prescription was from the time of King Richard I”, and that “time out of mind ... extends beyond” that date, then the uninterrupted existence of the commons as a distinct estate can be traced, he insisted, not only throughout the prescription period but beyond it.<sup>57</sup> For in Anglo-Saxon times, “the commons of England were a constituent part of the *Witenagemot*, or common council of the nation, ... and if it does not appear that they were deprived of that right by the Norman’s entrance ... I think we may very well conclude that things continued in the same state ... after [the] Conquest as they did before.”<sup>58</sup> If this conclusion was correct, “the commons [could] ... make as strong a claim by prescription for themselves and their ancestors ... as the king could make for himself and his ancestors”.<sup>59</sup>

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<sup>54</sup> Blackstone, 1 *Commentaries* 145.

<sup>55</sup> Ibid (“... it is not my intention here to enter into controversies of this sort”).

<sup>56</sup> James Tyrrell, *The General History of England, both Ecclesiastical and Civil*, 3 vols (London: Rogers, 1704) III, pt 1 at 213 (advertisement).

<sup>57</sup> James Tyrrell, *Bibliotheca Politica: Or, an Enquiry into the Ancient Constitution of the English Government*, 2<sup>nd</sup> ed (London: Darby, 1727 [1<sup>st</sup> ed 1694]) at 423, 425. The first edition is composed of thirteen “dialogues” which Tyrrell wrote between 1692 and 1694, a fourteenth dialogue being added to the second edition when it first appeared in 1701. Tyrrell, who died in 1718, presents the case for an immemorial commons mainly in the seventh and eighth dialogues.

<sup>58</sup> Ibid at 390. Essentially the same point is made *ibid* at 266.

<sup>59</sup> Ibid at 420. See also George Lawson (d 1678), *Politica Sacra et Civilis* (London: printed for JS, 1689 [1660]) at 157-8 (“by commons, some may understand only the plebeian rank, yet ... we find in that House men of as good birth, estates, and as eminent virtues, as many of the lords be.... [T]he truth is, if the whole assembly be considered as one representative, they are all peers, ... barons by tenure and ancient prescription since the time of William the Elder [*sc* William II], or by writ, or by patent”); Roger

Tyrrell had elaborated on Herle's claim that the commons had existed as an institution since time immemorial, but he had not rendered it more convincing. By the seventeenth century, we have seen, common lawyers were no longer fully committed to the idea that it must be possible to trace enjoyment back to 1189 if a right to that enjoyment was to be prescriptively acquired; proof of enjoyment within actual living memory was sometimes taken to suffice. But Tyrrell interpreted prescription strictly: for a right to prescribe, the activity or institution which formed the basis of that right had to be in continuous evidence since the coronation of Richard I. The commons had acquired the right to be recognized as a co-ordinate third estate, he believed, because it had existed since - indeed, existed long before - that date.

Tyrrell was by no means a lone voice. "Our government by a king and estates of parliament," Thomas Hunt asserted, "is as ancient as anything [that] can be remembered.... [I]t is established, and for ages and immemorial time has thus continued; a long succession of kings have recognized it to be such".<sup>60</sup> But had there really been *estates* of parliament - king, lords, and *commons* - since time immemorial? Not until the thirteenth century did parliament - a term which only becomes a description for large assemblies in the 1230s - begin to meet regularly and in the same place; only then did it start to become something more than an elite gathering of bishops, earls, and barons, and it would be at least another century before the representation of counties, towns, and cities began to resemble a separate parliamentary estate.<sup>61</sup> "[T]ruly, legally and properly understood either now or anciently," one royalist observed in 1687, "the word Estate cannot bear ... any other ... interpretation ... than a party ... of men elected by a community".<sup>62</sup> It was wishful thinking to insist that there was, within the assemblies of post-Conquest England (let alone the pre-Conquest witan), a commons equating to a party of men in parliament.<sup>63</sup>

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Acherley, *The Britannic Constitution: Or, the Fundamental Form of Government in Britain* (London: Bettesworth, 1727) at 116-7 ("from the old times, whereof there are no memorials to the contrary, the exercise of this form of government ['consisting of the three estates of king, lords, and commons'] ... have been ... in all times used and practiced.... The memorials are unquestionable, that ... William ... the Conqueror, assembled the *commune regni conciliun*; by which ... parliament, or the two estates of lords and commons, were always meant and understood").

<sup>60</sup> Thomas Hunt, *Mr Hunt's Postscript for Rectifying Some Mistakes in Some of the Inferiour Clergy* (London: printed for the author, 1682) at 2.

<sup>61</sup> See JR Maddicott, *The Origins of the English Parliament, 924-1327* (Oxford: Oxford UP, 2010) at 157, 161-4, 226-8.

<sup>62</sup> Fabian Philipps, *The Established Government of England, Vindicated from all Popular and Republican Principles and Mistakes* (London: printed for the author, 1687) at 656.

<sup>63</sup> "To apply 'prescription' in this very technical sense, to the claims of the House of Commons [*sc*, 'that all such rights must rest upon prescription, and must ... have existed from the time of Richard I'], would

## B A RIGHT TO REPRESENTATION?

Whig historians appeared to have invoked prescription to make a case not for recognizing particular rights as fundamental but rather for accepting – as integral to the unwritten constitution – the legislative authority of the commons within parliament. The case was easy to dismiss if it depended entirely on the assertion that the commons as an institution must have existed adamantine since 1189. But the Whigs had another string to their bow. The commons might not have emerged as a representative body of the kingdom until the mid-thirteenth century, but freemen had long been represented at parliamentary – and, before the time of parliament, conciliar – assemblies. Was there not – leaving aside the question of the provenance and status of the commons as an estate – a prescribed right to representation? Prynne thought not, but summarized the argument neatly: “the true original title and right of all our ancient cities [and] boroughs, electing and sending burgesses and citizens to our parliaments, is prescription time out of mind, long before the Conquest, it being a privilege they actually and of right enjoyed in Edward the Confessor’s time, or before, and exercised ever since.”<sup>64</sup>

The argument, Prynne observed, could be traced to an Elizabethan antiquarian and justice of the peace, William Lambarde, who thought that even as early as the tenth century, “in every quarter of the realm, a great many ... boroughs” were “send[ing] burgesses to the parliament”.<sup>65</sup> Just as “written authorities ... confirm our assertion of this continuance of this manner of parliament”, Lambarde claimed, “so is there also unwritten law, or prescription, that doth no less infallibly uphold the same.”<sup>66</sup> But his elaboration of the claim is marked by understandable diffidence. The Anglo-Saxon common council “is ... so ancient, and so long since decayed,” he conceded, “that it cannot be showed that [the burgesses] have been of any reputation at any time since the Conquest, and much less that they have obtained ... privilege”.<sup>67</sup>

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strip them of all privilege. The House cannot be shown to have existed, as a separate branch of the legislature, at that remote period.” *Cassidy v Stuart* (1841) 2 Man & G 437 at 467 n 52 (Tindal, CJ).

<sup>64</sup> Prynne, supra note 52 at 230.

<sup>65</sup> William Lambarde, *Archeion, or, A Discourse upon the High Courts of Justice in England* (London: Seile, 1635) at 257. (The manuscript of *Archeion* was completed by 1591, and may well have been completed earlier: see Paul L Ward, “William Lambarde’s Collections on Chancery” (1953) 7 Harv Lib Bull 271 at 274. Lambarde (sometimes spelled “Lambard”) died in 1601.)

<sup>66</sup> Lambarde, supra note 65 at 257.

<sup>67</sup> *Ibid* at 258.

On what was Lambarde's thinking based? He was convinced – as was Coke – that the “prescribed” custom of the better appointed Anglo-Saxon boroughs (“of ancient demesne”) was to opt not to send burgesses to council, and that from this it was reasonable to infer that council would have been willing to admit representatives from less privileged boroughs (“other places”), and that these boroughs *would* have opted to send representatives (would have adopted “a contrary usage of the self-same thing”).<sup>68</sup> But Lambarde was careful not to present the inference as proof that the “commonality of the realm”<sup>69</sup> had a prescriptively acquired right to representation in parliament.

Various seventeenth-century parliamentarians were more forthright. “[T]he [Anglo-Saxon] assemblies” which “the king convened”, William Dugdale asserted, “include[d] the representatives of the people, or commons”, with some English counties and boroughs “having ever since prescribed to be privileged from sending burgesses to parliament” while “other places did send burgesses”; “it must ... follow”, accordingly, “that there were parliaments before” the Conquest.<sup>70</sup> Roger Twysden wrote similarly of how “it cannot be concluded” that, “because sometimes the lords are only remembered to have met”, the “commons were not parties to what passed in th[e] great [Anglo-Saxon] assemblies”; for if it is accepted that “no custom can begin since 1 R 1”, it follows that “the sending [of] ... burgesses to parliament” – which began “before that king's time” – must be a “common custom of the realm”.<sup>71</sup> Tyrrell, agreeing with Lambarde (“the right to sit in parliament” enjoyed by the commonality had existed “time out of mind, that is, by prescription”<sup>72</sup>), sought to make Lambarde's argument more convincing by drawing attention to legislation from Richard II's reign which, according to Tyrrell, established that an immemorial right to parliamentary representation by “singular persons and commonalities” was accepted by parliament in

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<sup>68</sup> See *ibid* at 258-9. For Coke, see “To the Reader” [c 1612], in *The Ninth Part of the Reports of Sir Edward Coke, Knt, in thirteen parts complete*, 7 vols, ed G Wilson (London: Rivington & Sons, 1777) V at v-\*v (“It is evident that there were tenants in ancient demesne before the conquests.... [T]hese tenants ... had ... privileges ... and ... before and in the Conqueror's time ... were not to be returned burgesses to serve in parliament.... [T]herefore there were parliaments unto which ... burgesses were summoned both before and in the reign of the Conqueror”).

<sup>69</sup> Lambarde, *supra* note 65 at 262.

<sup>70</sup> William Dugdale, *Origines Juridicales* (London: Warren, 1666) at 15.

<sup>71</sup> Roger Twysden, *Certain Considerations upon the Government of England*, ed JM Kemble (London: Camden Society, 1849 [c 1648]) at 126. Cf Nathaniel Bacon's (anti-royalist) *An Historical Discourse of the Laws and Government of England* (London: Walbanke, 1647) at 278 (“[I]n the time of Ri I, ... the truth is, that ... although ... it was ordinary for kings to make a show of summoning parliaments, ... properly they were but parliamentary meetings of ... lords, clergy, and others, as the king saw most convenient to drive on his own design”).

<sup>72</sup> Tyrrell, *supra* note 57 at 434.

the 1380s.<sup>73</sup> The legislation in fact established something else: that some individuals had been summoned, and some communities summoned to send representatives, to parliament, since “old times” (*dauncienete*), and that there were likely to be financial penalties imposed on those who were summoned but did not comply.<sup>74</sup>

The historians who followed in Lambarde’s wake were nevertheless trying to provide evidence, rather than simply arguing that it was reasonable to infer, that burgesses had been returned to council since time immemorial. Their main discovery, from the earliest chancery rolls, was that the borough of St Albans had been sending burgesses to great council meetings as early as 1199 – surely enough, some thought, to make the case that the right to representation was affirmed by prescription.<sup>75</sup> Nobody mined this particular seam more tirelessly than did William Petyt in his highly influential essay in support of parliamentary sovereignty, *The Antient Right of the Commons of England Asserted* (1680). “[T]he claim and prescription of the borough of St Albans ... to send two burgesses to all parliaments” served to “admit and confirm the general prescription, that there were boroughs” which “were always accustomed to send two burgesses to parliament in all former ages,” Petyt insisted, “not only in the time of E 1 but ... in King John’s time”.<sup>76</sup> Only “in vain” could one “oppose or contradict their [i.e., the commons’] just and ancient right” to representation.<sup>77</sup>

One English republican wrote in the early 1680s of how he had been “inclined to believe that ... our ... commonality had not formally assembled in parliament” until the late-thirteenth century, but that after reading “the learned discourses lately published by Mr Petit [*sic*]” he was “fully convinced that it was otherwise”.<sup>78</sup> Royalist and high Tory writers, by contrast, were completely unmoved. That a king tolerated

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<sup>73</sup> Ibid.

<sup>74</sup> 5 Rich 2, s 2, c 4 (“the king ... command[s] ... that all singular persons and commonalities which ... have the summons of parliament, shall come ... as they are bound to do, and [have] been accustomed within the realm of England of old times. And if any ... come not at the said summons ... he shall be amerced ...”). Tyrrell mistakenly refers to c 5.

<sup>75</sup> See e.g. Tyrrell, *supra* note 56 at III, pt 1, 63-4, 67-8, 189, 199-200; Robert Atkyns, *The Power, Jurisdiction and Priviledge of Parliament; and the Antiquity of the House of Commons Asserted* (London: Goodwin, 1689) at 24.

<sup>76</sup> William Petyt, *The Antient Right of the Commons of England Asserted, or, A Discourse Proving by Records and the Best Historians that the Commons of England were ever an Essential Part of Parliament* (London: Smith, 1680) at 7, 10, 9 (first argument).

<sup>77</sup> Ibid at 12 (first argument), and see also *ibid* at 12 (preface) (“it is apparent and past all contradiction that the commons in th[e] Saxon and Norman] ages were an essential part of the legislative power”).

<sup>78</sup> Henry Neville, *Plato Redivivus*, 2<sup>nd</sup> ed (London: Dew, 1681 [1<sup>st</sup> ed 1680]) at 109-10. (Neville also acknowledges William Atwood, to whom we come in a moment.)

parliament's petitions did not equate to a right to parliamentary representation.<sup>79</sup> Even if it were correct to speak of a right to representation, furthermore, prescriptive acquisition of that right depended on evidence of uninterrupted enjoyment for a very long period of time. Tenants-in-chief, holding land directly from the king, could be summoned to parliament in the early thirteenth century, Henry Spelman had concluded in his *Archaeologus* (1626), but burgesses were not tenured at that time – this much was evident, he thought, from the wording of clause 14 of the first Magna Carta (“we will cause to be summoned ... earls and greater barons ...”).<sup>80</sup> The right of burgesses to sit in parliament must, accordingly, have been established after 1189. For the royalist, Robert Brady, there was no compelling evidence of commons representation before 1265 (49 Hen 3), and it was obvious that even after this date there were times when the king omitted to summon knights and burgesses to parliament.<sup>81</sup> William Prynne and Thomas Hobbes were of essentially the same view.<sup>82</sup> Petyt produced a long, unpublished response to Brady in which he purported to show that the “the authorities prove by a joint prescription” not only the “several liberties” of the lords but also “the ancient right of ... sending ... knights, citizens and burgesses” to be “representatives of the commons”.<sup>83</sup> But he was simply advancing more laboriously a

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<sup>79</sup> See George Hickes, *The Harmony of Divinity and Law* (London: printed by RE, 1684) at 32-3; also John Brydall, *The Absurdity of that New Devised State-Principle* (London: printed for TD, 1681) at 11 (“the making of laws is a peculiar and incommunicable privilege of the [king’s] supreme power; and the office of the two houses ... is only consultive [*sic*] or preparative”).

<sup>80</sup> “[N]ulli olim ad iudicia & consilia administranda personaliter accersendi erant, nisi qui proximi essent a Rege, ipsique arctioris fidei, & homagii vinculo coniuncti, hoc est, immediati vassalli sui, *Barones* nempe cuiuscunq; generis qui de ipso tenere in Capite, ut partim videas in ... Charta libertatum Regis Iohannis”. (“[N]one was personally summoned to give judgment and counsel apart from those nearest to the king, who were bound to him by the strictest ties of fealty and homage, that is, his immediate vassals, barons of whatever kind who held him in chief, as seen in ... King John’s charter of liberties”). Henry Spelman, *Archaeologus* (London: Beale, 1626) at 79-80. That Spelman has in mind c 14 of the 1215 Magna Carta becomes clear *ibid* at 86. Spelman died in 1641. An expanded version of *Archaeologus* was published under the supervision of William Dugdale as *Glossarium Archaiologicum* (London: Warren, 1664); the passage which I quote from the 1626 edition is at 67.

<sup>81</sup> See Robert Brady, *A Full and Clear Answer to a Book, Written by William Petit Esq* (London: Lowndes, 1681) at 225-6; also the more detailed account in Robert Brady, *An Introduction to the Old English History* (London: Lowndes, 1684) at 144-9.

<sup>82</sup> See Prynne, *supra* note 52 at 226 (“although some of these boroughs ... were summoned ... most of them ... had a long discontinuance”), 231 (“[t]he first writs or memorials ... extant on record, for electing knights, citizens and burgesses to come to our parliaments, are those in ... 49 H 3”); T[homas] H[obbes], *The History of the Civil Wars of England*, 2<sup>nd</sup> ed (London: s.n., 1679 [written 1668]) at 104-05 (“The knights of shires and burgesses were never called to parliament, for aught that I know, till the beginning of the reign of Edward I, or the latter end of the reign of Henry III, ... I do not find [the commons] were part of the king’s council at all, ... though it cannot be denied ... a king may ask their advice”).

<sup>83</sup> William Petyt, *The Antient Right of the Commons of England Reasserted, in Reply to a Book Written by Robert Brady*, unpublished manuscript (n.d.), Petyt collection, Inner Temple Library, London, MS 512/L at ff 80, 68v, 80, 74v. (Petyt treated 1189 as the limit of legal memory: *ibid* at 103-103v.)

case which he and others had made already.<sup>84</sup> A prescribed right is one which has been acquired notwithstanding a lack of documentary legal evidence that the right was ever created. It is difficult to resist the conclusion that Petyt and other Whig historians argued from prescription because they simply had no hard evidence supporting their case for a right of the commonality to representation.

In 1681 there appeared an essay by Petyt's disciple, William Atwood, which made much the same argument, using essentially the same material, as is to be found in Petyt's *Antient Right of the Commons of England Asserted*. But in the closing pages of his essay Atwood distinguished himself by stepping back momentarily from the detail and acknowledging that the case for the immemorial sovereignty of parliament could never be properly established. While "no sober man will deny" that in the eleventh century William I accepted that the lords had "a right of prescription to come to the upper house", it seems "strange", Atwood thought, that the "royal concession" should have been extended to the nobility but not to the laity.<sup>85</sup> After all, "proprietary of land" - holding land either from barons or directly from the king - were naturally "interested in" and wanted to "have a share in the legislature", and so "if they ... had no right to come in person, or be represented in parliament," this would have been "derogatory to the prerogative."<sup>86</sup> But would William, a ruler by conquest, really have been so concerned to make concessions to his tenants? Atwood had no answer. We could "suppose that a king ... take[s] it all to himself ... [to] make laws by a council of his own choosing, or without any [assistance]", he observed, or we might "suppose ... that *time* ... establish[ed] this great council", whereby "the lords [would] come of right in their own persons, and ... the commons should send representatives of their free choice."<sup>87</sup> While Atwood knew which supposition he preferred, he could not be sure that his preferred supposition was the correct one. Lambarde's diffidence, it seemed, had always been waiting in the wings.

Atwood's concession might have amounted to little, but at least it showed him to be reflective. The Whig tracts were mantra-like in asserting the commons' antiquity, predictable in their recounting of the history of St Albans, eager to present Lambarde as inspirational prophet rather than cautious antiquarian. To what end all this industry

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<sup>84</sup> Petyt summarized his case in a short pamphlet: *The Pillars of Parliament Struck at by a Cambridge Doctor* [sc, Brady] (London: Simmons, 1681).

<sup>85</sup> William Atwood, *Jus Anglorum ab Antiquo* (London: Berry, 1681) at 43.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid* at 42. Emphasis in original.

nobody cared to point out. What Petyt conspicuously failed to do – what all his like-minded contemporaries failed to do – was explain why demonstrating parliamentary representation to be a prescriptively acquired right should have mattered. Possibly the Whig writers considered it to go without saying that long and uninterrupted enjoyment is a mark of quality in that which is enjoyed, that evidence of the value of a right might therefore be drawn from the fact that it has existed undisturbed (and without falling into disuse) for a very long time, and that any king who sought to rule with the assent of the people would consider himself bound, or certainly absent good reason would consider himself bound, not to restrict or remove any such right. If this way of thinking explained the Whigs’ attachment to prescription, they were essentially at one with various eminent common lawyers who had lauded immemorial custom as tested reason.<sup>88</sup> But it is not obvious that the Whigs’ case for prescribed representation actually was attributable to this way of thinking. The significance of the right to representation having been prescriptively acquired – leaving aside the matter of whether it really had been so acquired – was taken to be self evident. It is difficult to imagine any of the Whig writers rejecting that the proposition that a prescribed right ought not to be disturbed because the reasons for accepting that right have stood the test of time. But for none of them was this proposition a pillar of their argument for a prescribed right to representation.

## C PARLIAMENTARY PRIVILEGES

In the seventeenth century, those who connected parliament and prescription were not always arguing that parliament itself, or that a right to representation in parliament, had existed since time immemorial. Sometimes, they were concerned with what parliament was entitled to do. Members of the Jacobean commons turned to prescription to make a case regarding their institutional rights. The commons’ “apology” to James I in 1604

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<sup>88</sup> See e.g. Fortescue, *supra* note 48 at 26 (“[T]he realm has been continuously regulated by the same customs as is now, customs which, if they had not been the best, ... kings would have changed ...”); Thomas Hedley, speech to the commons (28 June 1610) in *Proceedings of Parliament 1610. Vol. 2: House of Commons*, ed E Reed Foster (New Haven: Yale UP, 1966) 170-197 at 175 (“[T]he essential form of the common law ... is time, ... the trier of truth, author of all human wisdom, learning and knowledge ...”); John Davies, “A Discourse of Law and Lawyers” (1615), in *The Works in Verse and Prose, Including Hitherto Unpublished Manuscripts, of Sir John Davies*, 3 vols, ed AB Grosart (Blackburn: Tiplady, 1869-76) II, 243-357 at 252 (“But a custom doth never become a law ... until it hath been tried and approved time out of mind; during all which time there did thereby arise no inconvenience, for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a law”).



for his having been given “misinformation”<sup>89</sup> regarding the nature of parliamentary privileges was really a complaint that this foreign king was ignorant of the fact that “the very fundamental rights of our House”<sup>90</sup> were not granted by the crown but rather “our right and due inheritance”,<sup>91</sup> having been “enjoyed” by “the whole commons ... and [ou]r ancestors from time immemorable”.<sup>92</sup> When the House of Commons reiterated this complaint in the “protestation” of 1621 (“the liberties, franchises, privileges and jurisdictions of parliament are the ancient and undoubted birthright and inheritance of the subjects of England”<sup>93</sup>), members spoke in parliament of their privileges having been acquired by prescription.<sup>94</sup>

The commons could only have acquired its privileges prescriptively if it had existed since time immemorial, and so this argument would have been inconsequential to anyone who considered it anachronistic to speak of the commons having existed before 1189. But anyone who did believe in an immemorial commons could put the argument to good use. Charles II had been wrong to oppose the Exclusion Bill, Daniel Defoe claimed in 1689, because the commons’ right to pass laws governing succession to the throne was one of its prescriptively acquired privileges.<sup>95</sup> Writing around the same time, Robert Atkyns, once a member the Cavalier parliament and a vigorous opponent of the Stuart monarchy, invoked prescription to advance a yet more provocative argument. Like others, he presumed the commons to be “as ancient as the nation itself”, able “by law” and “title” to “prescribe and claim a share in all parliamentary powers and privileges” in conjunction with the lords.<sup>96</sup> But he went further. If it is accepted as “plain” that “every legal prerogative must be so by

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<sup>89</sup> “The Form of Apology and Satisfaction” (20 June 1604) in *Select Statutes and other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*, 4<sup>th</sup> ed GW Prothero (Oxford: Clarendon Press, 1913) 286-293 at 286.

<sup>90</sup> Ibid at 287.

<sup>91</sup> Ibid at 288.

<sup>92</sup> Ibid at 287.

<sup>93</sup> “Protestation of the House of Commons” (18 Dec 1621) in *ibid* at 313.

<sup>94</sup> See *Proceedings and Debates of the House of Commons, in 1620 and 1621*, 2 vols (Oxford: Clarendon Press, 1766) II at 332-3 (Christopher Brooke) (“[W]e have our privileges and liberties by prescription, time out [of] mind, and not ... as granted from kings to us”), 335 (Dudley Digges) (“our privileges are our right and inheritance, born with us... [W]e hold our privileges by custom or prescription”), 338 (William Noy).

<sup>95</sup> [Daniel Defoe], *The Advantages of the Present Settlement, and the Great Danger of a Relapse* (London: Chiswell, 1689) at 20 (To presume it to be not “in the power of the parliament to settle the succession of the crown ... is destructive of all right of conquest or prescription”).

<sup>96</sup> Atkyns, *supra* note 75 at 34.

prescription”,<sup>97</sup> not only were the commons’ privileges not modern – not granted “within time of memory ... in a legal understanding” – but, just as significantly, the royal power to dispense with laws *was* modern: the origin of the prerogative was traceable to the mid-thirteenth century.<sup>98</sup> “[D]ispensing with laws”, which is “but of latter times ... cannot be a prerogative of the king, for that must ever be by prescription”.<sup>99</sup> For Atkyns, parliament could assert certain rights as prescriptively acquired privileges but, on the basis that the dispensing power had not been prescriptively acquired, it could also assert a right (one which the king’s bench had pointedly refused to recognize in 1686<sup>100</sup>) to see its legislation enforcing religious conformity prevail against the will of James II.<sup>101</sup>

It would be easy, and not entirely wide of the mark, to characterize the prescription-based arguments concerning parliament, representation, and privileges as illustrative of the well-known thesis that with the seventeenth-century came the doctrine, or myth, that the English constitution is, as with all common law, to be understood as immemorial custom.<sup>102</sup> Some of the writers who turned to prescription – Tyrrell, Dugdale, Atwood, and Petyt (as well as the outlier, Prynne) – figure prominently among the cast regularly cited in support of this thesis. These writers, when they attributed parliament’s status or particular parliamentary rights to prescription, were sometimes using that word to describe the immemorial (prescriptive) nature of custom; this custom of the realm is custom by prescription, they would be saying, by which they meant that it was custom since time before memory and therefore a feature of the ancient constitution.<sup>103</sup>

But this is not the only way in which the concept of prescription was being used. Seventeenth century constitutional writers were not wholly insensitive to the distinction – attributed to Coke in section II(B), above – between custom, which is of the community, and prescription, which goes to the person. The idea of the common law being founded on immemorial custom, it was recognized, might be distinguished from

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<sup>97</sup> Robert Atkyns, *An Enquiry into the Power of Dispensing with Penal Statutes* (London: Goodwin, 1689) at 22; see also Atkyns, supra note 75 at 17.

<sup>98</sup> Atkyns, supra note 75 at 23.

<sup>99</sup> Ibid at 50.

<sup>100</sup> *Godden v Hales* (1686) 11 St Tr 1165.

<sup>101</sup> See Atkyns, supra note 97 at 36-7.

<sup>102</sup> See JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century (A Reissue with a Retrospect)* (Cambridge: Cambridge UP, 1987).

<sup>103</sup> See also [Samuel Masters], *The Case of Allegiance in our Present Circumstances Consider’d* (London: Chiswell, 1689) at 9 (“a tacit agreement between the king and subjects to observe ... common usages and practices, as by an immemorial prescription are become the common-law of our government”).

the idea that individuals and entities can acquire title to something – as if that thing had been expressly granted to them – by virtue of long and uninterrupted enjoyment. Constitutional writers never made this distinction explicitly, and sometimes their arguments ran against the drawing of it – sending burgesses to parliament, for example, was considered equally to be a prescribed customary convention *and* an entitlement granted by ancient kings and acquired by the people through prescription. Nevertheless, some of the seventeenth century constitutionalists’ arguments from prescription are specifically about the rights of the people or their representatives rather than the prescribed customs of the community. This brings us to two further pleas for responsible use of the prerogative.

## D MAGNA CARTA

In the seventeenth century, as in other periods, Magna Carta was sometimes described as having confirmed ancient liberties rather than having granted any new ones.<sup>104</sup> The first Magna Carta was issued in 1215 – within legal memory. But if it declared existing rather than introduced new laws, if the laws which it declared were created before 1189, and if the rights protected by those laws were not only declared in Magna Carta but had been regularly confirmed since 1215, had the king’s subjects acquired those rights by prescription? For Coke, writing around 1611, Magna Carta was certainly to be understood a declaration of immemorial, repeatedly reaffirmed legal rights:

King John ... made the two great Charters [Magna Carta and the 1217 Forest Charter], which are yet extant to this day.... [T]hose laws and liberties which the nobility of the realm did there seek to confirm are partly in the charter of King Henry, and partly taken out of the ancient laws of King Edward ... and [are] confirmed by the great charter made by 9 Hen 3 [the 1225 Magna Carta and its accompanying Forest Charter], which for their excellency have been confirmed and commanded to be put in execution by the wisdom of thirty several parliaments and above.<sup>105</sup>

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<sup>104</sup> See e.g. Hedley, *supra* note 88 at 190 (“I do not take Magna Charta to be a new grant or statute, but a restoring or confirming of the ancient laws and liberties of the kingdom, which by the Conquest before had been much impeached or obscured”); “Reflections by the Lrd Cheife Justice Hale [d 1676] on Mr Hobbes His Dialogue of the Lawe” (n.d.) (1921) 37 LQR 286 at 300 (“[T]he great Charter and the Charter of the Forest ... were not so much new grants of new liberties but restitutions of those very liberties by which the primitive and radical Constitution of the English government were of right belonging to them [*sc*, the king’s subjects]”); Dugdale, *supra* note 70 at 17.

<sup>105</sup> “To the Reader” (c 1611), in *The Eighth Part of the Reports of Sir Edward Coke, Knt, in thirteen parts complete*, 7 vols, ed G Wilson (Dublin: Moore, 1793) IV at vi-vii (unnumbered pages).

But Coke pointedly did not characterize rights protected by the laws of Edward the Confessor and in Henry I's coronation charter (and confirmed by Magna Carta) as rights which had prescribed. Some seventeenth century writers may well have accepted such a characterization – perhaps this would have been true of the pamphleteer who, in 1682, objected to the king using his prerogative to strip the City of London Corporation of its privileges (as Charles II did the following year) because they had been granted by statute, affirmed by Magna Carta, and prescriptively acquired.<sup>106</sup> But this is a matter on which one can easily end up out on a limb. While it seems “likely” that some seventeenth century statesmen were thinking about the content of Magna Carta “in terms of prescription”, Corinne Weston has observed, there is no solid evidence that anyone actually did.<sup>107</sup> Those of this period who had an eye for detail might even have read the penultimate clause of the 12 October 1297 confirmation (25 Edw I) – “the ... charter be firmly and inviolably observed in all and each of its articles, even if some of the articles contained in the ... charter have perhaps not been hitherto observed” – as having made prescription irrelevant to the status of charter rights. In 1628, the spokesman for the commons, John Glanville, in a speech to both houses before the passage of the Petition of Right, came perhaps as close as did any seventeenth century figure to reading Magna Carta as a set of prescriptively-acquired rights when he insisted that “Magna Carta”, by “declar[ing] and confirm[ing] the ancient common laws of the liberties of England”, vested “an inherent right and interest of liberty and freedom in the subjects of this realm as their birthright and inheritance, descendable to their heirs and posterity”, and that therefore “there is no trust in the king's sovereign power or prerogative royal to enable him to dispense with th[ose laws]”.<sup>108</sup>

If anyone in the seventeenth century was thinking of Magna Carta as a collection of prescribed rights, they were probably wise to keep it to themselves. The doctrine of prescription demands that the long and uninterrupted enjoyment which is necessary to acquisition be strictly construed: if I can show that I and my predecessors in title have

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<sup>106</sup> Anon, *The Rights and Priviledges of the City of London* (London: Baldwin, 1682). The argument was not original: see e.g. anon, “A Reading on Magna Carta [1297], c 9”, in *John Spelman's Reading on Quo Warranto delivered in Gray's Inn (Lent 1519)*, ed JH Baker (London: Selden Society, 1997) at 12-14. In the 1215 Magna Carta, the privileges are confirmed in c 13 (“the city of London is to have all its ancient liberties and free customs, by both land and water”).

<sup>107</sup> See Corinne C Weston, “England: Ancient Constitution and Common Law”, in *The Cambridge History of Political Thought*, ed JH Burns (Cambridge: Cambridge UP, 1991) 374-411 at 379.

<sup>108</sup> John Glanville, speech to both houses (28 May 1628) in *Commons Debates 1628. Volume III: 21 April - 27 May 1628*, ed RC Johnson et al (New Haven: Yale UP, 1977) 560-571 at 565-6. See also Weston, *supra* note 107 at 379-80.

regularly (and without force, stealth, and permission) used a path over my neighbour's land for the relevant prescription period, I acquire by prescription the right to use that path - and that right alone. If the laws made by an eleventh century king protected the subject's rights in a particular way, then a claim that those rights had descended to, and so had been prescriptively acquired by, citizens in the seventeenth century depended on the protection of those laws not only having continued for many centuries but those laws having continued without alteration to their content. Anyone intent on making Magna Carta the basis for such a claim would have been attempting a very difficult manoeuvre.

While such a manoeuvre would have been difficult, it was not necessarily impossible. Glanville, when he spoke as he did in 1628, presumably had in mind not Magna Carta as a whole but rather its clauses setting out general rights and procedures. In the early 1600s, some of the more general rights enumerated in Magna Carta - such as that freemen were entitled not be arrested and imprisoned without due process of law (clause 39) and not to see access to justice sold, denied, or delayed (clause 40) - perhaps could have been described as ancient rights affirmed in 1215 and reaffirmed regularly ever since. Some early-seventeenth century common lawyers, we saw in section II(A), were presuming that rights which could be acquired by prescription had existed since 1189, and therefore had prescribed, if they could be shown to have persisted without disturbance within actual living memory. Had Glanville or any other parliamentarian of this period adopted the same presumption - there is no evidence that any of them did - they might have been able to make a convincing case (should they have wanted to make the case) for treating particular clauses of Magna Carta as expressions of prescribed rights. Without this presumption, however, even a prescriptive reading of Magna Carta limited to its more general clauses was a tricky proposition, because the rights set forth in those clauses would be incapable of prescribing if there was evidence that they could not have prevailed without interruption since the coronation of Richard I.

Certainly it would not have been difficult, in the seventeenth century, to make the case that the rights affirmed in some of Magna Carta's more general clauses could not have existed continuously since 1189. Consider, for example, clause 12, which stipulates that a monarch cannot levy feudal aid from his subjects "save by the common

counsel of our kingdom”. Such a stipulation would not have seemed bizarre in 1189,<sup>109</sup> and the principle that consent is a prerequisite to taxation was certainly reaffirmed by parliament at various junctures from the late thirteenth century onwards – including, eventually, in both the Petition of Right and the Declaration of Rights.<sup>110</sup> But reaffirmations did not deter various monarchs from imposing taxes without parliamentary approval (as Charles I did in the years before the Petition of Right and in the decade when he ruled without parliament).<sup>111</sup> It would have required a considerable stretch of the imagination to conclude, in the seventeenth century, that the people had within living memory, let alone since 1189, continuously enjoyed the right not to be taxed by the king without parliament’s consent.

It would have been downright foolish to conclude that, by the seventeenth century, Magna Carta in its entirety had prescribed. Much of Magna Carta – clauses concerning the removal of alien knights and cross-bowmen from the realm, the returning of Welsh hostages, the delaying of decisions on deforestation until the king’s return from a crusade, and so on – had fallen into desuetude by 1600. The content of the charter, furthermore, had hardly remained unaltered. It was revised within a year of its first issue – the 1216 Magna Carta omits three of the original clauses, including the provision determining how it was to be enforced (clause 61) – and its text underwent numerous other emendations before the definitive version was issued in February 1225. As John Selden remarked in 1610, to presume legal constancy as between the eleventh and seventeenth centuries was – irrespective of whether Magna Carta was a bridge between the present and an immemorial past – straightforwardly to ignore reality: while some laws had “been carefully enough kept up from the time of the Saxons, and perhaps from an earlier date”, the “times on this side the Norman’s entrance are so full of new laws” that “to refer the original of our English laws to th[e] Conquest” can only be “a huge mistake”.<sup>112</sup> Yet for William Atwood, writing in 1690, constancy *was* reality: “[t]he Confessor’s law ... as the noblest transcript of the common law” had been

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<sup>109</sup> By the time of the Saladin Tithe of 1188, kings were expected (though not obliged) to seek approval to levy national taxes: see Sydney N Mitchell, *Studies in Taxation under John and Henry III* (New Haven: Yale UP, 1914) at 6.

<sup>110</sup> See Petition of Right 1628, c 1 (“your subjects have inherited this freedom, that they should not be compelled to contribute to any tax ... or other like charge not set by common consent, in parliament”); Declaration of Rights 1689, art 4 (“levying money for or to the use of the crown by pretence of prerogative without grant of parliament ... is illegal”).

<sup>111</sup> See Lois G Schworer, *The Declaration of Rights, 1689* (Baltimore: Johns Hopkins UP, 1981) at 66-9.

<sup>112</sup> John Selden, *Jani Anglorum facies altera* (London: Snodham, 1610) at 7-8 (unnumbered pages); Eng tr R Westcot: *The reverse or back-face of the English Janus* (London: Basset, 1682) at 4 (unnumbered pages).

“received by W[illiam] I and continued downwards by the coronation oaths required to this very day”.<sup>113</sup> This was no less anachronistic than claiming that there was a Saxon parliament which was much the same institution as the Stuart parliament. Even if Magna Carta and the coronation oaths from Edward II (crowned 1307) onwards were evidence of the continuity of the Confessor’s laws, there was no reason to think that the rights which were eventually enacted in 1689 were essentially the same as those which were legally recognized in the eleventh century.<sup>114</sup>

Perhaps what is most perplexing about the idea that one might interpret Magna Carta prescriptively (as well as the idea that the right to parliamentary representation was prescriptively acquired) is the presumption that the king’s subjects could claim a right as *fundamental* because they could show that they enjoyed that right by prescription. If a king believed that he ruled by divine sanction, and that he was accountable only to God, why should he have cared that a right had existed since the time of Edward the Confessor? What was to stop a modern king nullifying rights granted by an ancient one? Before concluding with a general assessment of the arguments connecting fundamental rights with prescription, let us consider what appears to be the one instance in which the seventeenth century literature challenging royal absolutism yields a distinct – which is not to say compelling – answer to this question.

## E PRESCRIBED RESIDUAL RIGHTS

A few years after the Revolution, George Savile, the Marquess of Halifax, wrote of how the sovereignty of parliament made it difficult to speak convincingly of English fundamental rights: “no feather has been more blown about in the world than this word *Fundamental*... There is no fundamental, for the parliament may judge as they please”, even if “their act is ill.”<sup>115</sup> The difficulty with treating Magna Carta as a collection of constitutional fundamentals, he thought, was that it “is very hard to be proved” that it “was for the most part declaratory of the principal grounds of the fundamental laws of

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<sup>113</sup> William Atwood, *The Fundamental Constitution of the English Government* (London: printed by JD, 1690) at 73, 103. In a similar vein, see William Higden, *A View of the English Constitution* (London: Keble, 1709) at 25-6.

<sup>114</sup> See Weston, *supra* note 107 at 380-3.

<sup>115</sup> Marquess of Halifax (1633-1695), “Political Thoughts and Reflections” (c 1693) in *Halifax: Complete Works*, ed JP Kenyon (Harmondsworth: Penguin, 1969) 193-212 at 193, 198. Emphasis in original.

England” as opposed to simply a grant of liberties by a medieval king.<sup>116</sup> If Magna Carta was indeed a collection of liberties granted by a king (or, as Halifax preferred, by a parliament), then it cannot set forth fundamental rights, for “a subsequent parliament” must have “the right of repealing” it just as that “preceding parliament” had “the right of making it.”<sup>117</sup>

Halifax appreciated that this reasoning cannot entirely undermine the notion of fundamental rights, because just such a right appears to be enjoyed by the sovereign legislator. Yet although “the king’s prerogative” is absolute – a “power which neither will nor ought to be bounded”<sup>118</sup> – the “wise” monarch recognizes “[t]hat prerogative is a trust” and that laws “are not the king’s laws, nor the parliament’s laws, but the laws of England, in which, after they have passed by the legislative power, the people have the property.”<sup>119</sup> Robert Atkyns set forth a similar argument in his essay of 1689 attacking the use of the dispensing power, though his point seemed to be that enacted laws are the property of those who make them – the king, lords, and commons – rather than the people.<sup>120</sup> That this general notion of laws as property was very much in the air in the late-seventeenth century is also evident from a letter written from exile in 1687 by the Scottish cleric, Gilbert Burnet. It is “a matter of great encouragement”, Burnet observed sarcastically, that “the perfect enjoyment of the[ people’s] property has never been ... invaded by [James II] since his coming to the crown”.<sup>121</sup> In the king’s short reign there had been many such invasions – the levying of “customs and ... additional excise” without parliament’s approval, the Bloody Assizes (“an open act of hostility to all law”) following the Monmouth Rebellion, the “many murders” and other illegal interferences

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<sup>116</sup> Ibid at 197.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid at 195.

<sup>119</sup> Ibid at 196. Similar thinking is to be found in John Selden’s *Table Talk*, which dates from the early seventeenth century but was only published for the first time in 1689. See John Selden, *Opera Omnia*, 3 vols, ed D Wilkins (London: Bowyer, 1726 [1616]) III, pt 2, col 2076 (“[M]ay subjects take up arms against their prince? ... Conceive it thus; here lies a shilling betwixt you and me; ten pence of the shilling is yours; two pence is mine. By agreement, I am as much king of my two pence, as you of your ten pence. If you therefore go about to take away my two pence, I will defend it; for there you and I are equal, both princes”). The notion that the king had trustee-like duties when exercising the prerogative was likewise not original to Halifax – it features regularly in constitutional writings of the Long Parliament period and beyond: for early examples, see Anon, *A Question Concerning the Great and Weightie Affairs of the Whole Kingdome* (London: Goal, 1641) at 3-4; [Henry Parker], *Observations upon Some of His Majesties Late Answers and Expresses* (London: s.n., 1642) at 4, 20, 35.

<sup>120</sup> “[I]t is not the king alone that makes the laws.... [O]thers have a hand in the making ... and a propriety and interest in them once they are made.” Atkyns, *supra* note 97 at 12.

<sup>121</sup> [Gilbert Burnet], A letter, containing some reflections on his majesties declaration for liberty of conscience, 4 April 1687, British Library, Stowe MSS 305 at f 44v.



with “the right that a man has to his life” – and so there was at least reassurance in learning that “all these things have fallen out without [the king’s] privity.”<sup>122</sup> Although Halifax had disparaged fundamental rights, the proposition that the king was not alone in being able to claim legislation as his property seemed to lend credence to the concept: since the people (or certainly their representatives) had dominion over enacted laws along with the king, they had a right to see those laws – their jointly-owned property – introduced, respected, amended, and repealed in accordance with their wishes.<sup>123</sup>

Others besides the king, according to this argument, had property in *enacted* laws. But could one also assert proprietorship over a legal right because it had been acquired by prescription rather than expressly granted? Certainly one Whig propagandist answered in the negative.<sup>124</sup> But not everybody considered the idea preposterous. A prescriptively acquired easement is not a right conferred but rather a right borne of passivity: it comes into being because land has been enjoyed in a particular way over a period of time without anyone who was entitled to object to that enjoyment having done so. One anonymous pamphleteer, writing at the time of the settlement in 1689, remarked on how some fundamental rights might be understood in much the same way: not as rights expressly granted, that is, but as rights which have been enjoyed for a long time and – until recently – left undisturbed by those with legislative power. A fundamental right is typically an “[e]xpress liberty”: “a stipulation ... by ... representatives ... or ... by princes, when they would either oblige or gratify their people, as was the Magna Carta”.<sup>125</sup> But a “[t]acit liberty” – the right to act in ways which are not contrary to the substantive law and which do not infringe the legal rights of others – is no less “property of the subject.”<sup>126</sup> A person’s “title” for this property “may

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<sup>122</sup> Ibid.

<sup>123</sup> See Howard Nenner, “Liberty, Law, and Property: The Constitution in Retrospect from 1689”, in *Liberty Secured? Britain Before and After 1688*, ed. JR Jones (Stanford, CA: Stanford UP, 1992) 88-121, 349-356 at 93-4. “The word [‘property’], highly charged in seventeenth-century political usage, had come”, Nenner concludes, “to mean an Englishman’s vested and unassailable rights” (ibid at 94). This manner of equating of property (or dominion) and fundamental rights in fact long pre-dates the seventeenth century: see Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge UP, 1979) at 5-31.

<sup>124</sup> See Algernon Sidney, *Discourses Concerning Government* (London: Booksellers of London & Westminster, 1698) at 380, where it is argued that although “the rights of Englishmen can be rendered more unquestionable by prescription”, a right is considered fundamental not because it has prescribed – “time can make nothing lawful or just” – but because “wise and good men” recognize in it “what is good and ought to be”.

<sup>125</sup> Anon, *An Essay upon the Original and Designe of the Magistracie* (Edinburgh: s.n., 1689) at 4.

<sup>126</sup> Ibid.

be supplied by prescription, ... to which perhaps ... most ... princes must ... recur, unless they would derive their pedigree from the sons of Noah, and instruct an uninterrupted succession ever since.”<sup>127</sup>

Quite what this pamphleteer thought prescriptive title to a tacit liberty actually conferred on the subject is not clear. That he believed that these liberties limited the exercise of the royal prerogative is evident: “the people devolve power on the prince upon certain conditions”<sup>128</sup> – “these conditions [being] the fundamental laws”<sup>129</sup> – and “if he does not perform [those conditions] he in effect renounces his right [to rule]”.<sup>130</sup> The implications of his argument for the law-making sovereignty of parliament, however, are less obvious: “resistance” to the sovereignty of “the lawgivers ... can never be lawful”, he asserted, unless they happen to commit a “notorious violation” of “the fundamental laws of the kingdom”.<sup>131</sup> What sort of violation would be so notorious as to warrant resistance? What form would the resistance take? John Locke, writing around the same time, insisted (and was not alone in insisting) that the people had extrajudicial authority to seek dissolution of the government if the sovereign legislator abused its powers.<sup>132</sup> It is possible that this pamphleteer was claiming the same, though we cannot be certain that he was. This final instance connecting prescription and fundamental rights yields an argument every bit as enigmatic as Coke’s famous dictum that the common law would control acts of parliament and adjudge them void when they are “against common right and reason, or repugnant, or impossible to be performed”.<sup>133</sup>

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<sup>127</sup> Ibid at 5.

<sup>128</sup> Ibid at 8.

<sup>129</sup> Ibid at 3.

<sup>130</sup> Ibid at 8.

<sup>131</sup> Ibid at 9.

<sup>132</sup> See John Locke, *Two Treatises of Government* (1689) II. xiii. 149 (“[T]here can be but one supreme power, which is the legislative, ... yet the legislative being only a fiduciary power ... there remains still in the people a supreme power to remove or alter the legislative, which they find the legislative act contrary to the trust reposed in them”) and II. xix. 221 (“There is, therefore, ... another way whereby governments are dissolved, and that is, when the legislative, or the prince, ... act contrary to their trust”). In a similar vein, see e.g. [John Wildman], *A Letter to a Friend* [5 Jan 1688] (London: Roper, 1689) at 1 (“[W]hen any one essential part [of parliament] is lost or gone, there is a dissolution of the corporation ... and ... power devolves on the people”); Daniel Defoe, *Mr S—r The Enclosed Memorial ... on Behalf of Many Thousands of the Good People of England, etc* (London: s.n., 1701) at 1 (“the great law of Reason says, and all nations allow, that whatever power is above law ... may be reduced by extrajudicial methods”).

<sup>133</sup> *Bonham’s Case*, supra note 3 at 118a. We do not know how far Coke thought judicial power extended, but it seems unlikely that he ever considered judges to have a general common law power to review the legality of statutes. Perhaps the most plausible reading of his proposition that statutes might sometimes be adjudged utterly void is that a statute attempting to oust the jurisdiction of the courts by making a man a judge in his own cause – this being what the statute at issue in *Bonham’s case* purported to do – would be void because contrary to “the law of nature” (which is “part of the laws of England[,] ... immutable, and cannot be changed” [*Calvin’s case* (1608) 7 Co Rep 1a at 4b]). In support of this reading,

Prescription features barely at all in British constitutional thought after the seventeenth century. Edmund Burke touched upon the concept,<sup>134</sup> as did William Paley,<sup>135</sup> but by the early 1700s constitutional arguments invoking prescription had basically had their day. Not that it had been much of a day. In Stuart constitutional discourse, the word “prescription” was, we have seen, sometimes used for no purpose other than to describe an immemorial custom. Prescription *sui generis* certainly featured in some arguments for restricting royal power, but none of those who relied on the concept seemed able, or at least none bothered, to say why the enjoyment and regular re-affirmation of a right since time before memory should make that right immune to the prerogative.

Common lawyers have always appreciated that prescription is a fairly inflexible doctrine. Enjoyment has to be long and continuous. A definite amount of time has to pass before a right can prescribe, and only certain types of rights can prescribe with the passing of that time. Restrictive covenants, for example, must be expressly conferred and can never be prescriptively acquired. Negative easements are a restricted category, not to be extended even by analogy.<sup>136</sup> While English law allows for the prescriptive acquisition of rights to enjoy land, the informal acquisition of legal estates in land is governed by the (extinctive) doctrine of adverse possession. Anyone claiming to have

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see JW Tubbs, *The Common Law Mind: Medieval and Early Conceptions* (Baltimore: Johns Hopkins UP, 2000) at 34-5, 158; Michael Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900* (Dordrecht: Springer, 2007) at 46; and RH Helmholz, “Bonham’s Case, Judicial Review, and the Law of Nature” (2009) 1 J Leg Analysis 325 at 339.

<sup>134</sup> See e.g. Edmund Burke, “Speech on the Reform of the Representation of the Commons in Parliament” (7 May 1782) in *Select Works of Edmund Burke: Miscellaneous Writings*, ed F Canavan (Indianapolis: Liberty Fund, 1999) at 15-30 at 18-24; *Reflections on the Revolution in France, and on the Proceedings in Certain Societies in London Relative to that Event*, ed CC O’Brien (Harmondsworth: Penguin, 1968 [1790]) at 276 (“... prescription, which, through long usage, mellows into legality governments that were violent in their commencement”).

<sup>135</sup> See Paley, *supra* note 1, II at 122-3. Other eighteenth century arguments invoked antiquity – David Hume’s case for government founded on an ancient unwritten contract, for example – but they were not arguments which appealed to prescription.

<sup>136</sup> Because a neighbour’s obligation to comply with a prescriptively acquired negative easement – to refrain from doing something to their land which interferes with my enjoyment of light, ventilation, artificial water-flow, or foundational support provided by the land – is likely to be discoverable by the neighbour only once she has done the thing that she was obliged not to do. “It is this sudden starting into existence of a right which did not exist the day before ... without reference to any presumption of acquiescence by the neighbour”, Lord Penzance observed in *Dalton v Angus* ((1880-1) LR 6 App Cas 740 at 803), “which I find it impossible to reconcile with legal principles.” So it is that the English courts have resisted extending negative easements beyond the four categories recognized by the common law: see e.g. *Phipps v Pears* [1965] 1 QB 76 (CA).

acquired a right over land by prescription, one Victorian barrister took considerable care to explain, must satisfy a formidable number of conditions.<sup>137</sup> The seventeenth century political writers who appealed to prescription paid little attention to the subtlety of the doctrine, and left unresolved various questions concerning its application to constitutional matters. Could a doctrine concerning the rights and duties of private landholders – concerning how owners of this land *but no other land* can be said to have acquired a right over a neighbour’s land – be straightforwardly re-cast as an argument for protecting the rights *of a class of people* against the intrusions of the state (or crown)? If prescription went to individuals and customs to communities, as Coke had maintained, how could arguments concerning the general rights of people *vis-à-vis* the crown, and concerning the right of parliament to deal with the succession to the throne, genuinely be based on prescription? Before 1689, the argument from prescription was, in essence, that the king’s rights should give way to the rights of the subject, as enacted (or reaffirmed) by parliament. How, if at all, would that argument apply to parliament itself once it had the power to make and change laws? “Tis most reasonable ... now”, one convert to the Revolution claimed in 1709, “that ... the most rightful government which is established” is the one with “the best title ... which has prevailed by prescription”.<sup>138</sup> But what if this government sought to interfere with prescribed liberties and privileges? Would it be constrained by the doctrine which had supposedly enabled it to prevail? Burke would argue that it was so constrained.<sup>139</sup> Seventeenth century Whig writers appeared to think otherwise.<sup>140</sup>

Perhaps the most notable difference between prescription at common law and prescription in seventeenth century constitutional thought concerned acquisition. Bracton, we have seen, was uncertain as to whether through prescription one acquired a possessory right, which could still be defeated by someone with stronger title, or a right which was good against all comers. The matter could not be left uncertain at common law – litigants wanted to know not only if they had acquired a right but also what kind of

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<sup>137</sup> See TA Herbert, *The History of the Law of Prescription in England* (London: Clay, 1891) at 58-142, 161-203.

<sup>138</sup> Offspring Blackall, *The Divine Institution of Magistracy, and the Gracious Design of its Institution* (London: Rogers, 1709) at 4.

<sup>139</sup> See Burke, *Reflections on the Revolution in France*, supra note 134 at 261 (“We entertain a high opinion of the legislative authority; but we have never dreamt that parliaments had any right whatever to violate property, to overrule prescription ...”).

<sup>140</sup> See Atkyns, supra note 75 at 50-1; William Petyt (d 1707), *Jus Parliamentarium: or, the Ancient Power, Rights and Liberties of the Most High Court of Parliament, Revived and Asserted* (London: Nourse, 1739 [c 1685]) pt I at 28 (“parliament ... has absolute power in all cases ... judiciously to determine matters in law”).

right they had acquired. Seventeenth century constitutional writers, unburdened by the obligation of ruling on legal disputes, appear never to have given serious thought to the question of what sorts of rights prescription might generate. Their general point was that prescription makes a constitutional right fundamental in the sense outlined in the opening paragraph of this article – that the fact of a right having prescribed should make a legislator extremely reluctant to disturb it. The point was distinctively about prescribed public law rights – rights which somebody or some entity (usually the commons) was seeking to secure against the sovereign. None of these writers was arguing that an easement, or any other private law right, was to be categorized as fundamental by virtue of prescription. But this was puzzling. Did they believe that prescriptively acquired private law rights were fundamental rights? How could prescription be the key to understanding the fundamentality of a constitutional right if the rights which actually *did* prescribe in law – various incorporeal rights over land – were not considered to be fundamental? Various seventeenth century parliamentarians were at once convinced that public law rights might be deemed fundamental by virtue of prescription and also silent on the matter of whether the same could be said of private law rights. If prescriptively acquired private law rights were not to be classified as fundamental rights – it is not obvious that any seventeenth century constitutional writer believed that they were to be classified thus – the key to explaining constitutional rights as fundamental rights would appear to lie somewhere other than in the doctrine of prescription.

The doctrine is, in fact, poorly suited to explaining fundamental rights under an unwritten constitution. Some of the great seventeenth century English lawyers liked compare the common law to the ship long at sea: just as the ship remains the same entity even though through repair and refurbishments its material changes over time, the common law remains rooted in the same ancient general customs even though it adapts to new circumstances and accommodates new content.<sup>141</sup> Unlike the common law, prescription bears no comparison to this ship, for the use or enjoyment cited in

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<sup>141</sup> See e.g. Selden, *supra* note 119, III, pt 2 at cols 1891-92 (“When there was first a state in that land, which the common law now governs ... there were natural laws limited for the conveniency of civil society, and those limitations have been from thence increased, altered, interpreted.... [I]n regard of their first being, they are not otherwise than the ship, that by often mending had no piece of the first materials, ... yet ... is to be accounted the same still”); Matthew Hale (1609-76), *History of the Common Law of England* (London: Walthoe, 1713) at 59-60 (“[T]hey are the same English laws now, that they were 600 years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, though in that long voyage it had successive amendments and scarce came back with its former materials”).

support of a claim that a right has been prescriptively acquired must, if the claim is to succeed, remain unchanged throughout the prescription period; when there is evidence that the use or enjoyment cited to establish the right has not stayed the same or is of recent origin, the case for prescriptive acquisition founders. Prescription is ill suited to explaining fundamental rights because the content and range of fundamental rights need not stay the same – they can be altered and supplemented by legislation and through the development of the common law – and such rights will sometimes have originated within the prescription period. The right to avoid self-incrimination, for example, first appears in English ecclesiastical law in the sixteenth century, does not enter the common law until the early seventeenth century,<sup>142</sup> and only in the twentieth century is elaborated so that an arrested person acquires an additional right to be told of the right.<sup>143</sup> The doctrine of prescription cannot satisfactorily explain unwritten-constitutional rights as fundamental rights, because it requires that all these rights be static and very old.

Nevertheless, some Stuart constitutionalists considered the doctrine to serve their objectives with distinction. “An argument from prescription”, Petyt proclaimed, is “the most unanswerable and binding argument that possibly can be produced”.<sup>144</sup> Prescription established constitutional *title* – a word used repeatedly by seventeenth century parliamentarians – though it is indisputable that sometimes they meant nothing other than that an institution (such as the commons) or a convention (such as sending burgesses to parliament) was part of immemorial custom.

When these writers argued that prescription established constitutional title in some more distinctive sense – when prescription was being invoked to explain not the community’s prescribed customs but people’s fundamental rights – what reasoning or philosophy, if any, lay behind the argument? We can only guess. The reasoning sometimes appeared to be that a prescribed right was fundamental because it was first in time: a right which has existed since time before memory may well have existed before there were kings, and a monarch should not interfere with a right which might be presumed to pre-date him and his kind. This seems to be Prynne’s reasoning as reported at the outset of section III(A), above, and perhaps also explains that

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<sup>142</sup> See Richard H Helmholz, “Origins of the Privilege against Self-Incrimination: The Role of the European *Ius Commune*” (1990) 65 NYU L Rev 962.

<sup>143</sup> See *R v Arnold* (1838) 8 Car & P 621 at 622 (Denman, CJ). The right was codified in the 1912 judges’ rules.

<sup>144</sup> Petyt, *supra* note 83 at f 33.

anonymous pamphleteer's (sardonic?) proposition that the prerogative cannot defeat prescriptively acquired title unless the king can justify his exercise of power according to an even stronger prescriptive claim – traceable without interruption to the sons of Noah.

We cannot be sure that either Prynne or the pamphleteer was so much as implying that prescription established constitutional title according to, and made the prerogative challengeable on the basis of, the principle of first in time. And even if either had argued this position explicitly, they might have met with a robust response: that the principle of first in time does not challenge but rather vindicates the king's prerogative. In a tract published in 1656, thirty years after his death, the poet and lawyer Sir John Davies set forth an argument to this effect in the course of defending the king's use of the prerogative to levy impositions without parliamentary consent.<sup>145</sup> His conclusion was predictable enough: that a king rules by divine right. But his route to that conclusion is intriguing for our purposes, for he was clearly of the view that the prerogative precedes, and so must trump, any prescriptively acquired title. “[T]he law of nature”, according to Davies, is “limit[ed]”<sup>146</sup> by “*ius gentium*, or the general law of nations ... of equal force in all kingdoms”.<sup>147</sup> All “kings were made by”<sup>148</sup> *ius gentium* – “the first and principal cause of making kings” being to regulate property<sup>149</sup> – and by this law of nations was their “prerogative given unto them” (“without the consent of the people”).<sup>150</sup> However, not only did *ius gentium* not belong to “the ordinary rules of the law”<sup>151</sup> which “maintain[ed] property and contracts, and traffic and commerce amongst men”,<sup>152</sup> but it also created kings “before any positive law was made”.<sup>153</sup> “Comen ley ad este puis le creacion del monde”, one serjeant-at-law proclaimed before the Court of Common Pleas in 1470.<sup>154</sup> For Davies, writing around 150 years later, this had to be

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<sup>145</sup> Charles I made Davies chief justice of the king's bench in 1626 in place of Sir Randolph Crew, who was removed from office for refusing to recognize the legality of the king's efforts to raise money through forced loans. Davies died the day before he was due to take office.

<sup>146</sup> John Davies, *The Question Concerning Impositions, Tonnage, Poundage, Prizage, Customs ...* (London: Twyford, 1656) at 29. Davies dedicated the work to James I (d March 1625).

<sup>147</sup> *Ibid* at 4.

<sup>148</sup> *Ibid* at 6.

<sup>149</sup> *Ibid* at 29.

<sup>150</sup> *Ibid* at 7.

<sup>151</sup> *Ibid* at 30.

<sup>152</sup> *Ibid* at 29.

<sup>153</sup> *Ibid* at 30.

<sup>154</sup> “Common law has existed since the creation of the world.” *Wallyng v Meger* (1470) 47 Seld Soc 38 at 38 (Catesby sjt).

wrong, for kings existed before there was a common law. Since the making of kings came before the creation of positive law, a monarch was entitled to “retain[] and reserv[e] ... that absolute and unlimited power which was given unto him by the law of nations”.<sup>155</sup> The doctrine of acquisitive prescription was but part of the positive law, and the positive law, though the king might be “pleased to limit and stint his absolute power” by “ty[ing] himself to” its rules,<sup>156</sup> could never subordinate the prerogative. Prescriptively acquired title is title acquired under rules established by the positive law. If the superior title is the one which came first in time, the powers which the law of nations vests in the king take priority (if the king wishes them to take priority) over rights acquired by prescription.

Davies preceded both Prynne and the anonymous pamphleteer; his argument was not a response to, but rather enables us to envisage a response to, the proposition that prescription might serve as a check on the royal prerogative by virtue of the principle of first in time. The argument is but an envisaged response because we cannot be sure that any seventeenth century constitutional theorist – Prynne or the pamphleteer or anybody else – actually endorsed this proposition. Some of these theorists evidently believed that particular institutions and practices became constitutional fundamentals if it could be said that they had endured undisturbed so as to prescribe. But when we try to discover the rationale underpinning that belief, we find ourselves on a path upon which darkness quickly descends.

As an illustration of this last observation, and by way of conclusion, consider John Locke – a name which one might have expected (which I had certainly expected) to feature more prominently in this article. In the 1680s, Locke, a hero to the Whigs, developed a theory of title acquisition which posed the question to which prescription supplies an answer: when did this property “begin to be [the title-holder’s]”, given that he acquired it “without the assignation or consent of anybody”?<sup>157</sup> Although Locke’s own response to the question made no reference to long and uninterrupted enjoyment, it is not inconceivable that some of the Whig writers who invoked the notion of

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<sup>155</sup> Davies, *supra* note 146 at 30.

<sup>156</sup> *Ibid.* Though Davies sought to vindicate the prerogative, he disapproved of parliament changing the common law because, he insisted, the common law, “coming nearest to the law of nature, which is the root and touchstone of all good laws, ... doth far excel ... our statutes, ... which is manifest in ... that when our parliament have altered ... any fundamental points of the common law, those alterations have been found ... so inconvenient ... that the common law hath ... been restored again ... by other acts of parliament in succeeding ages”. (Davies, “A Discourse of Law and Lawyers”, *supra* note 88 at II, 253.)

<sup>157</sup> Locke, *supra* note 132 at II. v. 28.



entitlement by prescription were thinking broadly as did Locke when he wrote of “how labour could ... begin a title of property in the common things of nature”<sup>158</sup> – that their argument was that people (by virtue of long enjoyment rather than labour) have property in, and so are entitled not to see disturbed, legal arrangements which protect rights that they hold dear. A philosophical denouement would, however, be a fabrication. For there is no evidence that any of these writers were thinking along Lockean lines (or along any other distinct philosophical lines) when they argued from prescription. Tyrrell, who on at least one occasion refers to title by prescription in relation to matters constitutional,<sup>159</sup> was a friend (of sorts) to Locke,<sup>160</sup> and it would not have been surprising to discover in his main works, which appeared after the publication of Locke’s *Two Treatises of Government*, at least references to the labour theory of acquisition. Yet neither he nor any other late-seventeenth century Whig introduced Locke’s name when invoking prescription – a noteworthy absence, given that these men never seemed shy about drawing attention to sources which supported their causes.<sup>161</sup> Prescription was certainly a concept of some significance in seventeenth century constitutional thought. Why this should have been so is something of a mystery.

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<sup>158</sup> Ibid at II. v. 51.

<sup>159</sup> See Tyrrell, supra note 57 at 425-6.

<sup>160</sup> See JW Gough, “James Tyrrell, Whig Historian and Friend of John Locke” (1976) 19 Hist J 581.

<sup>161</sup> Tyrrell was certainly not averse to citing Locke in other contexts – see e.g. James Tyrrell, *A Brief Disquisition of the Law of Nature* (London: Baldwin, 1692) at xlvi (non-paginated preface) – and the two men may even have written collaboratively in defence of Hugo Grotius’ theory of natural rights (see Tuck, supra note 123 at 169-70).